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Immigration Litigation Bulletin

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PRESIDENT BUSH CALLS FOR COMPREHENSIVE IMMIGRATION REFORM—CONFEREES TO DECIDE

President Bush in a nationally televised speech on May 15, 2006 called on Congress to pass comprehensive immigration reform. "America can be a lawful society and a welcoming society at the same time. We will fix the problems created by illegal immigration, and we will deliver a system that is secure, orderly, and fair. So I support comprehensive immigration reform," said the President. Ten days later the Senate, after some vigorous debates passed S.2611, the Comprehensive Immigration Reform Act of 2006, by a vote of 62-36. The Senate bill will now have to be reconciled with the House Bill, H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which was passed on December 16, 2005.

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Although both the Senate and House bills contain measures designed to enhance immigration enforcement and strengthen immigration penalties against illegal aliens and employers, the Senate version provides a tiered approach for the legalization of undocumented aliens. The House version has no such provision. As the President acknowledged in a recent speech, "the big issue facing Washington is what to do with people that have been here for quite a while. That's really, I think, the ultimate stumbling block."

Consequently, Title VI of the Senate bill, entitled "Work Authorization and Legalization of Undocumented Individuals" will be the focus of a lively debate as the Senate and House conferees meet to hammer out their respective positions. In particular, Section 601 of the Senate bill establishes an "Earned Adjustment Program." To earn adjustment, an alien would have to show that he or she was not legally present in the United States for five years before April 6, 2006, prove that he or she had been employed for at least three years during the five year period, show payment of income tax, and demonstrate

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THIRD CIRCUIT FINDS LACK OF JURISDICTION TO REVIEW VISA REVOCATION

In ***Jilin Pharmaceutical USA, Inc. v. Chertoff***, __F.3d__, 2006 WL 1236830 (3d Cir. May 10, 2006) (Rendell, Smith, *Aldisert*), the Third Circuit held that the decision of the Secretary of Homeland Security to revoke a visa under 8 U.S.C. § 1155, is not subject to judicial review because it is a discretionary decision specified under 8 U.S.C. 1252(a)(2)(B)(ii). Zhao, the individual appellant, a citizen of the PRC, entered the United States in 1996, on an employment-based nonimmigrant visa petition, an L-1A intra-company transferee. The petition was filed by Jilin USA, a company incorporated in New Jersey in 1996. The terms of the visa required Zhao to perform in an executive and managerial capacity. Two years later, Jilin USA filed an I-140, an

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AAG KEISLER TESTIFIES ON RESOURCE NEEDS OF CIVIL DIVISION AND OIL

Assistant Attorney General Peter D. Keisler recently testified before the House Judiciary Subcommittee on Commercial and Administrative Law concerning the Fiscal Year 2007 resource needs of the Civil Division and particularly its Office of Immigration Litigation

The Civil Division currently employs 660 attorneys and 295 full and part time employees. Over the past four years, the Division's caseload has increased by more than 70 percent. In FY 2002, it handled about 31,000 cases and matters, but by FY 2005, the caseload exceeded 52,000. This increase is attributable to two main factors: (1) significant growth in the number of claims filed with the compensation programs; and

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Highlights Inside

IMMIGRATION REFORM IN THE BALANCE

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basic citizenship skills. The application would be subject to a strict confidentiality provision. The bill would establish a single level of administrative review for the denial of applications and would also permit review of adverse determinations in the United States District Courts. The Secretary of Homeland Security would have 120 days after enactment to issue regulations implementing the legalization provision.

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Section 601(c) of the bill would authorize the Secretary of Homeland Security to grant Deferred Mandatory Departure for a period not to exceed three years to those aliens who can establish physical presence in the United States as of January 7, 2004, "to allow such aliens time to depart the United States and to seek admission as a nonimmigrant or immigrant alien." As a condition for obtaining DMD, applicants would have to pay an application fee of $1,000, and waive any right to judicial review or to contest removal actions other than challenges to asylum, withholding, CAT, and cancellation of removal. Aliens granted DMD may be employed in the United States. The bill would also place restrictions of review of denials of DMD.

