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NINTH CIRCUIT FINDS THAT FAMILY IS A PARTICULAR SOCIAL GROUP UNDER THE REFUGEE DEFINITION

In ***Thomas v. Gonzales***, 409 F.3d 1177 (9th Cir. 2005) (*en banc*) (Schroeder, Reinhardt, O'Scannlain, Rymer, Kleinfeld, Hawkins, Silverman, Graber, *Wardlaw*, Paez, Bea), the Ninth Circuit held that "family membership may constitute membership in a 'particular social group,' and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship." The court also overruled *Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991), and its progeny, to the extent that they held that a family may not constitute a "particular social group."

"Family membership may constitute membership in a 'particular social group,' and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship."

The petitioner, her husband, and two children are citizens of South Africa. They entered the United States as visitors in 1997 but did not depart when their visas expired. Within a year of their admission they applied for asylum. The principal petitioner testified that she came to the United States to avoid threats of physical violence and intimidation to which they were subjected because of abuses committed by her father-in-law who is known as "Boss Ronnie." Boss Ronnie was a foreman at Strongshore Construction in Durban and "was and is a racist who abused his back workers both physically and verbally." The petitioner testified that in February 1996, their dog was apparently poisoned. The next month, their car was vandalized and its tires slashed. When petitioner told her father-in-law of the incident, he told her that he had just had a confrontation with his workers, and that she should buy a gun. In May 1996, human feces were apparently thrown at petitioners' residence.

In December 1996, petitioner while sitting on her veranda was confronted by a man wearing overalls bearing the logo Strongshore. This person asked petitioner if she knew "Boss Ronnie," and told her that he would come back and cut her throat. Lastly, in March

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ATTORNEY GENERAL DENIES ASYLUM TO ALIEN ASSOCIATED WITH TERRORIST GROUPS

In ***Matter of A-H-,*** 23 I&N Dec. (A.G. 2005), the Attorney General exercised his discretion to deny asylum to a leader-in-exile of the Islamic Salvation Front of Algeria, primarily because of his "association with armed groups that committed widespread acts of persecution and terrorism in Algeria." The case had been referred to the AG by the then Acting Commissioner of the INS following the BIA's decision to grant respondent's request for asylum. The AG decision vacates the BIA's decision in its entirety, denies asylum, and remands the case to the BIA to consider respondent's application for withholding of removal and deferral of removal to Algeria.

The respondent is an Algerian

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ASYLUM DOCUMENTATION UNDER THE REAL ID ACT

This article examines the current use of documentation in the adjudication of asylum claims, and looks at the future effect of the REAL ID Act on this aspect of asylum adjudication. The INA, before the recent passage of the REAL ID Act, did not address whether or to what extent documentary evidence can be required to establish an asylum claim. The implementing regulation currently states that the "testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a). The REAL ID Act, as discussed below, will change the use of corroborating evidence in asylum

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Highlights Inside

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national who has been active in the Algerian Islamist movement for decades and is a self-proclaimed leader-in-exile of the Islamic Salvation Front in Algeria ("FIS").

In the early nineties, Algeria was wracked by internal conflict between security forces and armed Islamist groups that sought the overthrow of the government. One of the active groups, the Islamic Salvation Army ("AIS") has been identified as an armed wing of the FIS. In 1994, several Islamist groups, including IAS joined under the banner of the Armed Islamic Group ("GIA"). These armed groups engaged in acts of terrorism and widespread persecution of civilians in Algeria. The State Department designated GIA as a "foreign terrorist organization."

"The United States has significant interests in combating violent acts of persecution and terrorism, and it is inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence."

The case arose in 1993, when the respondent applied for asylum. The INS denied that application and placed respondent in exclusion proceedings for lack of a valid entry document. In 1997 an IJ denied respondent's request for asylum and withholding. The BIA reversed and remanded that decision for a new hearing. A second immigration judge, after hearing additional evidence, again denied the request for asylum and withholding but deferred the removal to Algeria under the Convention Against Torture ("CAT"). On appeal, the BIA reversed again and granted asylum. The INS then referred the case to the Attorney General.

In exercising his discretion to deny asylum, the AG considered respondent's ties to the armed Islamist groups and his statements purporting to justify terrorist activities by these groups. The AG found that "the United States has significant interests in combating violent acts of persecution and terrorism, and it is inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence."

In addition to the discretionary denial of asylum, the AG set forth the legal standards for denying withholding of deportation on the basis that an applicant persecuted others and where there are "reasonable grounds for regarding [an applicant] as a danger to the national security of the United States."

Persecution of Others

The AG determined that terrorist acts committed by the armed Islamist groups in Algeria, including the bombing of civilian targets and the widespread murders of journalists and intellectuals on account of their political opinions or religious beliefs, constitute the persecution of others. A person who is a leader-in-exile of a political movement, such as the respondent, may be found to have "incited, assisted, or otherwise participated in" acts of persecution in the home country by an armed group connected to that political movement where there is evidence indicating that the leader (1) was instrumental in creating and sustaining the ties between the political movement and the armed group and was aware of the atrocities committed by the armed group; (2) used his profile and position of influence to make public statements that encouraged those atrocities; or (3) made statements that appear to have condoned the persecution without publicly and specifically disassociating himself and his movement from the acts of persecution, particularly if his statements appear to have resulted in an increase in the persecution.

The AG remanded this issue to the BIA to determine whether there is sufficient evidence to indicate that the respondent "incited, assisted, or otherwise participated in the persecution" of others.

Credibility Findings

In connection with the findings that respondent was ineligible for withholding because he had persecuted others, the IJ had rejected as not credible respondent's testimony to the contrary. The IJ gave a list of reasons to justify the adverse credibility findings, including observations as to how petitioner testified. The BIA rejected all these findings. The AG found that the BIA failed to give the IJ's credibility findings "proper deference" and that its treatment of the IJ's credibility determination was "wholly inadequate." In particular, the AG noted that much of the IJ's assessment of respondent's credibility "related to is demeanor and sincerity as a witness, not only to asserted discrepancies and omissions in his testimony, and such assessments of testimonial credibility are uniquely within the ken of the Immigration Judge." Accordingly, the AG remanded to the BIA to reconsider the credibility findings consistent with is opinion.

Danger to National Security

The AG found that the phrase "danger to the security of the United States" is best understood to mean "a risk to the Nation's defense, foreign relations, or economic interests." "Where, under the circumstances information about an alien supports a reasonable belief that the alien poses a danger – that is, any nontrivial degree of risk – to the national security, the statutory bar to eligibility applies," he added.

The AG also found that, as used in the national security–related provisions of the INA, the "reasonable ground for regarding" standard is substantially less stringent than preponderance of the evidence. This stan-

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1997, while on her way to a store, four black men wearing Strongshore overalls, approached petitioner and tried to take her daughter from her arms. When she screamed, her neighbor came out and the men ran off. At this point petitioner decided to leave South Africa.

Petitioner also stated that her brother-in-law's house was broken into and his car vandalized several times. Petitioner speculated that her family was the subject of the attacks because her father-in-law lived in what was essentially a "fortress."

The BIA "has long and consistently held that 'kinship ties' are the sort of common and immutable characteristic that give rise to a 'particular social group' for purpose" of the refugee definition.

The Immigration Judge determined that petitioner had not met her burden in demonstrating that her family had suffered persecution based on any of the five statutory grounds, "whether it is race or political opinion." The IJ opined that petitioner's testimony was not totally credible, noting in particular that there was no explanation as to why the attacks suddenly began in 1996. However, he did not make an adverse credibility finding. The IJ rejected petitioner's claim that she was subjected to persecution on account of race finding that incidents of crimes in South Africa were not restricted to "Blacks committing crimes against Whites." The IJ also found that there was nothing political in the attacks against the petitioner. The IJ did not expressly reference "membership in a particular social group" even though petitioner had indicated so in her asylum application. The BIA affirmed the IJ's decision without opinion.

A divided panel of the Ninth Circuit held that the principal petitioner, her husband and two children, had been persecuted on account of membership in a particular social group, namely because the petitioner was the daughter-in-law of "Boss Ronnie." The government then sought rehearing *en banc* which the court granted to reconcile its intracircuit conflict on the question of whether a family may constitute a "particular social group."

