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Immigration Litigation Bulletin

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PRESIDENT SIGNS REAL ID ACT OF 2005 JUDICIAL REVIEW PROVISIONS AMENDING INA § 242 EFFECTIVE UPON ENACTMENT

On May 11, 2005, President Bush signed into law the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (H.R. 1268), which includes the REAL ID Act of 2005 (ID Act). *See* Division B of Title VII of H.R. 1268, 109 Cong. (2005), Pub. L. No. 109-13, 119 Stat. 231.

The REAL ID Act "will strengthen the Nation's ability to prevent foreign terrorists from operating in the States."

The ID Act seeks to close the security gaps which facilitated the movement of 19 terrorists who used driver's licenses and other state-issued identification to board planes which on 9/11 were turned into weapons of mass destruction. In signing the Act, the President stated that the REAL ID provisions "will strengthen the Nation's ability to prevent foreign terrorists from operating in the States."

There are five separate titles in the ID Act. Title I, the principal title of concern to immigration litigators, amends various sections of the INA, including the judicial review, asylum, and terrorist provisions, in order to protect against terrorist entry. Title II imposes national standards for the issuance of driver's licenses and prohibits issuance of licenses to illegal aliens. Federal agencies will be prohibited from accepting a driver's license or a state-issued identification that does not meet the minimum standards, including verification of immigration status. These provisions become effective three years after enactment. Title III addresses border infrastructure and technology integration. It requires the Secretary of Homeland Security to study the technology, equipment, and personnel needed to address vulnerabilities at the borders with Mexico and Canada and to institute a pilot program using ground surveillance technologies for border security. Title IV, cited as the "Save Our Small and Seasonal Businesses Act of 2005," amends the H-2B temporary workers provisions. Title V amends certain provisions governing nonimmigrant and immigrant visas to provide for reciprocal visas for nationals of Austra-

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NINTH CIRCUIT FINDS JURISDICTION TO REVIEW DENIAL OF HARDSHIP WAIVER UNDER INA § 216(c)(4)(b)

In ***Oropeza-Wong v. Gonzales***, __F.3d__ 2005 WL 1088938 (9th Cir. May 10, 2005) (*Nelson*, Reinhardt, Thomas), the Ninth Circuit held, *inter alia*, that it had jurisdiction to review the BIA's denial of a hardship waiver under INA § 216(c)(4)(B), 8 U.S.C. § 1186a (c)(4)(B).

Petitioner, a Mexican national, married a U.S. citizen in April 1994. The couple separated in June 1995 and divorced in November 1995. Petitioner, who had been granted conditional permanent residence in September 1994, subsequently filed a petition to remove the conditions on residence (I-751) and sought a hardship waiver of the joint filing requirement under INA § 216(c)(4)(B) on the grounds that he had en-

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ICE ISSUES GUIDELINES TO FACILITATE REMAND RECOMMENDATIONS IN IMMIGRATION CASES HANDLED BY U.S. ATTORNEYS

In light of the increased number of immigration cases that are now being litigated by U.S. Attorneys, ICE's Office of the Principal Legal Advisor (OPLA) recently issued guidelines on how to request remands to the Board of Immigration Appeals. The guidelines were transmitted to the Civil Chiefs on May 25, 2005.

OPLA requests that U.S. Attorney Office remand recommendations be directed to the local ICE Chief Counsel Office that litigated the case before the Executive Office for Immigration Review. If, for whatever reason, there is difficulty contacting the local Chief Counsel, ICE's Office of Appellate

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Highlights Inside

REMANDS PROCEDURES

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Counsel should be contacted for assistance: (703) 756-6257.

When recommending remand to an ICE Chief Counsel Office, OPLA suggests that the following procedures be used:

- Send remand recommendation in e-mail form using the following format for the subject line of the e-mail: "US Attorney Remand Request: Alien Name / A-number."

- Send the remand recommendations at least seven (7) days in advance of the briefing deadline, especially if all extensions have already been exhausted with the court.

To assist the ICE Chief Counsel office in making an informed decision, OPLA suggests that the remand request include the following key information:

- A summary of the facts and issues of the case, and an explanation of why remand is sought. (In this regard, a short pro/con litigation risk analysis would be helpful.)

- An outline of the proposed arguments to be made in a brief assuming the case is to be litigated before the federal court.

- Verification that the remand recommendation has received all necessary internal approvals, such as from the pertinent Civil Chief.

- Copies of the IJ and BIA decisions (as well as any other documents from the certified record necessary to assess the remand request). These documents can either be attached to the e-mail via PDF or faxed.

Finally, OPLA suggests that a draft of the remand motion could be provided to the ICE Chief Counsel Office for review/comment before filing with the court.

HARDSHIP WAIVER DENIAL IN MARRIAGE CASES SUBJECT TO JUDICIAL REVIEW

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tered into the marriage in good faith.

Petitioner's application was denied and he was charged with being removable on the basis of marriage fraud under INA § 237(a)(1)(G)(i), 8 U.S. § 1227(a)(1)(G)(i). The IJ found that petitioner was not a credible witness because he had failed to list his children from a previous relationship on his INS forms and he had testified inconsistently regarding his relationship with the mother of his children. The IJ noted that petitioner had returned to Mexico after his divorce from his U.S. citizen wife and had resumed his relationship with the mother of his children. Accordingly, the IJ held that petitioner had not entered into the marriage in good faith and denied him the statutory waiver as well as his request for voluntary departure. The BIA affirmed, finding petitioner had failed to provide sufficient evidence that he had entered his marriage in good faith.

"Unless the disputed determination is purely discretionary – unless there are no questions of fact or law at issue – judicial review is not precluded."

Preliminarily, the Ninth Circuit held that under INA § 240B(f), 8 U.S.C. § 1229c(f), it did not have jurisdiction over petitioner's voluntary departure claim. However, the court rejected the government's contention that it also lacked jurisdiction to review the denial of petitioner's hardship waiver under INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B). The court stated that its prior holdings had established the principle that, "unless the disputed determination is purely discretionary – unless there are no questions of fact or law at issue – judicial review is not precluded." Here, the court found that petitions for statutory waivers on the basis of a good faith marriage involve legal and factual questions that are not subject to the pure discretion of the IJ or BIA.

The court also rejected the government's contention that it could not review the adverse credibility determination because under INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4), that decision was "within the sole discretion of the Attorney General." The court explained that Congress had adopted that language not to limit judicial review of credibility decisions but rather "for the specific purpose of putting a stop to immigration officials' practice of employing overly strict evidentiary rules when determining the credibility of battered women." More importantly, noted the court, Congress had made "its liberal evidence rule applicable . . . to those whose good faith marriages had been terminated by legal proceedings." Accordingly, the court found that the "statutory statement regarding the Attorney General's discretion does not bar our review of claims involving credibility determinations in cases regarding statutory waivers under § 1186a(c)(4)."

The court also found, relying on *Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004), that it had jurisdiction over the marriage fraud based order of removal.

On the merits, the court found that there was substantial evidence to support the BIA's adverse credibility finding and its denial of the statutory waiver. The court found that the inconsistencies regarding whether petitioner had entered into a good faith marriage went to the "heart of his claim." Consequently, the court denied the petition with respect to the order of removal for marriage fraud.

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

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lia in specialty occupations and to recapture unused visas for nurses.

The ID Act includes a number of immigration provisions in Title I which became effective upon enactment. On May 12, and 2005, the Director of the Office of Immigration Litigation issued a memorandum to the Civil Chiefs in the United States Attorney's Offices, identifying the jurisdictional amendments which became effective on May 11, 2005, and providing guidance on what position the Government should take in a number of situations. Two other memoranda analyzing the amendments to the terrorism-related provisions and the asylum provisions were issued on May 16, and June 1, 2005. Those memoranda, the full text of the Real ID Act, and its Conference Report are reproduced in the Special Supplement accompanying this month's Immigration Litigation Bulletin. Additional information may be found on the OIL web site.

The following is a summary of the provisions in Title I of the ID Act.

Section 101

Section 101, entitled "Preventing Terrorists From Obtaining Relief From Removal," sets forth explicit evidentiary standards for adjudicating asylum claims and removes the numerical caps on asylum adjustments and §§ 101(c) & (d) set forth similar standards for withholding of removal and other applications for relief under the INA. These amendments apply to applications for relief or protection "made on or after" the ID Act's enactment date (May 11, 2005).