Subtitle B of Title VI of the Senate bill would provide up to 1,500,000 blue cards to aliens who "performed 863 hours or 150 work days during the 24-month period ending on December 31, 2005." An alien who is granted blue-card status and who performs qualifying agricultural work for 5 years (100 days or 575 hours) "shall" be granted LPR status. Applications under this program may be filed with DHS or with a qualified designated entity, such as farm labor organizations or qualified individuals. The bill provides for a single level of appellate review of a denial of blue-card status and judicial review only in the context of a removal order.

There are several other provisions in both the Senate and the House bill which will make significant changes to the INA, including Subtitle A of Title VII of the Senate bill which seeks to reduce immigration litigation. In particular, this subsection would provide increased resources to OIL and U.S. Attorneys for immigration litigation, and increase the number of Immigration Judges, and increase the numbers of BIA Members to 23. Subtitle C of Title VI, provides for the DREAM Act, which would, *inter alia*, repeal section 505 of IIRIRA and restore the option of the individual states to determine residency for purposes of higher education benefits, and provide for a special cancellation program for certain alien students.

However, these proposed changes are not likely to be the make-or-break issues that the conferees will face. As Attorney General Gonzales recently remarked at a press conference in Houston, Texas, the President's plan for comprehensive immigration reform, is an "attempt to create a culture of law-abidingness that had not existed before. It is contrary to our self-interest as a nation of laws for upwards of 11 million people to continue to live in the shadows." If the conferees can agree on how to deal with the growing population of illegal aliens, there may be a comprehensive immigration reform bill that the President will sign into law.

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USCIS SETS UP NATIONAL SECURITY DIRECTORATE

The U.S. Citizenship and Immigration Services (USCIS) Director Emilio T. Gonzalez, recently announced the establishment of a new operational Directorate, National Security and Records Verification. This new Directorate is made up of two divisions formerly embedded within the Domestic Operations Directorate, Fraud Detection and National Security (FDNS) Division and the Records Division plus a new Verifications Division.

FDNS functions as USCIS' law enforcement liaison and handles all USCIS' intelligence work, fraud detection and, as part of the new Directorate, the national security cases previously handled in Domestic Operations. The Records Division has diverse responsibilities, primary among them the storage and retrieval of close to 100 million immigration records, virtually all paper based. The new Verification Division now encompasses the Basic Pilot and SAVE volunteer employment and status verification programs, which allows participating employers to confirm employment eligibility of all newly hired employees.

"As USCIS' National Security functions continue to increase in both complexity and visibility, they need to be strategically positioned to deliver services both internally and externally," Director Gonzalez stated. "The merger of Records, FDNS and Verification into the National Security and Records Verification Directorate will enhance the security of our immigration system and stamp out fraud and abuse, through improved operational efficiency."

The National Security and Records Verification Directorate will be led by Acting Associate Director Janis Sposato, a 31-year veteran of the Department of Justice and the Department of Homeland Security, and the former Deputy Associate Director of the Domestic Operations Directorate.

SPECIAL IMMIGRANT JUVENILE STATUS - WHAT IS IT?

Special Immigrant Juvenile ("SIJ") status is an immigrant classification for minors under the age of 21 who can show that they have been abused, neglected, or abandoned by their parents or guardians and that it would be in their best interests to remain in the United States. SIJ classification requests are coming up more frequently in immigration litigation than in the past. There may be a variety of reasons as to why this is so, but one of them likely is Angelina Jolie. Ms. Jolie, a Goodwill Ambassador for the United Nations High Commissioner on Human Rights, has assisted with funding and publicity for the National Center for Refugee and Immigrant Children. This organization has been working to match unaccompanied alien children released from detention in the United States with *pro bono* legal assistance and social services. As a result of the actions of the National Center for Refugee and Immigrant Children, as well as an increased interest in providing effective legal process for unaccompanied children, issues related to SIJ status may become more prevalent in future immigration litigation.