On rehearing *en banc*, the court again held that a family may constitute a "particular social group," and overruled all of its prior decisions expressly or implicitly holding otherwise. Preliminarily, the court rejected the government's contention that the petitioners had failed to exhaust their administrative remedies on the issue of their membership in a particular social group. The court noted that the petitioner had checked the box on her asylum application marked "membership in a particular social group," and had attached a written declaration explaining that her family had been targeted because of the racism of her father-in-law. The court also determined that petitioner had raised the issue to the BIA because she had attached her declaration to her notice of appeal and had indicated in her counseled brief that her family feared persecution because of their relationship to "Boss Ronnie."

On the merits, the court found that the BIA "has long and consistently held that 'kinship ties' are the sort of common and immutable characteristic that give rise to a 'particular social group' for purpose" of the refugee definition. The court noted that in the seminal case of *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA recognized that "kinship" ties may be the defining characteristic of a particular social group. In that case, the BIA applied the doctrine of *ejusdem generis* to define the phrase "membership in a particular social group" to mean persecution that is directed toward an individual "who is a member of a group of persons all of whom share a common, immutable characteristic . . . [which] might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." The BIA subsequently applied that definition in *Matter of H-*, 21 I&N Dec. 337 (BIA 1996), where it held that an asylum applicant had been persecuted on account of his membership in the Marehan clan in Somalia. The court also noted that none of the other "circuits that have considered the question departed from the principle that a family may constitute a social group." However, within the Ninth Circuit, the court noted that there had been two diverging lines of authority on the issue – one holding that a "family" cannot constitute a particular social group and one holding that a family is a cognizable social group. *Compare Estrada-Posada v. INS*, 924 F.2d 916 (9th Cir. 1991) *with Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004). Finding that these lines of authority could not be reconciled, the court held "consistent with the views of the BIA and our sister circuits," that a family may constitute a particular social group and overruled all its prior decisions to the contrary.

The court then found that the petitioners here had demonstrated that the harm they suffered had been solely a result of their common and immutable kinship ties with Boss Ronnie. The court rejected the government's contention that " a family can constitute a particular social group only when the alleged persecution is intertwined with one of the four grounds for asylum." In particular, the government had argued that the threats against the petitioners were merely retaliation for personal conduct and that to recognize the family as a social group would confer refugee status on all victims of personal vendettas or feuds. The court noted that the government's fear was unfounded because "applicant must still show that the

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persecution is at the hands of the government or persons or organizations that the government is unable or unwilling to control." Moreover, a presumption of a fear of future persecution may be rebutted by relocating within that country or by showing changed circumstances, said the court. "We are confident that the statutory mechanism as a whole is capable of separating meritorious claims of persecution on the ground of kinship ties from claims based on mere personal retribution or generalized crimes," observed the court. Accordingly, the court found that petitioners had been targeted on account of their familial relationship, and remanded to the BIA for a determination as to whether the attacks rose to the level of persecution.

Four judges concurred and dissented in part with the majority. The dissenters would agree with the majority that a family *may* make up a particular social group, but would have remanded this case to the BIA for a determination as to whether "a nuclear family, without more," is a particular social group. The dissenters noted that "the question is important, and has profound implications. We have no business deciding such a question without the BIA's having first addressed it because we owe deference to the BIA's interpretation and application of the immigration laws." The dissenters questioned the majority's ruling on exhaustion, but noted that even if the issue of membership in a particular social group had been raised, it clearly was not ruled upon. Therefore, under *INS v. Ventura*, 537 U.S. 12 (2002), the court should have remanded the case to the BIA. "The BIA has never addressed whether a nuclear family is a "particular social group'" observed the court, noting that "in its considered judgment the BIA may believe that family-*plus* is required for an ordinary family to qualify, or it may not."

By Francesco Isgro, OIL
Contact: Frank Fraser
☎ 202-305-0193

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cases, but current law will continue to have application for quite some time because the REAL ID provisions that apply to corroborating evidence affect only asylum applications filed on or after the Act's date of enactment. *See* REAL ID Act of 2005, Title I, § 101(h), Pub. L. 109-13 (May 11, 2005).

Requirements for Corroborating Evidence in Asylum Cases Filed Before May 11, 2005

The BIA, in a 1997 *en banc* opinion that specifically addressed and clarified the use of documentary evidence in asylum cases, held that an alien must present evidence "of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available" and, if the evidence is unavailable, must "explain its unavailability." *Matter of S-M-J-*, 21 I. & N. Dec. 722 (BIA 1997)(en banc). The BIA gave examples of documentation that it would be reasonable to expect an alien to provide, such as "evidence of his or her place of birth, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment." *Id*. The BIA also noted that, if an alien claimed to be an officer in an organization, the alien should provide documentation to support that fact, or explain why the documentation was not available. *Id*. The BIA concluded in *Matter of S-M-J-* that the "absence of such corroborating evidence can lead to a finding that an applicant has failed to meet her burden of proof."

The BIA also held in *Matter of S-M-J-* that corroborating evidence has a role in the credibility phase of the asylum determination, concluding that "general country condition information is essential for an Immigration Judge's evaluation of an applicant's credibility." The BIA did not expressly address in *Matter of S-M-J-* whether a lack of individualized documentation (as opposed to general country condition reports) was a proper basis for a negative credibility finding, but the BIA did state that "[testimony is not a discrete, self-contained unit of evidence examined and weighed without context; it is part of the body of evidence which is intertwined and considered in its totality." *Id*. Thus, the BIA in *Matter of S-M-J-* held that corroborating evidence, where available, is an essential part of the burden-of-proof phase of the asylum inquiry, and that country condition documentation and the "body of evidence" as a whole are essential parts of the credibility determination.

The courts of appeals have split over *Matter of S-M-J-*. The Ninth Circuit held, contrary to *Matter of S-M-J-*, that if the agency finds that an alien was credible, or does not make an express adverse credibility finding, the agency cannot then conclude that the alien failed to meet his or her burden of proof due to a lack of documentation. *See Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000). *Ladha* does not address whether or to what extent an immigration judge can base a negative credibility finding (as opposed to a finding of failure to meet the burden of proof) on a lack of documentation, but the Ninth Circuit has indicated in other cases that a lack of documentation can be considered as part of the credibility analysis. *See Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000); *Mejia-Paiz v. INS*, 111 F.3d 720, 722-23 (9th Cir. 1996). The Second, Third, and Seventh Circuits have split with the Ninth Circuit on this issue and have held that corroborating evidence may be required in both the credibility and burden-of-proof phases of the asylum analysis. *See Balogun v. Ashcoft*, 374 F.3d 492, 501-03 (7th Cir. 2004); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 599 (3d Cir. 2003); *Diallo v. INS*, 232 F.3d 279, 290 (2d Cir. 2000). The Eighth Circuit has indicated that a failure to provide reasonably available corroborative evidence can be a substantial basis for a nega-

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Summaries Of BIA Decisions

■ Board Rules That The Offense Of Unauthorized Use Of A Motor Vehicle In Violation Of The Texas Penal Code Is An Aggravated Felony Offense

On June 7, the Board issued its precedent decision in ***Matter of Brieva***, 23 I&N Dec. 766 (BIA 2005), finding that the alien's conviction for the unauthorized use of a motor vehicle was a crime of violence and therefore constituted an aggravated felony offense.

The alien pleaded guilty in 1993. Adjudication was initially deferred, and he was sentenced to five years' probation. The alien failed to comply with the conditions of his probation and was sentenced to five years imprisonment, of which he served less than one year.

The Board relied on Fifth Circuit precedent in holding that the offense in question qualified as a crime of violence under 8 U.S.C. § 16(b) because it involved a substantial risk of use of force. Noting that some of the negligent or accidental conduct previously identified by the court as a crime of violence could no longer be so considered in light of the holding in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), the Board nevertheless determined that the unauthorized use of a motor vehicle remained a crime of violence because the nature of that offense was such that it involved a substantial risk that force would be used to cause property damage during the commission of the offense. The Board also denied the alien's application for a waiver of inadmissibility under former section 212(c) of the INA, holding that the aggravated felony ground of removal with which he was charged had no statutory counterpart in the grounds of inadmissibility under section 212(a).