Section 101(a)(3) creates three new subsections under INA § 208(b)(1)(B) which seek to establish uniformity on how federal courts apply

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evidentiary standards for granting asylum, including burden of proof, corroborating evidence, and credibility determinations.

As amended, INA § 208(b)(1)(B)(i) states that the burden is on the applicant to establish eligibility for asylum. More significantly, the law now requires the applicant to establish that race, religion, political opinion, nationality, or membership in a particular social group "was or will be one central reason" for why the applicant was persecuted or fears persecution.

A reviewing court may not reverse an agency finding with respect to the availability of corroborating evidence unless the court determines that a reasonable factfinder would be compelled to conclude that such corroborating evidence is unavailable.

The new INA § 208(b)(1)(B)(ii) provides that where a trier of fact determines that the applicant should submit evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant cannot reasonably obtain the evidence. Under this provision, "[t]he absence of corroborating evidence can lead to a finding that the applicant has failed to meet her burden of proof," even if the applicant's testimony is deemed credible. 151 Cong. Rec. H2813, 2870

Asylum credibility determinations will be made pursuant to the new INA § 208(b)(1)(B)(iii) which codifies case law identifying the relevant several factors on which an adjudicator may base an credibility determination. Among other things, these factors include "the demeanor, candor, or responsiveness of the applicant or witness" and the plausibility of the applicant's testimony. *Id.*

This provision also makes it clear that an applicant's testimony is not automatically deemed credible if the immigration judge does not make an explicit adverse credibility finding. Rather, the statute states that "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."

Section 101(e) amends INA § 242(b)(4)(D) by providing that a reviewing court may not reverse an agency finding with respect to the availability of corroborating evidence unless the court determines that a reasonable factfinder would be compelled to conclude that such corroborating evidence is unavailable. This amendment applies to applications for relief and protection from removal, including asylum and withholding of removal. Under § 101(h)(3) of the ID Act this amendment takes effect immediately.

Section 101(f) amends the discretionary review bar at 8 U.S.C. § 1252(a)(2)(B) by clarifying that the bar applies to discretionary determinations made *outside* the context of removal proceedings. Under § 101(h)(4) this amendment is effective *immediately* and applies to pending cases.

Section 101(g) amends INA § 209(b) by eliminating the annual 10,000 cap on adjustments of status of refugees. It further amends INA § 207(a) by removing the annual 1,000 cap on the number of aliens who can be granted asylum or admitted as refugees based on a claim of persecution for resistance to coercive population control methods. Pursuant to § 101(h)(5), these amendments take effect immediately.

Section 102

Section 102 amends IIRIRA § 102(c) by authorizing the Secretary of Homeland Security "to waive all legal requirements" in his discretion that might impede the "expeditious constructions of barriers and roads" along the U.S. land borders. Although § 102(c) provided for the waiver of certain environmental laws, the construction of the 14 miles of barriers and roads along the border near San Diego has been delayed due to disputes in-

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volving other laws. This amendment would also limit judicial review to only those cases where a constitutional violation is alleged. The action must be filed within 60 days after the action or decision is made by the Secretary of Homeland Security.

Section 103

Section 103 amends the inadmissibility grounds based on terrorist and terrorist related activities, and expands the definitions of "terrorist activity" and "terrorist organization." These amendments are fully retroactive; that is, they apply to removal proceedings instituted before, on, or after enactment, and to other events or circumstances that occurred or arose before, or, or after enactment.

Among some of the changes, section 103(a)(i) renders inadmissible, members of undesignated terrorist organizations "unless the alien can demonstrate by clear and convincing evidence that [he] did not know, and should not reasonably have known that the organization was a terrorist organization," and any alien who "has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization."

Section 103(c) amends the terrorist organization definitions in INA § 212(a)(3)(B)(vi)(II) and (III) to include soliciting and material support activities in INA § 212(a)(3)(B)(iv)(IV)-(VI), and to apply the definitions throughout INA § 212.

Section 104

Section 104 expands the waiver which had previously existed in the last paragraph of INA 212(a)(B)(iv), to 212 (d)(3). The new provision allows the Secretary of State (prior to commencement of removal proceedings) or the DHS Secretary (prior to and after commencement of removal proceedings), after consultations with each other and with the Attorney General, to waive application of certain sections of the INA's terrorism provisions: (i) section 212(a)(3)(B)(i)(IV)(bb) (relating to representatives of certain groups which endorse terrorist activity); (ii) section 212(a)(3)(B)(i)(VII) (relating to certain spouses and children of aliens inadmissible on terrorism grounds); (iii) section 212(a)(3)(B)(iv)(VI) (relating to aliens who provided material support to terrorists); and (iv) section 212(a)(3)(B)(vi)(III) (relating to terrorist organizations not designated as such by the Secretary of State, and which are terrorist organizations solely because of the activities of a subgroup). The amendments also make the discretionary waivers unreviewable.

Section 105

Section 105 amends INA § 237 (a)(4)(B) to render deportable any alien "described in" the full range of terrorism inadmissibility subsections 212(a)(3)(B) and (F) (aliens whom the Attorney General and Secretary of State conclude have been associated with terrorist organizations and intend to engage in the United States in activities that could endanger the welfare, safety, or security of the United States).

Section 105(a)(2) makes the foregoing changes, and the INA as so amended, retroactively applicable to "removal proceedings instituted before, on, or after" enactment, and to "acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring of existing before, on, or after" enactment.

Section 106

Section 106(a) amends INA § 242(a) to clarify that district courts lack jurisdiction, habeas or otherwise, to review *any* removal order for *any* alien. The jurisdictional bar applies to all removal claims, including challenges under domestic law implementing the Convention Against Torture. It applies to both criminal and non-criminal aliens. Thus, § 106 overturns the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

Section 106(a) enables all aliens, including criminal aliens, to obtain review of constitutional claims and "questions of law" through petitions for review filed in the courts of appeals. The section also amends INA § 242 by providing that a petition for review "shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture."

Section 106(b) makes the above changes effective upon enactment and applicable to all cases, *i.e.*, all challenges to removal, deportation, or exclusion orders issued before, on, or after enactment.

Section 106(c) provides that habeas petitions which are currently pending in district courts "shall" be transferred to the courts of appeals to be treated as petitions for review filed pursuant to INA § 242(a), to the extent the habeas petition seeks review of a removal order. If a habeas petition seeks review of a non-removal order issue as well as the removal order, "the part of the case that challenges the order of removal . . . " shall be transferred to the courts of appeals.

Section 106(d) governing transitional rule cases, provides that petitions for review under the old INA § 106 shall be treated as petitions for review under amended INA § 242.

By Francesco Isgro, OIL

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

Summaries Of Recent BIA Decisions

■BIA Holds That Marriage Involving A Postoperative Transsexual May Be The Basis For Visa Benefits Where The State In Which The Marriage Occurred Considers The Marriage Valid

On May 18, the BIA ruled in ***Matter of Lovo***, 23 I. & N. Dec. 746 (BIA 2005), that a marriage between a postoperative transsexual and a person of the opposite sex may be the basis for benefits under INA § 201(b)(2)(A)(i), where the state in which the marriage occurred recognized the change in sex of the postoperative transsexual and considered the marriage a valid heterosexual marriage. In so holding, the BIA determined that the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), did not preclude, for purposes of federal immigration law, recognition of a marriage involving a postoperative transsexual because North Carolina, where the marriage in question was performed, consider that marriage to be one between two individuals of the opposite sex. As there were no other issues raised regarding the validity of the marriage, the BIA sustained the alien's appeal and granted the visa petition.

A marriage between a postoperative transsexual and a person of the opposite sex may be the basis for immigration benefits.