SIJ classification is a valuable tool for gaining lawful permanent residency when other means to adjust status may be unavailable. Although the intent behind SIJ classification has not changed over time, the process for obtaining such status has changed through the years to prevent abuse. SIJ classification was originally introduced in the 1990 immigration legislation. The intent of the legislation was to protect abused, neglected, or abandoned children who illegally entered the United States, either with their families or alone, and for whom it was in their best interests to remain in the United States rather than return to their native countries. At that time, the process for awarding SIJ status involved: (1) a state court declaration that the child was dependent on the state or placement of the child into foster care; and (2) a determination by that court or the agency that it would be in the best interests of the child to remain in the United States. However, with time, it became clear that minors who clearly did not fall within the original intent of the legislation were being awarded SIJ status. Specifically, students coming to the United States were requesting, and being granted, declarations from state courts that they were wards of the state, which in turn made them eligible for SIJ status even though they were not truly "abused, neglected, or abandoned." Moreover, children granted SIJ classification were being used by family members as a way to obtain immigration status.

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As a result, in 1997, Congress amended the Immigration and Nationality Act ("INA") at 8 U.S.C. § 1101(a)(27)(J), to close loopholes and to make ineligible minors whose primary purpose in applying for SIJ classification was to obtain lawful permanent residency. The amended process (which remains in effect) involves several steps. First, a state court must declare that because a minor has been abused, neglected, or abandoned, he or she is dependent upon the state or place the minor in long term foster care. 8 U.S.C. 1101(a)(27)(J)(i). Second, it must be the "best interest" of the minor that he or she not return to his or her native country. 8 U.S.C. § 1101(a)(27)(J)(ii). Third, the Department of Homeland Security ("DHS") must "expressly consent[]" to the state court dependency order, meaning that DHS must have "determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]." *See* H.R. Rep. No. 105-405, at 130 (1997); *see also* 8 U.S.C. §1101(a)(27)(J)(iii). Importantly, if the minor is in custody, an extra and initial step must be taken: DHS must first "specifically consent" to a state court exercising jurisdiction prior to the court issuing any dependency order. 8 U.S.C. § 1101(a)(27)(J)(iii)(I). The INA also now provides that "no natural parents or other prior adoptive parent of any alien provided special immigrant status under this paragraph shall thereafter by virtue of such parentage, be accorded any right, privilege, or status under this chapter." 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

Various aspects of the SIJ classification process are being challenged by aliens in the federal courts. For example, in one case, a Boy Scout from Tanzania who was attending the Boy Scout Jamboree in Virginia indicated his desire to remain in the United States by obtaining lawful permanent residency through SIJ classification. *F.L. v. Thompson*, 293 F. Supp.2d 86 (D.D.C. 2003). The Tanzanian boy complained that the "consent" required by the INA was not consent from DHS, but rather consent from the Office of Refugee Resettlement, which after the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2153 (Nov. 11, 2002), was responsible for the custodial care of minor aliens. *F.L. v. Thompson*, 293 F.Supp.2d 86. The district court ultimately determined that, for a variety of reasons, the "consent" required must come from DHS. *Id.*

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SPECIAL IMMIGRANT JUVENILE STATUS

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at 95-97.

In another recent case, a detained alien, who had been denied asylum and ordered removed but who had a petition for review pending with a circuit court, applied for SIJ classification with DHS separate from his removal proceedings. *Zheng v. Pogash,* 416 F.Supp.2d 550 (SD Tex. 2006). The essence of his claim was that his father had abandoned him after he had refused to work off his debt to repay Chinese snakeheads who had smuggled him into the United States and who had begun to harass the alien's father in China for repayment. *Id.* at 558. DHS denied to "specifically consent" to the alien's request to pursue an order of dependency from the juvenile court, because DHS determined that the alien had not been abandoned and that his primary purpose in seeking SIJ classification was to obtain better educational opportunities in the United States. *Id.* at 557-58. The district court found that it had jurisdiction to consider the alien's challenge to DHS' denial of consent, and determined that DHS had abused its discretion in denying the alien the opportunity to obtain a dependency order from the juvenile court. *Id.* at 554-59.

As these cases come up more often, there are a variety of issues associated with them. The first issue is, as always, jurisdiction. Even after the REAL ID Act, if a minor seeks review of DHS' denial of either specific consent to seek a dependency order from the juvenile court or express consent that the dependency order satisfies the requirement for SIJ status, the appropriate forum has been found to be the district court. *See Zheng*, 416 F.Supp.2d at 554-57& n.7 (finding jurisdiction to review the alien's SIJ claim after the REAL ID Act as the SIJ claim did not challenge his final removal order). Nonetheless, arguments may exist against the courts exercising jurisdiction for procedural reasons, including *inter alia* standing and mootness.