■ Board Holds That The Date On Which A Previously Admitted Alien Is Lawfully Admitted For Permanent Residence May Constitute The "Date Of Admission" For Immigration Purposes

On June 6, the Board issued its precedent decision in ***Matter of Shanu***, 23 I&N Dec. 754 (BIA 2005), finding that the phrase "date of admission" includes, *inter alia*, the date on which a previously admitted alien is lawfully admitted for permanent residence by means of adjustment of status.

With respect to aliens who have been admitted to the United States more than once, each and every date of admission qualifies as a potentially "relevant" date of admissionfor purposes of determining removability.

The alien initially entered the United States as a nonimmigrant in 1989, and adjusted his status in 1996. He was placed in removal proceedings following his 1998 convictions for various federal fraud offenses, some of which he conceded constituted crimes involving moral turpitude. The alien contended that he was not removable because none of his crimes were committed within five years after the date of his admission as a nonimmigrant in June 1989.

The Board rejected that argument, holding that the plain language of the immigration statute demonstrated Congress's understanding that the term "admission" encompassed adjustment of status, and not just entry at the boarder with an immigrant or nonimmigrant visa. Moreover, the Board held that with respect to aliens who have been admitted to the United States more than once, each and every date of admission qualified as a potentially "relevant" date of admission for purposes of determining removability under 8 U.S.C. § 1227(a)(2)(A)(i).

Contact: Park Song, OIL
☎ 202-616-2189

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dard is satisfied, he stated, "if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security." As an example, the AG noted the case of *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990), where the First Circuit affirmed the denial of admission to an Irish terrorist based on information which would have been inadmissible in a federal court, but which was sufficient to justify a reasonable person in the belief that the alien fell within a proscribed category.

The AG remanded this issue to the BIA to apply the proper legal standard and "to determine whether the evidence, including any further fact-finding, would support a reasonable belief that respondent poses a danger to our national security interests, including foreign relations and economic interests of the United States."

Withholding and CAT

The AG also reopened and remanded the threshold issue of whether respondent is eligible for withholding of deportation in light of the significant passage of time since the outset of the case. The INS had apparently stipulated in 1997 that respondent had a fear of future persecution if returned to Algeria. The AG noted that there may be specific reasons to believe that the respondent may no longer satisfy the threshold claim of eligibility for withholding. For the same reasons, the AG reopened and remanded the issue of whether respondent faces a likelihood of being tortured in Algeria.

By Francesco Isgro, OIL

Contact: Michael Lindemann, OIL
☎ 202-616-4880

Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit Affirms BIA's Denial Of Asylum, But Remands For Consideration Of Protection Under CAT Because Wrong "Acquiescence" Standard Was Applied

In ***Ochoa v. Gonzales***, 406 F.3d 1166 (9th Cir. 2005) (Lay, Hawkins, *B. Fletcher*) the Ninth Circuit affirmed the BIA's denial of asylum and withholding of removal on the basis of the aliens' failure to demonstrate that the alleged persecution was on account of a statutorily protected ground.

The petitioners, husband and wife, are Colombian citizens who entered the United States in December 1997, and January 1998, respectively. The principal petitioner claimed that when he was a store owner in Colombia he borrowed money from a private lender, who turned out to be a narco-trafficker. When petitioner could not repay the loan he was threatened and refused to participate in a money laundering scheme. Petitioner testified that merchants who refused to work with the lenders often disappeared without any police inquiry. The IJ concluded that petitioners failed to show that "persecution" was on account of a statutory ground, but granted them withholding under CAT. The BIA affirmed the asylum and withholding denial but reversed the decision granting CAT.

On appeal, the principal petitioner contended that he would be persecuted as a member of a social group comprised of business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity. The Ninth Circuit noted that it was clear that if petitioners returned to Colombia they would "likely be targeted and possibly killed by drug traffickers." However, the court determined that under its definition of social group (*see Herandez-Montiel v. INS*, 225 F.3d 1084, 1093) (9th Cir. 2000)), a social group of business persons in petitioner's circumstances would be too broad to qualify as a particularized social group. The court found the group "analogous to the young, working class men of military age," which the court had previously found was not a social group in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). The court also rejected petitioner's contention that he would be persecuted because the narco-traffickers had imputed to him a political opinion.

Under CAT "a petitioner need only prove the government is aware of a third party's torturous activity and does nothing to intervene to prevent it."

The court, however, reversed the BIA's denial of protection under CAT, finding that its requirement that petitioners show that Colombian government officials were "willfully accepting" of the feared torturous activities had been overruled in *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). Under *Zheng*, "a petitioner need only prove the government is aware of a third party's torturous activity and does nothing to intervene to prevent it." Accordingly, the court remanded the case for the BIA to apply the correct standard of "acquiescence."

Contact: Richard Evans, OIL
☎ 202-616-4869

■Eighth Circuit Rules That Nigerian Alien Is Ineligible For Asylum For Lack Of Credibility

In ***Falaja v. Gonzales***, 406 F.3d 1076 (8th Cir. 2005) (Arnold, *Bowman*, Gruender), the Eighth Circuit held that substantial evidence supported the BIA's denial of asylum, withholding of removal, and CAT protection, citing multiple inconsistencies among the petitioner's statements in her asylum application, interview with the asylum officer, and testimony in the proceedings.

Petitioner, who entered the United Sates as a visitor in 1992 but never departed when her visa expired, claimed that she had been raised in a Muslim family and that her father was an imam at the local mosque. She claimed that her father mistreated her and threatened her because she had converted to Christianity. She also testified that as a Christian she was thwarted in her efforts to own a farm and restaurant in Nigeria. Both the IJ and the BIA determined that petitioner was not credible because of multiple inconsistencies and discrepancies in her written statements and testimony. Accordingly, petitioner's asylum and withholding application was denied. The BIA also denied petitioner's application for adjustment of status on the basis of the adverse credibility finding, concluding that she had made willful misrepresentations of a material facts in her attempt to secure asylum.

The court found that there were specific, convincing reasons to support the BIA's finding that petitioner lacked credibility. The court also concluded that the alien willfully misrepresented material facts in her attempt to gain asylum, and that she was thereby also ineligible for adjustment of status. "We find it of no import that the "willful misrepresentation' finding was based on the same facts that support the 'adverse credibility' finding, so long as substantial evidence supports both findings, as it does," said the court.

Contact: Margaret Perry, OIL
☎ 202-616-9318

■Third Circuit Holds That Albanian Citizen's Alleged Mistreatment Amounts To Persecution And Remands For Further Proceedings.

In ***Voci v. Gonzales,*** __F.3d__, 2005 WL 1322853 (3d Cir. June 6, 2005) (McKee, *Smith*, Van Antwerpen), the Third Circuit rejected the BIA's determination that petitioner failed to establish that he had suffered past persecution. The petitioner, an Albanian

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citizen, claimed that he had been beaten by police officers and threatened because of his involvement in a democracy movement that was taking hold in Albania. The IJ did not find petitioner's testimony credible and also determined that he had not been subject to persecution. Alternatively, the IJ noted the changed political climate in Albania. On appeal, the BIA disagreed with the IJ's credibility findings, but determined that petitioner had not shown past persecution or a well-founded fear of persecution.

Preliminarily, the Third Circuit noted that absent special circumstances, it reviews only decisions of the BIA and not those of immigration judges. Thus, as in this case, the court only reviews the record to determine whether it provides substantial evidence for the BIA's conclusion. "We cannot rescue the BIA from its paucity of analysis by injecting issues that were raised by the IJ, but we neither addressed or relied in the BIA's opinion," said the court. Here, the BIA accepted petitioner's testimony as credible and then found no past persecution, without explaining, said the court, how it reached that result. The court found that, taken together, the mistreatment alleged by the petitioner over the course of seven years based on his political activities rose to the level of persecution. "We are unaware of any prior BIA or federal appellate cases in which treatment similar to that experienced by [petitioner] was found to not rise to the level of persecution," explained the court. The court, in response to the government's argument that the BIA's denial was based on the absence of corroborative evidence of portions of petitioner's testimony, noted BIA's reasoning was not clear from its opinion. Thus, the court noted that it would be improper to speculate on the BIA's ruling *sub silentio*. Accordingly, the court remanded the case for the BIA to consider whether the alien's claims of injury required corroboration. For similar reasons, the court also remanded on the issue of whether the country conditions had sufficiently changed in Albania to rebut petitioner's presumption of a well-founded fear of future persecution.