■BIA Rules It Will Reinstate Same Period Of Time For Voluntary Departure Afforded To The Alien By The Immigration Judge

In ***Matter of A-M-***, 23 I. & N. Dec. 737 (BIA 2005), the BIA held that absent specific reasons for reducing the period of voluntary departure initially granted by the Immigration Judge at the conclusion of removal proceedings, the Board will reinstate the same period of time granted. The BIA noted that its long standing rule limiting its grant of voluntary departure to 30 days arose as a result of previous statutory framework, which authorized Immigration Judges to grant lengthy periods of voluntary departure time. The 1996 amendments to the immigration statute limited the grant of voluntary departure afforded at the conclusion of removal proceedings to 60 days, thereby resolving concerns arising from prolonged periods of voluntary departure. The BIA also observed that current regulatory and statutory provisions did not require a blank rule reducing the time period for voluntary departure to 30 days where an Immigration Judge had granted a 60-day period. Moreover, an alien would not be adversely affected by the potential loss of the opportunity to voluntarily depart in the event of an unsuccessful appeal because the timely filing of an appeal with the BIA automatically stayed the execution of the Immigration Judge's decision during the pendency of the appeal, and tolled the running of the voluntary departure time so authorized.

■BIA Concludes That Immigration Judges Have Jurisdiction For Bond Redetermination Over Arriving Aliens Initially Screened For Expedite Removal, But Found To Have Credible Fear

In ***Matter of X-K-***, 23 I. & N. Dec. 731 (BIA 2005), the BIA held that an alien who is initially screened for expedited removal pursuant to the authority in section 235(b)(1)(A)(iii), but who is subsequently placed in removal proceedings following a positive credible fear determination, is eligible for a custody redetermination hearing before an Immigration Judge unless the alien is a member of the class of aliens specifically excluded from the custody jurisdiction of Immigration Judges under 8 C.F.R. § 1003.19(h)(2)(i). The BIA rejected the DHS's argument that those aliens remained under its exclusive custody jurisdiction pursuant to INA § 235(b)(1), holding that the pertinent regulations specifically state that until there is a final removal order in the section 240 removal proceedings, Immigration Judges have jurisdiction "to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond" as provided in 8 C.F.R. § 1003.19. Because that regulatory provision did not list, in its class of aliens excluded from the Immigration judge's general custody jurisdiction, those who have been placed in section 240 removal proceedings after having been initially screened and detained for expedited removal, the BIA concluded that the alien was eligible for a custody redetermination before the Immigration Judge.

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

CORRECTION:
MATTER OF E-L-H-

In a letter to the Director of OIL dated May 17, 2005, the BIA's Chairman, Lori Scialabba, questioned the accuracy of the summary of *Matter of E-L-H-* which appeared in the last issue of the Bulletin. The Chairman correctly wrote that "an accurate account of the decision would explain that the Attorney General vacated the Board's decision in *Matter of E-L-H–*, 23 I&N Dec. 700 (A.G. 2004), and remanded the case to the Board for "reconsideration in light of the intervening decision of the Attorney General in *Matter of A-H-*, A.G. Order No. 2380-2001 (Jan. 19, 2001) (attached)."

The Chairman noted that the summary "leads the reader the mistaken impression that the Attorney General addressed and resolved the issue presented in *Matter of E-L-H-*."

Summaries Of Recent Federal Court Decisions

ADJUSTMENT OF STATUS

■Fifth Circuit Defers to BIA's Interpretation That Adjustment Of Status Under INA § 245(i) Does Not Waive The Unlawful Presence Inadmissibility Ground

In ***Mortera-Cruz v. Gonzales***, — F.3d —, 2005 WL 1076166 (5th Cir. May 9, 2005) (*Garwood*, Jones, Stewart), the Fifth Circuit held that an alien who is inadmissible because of multiple illegal entries under INA § 212(9)(C)(i), 8 U.S.C. § 1182(a)(9)(C)(i), is ineligible for adjustment of status under INA § 245(i).

Petitioner, a native of Mexico, entered the U.S. illegally in 1996. On March 28, 2001, he married a U.S. citizen who filed a petition for adjustment of status. Petitioner left the U.S. and illegally reentered on June 10, 2001. Petitioner plead guilty in district court of illegally entering the U.S. DHS argued that petitioner was ineligible for adjustment of status because he was inadmissible on the grounds that he had more than one year of unlawful presence and thereafter illegally reentered the U.S. without being admitted. The IJ held that contrary to petitioner's assertions, he pled guilty to entering the U.S. illegally and therefore was inadmissible and ineligible for adjustment of status. The BIA affirmed.

On appeal, the Fifth Circuit noted that the conduct specified by § 212(9)(C)(i) is both different from and more culpable than the conduct of a one-time illegal alien subject to inadmissibility under 212(9)(B)(i) and, by extension, more culpable than the conduct of an alien who is inadmissible only under section 212(a)(6)(A)(i). The court found that the extent of the inadmissibility created by different immigration violations demonstrates that Congress intended to treat different violations differently. The court held that the policy developed by the executive branch was a rational approach to reconciling the apparent tension in the statutes and in a reasonable way implements the intent of Congress that some, but not all, illegal aliens may adjust their status to that of a lawful permanent resident. Accordingly, the court deferred to the BIA's interpretation that, for purpose of adjustment of status under 245(i), the inadmissibility of one-time illegal entrants under § 212(a)(6)(A)(i) can be waived, while the inadmissibility under § 212(a)(9)(C) cannot.

Contact: Barry Pettinato, OIL
☎ 202-353-7742

ASYLUM

■Ninth Circuit Finds That Disabled Russian Children and Their Parents Who Help Care for Them Constitute a Particular Social Group for Purposes of Asylum

In ***Tchoukhrova v. Gonzales***, __F.3d__, 2005 WL 913449 (9th Cir. April 21, 2005) *(Reinhardt*, Tashima, Wardlaw), the Ninth Circuit held that disabled children and their parents constitute a statutorily protected group, and that a parent who provides care for a disabled child may seek asylum and withholding of removal on the basis of the persecution the child has suffered on account of his disability.

Petitioner, a native of Russia, applied for asylum and included her husband and son in her application. The petitioner sought asylum on the basis that her son, who was born with cerebral palsy, was denied access to public schools, threatened with institutionalization, verbally abused, and beaten. The IJ found that petitioners were members of a particular social group, namely, "a family whose child is severely disabled," and that the harms the family faced were at the hands of the Russian government because "Russia wished to isolate handicapped children." The IJ concluded however, that harm the family suffered did not rise to the level of persecution. The Board affirmed the IJ denial of asylum while noting the "very sympathetic family history."

"Because the parents and their disabled child incur the harm as a unit, it is appropriate to combine family members into a single social group for purposes of asylum and withholding."

The Ninth Circuit held that disabled children in Russia constitute a distinct and identifiable group, and thus resembled the particular social groups the Ninth Circuit had previously recognized. The court noted its holdings in the *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (Somali woman under threat of FGM), and *Karouni v. Gonzales*, 199 F.3d 1163 (9th Cir. 2005) (holding that alien homosexuals are members of a particular social group).

The court further held that Russian parents of disabled children were properly included in the social group. "Because the parents and their disabled child incur the harm as a unit, it is appropriate to combine family members into a single social group for purposes of asylum and withholding," said the court.

Additionally, the court held, after discussing at length the treatment of "family" under our immigration laws, that a parent of a disabled child may file for asylum as a principal applicant in order to prevent the child's forced return to the home country. Of note, the court cited to the International Covenant on Civil and Political Rights for the proposition that "caring for the family is also consistent with our international obligations." The court acknowledged that under the asylum statute there is no provision permitting parents to obtain asylum derivatively through their minor children. However, it applied the "pragmatic approach" of viewing the family as a whole without formalistically dividing the claims between "principal" and "derivative" applicants.

Finally, the court reversed the

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finding below that the harm suffered by the family did not rise to the level of persecution. The court found that the injurious conduct to which petitioners were subjected when taken together rose to the level of past persecution. Accordingly, the family also established a presumption of future persecution which the government did not rebut. Accordingly, the court found that the principal applicant, the mother, was statutorily eligible for asylum and that her child and husband were eligible for that relief through their derivative applications. The court also found that under 8 C.F.R. 1208.16(b)(1), the principal applicant was entitled to withholding of removal, as were her child and husband.