There may also be arguments against the courts exercising subject matter jurisdiction for challenges to DHS' denials of consent. First, under 8 U.S.C. § 1252(a)(2)(B)(ii), the courts lack jurisdiction to consider any challenge to a discretionary decision made outside the context of removal proceedings but within the purview of Subchapter II of the INA. Because the ultimate decision to allow an alien with SIJ classification to adjust status is a determination for which the authority is in Subchapter II of the INA at 8 U.S.C. § 1255, the courts should not exercise jurisdiction. *But see Zheng,* 416 F.Supp. 2d at 554-55 (finding that authority for DHS' denial of "specific[] consent" comes from Subchapter I of the INA at 8 U.S.C. § 1101(a)(27)(J), not Subchapter II).

As SIJ classification comes up in immigration litigation, the nature of challenges will likely evolve. Be aware that the area of law around the issue is developing and attempt to preserve all available arguments.

Second, any argument that a court has jurisdiction under the Administrative Procedures Act ("APA") to review DHS' discretionary denial of consent should be resisted on the basis that the SIJ provision is drawn in such broad terms as to be committed to agency discretion. *See* APA § 701 (a)(2). There are no established and meaningful guidelines for DHS to apply in reviewing a request for its specific consent to juvenile court jurisdiction or for its express consent that any declaration by the juvenile court satisfies the precondition to SIJ classification.

There are no substantive regulations other than 8 C.F.R. § 204.11, which do not govern the granting or denial of such consent but speak more broadly to eligibility. Also, although previous memoranda issued in 1998 and 1999 have been superseded by a 2004 memorandum providing policy and procedural guidance for DHS adjudicators, 2004 WL 1638268, the 2004 advisory still does not set forth specific standards providing a basis for the courts to appropriately evaluate the denial of consent. *But see Zheng*, 416 F.Supp.2d at 556-57 (finding jurisdiction under the APA based on the lack of other means of review and on the sufficient guidelines set forth in the (now superseded) 1999 memorandum).

Most likely, it would be prudent to alternatively argue the merits of any DHS denial of consent. In defending such a denial, it may be appropriate to describe the background of the SIJ provision to show that the statute is intended to include only those aliens under the age of 21 who have been deemed dependent on the state or eligible for long-term foster care based upon abuse, neglect, or abandonment, and not to include young aliens who may be pawns of adults wishing to obtain immigration status for their children. *See Yeboah v. US DOJ,* 345 F.3d 216, 221-25 (3d Cir. 2003) (holding that DHS did not abuse its discretion in denying consent after considering the intent of the minor's parents in sending the 10 year old to the United States unaccompanied).

As SIJ classification comes up in immigration litigation, the nature of challenges will likely evolve. Be aware that the area of law around the issue is developing and attempt to preserve all available arguments.

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ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Bulletin please contact Francesco Isgro at: francesco.isgro@usdoj.gov

ASYLUM LITIGATION UPDATE

"Particular Social Group" Cases: Contact OIL To Determine Whether, Or How, To Defend Such A Case

Asylum and withholding of removal are available for past persecution or a well-founded fear, or clear probability, of future persecution "on account of [an alien's] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 1231(b)(3). "[M]embership in a particular social group" is the least understood of the grounds for asylum and withholding of removal. Aliens and their attorneys are using this ground to try to make cultural customs, crimes, or societal problems in other countries a basis for asylum or withholding of removal in the United States. Examples of the kinds of conduct that aliens are trying to claim constitutes social group persecution are: (i) arranged marriages; (ii) prostitution or trafficking in women; (iii) domestic violence or child sex abuse; (iv) criminal youth gang violence or recruitment; (v) poverty and street children; (vi) intimidation of drug cartel witnesses or informants; (vii) honor killings; (viii) dowry violence; (ix) personal vendettas or disputes; or (x) other countries' treatment of mentally ill or disabled persons. The phrase "membership in a particular social group" is not statutorily defined. See 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3).