Contact: Lisa Edwards, CRT
☎ 202-514-5695

■Ninth Circuit Rules That Child Of Forcibly Sterilized Father Is Not Automatically Entitled To Asylum

In ***Zhang v. Gonzales,*** __F.3d__, 2005 WL 1242482 (9th Cir. May 26, 2005) (Cowen, *W. Fletcher*, Hawkins), the Ninth Circuit held that the child of a forcibly sterilized parent under China's coercive population control policy is not automatically eligible for asylum under INA § 101(a)(42)(b). The petitioner, a native of China, was fourteen years old when she sought to enter the United States with a fraudulent passport and visa on April 21, 2000. When stopped at the Los Angeles Airport, she told immigration officials that she wanted "to learn English and work here." She also stated that she was afraid to return to her country.

"When the text of the INA is ambiguous, we defer to the BIA's reasonable construction of the statute it administers."

At a hearing before an immigration judge, her counsel argued that she was eligible for asylum because she had experience persecution in China as the child of parents who had violated that country's planning policies. Apparently, her father had been sterilized and her family fined after local officials found that her parents had more children than allowed. According to petitioner, because the family could not pay the fine, the children were prohibited from attending school until it was paid. In light of these problems, petitioner's parents, with the help of a loan from some relative, made arrangements to have petitioner smuggled into the United States. The IJ determined that children of forcibly sterilized parents are not automatically entitled to asylum and that petitioner had failed to show that she herself had been subject to persecution or had a well-founded fear of persecution. The BIA adopted and affirmed the IJ's decision.

The Ninth Circuit deferred to the BIA's interpretation that children of forcibly sterilized parents are not automatically eligible for asylum. "When the text of the INA is ambiguous, we defer to the BIA's reasonable construction of the statute it administers," said the court. The court declined to extend the ruling in *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc), where it had held that spouses of individuals who have been sterilized are automatically eligible for asylum under INA § 101(a)(42(B).

The court then found that the hardships petitioner had suffered were on account of political opinion because her parents' resistance to China's coercive population control program was imputed to her. As the court reasoned, "an asylum applicant is persecuted on the ground of an imputed political opinion when the applicant's association with others holding that opinion (including the applicant's family) is the motivation for the persecution." The court then considered whether the hardships, namely, economic deprivation, denial of access to education, and violence directed at her father in her presence, amounted to persecution. The court found that each of these hardships could amount to persecution. However, the court further found that the IJ's findings that petitioner could have attended a non-public school and that her family could have arranged for the payment of the fine, which the IJ opined was less than the cost of her travel to the United States, were not supported by substantial evidence. Accordingly, the Court remanded the case to the BIA to determine whether the economic and educational hardship suffered by the petitioner following her father's forced sterilization amounted to persecution. The court also found that the lack of specific threats

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against the petitioner did not constitute substantial evidence that she lacked a fear of future persecution because "acts of violence against close associates can suffice to establish a well-founded fear of persecution." The court, however, affirmed the denial of withholding "despite the factual errors" made by the IJ regarding the asylum claim.

Contact: Paul Fiorino, OIL
☎ 202-353-9986

■Laotian Who Was Imprisoned in Communist-run Concentration Camp Established Past Persecution

In ***Phommasoukha v. Gonzales***, __F.3d__, 2005 WL 1309075 (8th Cir. Jun 03, 2005) (Arnold, Bowman, *Gruender*), the Eighth Circuit held that petitioner's imprisonment in a Communist-run concentration camp constituted past persecution based on his political opinion. The petitioner, a citizen of Laos, entered the United States as a nonimmigrant in 1997 and subsequently applied for asylum. An asylum officer determined that petitioner did not qualify for asylum because of changed country conditions. Petitioner was then placed in removal proceedings where he renewed his request for asylum. Petitioner testified that he had served in the Laotian Royal Armed Forces until the overthrow of the government by the Pathet Lao in 1975. Petitioner had also worked for the CIA to locate and monitor the North Vietnamese army. After his release from the camp in 1980, petitioner returned to his village where he was forced to serve as the local tax collector. In 1996, the Laotian government accused him of misappropriations of money which petitioner stated he used to buy medicine for those who had assisted the CIA. Fearing for his life, he left Laos, his wife, and several children. The IJ concluded that petitioner's imprisonment in a concentration camp did not constitute persecution and that he had not established a well-founded fear of future persecution. The BIA affirmed that decision without opinion.

The Eighth Circuit held that the IJ's conclusion of no showing of past persecution was not supported by substantial evidence. The court noted that the IJ had "erroneously focused solely on the apparent lack of physical harm" to petitioner at the concentration camp. "Based on his lengthy imprisonment in a concentration operated by a brutal authoritarian regime and the substantial deprivations he suffered during his internment, we simply cannot agree with the IJ's factual finding that [petitioner] did not suffer past persecution due to his protected status of political dissident," concluded the court. Consequently, as a result of the erroneous factual determination, the IJ improperly placed on petitioner the burden of establishing a well-founded fear of future persecution. Accordingly, the court remanded the case to the BIA for a determination of whether conditions in Laos have sufficiently changed to overcome the presumption that petitioner has a well-founded fear of future persecution.

Where "the judicial officer who saw and heard [a] witness makes and adverse credibility determination and supports that determination with specific findings, an appellate court should treat that determination with great respect."

Contact: Mary Jane Candaux, OIL
☎ 202-616-9303

■First Circuit Concludes That Nigerian Alien Failed To Establish Persecution On Account Of Conversion From Islam To Christianity

In ***Olujoke v. Gonzales,*** __F.3d__, 2005 WL 1355154 (1st Cir. June 9, 2005) (Torruella, *Boudin*, Selya), the First Circuit upheld the BIA's denial of asylum, withholding of removal, and protection under the Convention Against Torture. The petitioner, a Nigerian citizen, had entered the United States in 1993 using a passport and a visa obtained under a false name. She eventually married another Nigerian citizens and together they applied for asylum. When their claim was denied by an asylum officer they were both placed in proceedings. However, after the petitioner divorced, the proceedings were uncoupled. See *Falae v. Gonzales*, __F.3d__, 2005 WL 1355422 ((1st Cir. June 9, 2005). Petitioner contended that she could not return to Nigeria because she had converted from Islam to Christianity. Petitioner recounted a horrific tale of how she had been mistreated by her family and by the Muslim community in her town. The IJ did not find petitioner credible because, inter alia, she had entered the United States using fraudulent documents, she had submitted at the hearing a fraudulent birth certificate, and there were inconsistencies in her story. An her history of relationship with her former Nigerian spouse. Accordingly the IJ denied the applications for asylum, withholding, and CAT protection. While her appeal was pending to the BIA she sought a remand based on a psychological evaluation purporting to explain petitioner's evasive demeanor and inconsistent testimony during the hearing. The BIA summarily affirmed and denied the motion because it did not offer any new evidence.

The First Circuit affirmed the IJ's adverse credibility findings. Where "the judicial officer who saw and heard [a] witness makes and adverse credibility determination and supports that determination with specific findings, an appellate court should treat that determination with great respect" said the court, adding that "this is such a case." The court further noted that "when a petitioner's case depends on the veracity of her own testimony, a fully supported adverse credibility determination, without more, can sustain a denial of asylum." Here, the court found that the IJ's specific findings corroborated the "global finding that petitioner lacked credibility." The court also held that the BIA did not abuse its dis-

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cretion in refusing to reopen proceedings to allow the alien to present a psychological report proffered to explain inconsistences in her testimony, where the report indicated that the alien's symptoms appeared prior to her removal hearing.

Contact: Jennifer Levings, OIL
☎ 202-616-9707

■Ninth Circuit Holds That Fraud On Visa Application Was Not An Allowable Basis For Negative Credibility Determination In Asylum Case.