Contact:
Margaret Perry, OIL
☎ 202-616-9310

■Eight Circuit Affirms Denial of Asylum and CAT Based on Adverse Credibility Findings

The Eighth Circuit, in ***Prawira v. Gonzales***, __F.3d__ 2005 WL 926990 (8th Cir. April 22, 2005) (*Loken*, Arnold, Riley), affirmed the denial of petitioner's application for asylum and CAT protection based on an adverse credibility finding. Petitioner, an ethnic Chinese citizen of Indonesia, sought asylum, withholding, and CAT, on the grounds that a group of ethnic Indonesians once stopped his car, demanded money, and broke the window when he refused, causing petitioner minor cuts. Petitioner further testified that an ethnic Indonesian coworker occasionally threatened him, his brother's house was burned down after anti-Chinese riots, and his sister was attacked.

The IJ found petitioner's testimony not credible because he lied when he claimed on his initial asylum application that his cousin had been raped, that he mentioned neither of the alleged incidents of persecution he emphasized at the hearing, and that he exaggerated his fears of returning to Indonesia. The BIA affirmed without opinion.

The court, after reviewing the record, concluded that the IJ had specific and cogent reasons supporting his adverse credibility finding. "While minor inconsistencies and omissions will not support an averse credibility determination, inconsistencies or omissions that relate to the basis of persecution are not minor but are at the heart of the asylum claim," said the court citing to its decision in *Kondakova v. Ashcroft*, 383 F.3d 792, 796 (8th Cir. 2004). The court also found that because petitioner's CAT claim was based upon the same evidence as his asylum and withholding claims the IJ's adverse credibility finding was "was fatal to the CAT claim as well."

"While minor inconsistencies and omissions will not support an adverse credibility determination, inconsistencies or omissions that relate to the basis of persecution are not minor but are at the heart of the asylum claim."

The court rejected petitioner's contention that it was an error for the IJ to admit the asylum officer's written notes and a status report of a pending overseas investigation regarding the authenticity of petitioner's documents. Noting that the traditional rules of evidence do not apply in immigration proceedings, the court found that the IJ's evidentiary rulings were neither unfair nor prejudicial.

Contact: Shahira Tadross, OIL
☎ 202-616-6789

■Third Circuit Finds That Records Corroborating Claim of Forced Abortion Could Not Be Excluded Solely Based on Failure to Comply with 8 C.F.R. § 287.6

In ***Zhang v. Gonzales***, 405 F.3d 150 (3rd Cir. 2005) (*Alito*, McKee, Smith), the Third Circuit vacated and remanded a BIA denial of asylum because it was not clear whether the IJ had excluded corroborating documentary evidence proffered by the petitioner.

Petitioner, a native of China, sought asylum on the grounds that Chinese family planning authorities had, among other things, subjected her to a forced abortion and demanded that she or her husband be sterilized to prevent any further violations of the country's one-child policy. Petitioner provided several documents, including receipts of fines petitioner incurred for removing an IUD and attempting to give birth secretly. The IJ questioned the authenticity of these apparently official documents because they had not been authenticated by the U.S. consulate in China as required under 8 C.F.R. § 287.6(b)(1)-(2). The IJ denied relief but never explained why petitioner's supporting documentation did not bolster her credibility, or whether the documents had even been admitted into the record. The BIA affirmed.

The court found that it was unclear whether the IJ refused to admit petitioner's documents or if they were admitted but given less weight than they would appear to merit if accepted at face value. The court found that if the IJ had excluded the documents under 8 C.F.R. § 287.6, it would have been a "legal error." The court noted that it had recently held in *Lieu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004), that "8 C.F.R, § 287.6 is not an absolute rule of exclusion and is not the exclusive means of authenticating records before an immigration judge." *See Leia v. Ashcroft*, 393 F.3d 427 (3d Cir. 2005) (remanding where IJ found that § 287.6 was the exclusive means to authenticate documents). Accordingly the court vacated the BIA's order of removal and remanded to determine if the documents had been excluded.

In a concurring opinion Judge McKee wrote that he was troubled with the IJ's reasoning in the case, noting especially that he had ignored evidence corroborating petitioner's claim while "going out of his way to find problems with it."

Contact: Terri J. Scadron, OIL
☎ 202-514-3760

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■Ninth Circuit Finds That Punishment by the Military for Voicing Opposition to War Amounted to Torture Where Petitioner Suffered Severe Form of Cruel and Inhumane Treatment

In ***Nuru v. Gonzales***, __F.3d__, 2005 WL 913761 (9th Cir. April 21, 2005) (*Reinhardt*, Tashima, Wardlaw), the Ninth Circuit held that the treatment petitioner was subjected to by the Eritrean army when he voiced opposition to the war against Sudan, amounted to persecution on account of political opinion and torture.

"A government cannot exempt torturous acts from the CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law."

Petitioner testified that in 1996 he was drafted in the Eritrean military and after being trained for six months he was assigned to the front line of the Eritrean-Sudanese conflict. Subsequently, he realized that the Sudanese forces were better equipped and he observed the death of many of his comrades. When he spoke out against the war, his comrades tied him up for twenty-five days, naked and bound, and left him outside in the hot desert sun. He testified that he was beaten and whipped and denied medical treatment. However, when he complained about a tooth infection he was transferred to a nearby town to receive treatment. After the treatment he decided not to return to his unit and eventually hired a smuggler to take him into Ethiopia. After he fled, the Eritrean military arrested petitioner's two brothers, who have not been heard from since, and forcibly closed his father's business.

The IJ denied relief, finding petitioner was nothing more than a "common deserter" and that his opposition to the war was motivated by his concern for his own personal safety rather than by political conviction. The IJ also determine that petitioner had not suffered persecution because the treatment was appropriate given the circumstances. The IJ also denied petitioner's CAT claim, finding that petitioner would not face any form of torture if returned to Eritrea. The BIA adopted and affirmed the IJ's decision.

The Ninth Circuit found that petitioner's punishment by the Eritrean army was cruel and inhuman and thus fell well within the definition of torture set forth in the CAT. The court also found that the evidence in the record confirmed that Eritrea routinely prosecutes persons thought to be deserters and subjects some of them to torture. The court cited to an Amnesty International report on Eritrea, which was not part of the record, indicating that "torture is used as a standard form of military punishment."

Here, the court found that petitioner would be considered a deserter because he fled after he was tortured, and therefore failed to fulfill his military obligation. The court rejected the IJ's reasoning that Eritrea could punish petitioner in any lawful manner. The court reasoned that even if the punishment is lawfully sanctioned by that country, if it defeats the object and purpose of CAT, the victim is entitled to protection. "A government cannot exempt torturous acts from the CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law," observed the court. Thus, said the court, "acceptance of Eritrea's tortuous punishment of petitioner, would defeat the object and purpose of CAT to 'eliminate torture and other cruel, inhumane and degrading punishment.'" Accordingly, the court held that petitioner would be subject to torture if returned to Eritrea and granted CAT protection.

In light of its finding on torture, the court found that, "necessarily," the acts committed by the military rose to the level of persecution. The court then determined that petitioner had a political opinion, and that the military were aware and motivated to punish him for that opinion. Finally, the court found that the government had not rebutted the presumption of a well-founded fear of future persecution and consequently had established his eligibility for asylum and entitlement of withholding of removal.

Contact: Francis W. Fraser, OIL
☎ 202-305-0193

■Second Circuit Affirms Adverse Credibility Finding Where Petitioner's Omission of Sterilization Claim in Prior Asylum Application Went to the Heart of His Asylum Claim

In a *per curiam* decision in ***Dong v. Ashcroft***, 406 F.3d 110 (2d Cir. 2005) (Winter, McLaughlin, Cabranes), the Second Circuit affirmed a denial of asylum and withholding based on an adverse credibility finding. The petitioner, a native of China, sought relief on the grounds that, after he had fathered three children, he had been forcibly sterilized. The IJ denied relief, finding petitioner's testimony not credible principally because he had failed to mention his forced sterilization on his previous three asylum applications. The BIA summarily affirmed.

The Second Circuit agreed, finding the omission of that crucial fact went to the heart of petitioner's asylum claim, and thus upheld the IJ's adverse credibility determination. Finding petitioner ineligible for asylum, the court similarly found him ineligible for withholding of removal and affirmed the BIA's order.

