U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 7, No. 7 **VISIT US AT: https://oil.aspensys.com** *July 31, 2003*

NINTH CIRCUIT REJECTS CONSTITUTIONAL AND REGULATORY CHALLENGES TO BIA'S NEW STREAMLINING PROCEDURES

In ***Carriche v. Ashcroft***, __F.3d__ ,2003 WL 21639040) (9th Cir. July 14, 2003)(*McKeown*, Silverman, T.G. Nelson), the Ninth Circuit joined four other circuits in holding that the BIA's streamlining procedures set forth at 8 C.F.R. § 3.1(a)(7), do not violate an alien's due process rights under the Fifth Amendment. The court also found that it lacked jurisdiction to review whether the BIA improperly streamlined an appeal in which only discretionary factors are in dispute.

The court found that petitioners had "received all of the administrative appeals to which they were entitled by statute" and that "the Constitution does not require that the BIA do more."

The petitioners, a family from Mexico, had applied for cancellation of removal, claiming *inter alia* that the youngest daughter, a United States citizen, would suffer exceptional and extremely unusual hardship if the family were removed because she would have difficulty adapting to the Mexican educational system and, due to economic conditions in Mexico, the family would be hard-pressed to provide for her basic care. The IJ rejected this argument, concluding that the economic detriment and educational difficulties the daughter would face after removal were neither exceptional nor unusual. The BIA affirmed the IJ's decision pursuant to the streamlining procedures. Before the Ninth Circuit, petitioners argued that the streamlining procedures violated their Fifth Amendment right to due process and that, even if streamlining was constitutional, the discretionary nature of the hardship inquiry precluded streamlining in cancellation of removal cases.

The Ninth Circuit found persuasive the reasoning of the First Circuit in *Albathani v. INS*, 318 F.3d 365, 377 (1st Cir. 2003). In *Albathani*, the First Circuit held that any difficulty engendered by the court of appeals reviewing a "BIA decision without knowing its basis" does "not render the scheme a violation of due process or render judicial review impossible. Nor does the scheme violate any statute." The Ninth Circuit noted that

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SEVENTH CIRCUIT FINDS NO JURISDICTION TO REVIEW REVOCATION OF ADVANCE PAROLE OF ALIEN ABROAD

In ***Samirah v. O'Connell***, __F.3d__, 2003 WL 21507968 (7th Cir. July 2, 2003) (*Manion*, Flaum, Coffey), the Seventh Circuit reversed the district court and held that under INA § 242(a)(2)(B)(ii), the court lacked jurisdiction to review the Attorney General's decision to revoke petitioner's advance parole while petitioner was abroad.

The petitioner, a Jordanian national, first entered the United States in 1987 as a student. However, he failed to comply with the terms of his admission and dropped out of school. Petitioner subsequently applied for adjustment of status and, while that application was pending, he requested and was granted advance parole under INA § 212(d)(5) to leave the United States to visit a sick family member. On Janu-

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DHS LAUNCHES "OPERATION PREDATOR"—FUGITIVE CRIMINAL ALIENS WITH SEX OFFENSES TARGETED

The Department of Homeland Security recently announced Operation Predator, a comprehensive initiative designed to enhance the Administration's efforts to protect children from pornographers, child prostitution rings, Internet predators, alien smugglers, human traffickers, and other criminals.

The DHS' Bureau of Immigration and Customs Enforcement (ICE) will conduct the initiative from its headquarters in Washington, D.C., coordinating all field enforcement actions from the ICE CyberSmuggling Center in Fairfax, Virginia. Operation Predator draws on the full spectrum of cyber, intelligence, investigative, and detention and re-

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Highlights Inside

STREAMLINING RULE UPHELD BY THE NINTH CIRCUIT

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the petitioners here had "received a full hearing before the IJ, a detailed and reasoned opinion from the IJ, the opportunity to present their argument to the BIA, and a decision from the BIA." The court rejected petitioner's contention that they were entitled to a three-Board member review finding no support in the law. The court found that petitioners had "received all of the administrative appeals to which they were entitled by statute," and that "the Constitution does not require that the BIA do more."

The court held that it was not a due process violation to affirm the IJ's decision without issuing an opinion because it did not compromise the court's ability to review the IJ's decision directly. The court noted that the BIA is cognizant of the risks it takes when it affirms an IJ's decision without opinion and declines to articulate a different or alternate basis for the decision. Applying *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court found that despite petitioners' substantial interest in remaining in the United States, the government's interest in "reducing the BIA's financial and administrative caseload" is substantial, and that streamlining furthers this goal.

The court found that despite petitioners' substantial interest in remaining in the United States, the government's interest in "reducing the BIA's financial and administrative caseload" is substantial.

The court also rejected petitioners' contention that streamlining is never appropriate in cancellation cases because of the discretionary nature of the decision. In particular, petitioners argued that the fact-oriented nature of the inquiry as to whether "exceptional and extremely unusual hardship exists," makes every cancellation case necessarily novel and thus inappropriate for streamlining. The court found that not "every case is novel in the eyes of the law." The court noted that the Attorney General had responded to those concerns in his comments to the proposed regulation stating that "while facts of each case are different, the legally significant facts often fall into recognizable patterns, and where this occurs, a novel fact situation may not be presented." "It is neither arbitrary nor a violation of due process for the BIA to decide that a particular case clearly falls within, or outside, those boundaries," said the court.

The court also held that it lacked jurisdiction to consider whether streamlining was appropriate in petitioners' case because the court lacked jurisdiction to review the IJ's discretionary decision regarding the "exceptional and extremely unusual hardship requirement - the only aspect of the cancellation or removal decision at issue before the court. The court did not "embrace" the government's argument that the streamlining procedures were "inherently discretionary." The court noted that, for example, it would have jurisdiction to review the merits of an asylum case or a cancellation of removal case where the IJ's decision is not based on a discretionary factor. "In those cases" said the court, "we would, as a technical matter, have jurisdiction to review the BIA's streamlining decision because the streamlining would fall within 'action taken' in a removal proceedings" under INA § 242 (b)(9); 8 U.S.C. § 1252(b)(9). However, such review would be "unnecessary and duplicative" added the court, because the IJ's decision would be subject to review, and the decision to streamline would become "indistinguishable from the merits." "Thus, where we can reach the merits of the decision by the IJ or the BIA, an additional review of the streamlining decision would be superfluous," concluded the court.