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The Immutable/Fundamental Characteristic Approach

The Board has construed "particular social group" in a manner consistent with the other four grounds of persecution that qualify for asylum or withholding of removal (race, religion, nationality, political opinion) to refer to: " a group of persons all of whom share a common, immutable characteristic. . . .[T]he common characteristic that defines the group. . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). This is a balance between construing "particular social group" so broadly that it refers to any group that is persecuted – which would render the other four grounds of persecution superfluous – or so narrowly that "particular social group" becomes a nullity. *See Castillo-Arias v. U.S. Atty. General*, _ F.3d _, 2006 WL 1027726 *5 (11th Cir. 2006). The Board determines whether a group qualifies as a "particular social group" on a case by case basis. *Acosta,* 19 I. & N. Dec. at 233. To date the Board has concluded the following are "particular social groups" because of a common "immutable" characteristic that could not be changed, or a characteristic that is changeable but "fundamental" to members' identities or consciences: Filipinos of inherited Chinese ancestry (*Matter of V-T-S-*, 21 I. & N. Dec. 792 (BIA 1997)); a subclan in Somalia (*Matter of H-*, 21 I . & N. Dec. 337 (BIA 1996)); women with intact genitalia and inherited tribal membership in Togo (*Matter of Kasinga*, 21 I. & N . Dec. 357 (BIA 1996)); and homosexuals in Cuba (*Matter of Tobosco-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990)).

The Board has indicated that people who share a common past experience (such as former membership in the military) may qualify as a "particular social group," because their experiences are immutable, in the sense that they cannot be changed because they are in the past. *See Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988). However, policy considerations also come into play when considering a social group claim based on past experiences. For instance, the Board has concluded that former "drug traffickers" are not a "particular social group," and the Seventh Circuit has endorsed this as a reasonable construction, since to conclude otherwise would blur distinctions between persecution and ordinary crime. *See Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992). The same kinds of considerations would come into play if an alien claimed membership in a "particular social group" of former gang members, or some other type of shared past experience involving criminal activities.

Several circuits have adopted the immutable/fundamental approach. *Castillo-Arias v. U.S. Attorney General,* 446 F.3d 1190, 1192 (11th Cir. 2006); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Meguenine v. INS*, 139 F.3d 28 (1st Cir. 1998); *Sarafie v. INS*, 25 F.3d 636 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). Recently the Second Circuit used this approach, without analysis, to hold that a woman subject to a family arranged marriage in China was a member of a social group and could qualify for asylum. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006). The government has filed for rehearing en banc challenging this decision. The Fourth Circuit has viewed the immutable/fundamental characteristic approach favorably, but has not yet expressly adopted it. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

Some courts have expressed the view, in dicta, that a nuclear family can constitute a "particular social

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group," because family membership is inherited, and therefore immutable in the sense that it cannot be changed. *See Lopez-Soto*, 383 F.3d at 235, 236-38 and cases cited. The Board has never held in a published decision that a nuclear family constitutes a "particular social group." Recently the Supreme Court reversed the Ninth Circuit for holding that "family" constitutes a "particular social group." *Gonzales v. Thomas*, __ U.S. __, 126 S.Ct. 1613, 1615 (2006) (*per curiam*). If you have a case involving a claim of membership in a social group consisting of an alien's "family," contact OIL. This is a sensitive claim and will need careful consultation with OIL to determine how to defend the decision.

The Third Circuit has held that a "particular social group" cannot circularly be created by the members' underlying persecution.

The Prohibition Against Circularly Defining A Social Group By The Persecution

The Third Circuit has held that a "particular social group" cannot circularly be created by the members' underlying persecution. *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003) (rejecting a circular claim of persecution [guerrilla kidnaping and recruitment of children] on account of membership in alleged social group of children who have been kidnaped and recruited by guerrillas). This reflects international understanding. *See Castillo-Arias*, __ F.3d __, 2006 WL 1027726 *4 (noting United Nations High Commissioner of Refugees' [UNHCR] guidelines defining "particular social group" as "[a] group of persons who share a common characteristic *other than their risk of being persecuted*") (emphasis added). *See also Islam v. Secretary of State for the Home Department*, 2 App. Cas. 629 (H.L. 1999) (United Kingdom) ("It is common ground that there is a general principle that there can only be a 'particular social group' if the group exists independently of the persecution") (Lord Steyn).