Contact: Michael R. Holden, AUSA
☎ 212-637-2800

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■Third Circuit Holds That Persecution of Asylum Applicant's Parents on Account of Their Violation of the One Baby Policy Is Not Persecution of Applicant

In ***Wang v. Gonzales***, 405 F.3d 134 (3rd Cir. 2005) (Scirica, Roth, *Greenberg*), the Third Circuit held that persecution of petitioner's parents in China based on their violation of one-child policy, was not persecution of applicant on account of political opinion.

Petitioner, a native of China, sought relief on the grounds that the Chinese government had been harassing his parents for their failure to pay a fine for violating the one-child policy. Petitioner alleged that if he was removed, he would be arrested because he left the country illegally and his parents would be unable to pay the fine to secure his release. The IJ denied petitioner's application for asylum but granted him withholding of removal. Both parties appealed and the BIA denied petitioner's requested relief and ordered him removed to China.

On appeal, the Third Circuit found that even if petitioner's parents had been persecuted, petitioner could not "stand in the shoes of his parents," and thus could not establish that he himself had been persecuted and was ineligible for asylum. The court agreed with the BIA's reasoning that petitioner's case was distinguishable from that in *Matter of C-Y-Z-*, where the BIA had held that the statutory definition included the spouse of person who resisted family planning policies. The court noted that in *Chen v. Ashcroft,* it had found reasonable the BIA's interpretation that *C-Y-Z-* did not reach unmarried partners. *A fortiori*, the court found that the BIA's interpretation here was reasonable, too. However, it left open the possibility that "in an appropriate case, persecution of parents can be persecution of a child even though the effect on the child is only a collateral consequence of his parents persecution."

Finding that petitioner had failed to satisfy the standard for asylum, the court found he failed to satisfy the more stringent standard for withholding of removal and provided no evidence that he would be tortured if removed. Accordingly, the court denied the petition for review.

Contact: Keith I. Bernstein, OIL
☎ 202-514-3567

"In an appropriate case, persecution of parents can be persecution of a child even though the effect of the child is only a collateral consequence of his parents persecution."

■Eighth Circuit Affirms Adverse Credibility Finding Where, Inter Alia, Asylum Applicant Did Not Know Leader of Opposition Forces

In ***Turay v. Ashcroft***, 405 F.3d 663 (8th Cir. 2005) (Loken, Riley, *Smith*), the Eighth Circuit affirmed the BIA's order dismissing petitioner's applications for asylum, withholding of removal, and CAT protection.

Petitioner, a citizen of Sierra Leone, sought relief on the grounds that he had been persecuted for his political beliefs. Petitioner testified that he was assaulted and kidnapped by the Kamajors, a pro-government rebel group when he refused to join their ranks. The IJ denied relief, finding petitioner's testimony not credible. Specifically, the IJ pointed to discrepancies in petitioner's testimony and his submission of false documents, as well as the implausibility that petitioner would not have known of the leader of the opposition forces or that the Kamajors were pro-, not anti-government. The BIA affirmed.

The court found specific, cogent reasons supporting the IJ's decision that petitioner's testimony was not credible. The court noted that while extensive knowledge of domestic politics within an applicant's home country should not be a condition of asylum, an applicant relying on a claim of political persecution must nonetheless state a persuasive case that it has actually occurred. Accordingly, the court affirmed the BIA.

Contact: Sarah Maloney, OIL
☎ 703- 605-1762

■Sixth Circuit Affirms Denial of Asylum, Finding That Applicant Who Claims Membership in a "Family" Social Group Must Still Show That He Would Be Targeted Because of Familial Ties

In ***Akhtar v. Gonzales***, __F.3d__, 2005 WL 991355 (6th Cir. April 29, 2005) (*Ryan*, Cook, Bell), the Sixth Circuit affirmed petitioner's denial asylum, withholding of deportation, and CAT protection, but reversed the BIA's denial of his motion to reopen.

Petitioner, a native and citizen of Pakistan, sought relief on the grounds that he and his family are Mohajirs and his father had been murdered on account of his involvement with the Mohajir Qaumi Movement Altaf (MQM (A)). The IJ found petitioner was apolitical, unlike his father, and could not establish that he was or would be persecuted as a Mohajir. Petitioner appealed, and while his appeal was pending, he married a U.S. citizen. Petitioner's spouse filed a visa petition on behalf of petitioner as well as a motion to stay proceedings so that the visa petition could be adjudicated. The BIA affirmed the IJ's order denying petitioner relief and construed his motion to stay proceedings as a motion to "reopen and remand" so he could adjust his status. Because petitioner had not submitted a copy of an application for adjustment of status, the BIA denied the motion. Subsequently, petitioner filed a motion to

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reopen based, *inter alia*, on ineffective assistance of counsel. The BIA denied that motion as being barred by "numerical limitations," and for failure to comply with *Matter of Lozada*. Petitioner sought review of both the original removal order and the denial of his motion to reopen.

The Sixth Circuit found that petitioner did not have a well-founded fear of persecution due to his identity as a Mohajir. Citing to two unpublished decisions from the Ninth and Sixth Circuit, the court determined that "the petitioner's allegations, if true, describe general strife in Pakistan, which relate to, but are not necessarily the result of any of the grounds listed in the statute." The court also determined that, although the "family" is recognizable as a "particular social group," an applicant must still show that he has been or "will be targeted due to his familial ties." Here, although petitioner's father had been murdered and his mother wounded as a consequence of their involvement in the MQM(A), petitioner presented no evidence that he would be targeted due to his familial ties.

Petitioner also contended that his equal protection and substantive due process rights had been violated because he had not been granted asylum along with his mother. Although the mother had listed all four of her children in the asylum application, including petitioner, petitioner and one of his siblings "aged out" by reaching their twenty-first birthdays during her immigration proceedings. *See* INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (definition of child)

The court found that petitioner was ineligible for relief as a "child" accompanying or following to join his mother, because he had "aged out." Similarly, petitioner was ineligible under the Child Status Protection Act (CSPA) because he was married and his mother's asylum application had been granted three years prior to the passage of the CSPA. Rejecting a due process challenge to these statutory provisions, the court held that "the immigration laws' distinctions based on age and marital status are precisely the kinds of policy decisions that *Fiallo* recognized were within the exclusive control of Congress."

Finally, the court found that the BIA abused its discretion in its denial of petitioner's motion to reopen. The court found that the BIA had improperly construed petitioner's motion to stay proceedings as a motion to reopen, and therefore petitioner's "second" motion to reopen was actually his first. Accordingly the court remanded to the BIA with instructions to consider petitioner's motion to reopen on the merits.

Contact: Margaret K. Taylor, OIL
☎ 202-616-9323

■Fourth Circuit Finds That Single Event of Insertion of IUD Is Not Persecution Where Not Accompanied by Physical Force or Abuse

In ***Li v. Gonzales***, __F.3d__, 2005 WL 1006272 (4th Cir. May 2, 2005) (Luttig, *Williams*, Gregory), the Fourth Circuit affirmed the BIA's order denying petitioner's applications for asylum and withholding of removal. Petitioner, a native of China, married her husband when she was not yet of legal marrying age. Petitioner gave birth to a child and was fined 10,000 RMB ($1,300) for the unauthorized birth. Petitioner was also forced to submit to an IUD insertion against her will. Petitioner did not remove the IUD, even after arriving in the U.S., because she feared the repercussions if she were removed to China. The IJ concluded that petitioner had not been persecuted and did not have a well-founded fear of persecution because neither the fine nor the IUD insertion were severe enough to amount to persecution. The IJ also noted that petitioner had not had the IUD removed while she was in the U.S. and that her husband and child were still living in China. The BIA found that petitioner had not been forcibly sterilized or forced to have an abortion, and that neither the IUD nor the fine constituted persecution.

On appeal, the Fourth Circuit affirmed. While the court felt the 10,000 RMB fine was harsh, it was not so large as to compel a finding that it threatened petitioner's life or freedom. By contrast, the court noted that petitioner voluntarily paid $60,000 to be smuggled in the United States. The court also determined that petitioner claimed past persecution on account of the *insertion* of the IUD, as opposed to its continued forced *usage*. The court held that the "single event of insertion of the IUD" did not constitute persecution where there was "no allegation of force, physical abuse, or other equivalent circumstances." Accordingly, it concluded that the BIA's determination that petitioner was not persecuted was not "*manifestly* contrary to law."