In a concurring and dissenting opinion, Judge Nelson disagreed with the majority's conclusion that the court lacked jurisdiction to review the BIA's decision to streamline a case. He would have found that the streamlining criteria, with one exception, are "non-discretionary," and thus subject to review. Judge Nelson would have reached the merits, and found that the BIA appropriately streamlined petitioners' case.

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OPERATION PREDATOR

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moval functions of ICE to target those who exploit children.

"There is nothing more important than protecting our children - the future of our nation. Through Operation Predator, ICE is in a unique position to carry out this critical responsibility," said Michael J. Garcia, Acting Assistant Secretary of Homeland Security for Immigration and Customs Enforcement (ICE).

As part of its three-pronged strategy of identifying, investigating, and removing child predators from our streets, ICE will use a single web portal to access all publicly available Megan's Law websites. In addition, ICE is creating a new multi-agency unit at its CyberSmuggling Center to oversee and coordinate Operation Predator activities at the national level.

DHS reports that during a week-long, nationwide enforcement action ending on June 30, ICE fugitive operations teams apprehended 89 foreign nationals who had been convicted of sex offenses but had subsequently evaded law enforcement efforts to remove them from the country. In Chicago alone, ICE teams arrested 37 convicted alien sex offenders during this period.
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IMMIGRATION, ASYLUM, AND TERRORISM — A STUDY IN THE CHANGING DYNAMIC IN EUROPEAN LAW

The events of September 11th brought about many changes in security and immigration laws, enforcement efforts and shifts in policy priorities. The United States was not alone in these endeavors. A recently published book, *Immigration, Asylum and Terrorism, A Changing Dynamic in European Law*, E. Brouwer, P. Catz and E. Guild, Recht & Samenleving 19, Center for Migration Law, Nijmegen, Netherlands, 2003, provides an overview of efforts undertaken by European countries and the European Union. The book surveys the legal developments in immigration laws and enforcement efforts since 9/11 in France, Germany, Italy, the Netherlands, the United Kingdom, the European Union and the United States.

Germany and the United Kingdom undertook the most extensive legislative and enforcement efforts among the European nations surveyed in the book. Of particular note, Germany enacted omnibus legislation called the Prevention of Terrorism Act (PTA) which amended 22 existing Acts. This legislative package is akin to the USA-PATRIOT Act in the United States. Some of the notable provisions of the PTA are new grounds of exclusion for those who, inter alia, pose a threat to the free democracy or security of Germany or take part in acts of violence or advocate violence in public. The PTA also breaks with long-standing European "non-refoulement" principles by providing for the expulsion of non-European Union citizens if they fall into the new mandatory expulsion grounds, including those who were ineligible for admission for security reasons and those who concealed an earlier stay in Germany or in other European Union member States from immigration officials, and those who have given incomplete or false information about his or her connections with persons or organizations, suspected of international terrorism. A conviction is not required for these grounds to apply. Another interesting provision of the PTA is a section that amends the Asylum Act which makes it possible to record the conversations of asylum seekers and to compare the dialect of the person concerned with those dialects available to authorities from the countries of origin in order to thwart a perceived common occurrence in which asylum seekers claim to come from countries other than their actual country of origin. The PTA includes a particularly controversial provision that permits German authorities to create a national database of residents in Germany which contains attributes based on information known about the hijackers that was provided to German authorities by the FBI. This profiling information includes such things as being male, Muslim, residing legally in Germany, having no children, being a student of technology, frequently applying for visas and several other factors. As a result of this profile, approximately 30,000 male students were "checked" and 140 persons were contacted by the police in Hamburg alone. This profiling program has been challenged in the German courts with a majority of courts upholding the program but with some courts striking it down. Not unlike some experiences within the United States, critics have charged that the PTA has resulted in improperly using immigration laws as an internal security tool.

On December 14, 2001, the United Kingdom enacted the Anti-terrorism, Crime and Security Act ("ATA") which contains 22 provisions. One of the provisions authorizes the "certification" of an individual as a terrorist which would preclude eligibility for protection under the refugee convention. The ATA also provides for the retention of fingerprints of all asylum applicants. Perhaps one of the UK's most ambitious security efforts was in its declaration of a state of emergency on November 12, 2001, which permitted the UK to derrogate from the European Convention on Human Rights, Article 5(1) relating to the right to liberty and security of person. This derrogation permitted indefinite detention of aliens. The state of emergency, the corresponding derrogation from the ECHR and terrorist certification provisions contain a sun-setting clause in which they will expire after 15 months if not explicitly extended.

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Several countries, including the UK, the Netherlands and Germany put forth legislative proposals to institute a national identity card, but these efforts did not find immediate success as the consensus was that the idea was too controversial and needed further study. The Netherlands, France and Italy had amended their immigration and security laws shortly before September 11th, and while they undertook extensive debates about further legislative acts, they did not implement significant legislative changes after 9/11. Each country has its own history and corresponding legal framework for contending with criminal and terrorist threats to their national security which are briefly discussed in the book. This discussion includes Italy's long-standing efforts to combat organized crime and the recent deluge of economic migrants and refugees embarking on its shores and France's history with Algerians and others who have settled in France from former colonies importing into France terrorist tactics as part of their political protests.

By Patricia Buchanan, OIL
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Editor's Note: OIL's attorney, Ms. Paticia Buchanan is a contributing author. She wrote the chapter on the U.S. response to 9/11 while she was on leave from OIL and living in the Netherlands in the spring/summer of 2002.

REVOCATION OF ADVANCE PAROLE NOT SUBJECT TO JUDICIAL REVIEW

(Continued from page 1)

ary17, 2003, while petitioner was abroad, the INS District Director in Chicago revoked his advance parole because the INS had received information that he was a "security risk to the United States."