The Voluntary Associational Relationship Approach

The Ninth Circuit has held that a "particular social group" requires either (i) immutability or a fundamental trait (the Board's *Acosta* approach), or (ii) a voluntary associational relationship and group actuated by some common impulse or interest. *Hernandez-Montiel*, 225 F.3d at 1093 and n. 6; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). The Second Circuit has endorsed the concept that a social group refers to persons actuated by some common impulse or interest. *Gomez v. INS*, 947 F.2d 660, 664 (1991). The Third, Eighth, and Ninth Circuits have also concluded that "particular social group" requires a discreet collection of individuals, not a broad segment of society. *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (rejecting as too broad alleged social group of business persons in Colombia who had resisted demands by narcotics traffickers to participate in illegal trafficking activities); *Sarafie*, 25 F.3d at 640 (rejecting alleged social group of Iranian women based on female gender as over broad); *Fatin*, 12 F.3d at 1240-41 (same).

The Group Perception/Visibility Approach

The Second Circuit focuses on group perception or social visibility, and has construed "particular social group" to refer to "individuals who possess some fundamental characteristic which serves to distinguish them in the eyes of the persecutor – or in the eyes of the outside world in general." *Gomez*, 947 F.2d at 664. The Board has incorporated this requirement. *Matter of V-T-S-*, supra ("Filipinos of Chinese ancestry" are a "particular social group" because mixed ancestry is immutable and "identifiable"); *Matter of H-*, supra, (the Marehan subclan of Somalia is "particular social group" because members share common immutable ties of kinship and "are identifiable as a group based on linguistic commonalities"). *See also Castillo-Arias*, 2006 WL 1027726 **4-5 (affirming Board's assessment that "particular social group" requires "immutability" and "social visibility"). The United Nations High Commissioner of Refugees has also adopted this group perception/social visibility approach. See UNHCR, "Guidelines on International Protection: 'Membership of a particular social group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Para. 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (defining "particular social group as [a] group of persons . . .who are perceived as a group by society"). UNHCR guidelines are non-binding and leave the determination of these matters to individual states. *See generally INS v. Aguirre-Aguirre*, 526 U.S. 415, 524-25, 227-28 (1999).

Contact OIL If You Have A Social Group Case

As shown above, the law about what constitutes a "particular social group" is varied and developing. The Board and courts of appeals have used several different approaches. An adverse social group decision can have consequences far beyond your case and create a broad new category of people who are eligible to seek asylum. Therefore these cases need to be briefed with care. If you have a social group case, contact OIL (margaret.perry@usdoj.gov) to discuss how best to proceed and whether the decision is defensible or requires remand to the agency for further analysis.

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Summaries of Recent Federal Court Decisions

FIRST CIRCUIT

■ Petitioner Not Eligible For 212(c) Relief Where Plea And Conviction Occurred After April 1, 1997, And His Detention Longer Than 90 Days Was Lawful Due To His Legal Challenges

In *Lawrence v. Gonzales*, __F.3d__, 2006 WL 1195679 (1st Cir. May 5, 2006)(*Boudin*, Stahl, Howard), the court consolidated the review of a denial of a motion to reopen with a transferred habeas petition, and held that petitioner was ineligible for 212(c) relief, and that his detention longer than 90 days was lawful. The petitioner, a Nigerian citizen and an LPR, had been convicted of larceny in 1995 based on the writing of bad checks. In 1998, the INS charged him with being removable as having been convicted of an aggravated felony. Petitioner then successfully reopened his district court proceedings and was resentenced to 338 days of probation - just below the one-year floor established by the 1998 expanded definition of aggravated felony. The INS then amended the charge alleging that petitioner was deportable as an alien who had been convicted of a crime involving moral turpitude.