In ***Marcos v. Gonzales,*** __F.3d__, 2005 WL 1355491 (9th Cir. June 9, 2005) (*Paez*, Thomas, Graber), the Ninth Circuit reversed an Immigration Judge's adverse credibility determination.

The court held that neither petitioner's failure to disclose, on his visa application, that his American brother-in-law had died, nor his failure to present documentary evidence corroborating that he worked for the Red Cross constituted substantial evidence supporting the IJ's adverse credibility finding. In 1996, the petitioner's wife had obtained an immigrant visa to enter the United States on the basis of a visa petition that her brother had filed in 1977. However, the brother had died in 1990, and petitioner stated that he had been unaware of his death and that his wife had done all the paperwork and he had signed it without reading it. The court found that the fraud was not on an issue that was central to petitioner's asylum claim and could not therefore be considered as evidence of a lack of credibility. "The false statement is simply unrelated to the basis for [petitioner's] asylum claim," said the court. The court then reached the merits of petitioner's asylum claim and found that as a former volunteer radio operator in the Civilian Home Defense he had shown a well-founded fear of future persecution by the New People's Army because he had received three death threats.

In a dissenting opinion, Judge Graber would have found that the IJ had properly considered the fraud as a factor bearing on petitioner's general propensity to tell the truth.

Contact: Susan Houser, OIL
☎ 202-616-9320

■Eighth Circuit Holds That Immigration Judge Properly Denied Asylum To Haitian Alien Who Submitted Fraudulent Documents In Support Of His Claim

In ***Ambroise v. Gonzales,*** __ F.3d __, 2005 WL 1412954 (8th Cir. June 17, 2005) (Melloy, McMillian, Gruender)(*per curiam*), the Eighth Circuit held that substantial evidence supported the IJ's adverse credibility determination against a Haitian citizen, who had submitted fraudulent documentation in support of his asylum claim, failed to provide a satisfactory explanation for having done so, and had not present other credible documentary evidence to support his claim of political persecution. The court also held that substantial evidence supported the IJ's denial of withholding of removal and protection under the Convention Against Torture.

Contact: Thankful Vanderstar, OIL
☎ 202-616-4874

BIVENS

■The Ninth Circuit Permits *Bivens* Claim Against An Immigration Official And Affirms The Denial Of Qualified Immunity

In ***Sissoko v. Rocha***, __F.3d__ (Skopil, Noonan, *Berzon*, J.) (9th Cir. June 13, 2005), the Ninth Circuit held that the district court had jurisdiction over a *Bivens* claim arising from the decision to place an alien in expedited removal proceedings. The court recognized that the review of a decision to commence removal proceedings was barred by statute, but held that a plaintiff could, nonetheless, challenge the fact he was placed in detention after the commencement of proceedings, even though detention was mandated by regulation upon the commencement of those proceedings.

The court also determined that the district court properly denied the request for qualified immunity, noting that a reasonable official would have known that it was improper to commence proceedings against the alien, who had been granted advance parole, even where the official suspected that the grant of parole was based on an underlying fraud.

Contact: Robert M. Loeb, Appellate
☎ 202-514-4332

CRIMES

■Ninth Circuit Upholds Constitutionality Of 8 U.S.C. § 1326

In ***United States v. Bahena-Cardenas***, __F.3d__, 2005 WL 1384353 (9th Cir. June 13, 2005) (*Hall*, Reinhardt, Wardlaw), the Ninth Circuit upheld, against an attack under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the constitutionality of 8 U.S.C. § 1326, which makes it a crime for certain aliens to enter the United States without permission of the Attorney General after being excluded, deported, or removed. The Ninth Circuit held that, although a deportation hearing establishes that an alien was "denied admission" or "excluded," the government may not rely solely on the deportation hearing but must separately prove the exclusion element to secure a section 1326 conviction. The court also held that (1) uncontroverted evidence that the alien was found in a city in San Diego County that does not share a border with Mexico was sufficient to prove voluntary entry; (2) a warrant of deportation, signed by an immigration official, may be admitted to prove physical removal because such a warrant is non-testimonial in that it is "simply a routine, objective, cataloging of an unambiguous factual matter"; and (3) the

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jury's resolution of conflicting evidence regarding defendant's alienage was supported by the record.

Contact: Anne Perry, AUSA
☎ 619-557-5767

■Seventh Circuit Defers to BIA's Application of Categorical Approach to Find That Solicitation of Minor Is Sexual Abuse and Therefore an Aggravated Felony

In ***Gattem v. Gonzales***, __F.3d___ (7th Cir. June 20, 2005) (Easterbrook, *Rovner*; Posner (dissenting)), the Seventh Circuit affirmed the BIA's decision finding that solicitation of a minor to engage in a sexual act is sexual abuse of minor and therefore an aggravated felony.

The petitioner, a citizen of India, married a United States citizen after he had overstayed his H-1B visa. When he and his wife appeared for a interview on his application for adjustment of status, he was taken into custody by ICE and placed in removal proceedings. ICE alleged, among other grounds for removal, that in 2002 petitioner had been convicted of solicitation of sexual act in violation of 720 ILCS 5/11-14.1(a), a class B misdemeanor. However, because petitioner had solicited the sex act with a minor, ICE alleged that he had been convicted of sexual abuse of a minor, and aggravated felony under INA § 101(a)(43)(A). At the removal hearing, petitioner acknowledged the conviction and admitted that the individual from whom he had solicited sex was a juvenile. However, he contested the assertion that his solicitation amounted to sexual abuse. The IJ, relying on *Matter of Rodriguez-Rodriguez*, 22 I.&N. Dec. 991 (BIA 1999), where the BIA had applied the broad definition of "sexual abuse" found in 18 U.S.C. § 3509(a)(8), determined that petitioner's solicitation amounted to sexual abuse. The BIA agreed with the IJ that petitioner's conviction was within the "sexual abuse" definition .

On appeal, the Seventh Circuit, as a threshold matter held that it had jurisdiction over the petition on two grounds. First, it had jurisdiction to determine its own jurisdiction. Second, it held that under the section 106(a)(1)(A)(iii) of the REAL ID act, it had jurisdiction because the "BIA's holding turned on its construction of the INA, and in particular the meaning of 'sexual abuse of a minor . . . a question of law that Congress has given us power to address."

"Construing sexual abuse of a minor broadly to include the crime of soliciting a minor is reasonable notwithstanding the absence of any physical contact with or threat against the minor, given the inherent risk of exploitation that soliciting a minor presents."

The Seventh Circuit had previously approved this approach in *Lara-Ruiz v. INS*, 241 F.3d 934 (2001). Here, applying the "categorical" approach, the BIA held that the misdemeanor conviction qualified as an aggravated felony because it fell within the definition of "sexual abuse." The court rejected alien's contention that it could not have been "sexual abuse" because the offense involved only words, without any threat or coercion. "Construing sexual abuse of a minor broadly to include the crime of soliciting a minor is reasonable notwithstanding the absence of any physical contact with or threat against the minor, given the inherent risk of exploitation that soliciting a minor presents."

Judge Posner dissented arguing that "solicitation" was not a "sex act," and that the BIA's reliance on the definition of "sexual abuse of a minor" in 18 U.S.C. § 3509(a) was "casting far afield.

Contact: Eric Marsteller, OIL
☎ 202-616-9340

■Ninth Circuit Concludes That The Security Provisions Of The Immigration Act Of 1990 Are Retroactive, And Alien Did Not Rely To His Detriment On Waiver Of The Non-Criminal Grounds

In ***Kelava v. Gonzales,*** __F.3d__, 2005 WL 1331229 (9th Cir. June 7, 2005) (Kleinfeld, *Hawkins*, Graber), the Ninth Circuit held that the security and related grounds for deportation in section 602(a) of the Immigration Act of 1990 were unambiguously retroactive, and that a waiver of excludability under former INA § 212(c) was not available to an alien ordered deported under the non-criminal grounds.