On January 18, 2003, when petitioner presented himself at a reinspection station in Shannon International Airport, Ireland, an INS inspector served him with a notice revoking the advance parole on security grounds. The INS inspector also determined that petitioner was inadmissible to the United States because he had more than one year of unlawful presence in the United States and he lacked a valid travel document.

> The Seventh Circuit held that "the Attorney General's decision to grant or revoke parole is squarely within the ambit of § 242(a)(2)(B)(ii)."

Petitioner, through his attorney, then filed an action in the district court seeking, inter alia, injunctive relief requiring the government to allow his return to the United States. The district court reversed the INS's decision, finding that the government could not "short circuit the rights of an alien who has long lived in the United States by revoking his parole and then treating him as if he had never been here at all." The government appealed.

The Seventh Circuit held that "the Attorney General's decision to grant or revoke parole is squarely within the ambit of § 242(a)(2)(B)(ii)," and therefore "the district court lacked jurisdiction to review, much less reverse, the revocation of [petitioner's] parole – at least outside the context of a habeas proceeding." The court reasoned that INA §212(d)(5), the parole provision, is "specified under" the "subchapter" mentioned in INA § 242(a)(2)(B)(ii).

The court declined to address § 242(a)(2)(B)(ii)'s effect on habeas jurisdiction, finding that the district court lacked jurisdiction under § 2241 for at least two reasons. First, the court held that petitioner was not in "custody" when he filed his petition, because he was apparently living in Jordan and free "to travel the world at his leisure." The court disagreed with a contrary Ninth Circuit's holding in *Subias v. Meese*, 835 F.2d 1288, 1289 (9th Cir. 1987), where that court had found that a denial of entry amounted to a restraint on liberty sufficient to constitute custody under § 2241. The court in a footnote, noted that it wasn't clear whether federal courts may exercise extraterritorial jurisdiction over an alien bringing a habeas petition, citing to recent decisions involving the enemy combatants detained in Guantanamo Bay.

Second, the court found that petitioner had not named the proper "custodian" for purpose of § 2241 jurisdiction, because the DHS/ICE Interim Director did not have "day-to-day" control over petitioner, and therefore could not "produce" him because petitioner was free to travel the world. The court noted that there could be "limited circumstances" where the United States holds a prisoner abroad in which a petitioner "may be allowed to file a habeas action in a district where *someone* with control over his body is located." *See Ex Parte Hayes*, 414 U.S. 1237 (1973).

Finally, the court noted in a footnote that, given the split in the circuits on the question of habeas jurisdiction, it had circulated the opinion to the judges of the Seventh Circuit and none had voted to hear the case *en banc*.

By Francesco Isgro, OIL

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REGULATORY UPDATE

The Department of Homeland Security (DHS), which absorbed the functions of the INS continues to promulgate rules to reflect the transfer of INS functions to the DHS field structures of the Bureau of Citizenship and Immigration Service (BCIS), the Bureau of Customs and Border Protection (CBP), and the Bureau of Immigration and Customs Enforcement (ICE).

Powers and Authorities of DHS Officers

On June 13, 2003, DHS published a final rule making a number of regulatory changes to reflect the transfer of functions from the INS to DHS. 68 *Fed. Reg.* 35273 (June 13, 2003). Among the changes, the rule revises 8 C.F.R. 239.1, the delegation of authority to issue notices to appear (NTAs). The rule also amends the list of officers authorized to issue NTAs to reflect the ongoing reorganization within DHS. Some of the titles of the former INS enforcement officers have been changed. The rule amends the internal review process for alleged violations of standards of conduct, by removing references to office within the Department of Justice that had been previously responsible for reviewing the allegations. The rule also revises 8 C.F.R.287.8, by adding a new subsection (g) which states that the criminal law enforcement activities authorized under this rule will be exercised in a manner consistent with all applicable DHS and Department of Justice guidelines and policies.

DHS Issues Final Rule On Parole Authority

On June 12, 2003, DHS published a final rule amending the titles of officers given parole authority under INA § 212(d)(5). 68 *Fed. Reg.* 35151 (June 12, 2003). The rule does not make any substantive changes to

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REGULATORY UPDATE

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the standards for making determinations regarding requests for parole. Among the changes, the title of "Commissioner" has been replaced with "Secretary." The terms "district director or chief patrol agent" have been deleted and replaced with references to "Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees." 8 CFR § 212.5(a), (b)(3), (5), (5)(c), (5)(d), (5)(e)(2)(i).

INSIDE DHS

Mr. **Eduardo Aguirre, Jr.** has been confirmed by the Senate as the first Director of the new DHS Bureau of Citizenship and Immigration Services. Mr. Aguirre reports to the Deputy Secretary for Homeland Security and functions in the same capacity as an Under Secretary. He joins the DHS from the Export-Import Bank of the United States (Ex-Im Bank), where he served as vice chairman and COO.

Prior to joining the Ex-Im Bank, Mr. Aguirre served as President of International Private Banking at Bank of America. Mr. Aguirre also served as Chairman of the Board of Regents of the University of Houston System for a six-year term until 2001.

BIA FINDS THAT VACATED CRIMINAL CONVICTION IS STILL VALID FOR IMMIGRATION PURPOSES

The Board recently decided a significant case which has potentially far-reaching implications for criminal aliens. In recent years, many criminal aliens returned to criminal court, seeking vacation of their convictions in order to avoid immigration consequences. Many criminal courts entertained and granted vacaturs of the convictions. In ***Matter of Pickering***, 23 I&N Dec. 621 (BIA 2003), a Board panel (Filppu, Guendelsberger, and Pauley) addressed this issue squarely and held that a criminal conviction vacated for rehabilitative reasons or solely to vitiate the immigration consequences would remain valid for immigration purposes.

> "If a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes."