In a dissenting opinion, Judge Gregory would have found that the insertion of the IUD, even if a "medically routine insertion," was still persecution because petitioner "was compelled to coercively submit to a procedure that caused her harm, and that was done in violation of her personal bodily privacy."

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

■Eight Circuit Affirms Denial of Untimely Filed Asylum Application

In ***Mompongo v. Gonzales***, __F.3d__, 2005 WL 1037472 (8th Cir. May 5, 2005) (Loken, *Riley*, Smith), the Eighth Circuit dismissed petitioner's asylum claim and denied his requests for withholding of removal and CAT protection. Petitioner, a native of the Democratic Republic of Congo ("DRC"), sought asylum because he feared persecution because of his family's associations with the former Mobutu regime and because of his participation in the youth wing of the Mobutu party. The IJ concluded that petitioner failed to timely file his asylum application and denied petitioner's

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claims for withholding of removal and CAT protection. The BIA affirmed without opinion.

The court found it lacked jurisdiction over the IJ's finding that petitioner's asylum application was untimely. Furthermore, the court held that petitioner had failed to establish that it was more likely than not that he would be harmed or tortured if he were returned to the DRC, noting that petitioner's remaining family in the DRC had not suffered any harm on account of their connection to Mobutu. Accordingly, the court denied the petition for review.

Contact: Linda Wernery, OIL
☎ 202-616-4865

■Tenth Circuit Finds That Aliens Indebted to Same Private Creditor Not Members of a Particular Social Group

In ***Cruz-Funez v. Gonzales***, __F.3d__, 2005 WL 1009788 (10th Cir. May 2, 2005) (Tacha, *Henry*, O'Brien), the Tenth Circuit affirmed the denial of asylum to two Honduran asylum applicants who claimed that their business debt to an unscrupulous Honduran creditor put them in the particular social group of small businessmen ruined in 1998 by Hurricane Mitch who are indebted to private creditors connected to the corrupt Honduran business and political system.

The two petitioners' cases were consolidated by the IJ who denied them both asylum and withholding of removal. The BIA, though a single Board member, affirmed the IJ's decision but did not mention, with the exception of *INS v. Stevic*, any of the five cases that the IJ cited in his discussion about what constitutes a particular social group.

On appeal, the court preliminarily determined that while the BIA had affirmed the IJ's decision under 8 C.F.R. § 1003.1(e)(5), it had not followed its own procedures pursuant to that section. The court noted that the BIA's "citation of cases is somewhat mystifying and does not allow us to provide a meaningful review" of its judgment. Nonetheless, the court found that the IJ's decision provided an adequate basis for meaningful review.

On the merits, the court held that while petitioners may have been indebted to a common unscrupulous creditor, this relationship did not constitute a particular "social group" for the purposes of asylum and withholding of removal. While noting that the "courts are struggling to set the parameters for the definition of a "particular social group," "we can confidently state that petitioners cannot prevail under any of the circuits' tests." "Being indebted to the same creditor (unscrupulous or not) is not the kind of group characteristic that a person either cannot change or should not be required to change," said the court.

"Being indebted to the same creditor (unscrupulous or not) is not the kind of group characteristic that a person either cannot change or should not be required to change"

Finally, the court held that while petitioners may have been threatened by their creditor, and had presented evidence of corruption in the Honduran government, they had failed to show that the actions the creditor would take against them would be with the acquiescence of the Honduran government.

Contact: Anh-Thu Mai, OIL
☎ 202-353-7835

Ninth Circuit Finds That Ukrainian Tax Auditor Who Was Threatened by Company Henchmen When He Uncovered Tax Evasion Scheme and Refused to Be Bribed Established Persecution on Account of Imputed Political Opinion

In ***Sagaydak v. Gonzales***, __F.3d__, 2005 WL 1027035 (9th Cir. May 4, 2005) (Hug, Tashima, *Paez*), the Ninth Circuit determined it had jurisdiction to review an IJ's determination that petitioners' asylum application was time barred, and remanded to determine if petitioners were eligible for asylum.

Petitioners, husband and wife, and natives of Ukraine, sought asylum on the grounds that they had been threatened because the husband reported a tax-evasion scheme by Hidro, a corporation founded by a high-ranking government official. The husband petitioner had failed to file his asylum application within one year of his arrival in the U.S. The IJ denied the application of the husband as being untimely and denied the wife's application on the merits. The IJ also denied the claims of withholding of removal on the basis that tax-auditors are not a social group and that petitioners were targeted for persecution because of their involvement with the prosecution of corrupt officials. The BIA affirmed without opinion.

The Ninth Circuit held that, while under most circumstances it would not have jurisdiction to review a petitioner's claim that exceptional circumstances should excuse a late filing, the IJ in this case erred in not determining whether petitioner's failure to timely file was attributable to exceptional circumstances when petitioner raised the issue. The court noted that it appeared that the IJ thought the one-year time bar was absolute and not subject to any exception.

Furthermore, the court found that the IJ's denial of husband's application for withholding and the application for asylum and withholding by the wife was not supported by substantial evidence. The court held that while the Hidro officials may have been motivated in part by personal retribution, that did not mean that they did not also see petitioners as their political enemy. "Our cases make clear that a victim who is targeted for exposing government corruption is persecuted on 'account of' political opinion," said the court. Here, the court found that although

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the corruption was uncovered within a private organization, "it implicated the foundations of Ukrainian government and was undeniably a political statement in the context of the country's evolving politics." Accordingly, the court determined that by adhering to government policies and refusing bribes, the petitioner "took a political stance in opposition to the corrupt government practices that allowed Hidro to exist." Noting that many persecutors have mixed motives, the court further found that petitioners' "troubles arose at least in part because of the political opinion imputed to" the husband. The court remanded the case to the BIA to determine whether extraordinary circumstances existed to excuse the late filing of the asylum application and to determine petitioners' eligibility for asylum and withholding.

Contact: Leslie McKay, OIL
☎ 202-353-4424

■Third Circuit Finds That in a Mixed Motive Case, That Indian Sikh Had Been Persecuted on Account of Imputed Political Opinion

In ***Singh v. Gonzales***, __F.3d__, 2005 WL 1039073 (3rd Cir. May 5, 2005) (Nygaard, *Ambro*, Van Antwerpen), the Third Circuit reversed the denial of asylum and withholding to an asylum applicant from India who claimed persecution on account of his political opinion in support of an independent state for Sikhs.

Petitioner, a native and citizen of India, sought relief because he believed the Indian police were "after" him and his father and were attempting to kill them because they were Sikhs and his father was working for an independent Khalistan. Petitioner testified that he and his father were beaten by the police and that the police threatened to kill him if they found him. The IJ granted petitioner's applications, finding his testimony that he had been persecuted on account of his perceived political opinion as being both his father's son and a Sikh himself. INS appealed, and the BIA vacated the grant of asylum, finding that even if petitioner had been persecuted, he had not met his burden of proving persecution on account of one of the five enumerated grounds.

On appeal, the Third Circuit reversed the BIA's findings. The court noted that petitioner was arrested with his father, was a member of the same faction of the Akali Dal as his father, and that while the police were beating him and his father, they said they were trying to stop petitioner's father from continuing his work. Therefore, the court found petitioner had been persecuted on account his imputed political opinion. The court dismissed the government's argument that the motive behind petitioner's arrest was a legitimate law enforcement purpose, noting that an asylum applicant needs to show "that the persecution was motivated, *at least in part*, by one of the protected characteristics." Thus, even if there was some legitimate security purpose for petitioner's arrest and mistreatment, he is eligible for asylum "if he establishes that the mistreatment was also motivated by the police's attribution of his father's political opinion to him," said the court. Accordingly, the court found that petitioner had been persecuted on account of political opinion, and remanded the case to the BIA for the exercise of its discretion.

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

JURISDICTION

■Ninth Circuit Holds That a 212(k) Denial of a Waiver of Inadmissibility Is Subject to Review Where Denial Is Based on Failure to Prove Exercise of Due Diligence to Ascertain Validity of Visa

In ***Limon v. Gonzales***, __F.3d__, 2005 WL 894692 (9th Cir. April 19, 2005) (*Hawkins*, McKeown, Clifton), the Ninth Circuit affirmed the BIA's denial of a 212(k) waiver after finding that it had jurisdiction to review the denial.