The petitioner, an anti-communist dissident from the Croatian region of the former Yugoslavia, entered the United States as a refugee in 1969, and became a permanent resident in 1972. In 1978, petitioner and another man entered the West German Consulate in Chicago, armed with handguns, and demanding that West Germany refuse to extradite a prominent Croatian dissident to Yugoslavia. Eventually, in 1980, petitioner pled guilty to one charge of unarmed imprisonment of a foreign national and was sentenced to two and a half years in prison. Twenty years later, after petitioner applied for the third time for naturalization, the INS instituted removal proceedings against him on the grounds that he had been convicted of an aggravated felony, and for having engaged in a terrorist activity. An IJ and subsequently the BIA ordered petitioner removed on the terrorist ground and denied his application for a § 212(c) waiver.

On appeal petitioner argued that since he had pled guilty in 1980, IIRIRA § 304(b) should not preclude him from seeking §212(c) relief. The Ninth Circuit held that regardless of whether petitioner had relied on the availability of 212(c) relief when he pled guilty to the offense, he did not so rely when he engaged in the activity

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itself. The court reasoned that petitioner's removability did not hinge on a "conviction," as in *St. Cyr*, but rather on the issue of whether he "had engaged in" a terrorist activity "at any time after admission."

Contact: Andy MacLachlan, OIL
☎ 202-514-9718

DETENTION

■Fourth Circuit Concludes That "Due Care Exception" Bars False Imprisonment Claim Based On Alien's Mandatory Detention Pending Removal Proceedings.

In ***Welch v. United States,*** __F.3d__, 2005 WL 1271429 (4th Cir. May 31, 2005) (*Duncan*, Michael, Stamp), the Fourth Circuit, affirmed the district court's dismissal of petitioner's claim "wrongful imprisonment" under the Federal Tort Claims Act for lack of subject-matter jurisdiction. The petitioner contended that the indefinite detention mandated by statute, previously determined to be unconstitutional as applied to him, also constituted the tort of false imprisonment under state law and that the Federal Tort Claims Act waived sovereign immunity. He argued that mandatory actions involved no "due care" and therefore were not excepted from the waiver of sovereign immunity.

The court found that "[s]uch enforcement is, by its very nature, executed with due care. The mandatory nature of the enforcement does not discourage, but only reinforces, such a conclusion." Accordingly, the court held that the "due care" exception to the waiver of the government's sovereign immunity applied to prevent the alien from recovering on his false imprisonment theory.

Contact: Neil R. White, AUSA
☎ 410-209-4800

DUE PROCESS

■Sixth Circuit Finds Substantial Evidence Supports Adverse Credibility Determination But Holds That IJ's Conduct Violated Due Process

In ***Vasha v. Gonzales***, __F.3d__, 2005 WL 1389003 (*Moore*, Sutton, Adams) (6th Cir. June 14, 2005), the Sixth Circuit held that substantial evidence supported the IJ's adverse credibility determination against an Albanian citizen, based on several inconsistencies in his story that went to the heart of his asylum claim. The petitioner claimed that he had been persecuted by the former communist government in Albania because of his pro-democracy activities. After the communist government fell, petitioner experienced a "quiet period" until the election of the Socialist Party in 1997. Following that elections, he claimed that he was fired from his job for political reasons and the police targeted him because of his participation in anti-government demonstration. Following the close of all the evidence, the IJ learned through discussions with the court's clerk, that petitioner's second cousin, with whom he was living, was a prominent member of the local Albanian community, and that he was one of the sponsors of an upcoming trip to the Detroit area by the president of Albania. At this point, the IJ continued the hearing, gave the parties an opportunity to introduce additional evidence, and subpoenaed petitioner's second cousin. The second cousin eventually testified that he had supported the petitioner and that he had hosted the Albanian president when he visited the United States. The IJ then found petitioner not credible and that he lacked a fear of future persecution given the fact that his second cousin had a significant relationship with the president of Albania. The IJ also entered a Frivolous Finding Order against the petitioner. With the exception of this order, a single BIA member affirmed the IJ's decision.

"The Fifth Amendment's due process guarantee would be eviscerated if a trier of fact, who is supposed to remain impartial, could nevertheless conduct an independent investigation, discover new evidence, and bolster one side of the dispute."

The Sixth Circuit held that, even though several of the inconsistencies identified by the IJ were unsupported, the record as a whole did not compel a contrary result. However, the court found that petitioner's due process rights were violated by the IJ's conduct.

The court found that a due process violation occurred "at the moment the IJ abandoned her role as an impartial arbiter and became a zealous advocate, uncovering a witness the Government did not reveal or present." "The Fifth Amendment's due process guarantee would be eviscerated if a trier of fact, who is supposed to remain impartial, could nevertheless conduct an independent investigation, discover new evidence, and bolster one side of the dispute," said the court. The fact that the witness was eventually called as a government witness did not cure the constitutional infirmity, said the court because the "record clearly reveals that the IJ made her determination soon after the off-the-record conversation with her clerk." Nonetheless, the court determined that notwithstanding the due process violation, petitioner was not prejudiced because substantial evidence - even without reliance on the testimony of the new witness - supported the denial of asylum based on adverse credibility.

In a concurring opinion, Judge Sutton would have agreed with the adverse credibility findings and the holding that any constitutional violation did not prejudice petitioner. However, he would have saved it for another day the question of whether the IJ's conduct in this case violated due process.

Contact: Thankful Vanderstar, OIL
☎ 202-616-4874

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JURIDICTION

■Fifth Circuit Holds That Habeas Corpus Relief Is Not Available To An Immigrant Who Has Other Procedural Devices.

In ***Lee v. Gonzales***, __F.3d__, 2005 WL 1274218 (5th Cir. June 3, 2005) (Garwood, *Jones*, Stewart), the Fifth Circuit, affirmed the district court's dismissal of petitioner's writ of habeas corpus. The petitioner, a citizen of South Korea and a lawful permanent resident pled guilty in 1988 to a single count of trafficking in counterfeit goods or services. The court ordered him to pay restitution and placed him on probation for sixty months. On the basis of this conviction, the INS instituted removal proceedings. The Immigration Judge found that petitioner was deportable based upon his conviction of a crime involving moral turpitude. The BIA affirmed that decision but petitioner did not seek judicial review in the court of appeals. Instead, the petitioner filed a petition for a writ of habeas corpus in the district court. The district court dismissed the petition for lack of jurisdiction.

"If [petitioner] had doubts as to whether this court could have heard his petition for review, he should have protected his rights by filing one."

On appeal, petitioner contended that he had not filed a petition for review of the BIA decision because the court would have lacked jurisdiction. "While logical at first blush, [petitioner's]'subsumation theory' cannot survive more careful scrutiny," noted the court. The court explained that because petitioner had only committed a single CIMT within five years of admission, he was not subject to the "jurisdiction-stripping statute." "If [petitioner] had doubts as to whether this court could have heard his petition for review, he should have protected his rights by filing one." said the court. "A petitioner must exhaust available avenues of relief and turn to habeas only when no other means of judicial review exist. When a petitioner challenges whether a crime constitute a CIMT, this court has jurisdiction to determine our jurisdiction and thus decide whether the BIA correctly considered the crime a CIMT." Accordingly, the court held that the district court had properly dismissed the habeas petition.

Contact: Frank D. Able, AUSA
☎ 214-659-8600

■Second Circuit Concludes That It Has No Jurisdiction To Review The BIA's Denial Of A Motion To Reopen Where Underlying Relief Was Denied On Discretionary Grounds

In ***Mariuta v. Gonzales,*** __F.3d__, 2005 WL 1383151 (2d Cir. June 10, 2005) (*Walker, C.J.*; Leval; Duplantier (D. E.D. La.)), the Second Circuit held that under IIRIRA's transitional rules it lacked subject-matter jurisdiction to review the BIA's discretionary denial of a motion to reopen to apply for adjustment of status. The court first determined that the BIA denied the motion to reopen on the basis that petitioner would not be entitled to the underlying discretionary relief, namely adjustment of status. "Where a denial is based on the BIA's merits-deciding" analysis of the alien's entitlement to the ultimate relief sought, the denial may properly be said to be a decision 'under' the statutory provision providing that ultimate relief," explained the court.

Having determined that the BIA's denial was under INA § 245 (the adjustment of status provision), the found that it was clear that the BIA's denial of adjustment was discretionary. Accordingly, the court held that IIRIRA's transitional rule § 309(c)(4)(E) barred it from reviewing such a discretionary determination, even though motions to reopen are not listed in that section as an unreviewable form of relief.