Mr. Pickering was convicted in 1980 in Canada of unlawful possession of LSD and fined. Following his 1993 application for adjustment of status and concerned about the effect of his conviction on that application, he asked a Canadian court to quash his conviction. In 1997, the court quashed the conviction. The adjustment application was subsequently denied and removal proceedings commenced. An immigration judge found that the Canadian court's action did not eliminate the immigration consequences of the conviction because its goal was to allow Pickering to remain in the United States and found Pickering removable as charged.

On appeal, the Board looked to the statutory definition of conviction, which is not limited by its terms to judgments which have not been vacated, quashed, expunged, dismissed, or discharged. The Board looked also to its recent precedent in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), neither of which was precisely on point, although both considered related issues. Several federal courts had previously addressed the issue: *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000); *Zaitona v. INS*, 9 F.3d 432, 436-37 (6th Cir. 1993); *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812 (5th Cir. 2002); *Beltran-Leon v. INS*, 134 F.3d 1379, 1380-81 (9th Cir. 1998).

Against the background of all this authority, the Board found that "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes." 23 I&N Dec. at 624. The Board also found it irrelevant that the conviction at issue in *Pickering* was a foreign conviction and not a domestic one. Since nothing in the record raised an issue related to the integrity of the underlying criminal proceeding, the Board found that the conviction was vacated solely for immigration purposes and that it remained valid.

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Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit Holds Aliens Who Pled Guilty To A "Particularly Serious Crime" Prior To October 1, 1990, Are Not Automatically Barred From Seeking Asylum

In ***Kankamalage v. INS*** **,** __F.3d __, 2003 WL 21524766 (9th Cir. July 8, 2003) (Browning, B. Fletcher, *Silverman*), the Ninth Circuit held that aliens who pled guilty to a "particularly serious crime" prior to October 1, 1990, are not barred from asylum by 8 C.F.R. § 208.13(c)(2)(i)(A) (effective October 1, 1990).

The petitioner, a citizen of Sri Lanka, had pled guilty to robbery in 1988. That conviction did not categorically disqualify him for consideration for asylum. In 1990, the Attorney General promulgated a regulation making aliens such as petitioner ineligible for a discretionary grant of asylum. The INS instituted deportation proceedings in March 1989, charging the petitioner as an overstay. An IJ denied petitioner's asylum application as a matter of discretion given the conviction and petitioner's drug use. Petitioner's appeal to the BIA was dismissed, but the case was eventually remanded by the Ninth Circuit to the BIA because it had applied an incorrect legal standard. The BIA then found that petitioner was statutorily ineligible for withholding and ineligible for asylum under the amended regulation at 8 C.F.R. 208.13(c)(2)(i)(A).

Aliens who pled guilty to a "particularly serious crime" prior to October 1, 1990, are not barred from asylum by 8 C.F.R. § 208.13(c)(2)(i)(A).

The court applied the *Landgraf*, 511 U.S. 244 (1944), and *St. Cyr*, 533 U.S. 289 (2001), test to determine whether the regulation had an impermissibly retroactive effect. First, it found that there was no clear intent that the regulation applied to convictions before its effective date. Then the court found that when petitioner pled guilty he was eligible for asylum and therefore the new regulations which rendered ineligible for that relief "attached a new disability, in respect to transactions and consideration already past." The court rejected the government's contention that since the relief was purely discretionary *St. Cyr* did not apply.

Accordingly, the court remanded the case to the BIA for an adjudication of petitioner's asylum claim.

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■Third Circuit Vacates BIA Denial Of Asylum Finding That BIA Did Not Explain Its Reasoning

In ***Kayembe v. Ashcroft***, __F.3d__, 2003 WL 21500204(3rd Cir. July 1, 2003) (Roth, Smith, *Cudahy*), the Third Circuit found that the BIA had failed to make findings regarding petitioner credibility and had failed to explain how petitioner had not met his burden of proof for asylum eligibility.

The petitioner, who was born in Zaire, later renamed Democratic Republic of Congo (DRC), claimed that the DRC discriminated against those of Tutsi ethnicity, and that he had been subjected to persecution because, through his mother, he was part-Tutsi. Petitioner's father is of Luba ethnicity and was a diamond dealer. Petitioner testified that his father had been detained by the DRC because of suspicion that diamond dealers were connected with a failed attempt to assassinate the president of the DRC. Following his father's detention, petitioner went into hiding and then with a counterfeit French passport traveled to the United States where he was detained. An immigration judge denied petitioner's application for asylum finding his testimony not credible enough, in part due to lack of corroboration.

On appeal, the BIA held that petitioner had not established persecution on account of his Tutsi ethnicity given that the Department of State indicated that the DRC is no longer detaining Tutsis without charge. The BIA also rejected petitioner's fear of future persecution based on his father's detention by the DRC.

The Third Circuit held that substantial evidence supported the BIA's finding that the State Department's report rebutted the presumption of future persecution based on petitioner's Tutsi ethnicity. Although the court noted that the State Department report "cut both ways," it concluded "a reasonable fact finder *could* find that a Tutsi in the DRC does not have a reasonable fear of persecution based upon his ethnicity."

The court, however, was troubled by the fact that the BIA, without making a credibility finding, rejected petitioner's claim of imputed political opinion based on his father's arrest by the DRC authorities. If petitioner's testimony "is assumed credible, there is no way that a reasonable factfinder could reach a conclusion other than that [petitioner] had a reasonable fear of persecution based upon imputed political beliefs." However, the court noted that the BIA, even if it found petitioner credible, could still find that petitioner had not met his burden of proof because of lack of corroboration.

In its final analysis, the court found that the BIA had "failed even to provide us with clue that would indicate why or how" petitioner failed to meet his burden of proof, and therefore the court could not "meaningfully review its decision." Accordingly the court vacated and remanded so that the

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BIA "can further explain its reasoning."

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■Ninth Circuit Finds That Country Report Rebuts Presumption Of Future Persecution

In ***Gonzales-Hernandez v. Ashcroft***, __F.3d__, 2003 WL 21674489 (9th Cir. July 18, 2003) (Thompson, Trott, *Tallman*), the Ninth Circuit affirmed the BIA's denial of asylum to petitioner and his family, finding that the INS had rebutted the presumption of future persecution through the use of a State Department country report.