An IJ found petitioner removable as charged but the hearing was continued to allow him to file an asylum application, which was subsequently filed and withdrawn, and a visa petition filed by his USC spouse. Following the approval of the visa petition by the INS, petitioner applied for adjustment of status and sought a 212(h) waiver of his inadmissibility. In October 2001, the IJ denied the applications and subsequently also denied a motion to reopen. Petitioner's appeal to the BIA was dismissed without opinion in July 2002. His subsequent two motions to reopen were also denied. In April 2003, while petitioner was being detained pending his removal to Nigeria, he petitioned for a writ of habeas corpus and successfully sought a stay of removal. On June 24, 2005, while the petition was still pending, the district court transferred it to the court of appeals under the REAL ID Act. On April 26, 2005, petitioner filed a special motion with the BIA seeking 212(c) relief. When that motion was denied, petitioner then filed a petition for review which the First Circuit consolidated with the transferred habeas petition.

The court held that, under *St. Cyr* and 8 C.F.R. § 1003.44(b)(2), the BIA had properly found as a matter of law that petitioner was ineligible for 212(c) relief because his plea and conviction had occurred in July 1998 and not before April 1, 1997. Consequently, said the court, "he had no basis for assuming (as part of his plea or otherwise) that section 212(c) relief would be potentially available as part of the quid pro quo for the plea." The court rejected the argument that 212(c) relief should be determined based on when the conduct underlying the conviction occurred. "*[E]x post facto* principles do not apply to removal proceedings . . . . Instead, *St. Cyr* and the regulations control, and, for their tests, the date of the criminal conduct is irrelevant," said the court.

"*[E]x post facto* principles do not apply to removal proceedings . . . . Instead, *St. Cyr* and the regulations control, and, for their tests, the date of the criminal conduct is irrelevant."

The court then found that the transferred habeas petition raised issues that had not been previously presented to the BIA, including a claim of ineffective assistance of counsel, and therefore he had failed to exhaust those claims. The fact that petitioner had filed his habeas after the BIA proceedings did "not affect the statutory exhaustion provisions governing petitions for review," said the court. The court also found that petitioner's counsel attempt to incorporate by cross-reference the arguments that he had presented to the district court did not comport with the ordinary rule "that claims made to this court must be presented fully in an appellate brief and not by cross-reference to claims made in the district court."

Finally, the court rejected petitioner's contention that he should have been released because he had been detained longer than 90 days. The court found that petitioner's continued detention "occurred pursuant to his own procuring of stays incident to his legal challenged to the removal order." A remand on this issue would be fruitless, said the court, because the litigation has been resolved and his removal "is presumably imminent."

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■ First Circuit Holds That It Lacked Jurisdiction Under The REAL ID Act To Review The BIA's Determination That Petitioner Had Not Exercised Due Diligence In Filing An Untimely Motion To Reopen

In ***Bokai v. Gonzales***, __F.3d___, 2006 WL 1101616 (1st Cir. April 27, 2006) (Torruella, *Lynch*, Howard), the court held that it lacked jurisdiction to review the BIA's decision not to grant equitable tolling of 90-day deadline for filing of motion to reopen. The petitioner, a Liberia citizen, had been ordered removed because of his conviction of an aggravated felony. His application for CAT protection was denied on February 27, 2002. Petitioner did not seek review of that decision. Instead he filed a pro se habeas action and the district court appointed counsel on October 2002. On April 16, 2003, petitioner's appointed counsel filed an untimely motion to reopen, arguing *inter alia*, ineffective assistance of counsel. The BIA denied the motion, finding that if equitable tolling were available, petitioner would have to show that he acted with

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due diligence. Here, it found no due diligence because the motion was filed more than six months after counsel was appointed and more than a year after petitioner had been served with the BIA's decision.

Preliminarily, the court noted that petitioner's initial brief to the court "ignored the obvious jurisdictional difficulties present in his case [and] simply asserted there was jurisdiction under the REAL ID Act." "Little is to be gained and much to be lost by a 'masquerade ignor[ing] the central question' in a case," warned the court.