Court had jurisdiction to review the denial of the waiver because the BIA's determination of whether petitioner knew or should have known of her inadmissibility was essentially factual in nature, and thus was nondiscretionary.

Petitioner, a native and citizen of the Philippines, was charged as removable for not having a valid visa at the time of entry because her daughter, who petitioned for her, was not legally married to a United States citizen. Petitioner sought a discretionary "212(k) waiver" on the grounds that she was unaware that his daughter's marriage was invalid. The IJ denied relief, finding that petitioner should have made reasonable inquiries about the validity of the marriage upon which she was relying for her visa. The BIA affirmed, finding that petitioner had failed to show that she was unaware of her ineligibility for admission and could have discovered this ineligibility by exercise of reasonable diligence.

The court determined that, notwithstanding INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), it had jurisdiction to review the denial of the waiver because the BIA's determination of whether petitioner knew or should have known of her inadmissibility was essentially factual in nature, and thus was nondiscretionary. The court relied on its prior case law where it had held that it had jurisdiction over nondiscretionary eligibility requirements for cancellation and over a BIA's finding of marriage fraud. *See Lopez-Alvarado v. Ashcroft*, 381 F.3d 847 (9th Cir. 2004), *Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004).

The court, however, affirmed the BIA's denial after finding that substantial evidence supported the conclusion that petitioner was at least on notice that her daughter's marriage was suspect in light of the fact that she never divorced her first husband, and that therefore she had not

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exercised reasonable diligence to ascertain her admissibility.

Contact: Lyle D. Jentzer, OIL
☎ 202-305-0192

Second Circuit Holds That It Has Jurisdiction to Review Denial of Hardship Waived Based on Failure to Establish Good Faith Marriage

The First Circuit, in ***Cho v. Gonzales***, 404 F.3d 96 (1st Cir. April 19, 2005) (Boudin, Torruella, *Howard*), after holding that it had jurisdiction, reversed the BIA's denial of hardship waiver based on a finding of a lack of good faith marriage.

Petitioner, a native of China, married a U.S. citizen and secured conditional admission as a permanent resident. The couple divorced within two years and petitioner applied for a hardship waiver pursuant to INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B). The INS district director, the IJ, and eventually the BIA found that petitioner had failed to prove that she had entered into the marriage in good faith and denied her a waiver.

"Gross negligence is still negligence, however flagrant, and does not constitute the kind of active employment of force against another that Leocal requires for a crime of violence."

Preliminarily, the court found that it had jurisdiction, finding that the government's relevant "decision or action" was not the discretionary denial of waiver, but rather the decision that petitioner was not entitled to apply for the waiver because she had failed to establish that she had married in good faith.

The court further found that petitioner and her future husband had engaged in a nearly two-year courtship prior to marrying, that the couple stayed in contact via telephone calls and visits while he lived in the U.S. and she in Taiwan, and that the couple combined their financial assets. The court was also not persuaded that the timing of the marriage or the fact that petitioner's husband had an affair with another woman affected the *bona fides* of petitioner's marriage. Therefore the court found that petitioner had satisfied the "good faith" requirement and was eligible for a waiver.

Contact: Jamie M. Dowd, OIL
☎ 202-616-4866

CRIMES

■Ninth Circuit Finds That Drunken Driving Crime, Even Accompanied by Gross Negligence, Is Not a Crime of Violence

In ***Lara-Cazares v. Gonzales***, __F.3d__2005 WL 1206809 (9th Cir. May 23, 2005) (Pregerson, *Canby*, Beezer), the Ninth Circuit held that "a drunken driving crime, even accompanied by gross negligence, is not a crime of violence for purposes of 18 U.S.C. § 16," and consequently not an aggravated felony under INA § 101(a)(43(F), 8 U.S.C. § 1101(a)(43)(F). The petitioner, a lawful permanent resident, had been convicted of gross vehicular manslaughter while intoxicated, and had been sentenced to eight years in prison. The BIA ordered petitioner deported, finding that his conviction qualified as an aggravated felony because it was crime of violence under Ninth Circuit case law. However, that decision was made before the Supreme court decision in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004).

In *Leocal*, the Court held, *inter alia*, that the use of force under 18 U.S.C. § 16, "naturally suggests a higher degree of intent than negligent or merely accidental conduct." The government argued that *Leocal* did not apply to petitioner because that case dealt only with a requirement of simple negligence, while the California statute violated by petitioner required gross negligence. The court declined to read *Leocal* "in such limited fashion." It held that, "gross negligence is still negligence, however flagrant, and does not constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence."

Contact: Jennifer Paisner, OIL
☎ 202-616-4268

■Ninth Circuit Finds That Conviction of Sexual Intercourse with Person under 18 in Violation of California Penal Code § 261.5(c) Is an Aggravated Felony

In ***Valencia v. Gonzales***, — F.3d —, 2005 WL 1119646 (9th Cir. May 12, 2005) (O'Scannlain, Cowen, *Bea*), the Ninth Circuit held that unlawful sexual intercourse with a person under 18, who was more than three years younger than he, in violation of California Penal Code § 261.5(c) is a crime of violence and consequently an aggravated felony under INA § 101(a)(43).

The petitioner, a native of Peru, was charged with being removable as an aggravated felon for committing sexual abuse of a minor and for committing a crime of violence. The IJ found petitioner removable as an aggravated felon holding that the crime constituted a crime of violence. The IJ also denied petitioner's application for adjustment of status. The BIA summarily affirmed.

The Ninth Circuit court agreed that petitioner's crime was an aggravated felony. While section 261.5(c) does not have as an element the use, attempted use, or threatened use of violent force, the court, applying the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), found that the "full range of conduct" covered by section 261.5(c) involved a substantial risk that physical force may be used in the course of committing the offence and concluded that petitioner's crime constituted a crime of violence. Given that petitioner was removable for having committed an aggravated felony, the court found it lacked

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jurisdiction to consider whether petitioner was eligible for adjustment of status and dismissed that portion of petitioner's claim.

Contact: Greg D. Mack, OIL
☎ 202–616- 4858

■Conviction of Using Communications Device to Facilitate Conspiracy to Distribute and Possess Drugs Was Aggravated Felony for Removability

In ***Evola v. Carbone***, 365 F. Supp. 2d 592 (D.N.J. 2005)(Pisano), the district court denied the petitions for habeas relief and *Writ of Error Coram Nobis*. Petitioner, an Italian national, pleaded guilty to using a communication device to facilitate a conspiracy to distribute and to possess with intent to distribute a controlled substance pursuant to 21 U.S.C. § 843(b). An IJ ordered petitioner removed and the BIA affirmed, finding that violation of § 843(b) constituted an aggravated felony.

Petitioner filed a habeas corpus petition seeking to vacate his sentence as a result of ineffective assistance of counsel. The district court denied the petition on the grounds it was barred by the relevant one-year statute of limitations. Petitioner then filed a writ of error *coram nobis*.

In denying the § 2241 petition, the court noted that § 843(b) is part of the Controlled Substances Act, and that the INA defined an "aggravated felony" as including a drug trafficking crime as defined as any felony punishable under the Controlled Substances Act. Turning to the writ of error *coram nobis*, the court found petitioner had failed to carry his burden of showing that his reliance upon his counsel's advice that he might not be subject to deportation if he pleaded guilty constituted ineffective assistance of counsel and denied the petition.

Contact: Andrew Carey, AUSA
☎ 973-645-2700

MOTION TO REOPEN

■Eight Circuit Affirms Denial of MTR Based on Ineffective Assistance of Counsel Where Complaint Letter to State Bar Was Deficient

In ***Hernandez-Moran v. Gonzales***__F.3d__2005 WL 1186534 (8th Cir. May 20, 2005)(Loken, Riley, *Smith*), the Eight Circuit affirmed the BIA's denial of a motion to reopen which was based on ineffective assistance of counsel. The petitioner, a citizen of El Salvador who had lived in the United States for 34 years, had obtained temporary residence status under the 1986 Special Agricultural Worker Program. Subsequently, the INS terminated that status because petitioner failed to submit the requested evidence. At the deportation hearing, petitioner's counsel indicated that petitioner would apply for registry and cancellation of removal. The applications were never filed. When petitioner was ordered removed, his counsel appealed to the BIA even though they had no further contact.