The petitioner was a member of the Christian Democratic Party, a rival to the Revolutionary Party in Guatemala. During an election in March 1987, he confronted members of the Revolutionary Party that were allegedly committing voting fraud. The petitioner was then assaulted while police stood by watching, failing to intervene. After the election, the petitioner continued to receive threats from the Revolutionary Party but suffered no more physical harm. In 1988, petitioner and his family arrived illegally in the United States. They were subsequently charged with being removable in 1998, but filed for asylum and withholding of removal.

At the conclusion of their removal hearings, the IJ found that petitioner had failed to establish past persecution, and in the alternative that even if he had established past persecution, country conditions in Guatemala had changed such that petitioner no longer had a well-founded fear of persecution. The BIA disagreed with the IJ and concluded that petitioner had, in fact, established past persecution on account of political opinion but held that the 1997 State Department country report demonstrated that petitioner no longer had a well-founded fear of persecution in Guatemala.

The Ninth Circuit affirmed the BIA, finding that the country report established that only party leaders or high-profile activists were at risk, unlike petitioner who was a mere member of the group. In addition, the Ninth Circuit found that even those who were susceptible to persecution could relocate from their home communities somewhere else within Guatemala and remain safe. The court also held that although the country report was ambiguous and contradictory, it was still useful to a changed country conditions inquiry by the BIA. The court concluded by stating, "where the BIA rationally construes an ambiguous or somewhat contradictory country report and provided an 'individualized analysis of how changed conditions will affect the specific petitioner's situation,' substantial evidence will support the agency determination."

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■Ninth Circuit Holds Israeli Arab Entitled To Asylum Based On Persecution By Israeli Marines

In ***Baballah v. Ashcroft*** , __F.3d__, 2003 WL 21557492 (9th Cir. July 11, 2003) (Tashima, Thomas, *Paez*), the Ninth Circuit reversed the BIA's denial of asylum and withholding of removal to petitioner who claimed that he had been persecuted on the basis of his ethnicity. The petitioner, a native and citizen of Israel, claimed that threats and attacks by Israeli Marines over a ten-year period made it virtually impossible for him to earn a living.

Petitioner, who had studied to be an accountant, was unable to find employment. Bank officials refused to hire him and called him a "goy," a word that means "non-Jew" in Hebrew and has derogatory connotations in Arabic. Unable to find employment in his field, petitioner went to work for his family as a fisherman. During the ten years that he worked as a fisherman, he was victim of incessant threats and acts of violence by Israeli Marines, who harassed him. Apparently the Marines did not confront other fishermen, but when they saw petitioner, they would circle his fishing boat causing his boat to rock precipitously and fill with water. Eventually, petitioner bought a speedboat with which he intended to earn a living by offering pleasure trips.

An immigration judge found petitioner's testimony credible but denied asylum finding that the his encounters with the Israeli Marines did not rise to the level of persecution. The BIA affirmed the denial of asylum also finding that the encounters with the Israeli Marines did not rise to the level of persecution.

The court rejected the government's argument that petitioner had never complained to the police about any of the claimed incidents of persecution, finding that "when government is responsible for persecution" there is no need for further analysis."

The Ninth Circuit held that although petitioner had never been physically harmed, the cumulative impact of the threats and attacks from government actors amounted to persecution. "Threats and attacks can constitute persecution even when an applicant has not been beaten or physically harmed," said the court, citing to prior court decisions. Moreover, "an applicant may suffer persecution because of the cumulative impact of several incidents even where no single incident would constitute persecution on its own," said the court. The court also found that the Israeli Marines were motivated in persecuting petitioner on account of his ethnicity, religion, or the fact that he was the child of a mixed religious and ethnic marriage.

Finally, the court held that the persecution against the petitioner was committed by "government actors, conclusively establishing the third prong of the analysis by showing governmental involvement." The court rejected the

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government's argument that petitioner had never complained to the police about any of the claimed incidents of persecution, finding that "when government is responsible for persecution" there is no need for further analysis.

In light of its findings of past persecution, the court then found that the INS had not presented any evidence to rebut the presumption of future persecution. Accordingly, it granted petitioner's request for withholding of deportation and remanded to the BIA to exercise it discretion as to whether to grant asylum.

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■Ninth Circuit Affirms Denial Of Asylum On Credibility Grounds

In ***Malhi v. INS***, __ F.3d__, 2003 WL 21674483 (9th Cir. July 18, 2003) (Graber, Wardlaw, *Clifton*), the Ninth Circuit affirmed the BIA's denial of asylum, withholding , and CAT claims, on the basis that petitioner, a citizen of India was not credible. The IJ had denied relief based primarily on an adverse credibility finding, and the BIA affirmed on that basis. In addition, the BIA denied petitioner's motion to remand for adjudication on adjustment of status pursuant to his marriage to a U.S. citizen that had occurred while the case was pending.

The Ninth Circuit held that the BIA had a legitimate, articulated basis to question the petitioner's credibility in that it found geographic and linguistic discrepancies in petitioner's testimony, thus meeting the standard for an adverse credibility finding. The court further held that the petitioner's membership in a dissident political group alone did not compel a finding of a well-founded fear of persecution.

The court further held that petitioner had failed to establish the BIA had abused its discretion in denying petitioner's motion to remand based on petitioner's marriage. The court found that petitioner's proffering of a divorce decree of his first marriage (also to a U.S. citizen), four photographs of the wedding, a marriage certificate, his wife's U.S. birth certificate, and a receipt of an I-130 filing did not provide clear and convincing evidence that the marriage was bona fide.

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■Eleventh Circuit Upholds Denial Of Asylum To Guatemalan On The Basis Of Changed Country Conditions

In ***Quevedo v. Ashcroft***,__F.3d__, 2003 WL 21665015 (1st Cir. July 17, 2003) (*Lynch*, Lipez, Howard), the First Circuit affirmed the BIA's denial of petitioner's application for asylum based on his membership in an agrarian cooperative in Guatemala.