Contact: Mark Chestnutt, EOIR
☎ 703-605-1931

■Second Circuit Finds That it Lacks Jurisdiction to Review Merits of Underlying Order Where Petition for Review Was Not Timely Filed

In ***Singh v. Gonzales***, __F.3d__, 2005 WL 1490458 (2d Cir. Jun 24, 2005) (Cabranes, Raggi, Ryan (D. N.D. Cal.)), the Second Circuit affirmed the denial of a motion to reopen where petitioner sought to introduce new evidence regarding her asylum claim. As a threshold matter the court held that its review was limited to the BIA's denial of the motion to reopen because petitioner had not timely filed an appeal from the denial of the underlying asylum claim. Although petitioner's brief only argued the merits of her asylum claim, the court nonetheless reviewed the the BIA's exercise of discretion and held that the BIA had clearly explained that the evidence submitted was not "'material' because it did not rebut the adverse credibility finding that provided the basis for the IJ's denial of the underlying asylum application."

Contact: Steven J. Saltiel, AUSA
☎ 415-436-6996

■Ninth Circuit Holds That Fugitive Disentitlement Principles Require Dismissal Of Appeal

In ***Armentero v. INS,*** __F.3d__, 2005 WL 1431880 (9th Cir. June 21, 2005) (*Meskill*, Ferguson, Berzon), the Ninth Circuit dismissed petitioner's appeal from the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241 because he "is a fugitive from custody." The panel did not decide the underlying issues in the case -- the proper respondent to a habeas corpus petition seeking review of the legality of immigration detention. Judge Berzon in dissent stated that the fugitive disentitlement doctrine was not appropriate to the case, and that the Supreme Court's decision in *Rumsfeld v.*

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Padilla, 124 S. Ct. 2711 (2004), would not require a court to apply the "immediate custodian" rule under the circumstances presented in the case.

Contact: Michelle Gorden Latour, OIL
☎ 202-616-7426

■D.C. Circuit Holds That Statute Bars Judicial Review Of Attorney General's Refusal To Waive Labor Certification Requirement

In ***Zhu v. Gonzales,*** __F.3d__, 2005 WL 1412413 (D.C. Cir. June 17, 2005) (*Ginsburg*, Edwards, Garland), the D.C. Circuit affirmed the district court's holding that the Attorney General's refusal to waive a labor certification requirement is not subject to judicial review under INA § 242(a)(2)(B)(ii), 8 § U.S.C. 1252(a)(2)(b)(ii). The plaintiffs, four medical researchers from China, sought to waive the requirements of obtaining a labor certification by applying for a "national interest" waiver under INA § 243(b)(2)(i), 8 U.S.C. § 1153(b)(2)(B)(i). This provision states that "the Attorney General may when [he] deems it to be in the national interest, waive the requirements of [obtaining a labor certification] that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States." The court found that, while this provision does not containing the word "discretion," it gives the Attorney General complete discretion with respect to the labor certification requirement. The court noted in particular that the statute providing for a waiver in the "national interest," calls upon the Attorney General's "expertise and judgment unfettered by any statutory standard whatsoever."

The court noted in particular that the statute providing for a waiver in the "national interest," calls upon the Attorney General's "expertise and judgment unfettered by any statutory standard whatsoever."

Contact: Alan Burch, AUSA
☎ 202-514-7204

MOTION TO REOPEN

■First Circuit Rules That BIA's Denial Of Motion To Reopen Was Sufficiently Supported By The Record

In ***Falae v. Gonzales,*** __F.3d__, 2005 WL 1355422 (Torruella, *Boudin*, Selya) (1st Cir. June 9, 2005), the First Circuit held that BIA properly denied a motion to remand based on an adverse credibility determination. The petitioner, a Nigerian national "apparently" entered the United States in 1995 as a tourist but did not depart when his visa expired. Both the visa and the passport had been issued under a different name than that of petitioner. The petitioner married a United States citizen in 1996, but divorced her in 1997 without having lived with her. Nine days after that divorce, petitioner married his former fiancée, also from Nigeria, who amended her asylum application to include petitioner. When that application was denied both aliens were placed in consolidated proceedings. Subsequently, after petitioner again divorced, the cases were separated. Petitioner then sought to apply for adjustment on the basis of an approved I-140. The IJ pretermitted and denied that application on the basis of petitioner's use of fraudulent documents and his lack of credibility at the hearing. The IJ found particularly troubling the fact that petitioner could not remember any detail about his first marriage. The IJ also denied petitioner's request for asylum and withholding on the merits. While petitioner's appeal was pending before the BIA, petitioner again married a United States citizen. He then filed a motion to remand based on that marriages and the approved I-140. The BIA upheld the findings of the IJ and denied the motion to remand, which it treated it as a motion to reopen. The BIA noted petitioner's lack of credibility, his prior use of fraudulent documents, and the timing of his "current marriage."

Before the First Circuit, petitioner only pursued the denial of his motion to remand. Preliminarily the court found that the BIA had properly treated the motion as a motion to reopen. The court then held that the BIA did not abuse its discretion given the sufficient record support for the BIA's adverse credibility determination, the BIA's grave doubts as to the suspicious timing and genuineness of the alien's marriage, and the BIA's citation of the alien's persistent use of fraudulent documents, checkered marital history, and overall lack of credibility. "There was a sound and wholly rational predicate for the BIA's negative exercise of discretion," said the court.

Contact: Jennifer Levings, OIL
☎ 202-616-9707

■Second Circuit Rules That The Immigration Judge Abused Her Discretion In Denying Alien's Motion To Rescind The *In Absentia* Order Of Removal.

In ***Twum v. INS,*** __F.3d__, 2005 WL 1349870 (2d Cir. June 8, 2005) (Winter, *Sotomayor*, Holwell), the Second Circuit determined that the IJ abused her discretion in denying petitioner's motion to reopen an exclusion order entered against him in absentia. In his motion, petitioner claimed that, although he presented himself at the public entrance to the building that houses the Immigration Court several hours before the hearing, he was prevented from attending his hearing because guards would not admit him without a hearing notice that was in the possession of his attorney, who was inside the building. The IJ determined that petitioner's motion to reopen in essence alleged ineffective assistance of counsel as the cause of his failure to appear, and denied the motion based petitioner's failure to comply with the *Lozada* requirements. The BIA affirmed that decision without opinion.

The Second Circuit disagreed with the IJ's conclusion that petitioner's claim

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in his motion to reopen was one of ineffective assistance of counsel and found the denial arbitrary. In particular, the court noted that the invocation of *Lozada* was inconsistent with the BIA's analysis in other similar claims involving aliens who were not at their hearings because of "misunderstandings involving their attorneys." However, the court declined to hold that the excuse offered by the petitioner was sufficient to establish a "reasonable cause" for his failure to appear at the hearing, noting that "where a determination is entrusted to agency discretion in the first instance, judicial judgment cannot be made to do service for an administrative judgment."

Contact: Annemarie Roll, EOIR
☎703- 605-1948

NACARA

■Ninth Circuit Rules That The Filing Deadline For Motions To Reopen Under The Nicaraguan Adjustment And Central American Relief Act Is Subject to Equitable Tolling

In ***Albillo-De Leon v. Gonzales***, __F.3d__, 2005 WL 1345565 (9th Cir. June 8, 2005) *(Pregerson,* Schroeder, Trott), the Ninth Circuit reversed the BIA's affirmance of the Immigration Judge's denial of the alien's motion to reopen, holding that the filing deadline under section 203(c) of the Nicaraguan Adjustment and Central American Relief Act is a statute of limitations that is subject to equitable tolling. The court determined that the alien, who waited until one day before the filing deadline to find someone to file a motion to reopen on his behalf, was deceived and prejudiced by ineffective assistance because the notario he consulted did not file the motion. The court equitably tolled the statute of limitations to the date the alien knew conclusively that no motion was ever filed.

Contact: Shelley Goad, OIL
☎2 02-616-4864

NATURALIZATION

■Northern District Of Illinois Denies Petition For Naturalization Of Aggravated Felon War Veteran For Lack Of Good Moral Character

In ***O'Sullivan v. United States Citizenship and Immigration Services,*** __F. Supp. 2d __, 2005 WL 1383309 (N.D. Il. June 9, 2005) (*Gettleman, J.*), the district court held that, under 8 U.S.C. § 1421(c), it had jurisdiction to review the denial of the naturalization application of a Jamaican alien who served in the U.S. military during the Vietnam hostilities, as a final order of removal had not yet been entered against him.