The court held that the 180-day period for filing a motion to reopen an in absentia order was analogous to a statute of limitations, and was subject to equitable tolling where there was ineffective assistance of counsel.

The BIA administratively closed the case to allow petitioner to apply for Temporary Protected Status. When that application was not filed either, the INS reinstated the proceedings and notified petitioner's counsel. The BIA affirmed the decision below, finding that petitioner had abandoned his applications for relief. Subsequently, petitioner with the assistance of new counsel filed a motion to reopen claiming ineffective assistance of counsel. The motion was not filed within the ninety days of the entry of the final order - it was nine days late. The BIA denied the motion because it failed to comply with the requirements imposed by *Matter of Lozada*.

The court affirmed the BIA's decision, noting particularly that petitioner's complaint letter to the state bar was deficient. The court also rejected a claim that the time limit for filing the motion to reopen should be equitably tolled, relying on petitioner's failure to notify the BIA or his former counsel of his current address, and on his failure to show that the untimeliness of the motion was due to former counsel's alleged negligence. The court found that the language barrier between petitioner and his former counsel was not an extraordinary circumstance far beyond his control so as to warrant tolling where the alien did not request an interpreter or bring along anyone to aid in communication.

Contact: James Hunolt, OIL
☎ 202-616-4876

■Seventh Circuit Rules That 180-Day Time Limitation For Filing Motions To Reopen May Be Equitably Tolled For Ineffective Assistance

In ***Pervaiz v. Gonzales***, __F.3d__, 2005 WL 949080 (7th Cir. April 18, 2005) (Bauer, *Posner*, Evans), the Seventh Circuit reversed the BIA's decision denying as untimely petitioner's second motion to reopen her *in absentia* removal order. The court held that the 180-day period for filing a motion to reopen an *in absentia* order was analogous to a statute of limitations, and was subject to equitable tolling where there was ineffective assistance of counsel. The court remanded the case to the Board to determine whether the alien's first attorney's failure in the initial motion to reopen to argue a distinction between "notice" and "actual receipt" of the hearing notice constituted ineffective assistance, and whether there was due diligence despite a 9-month delay between the denial of the first motion and the filing of the second.

Contact: Alison R. Drucker, OIL
☎ 202-616-4867

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Summaries Of Recent Federal Court Decisions

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NATURALIZATION

Naturalization Examination Is Not Completed Until CIS Receives Results of FBI Background Check

In ***Danilov v. Aguirre***, __F. Supp.2d__, 2005 WL 1253527 (E.D.Va. May 26, 2005) (*Ellis, J.*), an applicant for naturalization sought injunctive relief to require CIS to act on his application for naturalization application, or in the alternative to have his application adjudicated by the court. Plaintiff contended that the date of his interview triggered the running of the 120-day period which must expire before a civil suit may be brought under INA § 336 (b), 8 U.S.C. § 1447(b).

Reinstatement is not impermissibly retroactive when applied to an alien who reentered the United States before April 1, 1997, IIRIRA's effective date, but who did not apply for adjustment of status until after that date.

Applying *Chevron*, the court held that completion of naturalization interview is not "examination" initiating the 120 day approval clock. Therefore, the court held that it lacked jurisdiction under INA § 336(b). The court further found that the APA and mandamus statutes may not expand the specific, limited grant of jurisdiction in § 336(b), and even if they did, the "delay" in this case did not support a claim.

Contact: Joe Sher, AUSA
☎ 703-299-3700

REINSTATEMENT

■Reinstatement Provision Not Impermissibly Retroactive When Applied to Aliens Who, after Removal, Reentered Illegally Before IIRIRA Effective Date and Then Applied for Adjustment After That Date

In ***Labojewski v. Gonzales***, __F.3d__2005 WL 1083716 (7th Cir. May 4, 2005) (Coffey, Ripple, *Sykes)*, the Seventh Circuit held in two consolidated cases, that IIRIRA's reinstatement provision codified at INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), is not impermissibly retroactive when applied to an alien who reentered the United States before April 1, 1997, IIRIRA's effective date, but who did not apply for adjustment of status until after that date.

The petitioners, one a native of Mexico and the other a native of Poland, illegally reentered the United States prior to 1996 after having been previously removed. In September 1997, and September 2001, respectively, they applied for adjustment of status. In the course of adjudicating their applications, DHS discovered that both aliens had reentered illegally after having been removed. Accordingly, ICE reinstated their prior orders of removal. On appeal, both petitioners questioned the retroactive application of the reinstatement provision.

The court looked to its decision in *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005), where it had held that the reinstatement provision was impermissibly retroactive when an alien both reentered *and* applied for adjustment of status before IIRIRA's effective date. The court declined to extend that holding to petitioners who had illegally reentered before IIRIRA's effective date but who had not applied for adjustment of status until after that date. The court reasoned that unlike the alien in *St. Cyr*, who had pleaded guilty with the expectation of continued eligibility for § 212 (c) relief, the petitioners here had fair notice that they would no longer be eligible for discretionary adjustment of status as of April 1, 1997, and that they would be subject to summary reinstatement of their prior orders of removal based upon their illegal entry. Because they did not file until after IIRIRA's effective date, they could not claim that the reinstatement provision attached any new legal consequences to acts already completed before the new law was enacted. Accordingly, the court denied their petitions for review.

Contact: Papu Sandhu, OIL
☎ 202- 616-9357

VISA WAIVER PROGRAM

■Eleventh Circuit Finds Jurisdiction To Review Denial of Asylum to VWP Applicant Who Was Not Expressly Ordered Removed

In ***Nreka v. U.S. Attorney General***, __ F.3d__, 2005 WL 1138770 (*Barkett*, Hill, Farris) (11th Cir. May 16, 2005), the Eleventh Circuit, held that it had jurisdiction to review the denial of asylum, withholding of removal, and protection under the Convention Against Torture of an alien who was not expressly ordered removed in asylum-only proceedings.

The petitioner, a citizen of Albania, attempted to enter the United States with a fraudulent Swedish passport under the Visa Waiver Program, which requires aliens to waive the right to contest removability. An IJ denied petitioner's applications for asylum and CAT protection, and the BIA adopted and affirmed the that determination.

The court concluded that because the denial of an asylum application is so closely tied to the removal of the alien, it must be deemed - in conjunction with the referral to the immigration judge - as an order of removal, which is subject to judicial review. The court noted that there was "nothing in the VWP statute to indicate that unsuccessful VWP applicants should be treated differently than any other inadmissible alien stopped at the border who has established sufficient credible fear of persecution to be referred to an IJ for a hearing."

On the merits, the court found that substantial evidence supported the denial of petitioner's applications for relief.

Contact: Beau Grimes, OIL
☎ 202-305-1537

CASES SUMMARIZED

NOTED

"The BIA used to set forth reasoning as to why they affirmed the immigration judge, Now, if they affirm, you often don't know what the grounds are. Basically, the appeals courts now have to serve in the role of the BIA."

Cathy Catterson, Ninth Circuit Clerk

INSIDE OIL

OIL welcomes the following Summer 2005 Interns!

Stan Swinton graduated of Brigham Young University and has completed his first year at George Washington School of Law.

Dree Collopy graduated from Grinnell College and has completed her first year at Catholic University's Columbus School of Law.

Laura Halliday graduated from the University of Buffalo and has completed her first year in the JD/MA program at American University.

Jessica Sherman graduated from Washington University in St. Louis and has just completed her second year at Washington University School of Law.

Wally Hicks graduated from the Naval Academy and this fall will be entering University of Oregon School of Law.

Steve Buckingham graduated from Georgetown University and will be entering his third year of law school at Temple University.

From L to R: Stanford Swinton, Dree Collopy, Laura Halliday, Jessica Sherman, Wally Hicks, Steve Buckingham.

Photo by Emily Earthman

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.

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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 Isgro
Senior Litigation Counsel
Editor
francesco.isgro@usdoj.gov