The Ninth Circuit held that it retained jurisdiction to review the constitutional claim that the BIA's interpretation of hardship standard violates due process.

Petitioner entered the United States unlawfully in 1991. When placed in proceedings, he sought asylum claiming that he had been persecuted by Guatemalan guerrilla rebels on account of his affiliation with the Guatemalan government. The IJ held that the petitioner had suffered past persecution but that the 1997 and 1996 Department of State country reports, introduced by the government, which highlighted the peace accord between the government and the particular guerrilla group from which petitioner had suffered persecution, satisfied the changed country conditions requirement to rebut a well-founded fear of persecution presumption. The BIA affirmed, without opinion, the IJ's decision.

The court affirmed the BIA's decision and further held that petitioner's single incident of persecution of a short duration that was not followed by acts of recrimination did not compel a contrary finding of asylum eligibility. The Eleventh Circuit also stated that the IJ's opinion correctly found petitioner had not been singled out and petitioner's family in Guatemala remained unharmed.

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CANCELLATION

■Ninth Circuit Finds That It Retains Jurisdiction To Review Claim That Hardship Standards Violate Due Process

In ***Ramirez-Perez v. Ashcroft***, __F.3d__, 2003 WL 21674495 (9th Cir. July 18, 2003) (*Nelson*, Silverman, McKeown), the Ninth Circuit affirmed the BIA's denial of petitioner's cancellation of removal and further held that the BIA's interpretation of "exceptional and extremely unusual hardship" and summary affirmance ("streamlining") procedure were constitutional.

Petitioner, a native and citizen of Mexico, requested cancellation of removal after being issued an NTA for illegally entering and residing in the U.S. In 1999, she had a child in the U.S., and she has family members in both Mexico and the U.S. The IJ made no credibility finding but found petitioner was not eligible for cancellation of removal because she failed to establish (1) the ten years' continuous presence statutory prerequisite due to inconsistent testimony concerning her residence and (2) "exceptional and extremely unusual hardship" because her child would not suffer any difficulty materially different from any child who relocates with a parent at a young age. In addition, the IJ held that the child could possibly stay with her father, a U.S. citizen, who lives in the United States. The BIA affirmed without opinion the IJ's decision.

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The Ninth Circuit held that it retained jurisdiction to review the constitutional claim that the BIA's interpretation of hardship standard violates due process even though the court admitted it did not have jurisdiction to review the discretionary decision by the IJ of whether the alien had actually established exceptional and extremely unusual hardship. The court then found that the BIA's interpretation fell well within the broad range authorized by the statutory language because the BIA considered the "ages, health, and circumstances of qualifying" relatives in its decision. In addition, the court rejected petitioner's streamlining challenge stating, it had already ruled in *Carriche* that the streamlining process did not violate due process.

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CITIZENSHIP

■Second Circuit Holds That Veteran Must Show Good Moral Character To Qualify For Naturalization

In ***Nolan v. Holmes,*** __F.3d__, 2003 WL 21509046 (2d Cir. July 2, 2003) (*Kearse*, Parker, Rakoff), the Second Circuit affirmed a district court decision holding that a veteran of the U.S. armed forces must demonstrate good moral character to qualify for naturalization. Peitioner served two tours of duty during the Vietnam conflict. After the first tour, he received an honorable discharge; after the second, he received an "other than honorable" discharge.

The district court held that the special provisions governing naturalization of aliens who serve in the U.S. armed forces did not obviate the requirement that an applicant for naturalization must possess good moral character.

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■Ninth Circuit Holds Individuals May Become United States "Nationals" Only By Birth Or Naturalization

In ***Perdomo-Padilla v. Ashcroft,*** __F.3d__, 2003 WL 21435851 (9th Cir. June 23, 2003) (Schroeder, Thompson, *Graber*), the Ninth Circuit dismissed petitioner's appeal for lack of jurisdiction based on his controlled substance conviction. The court rejected petitioner's assertion that he was a "national" of the United States because he had filed an application for naturalization before his conviction. The court held that the traditional meaning of the term "national," and the language of the immigration statute, indicated that a person may become a U.S. "national" only through birth in a United States territory or by naturalization.

The court held that that a person may become a U.S. "national" only through birth in a United States territory or by naturalization.

The court rejected the Fourth Circuit's finding in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), that a murdered lawful permanent resident who applied for naturalization was a "national," holding that the Fourth Circuit "provided no reasoning for its conclusion" and did not address the statute or the traditional meaning of the term.

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CRIMES

■Eleventh Circuit Holds "Cryptic" Criminal Evidence Is Inadequate To Prove Firearms Offender Is Removable

In ***Adefemi v. Ashcroft,*** __F.3d__, 2003 WL 21488868 (11th Cir. June 30, 2003) (*Barkett*, Kravitch, Fullam), the Eleventh Circuit held that the "cryptic" notations contained in a citation issued to petitioner for possessing a firearm were ambiguous and did not constitute clear and convincing evidence to sustain deportability based on a firearm offense.

The petitioner, a citizen of Nigeria, became a permanent resident in 1989. In 1993, the INS instituted deportation proceedings on the basis that petitioner had been convicted of two theft offenses in 1991. Petitioner did not contest the charges but applied for § 212(c) relief. Subsequently, the INS amended the charges alleging that petitioner was also deportable on the basis of a 1991 firearm offense. An IJ found petitioner deportable on all grounds, finding also that INS had established the firearm conviction "by evidence which is clear, convincing and unequivocal." The IJ also denied the § 212(c) waiver finding that the firearm offense did not have an analogue in the exclusion context and therefore that ground of removal could not be waived. Petitioner appealed that decision and the BIA affirmed in 2000, after having ruled on other aspects of the case in 1997 and 1999.