The court denied the petition under 8 U.S.C. § 1440, holding that when Congress enacted the special statutory provision for war veterans it did not exempt the good moral character requirement to become a naturalized citizen. The court further held that the alien, who was convicted of possession with intent to deliver cocaine in August of 2000, was forever barred from demonstrating good moral character and therefore barred from naturalizing under 8 U.S.C. § 1440.

Contact: Sheila McNulty, SAUSA
☎ 312-353-8788

REAL ID ACT

■Third Circuit Finds Jurisdiction under REAL ID Act

In ***Papageorgiou v. Gonzales***, __F.3d__, 2005 WL 1490454 (3rd Cir., Jun 24, 2005), the Third Circuit held that under the REAL ID Act, it has jurisdiction to consider constitutional claims and questions of law raised by all aliens and that the Act applies retroactively.

The petitioner, a Greek citizen had been convicted of an aggravated felony but sought protection under CAT. The IJ and later the BIA denied the request.

Preliminarily, the court noted that it had always retained jurisdiction to determine its jurisdiction. Moreover, the court found that under to § 106(a)(1)(A)(iii) of the REAL ID Act, "Congress evidenced its intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders. This now permits all aliens, including criminal aliens, to obtain review of constitutional claims and questions of law upon the filing of a petition for review with an appropriate court of appeals . . . We believe that, with passage of the Act, Congress has repealed all jurisdictional bars to our direct review of constitutional claims and questions of law in final removal orders other than those remaining in 8 U.S.C. § 1252 (*e.g.,* in provisions other than (a)(2)(B) or (C)) following the amendment of that section by the Act." The court noted that the Ninth Circuit reached the same conclusion in *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585 (9th Cir. 2005).

> ***"We believe that, with passage of the Act, Congress has repealed all jurisdictional bars to our direct review of constitutional claims and questions of law in final removal orders other than those remaining in 8 U.S.C. § 1252."***

The court also found that the REAL ID Act applied to this petition for review as well as "to all other pending or future petitions for direct review challenging final orders of removal, except as may otherwise be provided in § 1252."

On the merits, the court rejected petitioner's contention that the BIA's summary affirmance of the denial of the CAT claim deprived him of due process.

Contact: William Peachey, OIL
☎ 202-307-0871

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Summaries

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STAY OF REMOVAL

Fifth Circuit Determines That Motions For Stay Of Removal Are Reviewed Under "Traditional" Stay Standard, And Grants Stay Of Removal

In ***Tesfamichael v. Gonzales***, __F.3d__, 2005 WL 1220939 (5th Cir. May 24, 2005) (Davis, *Smith*, Dennis), the Fifth Circuit held that the injunction standard under INA § 242(f)(2) does not apply to motions for stays of removal, which are governed instead by the "traditional test" for temporary stays of removal pending appellate review.

The court was persuaded by the analysis of the Seventh Circuit and other circuits that the terms "enjoin" and "stay" are not synonymous, rather than by the textual analysis of the Eleventh Circuit. On the merits of the stay request, the court concluded that petitioners had demonstrated "significant likelihood of success on the merits" to justify a stay pending judicial review on the merits of the BIA's decision.

Contact: Andy MacLachlan, OIL
☎ 202-514-9718

ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any suggestions for improving this publication, please contact Francesco Isgro at:

francesco.isgro @usdoj.gov

ASYLUM DOCUMENTATION UNDER REAL ID ACT

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tive credibility finding. *See Loulou v. Ashcroft*, 354 F.3d 706, 709-10 (8th Cir. 2004). Additional cases on these issues are cited in an American Law Reports annotation. *See* 179 A.L.R. Fed. 357 (2005). Thus, in a court of appeals other than the Ninth Circuit, OIL attorneys generally will have support in the case law to argue that the agency had a substantial basis to deny asylum based on a lack of reasonably available documentation. Even in the Ninth Circuit, OIL attorneys can argue that a lack of documentation is a proper consideration in cases where the agency made an express finding that the alien was not credible.

Congress made it clear in the legislative history of the Real ID Act that it was adopting the BIA's interpretation in *Matter of S-M-J-* that corroborating evidence may be required in the burden-of-proof phase of the asylum analysis.

Requirements for Corroborating Evidence in Asylum Cases Filed On or After May 11, 2005

Section 101(a)(3) of the Real ID Act of 2005 provides that the immigration judge shall determine whether an alien's testimony is adequate by itself to sustain the alien's burden of proof and, if the testimony alone is not sufficient, the immigration judge can require the alien to provide reasonably obtainable corroborating evidence. *See* REAL ID Act of 2005, Title 1, § 101(a)(3)(May 11, 2005). The Act also provides that the fact-finder's determination that corroborating evidence was available is subject to reversal only if a reasonable trier of fact would be compelled to conclude that the corroborating evidence was unavailable. Id. at § 101(e)(effective immediately and applicable to pending cases).

Congress made it clear in the legislative history of the REAL ID act that it was adopting the BIA's interpretation in *Matter of S-M-J-* that corroborating evidence may be required in the burden-of-proof phase of the asylum analysis. The Conference Report for the REAL ID act specifically states that the burden-of-proof provision in section 101(a)(3) of the act "is based upon the standard set forth in the BIA's decision in *Matter of S-M-J-*." H.R. Rep. No. 109-72. The REAL ID act thus supercedes the Ninth Circuit's holding in *Ladha v. INS* that corroborating evidence cannot be required in the burden-of-proof phase of the asylum analysis.

The REAL ID Act does not directly address whether documentary evidence may be required in the credibility phase of the asylum analysis, although it provides that the agency adjudicator may base the credibility determination on "the totality of the circumstances, and all relevant factors" and may examine whether the alien's testimony is consistent with "other evidence of record." The "other evidence of record" would presumably include any corroborating evidence that the immigration judge could require the alien to produce as part of the burden-of-proof analysis. Moreover, the REAL ID Act did not disturb the precedent decisions in the courts of appeals that have held that documentary evidence can be a factor in the credibility determination. Thus, agency credibility determinations based solely or in part on a failure to provide corroborating evidence should be at least as defensible under the REAL ID Act as they were under previous case law.

By Susan Houser, OIL
■ 202-616-9320

OIL REAL ID ACT CONTACTS:

JURISDICTIONAL ISSUES
David Kline ☎202-616-4856
David McConnell ☎202-616-4881

ASYLUM AND PROTECTION ISSUES
Donald Keener ☎202-616-4878

TERRORISM ISSUES
Michael Lindemann ☎202-616-4880

CASES SUMMARIZED

INSIDE OIL

OIL welcomes the following attorneys from the Federal Deposit Insurance Corporation (FDIC), who have been detailed to OIL: **Sam Taylor** (Dallas), **David Edwards** (Dallas), **Mike Haney** (Dallas), **Manual Palau** (DC) **Tom Holzman** (DC), **John Stevens** (Chicago), **Scott Watson** (DC), **Kathy Gunning** (DC).

On June 7-8, the FDIC attorneys attended an immigration law training seminar at OIL.

The **Annual OIL-DHS-EOIR Picnic** will be held on July 22, 2005, at Bolling Air Force Base, Giesboro Park. If you have not rsvp'd and would like to attend, contact Stacy Paddack at 202-353-4426.

For the month of June 2005, OIL received 591 briefs for assignment—the highest number of briefs ever received in one month.

Senior Litigation Counsel Margaret Perry leads a discussion on asylum with the FDIC attorneys

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"

If you are not on our mailing list or for a change of address please contact karen.drummond@usdoj.gov

Peter D. Keisler
Assistant Attorney General

Jonathan Cohn
Deputy Assistant Attorney General
United States Department of Justice
Civil Division

Thomas W. Hussey
Director

David J. Kline
Principal Deputy Director
Office of Immigration Litigation

Francesco Isgrò
Senior Litigation Counsel
Editor
francesco.isgro@usdoj.gov