The principal issue before the Eleventh Circuit was whether a "two-sided, preprinted document that would be colloquially termed a traffic 'ticket'" was sufficient evidence to demonstrate petitioner's conviction. To review this determination, said the court, "we must examine a somewhat inscrutable combination of signatures, stamps, and handwritten marks recorded on this document." Apparently, the petitioner had been charged with carrying a concealed firearm. However, the court found that the document to prove that petitioner was convicted of that offense was ambiguous and "cryptic" - indeed, the court inferred that petitioner might have only been convicted of a traffic violation. The court found, citing to *Woodby*, that the "clear and convincing' evidentiary standard applicable in deportation proceedings requires something more before an individual may be

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'compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."

In a concurring and dissenting opinion, Judge Kravitch would have found that the evidence did not "compel" a conclusion contrary to the BIA's factual finding.

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■Ninth Circuit Finds That Conviction Under "Wobbler" Statute Is Not An Aggravated Felony

In ***Garcia-Lopez v. Ashcroft***, __F.3d__, 2003 WL 21468252 (9th Cir. June 26, 2003) (Lay, *Ferguson*, Gould), the Ninth Circuit reversed the BIA's denial of suspension of deportation for a petitioner who had been convicted pursuant to a California "wobbler" statute, under which an offense may be treated as either a misdemeanor or a felony.

Petitioner, a native and citizen of Guatemala, was convicted in CA for stealing a purse. The crime was considered grand theft in CA which could be construed as either a felony or misdemeanor depending on the time served. The petitioner ultimately only served six months, so the CA state court determined that his offense was a misdemeanor. The INS commenced deportation proceedings against him, and the petitioner conceded deportability but applied for suspension of deportation. The IJ found that it was bound by the state court's classification of the offense as a misdemeanor, found him eligible for suspension of deportation, and granted that relief, finding that he had met all the remaining requirements. Following an INS appeal the BIA reversed, finding that it was not bound by the state court's designation of petitioner's offense as a misdemeanor and therefore found him statutory ineligible for suspension of deportation.

The Ninth Circuit reversed the BIA. The court held that, pursuant to its holding in *Lafarga*, a state court's designation of a wobbler offense as a misdemeanor was binding on the BIA for the purpose of applying the petty offense exception. Because the penalty for petitioner's offense did not exceed imprisonment for one year, and because petitioner received an actual sentence of less than six months, he qualified for the petty offense exception.

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CRIMINAL PROSECUTIONS

■Fourth Circuit Holds Materiality Not An Element In Naturalization Prosecution

In ***United States v. Abuagla***, __F.3d__, 2003 WL 21541110 (4th Cir. July 9, 2003) (Niemeyer, *Williams*, Traxler), the Fourth Circuit held that materiality is not an element of the crime of knowingly making a false statement under oath in a naturalization proceeding under 18 U.S.C. §§1015(a). The defendant had been arrested in 1988 for possession of a concealed firearm. Subsequently in 1990, the criminal charges for possession of a concealed firearm were dropped because the defendant participated in a pre-trial intervention program. On November 11, 1995, the defendant submitted an application for naturalization in which he answered "no" to the question of whether he had ever been arrested for breaking or violating any law, excluding traffic regulations. At the time that he answered the question, the defendant knew that he had been arrested in 1988. The government conceded that this false statement was not material.

Section 1015(a) makes it a crime to "knowingly make[ ] any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens." The Fourth Circuit found that this language was clear on its face and that none of the terms included a requirement of materiality.

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DUE PROCESS

■Sixth Circuit Finds Petitioner Did Not Meet The *Lozada* Requirement

In ***Al Hamid v. Ashcroft***,__F.3d__, 2003 WL 21658620 (6th Cir. July 15, 2003) (Boggs, *Gilman*, Marbley), the Sixth Circuit affirmed the BIA's denial of petitioner's claim that the ineffectiveness of his two counsel violated his due process rights. Petitioner, a citizen and native of Jordan, overstayed his visitor's visa and was served with a NTA in 1998. The IJ found him removable, and the petitioner appealed to the BIA alleging ineffective counsel, which the BIA dismissed. The Sixth Circuit held that petitioner failed to meet the *Lozada* requirements for establishing ineffective counsel because (1) petitioner's affidavit and trial transcript, which summarized his complaints, merely alleged what his counsel failed to do but did not mention what actions his counsel promised to take, and (2) his affidavit stating he was sending his complaint to the Bar Association in support of his grievance did not satisfy the requirement that a complaint be filed *before* the affidavit is submitted to the BIA.

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JURISDICTION

Eleventh Circuit finds Lack Of Jurisdiction To Review Denial Of Motion To Reopen Filed By Convicted Alien

In ***Patel v. INS***,__F.3d__, 2003 WL 21480378 (11th Cir. June 27, 2003) (Black, Roney, *Stapleton*), the Eleventh Circuit dismissed for lack of jurisdiction a challenge to a denial of a motion to reopen filed by a convicted alien.

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Petitioner, a citizen of India, was sentenced in the United States to one year of jail time with all but 16 days of the sentence suspended for a battery conviction. He was removed as an alien convicted of an aggravated felony in 2000. Subsequent to his removal the state court reduced his sentence *nunc pro tunc* to 16 days. Petitioner then petitioned the IJ, from India, to reopen his removal proceedings in light of his modified sentence. The IJ ruled that he lacked jurisdiction to reopen a removal proceeding after the removal order had been executed, and the BIA affirmed.

The Eleventh Circuit held that the jurisdiction-limiting provisions of § 1252(a)(2)(c), which take jurisdiction away for reviews of final orders of removal for convicted aliens, precluded the court from entertaining an attack on petitioner's removal order through a filing of a motion to reopen. The court found that pursuant to INA § 101(a)(48)(B) the definition of an aggravated felony included the entire period of incarceration ordered by the court regardless of any suspension of that imprisonment. In addition, the Eleventh Circuit denied petitioner's request for his case to be transferred to the district court for habeas relief because he was no longer detained in the United States and was therefore not restrained in his liberty.

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■Third Circuit Holds District Court Lacks Habeas Jurisdiction Where Alien Fails To Exhaust Administrative Remedies

In ***Duvall v. Elwood***, __F.3d__, 2003 WL 21574823) (3d Cir. July 11, 2003) (Scirica, Ambro, *Garth*), the Third Circuit vacated a district court's grant of habeas corpus, holding that the lower court lacked habeas jurisdiction because petitioner had not exhausted his administrative remedies because the BIA had not issued a final order of removal in the case. The district court had held that the BIA had erred when it held that the doctrine of collateral estoppel did not bar the INS from relitigating petitioner's alienage during a different proceeding involving two new crimes she committed. The BIA had remanded the case to the IJ for further proceedings and was pending before the immigration court, when petitioner filed a habeas petition.

The Third Circuit held that the INA § 242(d)(1) mandates that all administrative remedies be exhausted before a court may exercise jurisdiction over an alien's habeas petition or a petition for review. The court found that this exhaustion requirement for subject matter jurisdiction cannot be waived and is not subject to an exception for futility.

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REINSTATEMENT

■Ninth Circuit Holds That Aliens Whose Prior Immigration Orders Are Reinstated May Not Apply For Adjustment Of Status

In ***Padilla v. Ashcroft,*** __F.3d__, WL 21499281 (9th Cir. July 1, 2003) (*Graber*, Kozinski, Berzon), the Ninth Circuit held that the immigration statute's bar on relief to aliens whose removal proceedings are reinstated on illegal reentry precludes such aliens from applying for adjustment of status. The court also held that petitioner's due process challenge to the reinstatement regulations failed because she could not establish the necessary showing of prejudice.

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STREAMLINING

■Eighth Circuit Upholds Streamlining Rule and Denies Asylum Claim

In ***Chavez-Dominguez v. Ashcroft***, __F.3d__, 2003 WL 21648940 (8th Cir. July 15, 2003) (Bowman, *Murphy*, Bye), the Eighth Circuit affirmed the BIA's denial of asylum and withholding, holding that petitioner's claim of past persecution was no more than a case of forced recruitment by the Guatemalan guerrillas. The court also upheld the BIA's use of streamlining, holding that the BIA's streamlining constitutes an adoption of the IJ's decision and is not an abuse of discretion, and that the IJ's decision sufficiently sets forth the basis for the agency's decision.

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SUSPENSION

■Ninth Circuit Finds That An Application For Suspension Of Deportation Cannot Be Filed Directly With The INS

In ***Ramirez-Zavala v. Ashcroft***, ___F.3d__, 2003 WL 21544177) (Pregerson, *Thomas*, Jorgenson) (9th Cir. July 10, 2003), the Ninth Circuit affirmed the BIA's ruling that an alien can file an application for suspension of deportation only before the immigration judge in the course of deportation proceedings commenced prior to April 1, 1997. The alien had filed an application for suspension of deportation directly with the INS shortly before that date, even though she was not in proceedings.

The court held that an application could not be filed directly with the Attorney General, but must be filed with an Immigration Judge in conformity with the controlling regulations. The court held that the alien's submission of an application did not preserve suspension of deportation as a remedy in removal proceedings commenced after April 1, 1997.

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Contributions To The Immigration Litigation Bulletin Are Welcomed!

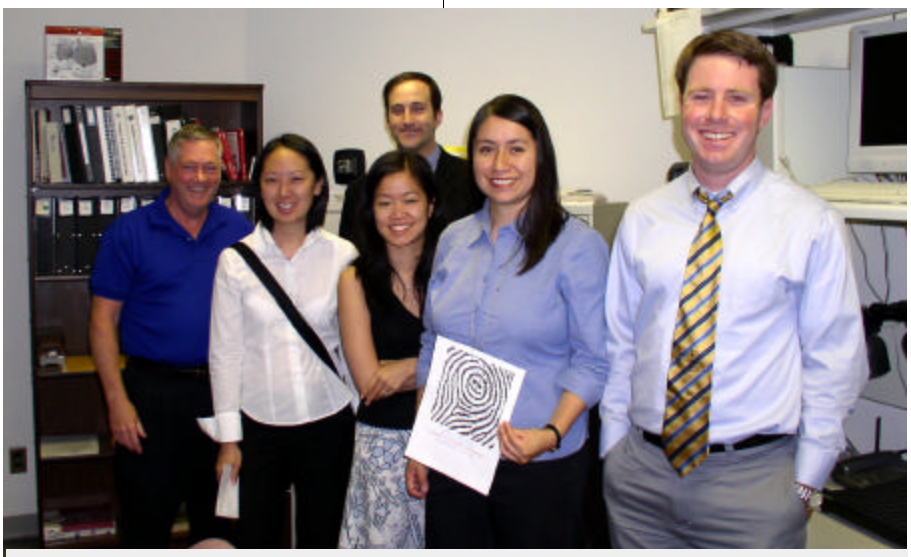
CASES SUMMARIZED IN THIS ISSUE

"We must not forget that in the struggle between the forces of freedom and the ideology of hate, our challenge in this war against terrorism is to adapt and anticipate, to out-think and outmaneuver our enemies, while honoring our Constitution."

Attorney General Ashcroft

INSIDE OIL

This summer, the Office of Immigration Litigation has had 15 legal interns. Inducted through trial by fire, the interns were assigned an appellate brief the first day they arrive and steadily received additional briefing assignments. In addition, many of the interns took on collateral duties that include assisting with office legal training, working on the OIL website, and coordinating events. The interns also took advantage of various excursions to client sites. The interns visited the Immigration Court in Arlington, the BIA in Falls Church, the Forensic Document Lab for the DHS in McLean, and Dulles International Airport. While some of the interns received a stipend, most were volunteers. OIL is grateful for their help, and the interns appreciated the responsibility and invaluable training provided by the OIL attorney staff.



OIL interns visiting DHS' Forensic Lab in McLean, Virginia. Pictured from R to L are: Patrick Cowhard, Shirley Rivadeneira, Angela Gi, Adam Gerowin, Janice Lam, and Jim Hesse, DHS Chief Intelligence Officer.

The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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