The court observed that under pre-REAL ID Act law it would not have had jurisdiction to consider a final order against an alien subject to removal because of a commission of an aggravated felony. However, under the REAL ID Act, the court found that it has limited jurisdiction "over petitions for review from aggravated felons who have been denied CAT relief. Under the new provision, the courts of appeals have jurisdiction if such petitions raise 'constitutional claims or questions of law.'" See RIDA § 106(a)(1)(A)(iii). Here, the court held, assuming the availability of equitable tolling, that the denial of a motion based on the factual determination that petitioner had not exercised due diligence, was "plainly" not a question of law. Therefore, it lacked jurisdiction to consider the denial of the motion. The court also held that it lacked jurisdiction to review the denial of CAT protection because it rested wholly on the ineffective assistance of counsel claim. That claim, however, was never ruled on by the BIA and so petitioner had not exhausted that issue. "Both before and after the REAL ID Act, this court lacks jurisdiction over a claim if the alien has not exhausted all administrative remedies as to that claim," held the court.

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■ **First Circuit Upholds BIA's Finding That Chinese Woman Who Resisted A Forced Marriage Failed To Show Persecution On Account of Membership In A Particular Social Group**

In ***Pan v. Gonzales,*** 445 F.3d 60 (1st Cir. 2006) (Selya, Lynch, *Howard*), the First Circuit affirmed the BIA's decision finding that even assuming that "unmarried young women from rural China . . . who have resisted being forced into marriages and sexual relationships by a person in power" could be a valid social group, petitioner had failed to establish that such women are targets of persecution in China. The petitioner testified, *inter alia*, that "her father and his business associate attempted to sell her and her sister into an arranged marriage (or some other kind of involuntary sexual relationship), and that both she and her sister successfully resisted and escaped." The IJ determined that petitioner's narrative of the factual events was "essentially credible," but denied asylum and withholding finding that petitioner had failed to show that she belonged to a particular social group. On appeal, the BIA agreed finding that "young women from rural China" is too broad to be considered a "particular social group." The BIA further found, even assuming the more narrowly defined category of "unmarried young wom [en] from rural China . . . who have resisted being forced into marriages and sexual relationships by a person in power" could be a valid social group," that petitioner had failed on the evidence to establish that such women are targets of persecution in China.

The court also found that petitioner did not present "evidence establishing that other young unmarried women from rural China who have similarly resisted forced sexual relationships have been persecuted on that basis."

The court agreed with the BIA's analysis and held that held that "even assuming *arguendo* that petitioner's proffered social group is valid for asylum purposes, she has failed to establish that she has a well-founded fear of persecution on account of her membership in that group." In particular, the court noted that petitioner's "only evidence of persecution is that her father and his business associate attempted to sell her and her sister into an arranged marriage (or some other kind of involuntary sexual relationship), and that both she and her sister successfully resisted and escaped. But there is no evidence of persecution following petitioner's escape from the hotel." The court also noted that following the escape petitioner remained in China for two and a half years, and was never persecuted because of her resistance. Additionally, she failed to present any evidence that anyone in China now intends to punish her for her resistance. The court also found that she did not present "evidence establishing that other young unmarried women from rural China who have similarly resisted forced sexual relationships have been persecuted on that basis." Finally, the court found that the State Department country conditions report did not indicate that other "women who have resisted forced sexual relationships are singled out for persecution," or that such women cannot find safety by relocating within China, or that "the government of China condones forced sexual relationships."

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■ **First Circuit Upholds Denial Of Asylum Based On An Adverse Credibility Determination**

In ***Lumaj v. Gonzales***, __F.3d__, 2006 WL 1085547 (1st Cir. April 26, 2006)(Howard, *Coffin*, Campbell), the First Circuit held that substantial evi-

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dence supported the IJ's findings that petitioner, a native and citizen of Albania, was not credible when he testified in support of his asylum claim. The petitioner, who sought to enter the United States with a Slovenian passport bearing someone else's name, sought asylum on account of his affiliation with the Albanian Democratic Party. However, the IJ found inconsistencies in his recollections about significant events and a number of discrepancies including his testimony as to his year of birth, which contradicted his birth certificate, and his testimony about his detention and subsequent release. The court agreed with the adverse credibility determination finding that the primary episodes of his alleged persecution were inconsistent, and "other discrepancies, though minor in isolation, added to a reasonable inference of lack of candor." The court further noted that even if true, petitioner's claims of abuse did not amount to persecution within the meaning of the INA, but represented sporadic episodes of mistreatment, only one of which involved physical harm.

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SECOND CIRCUIT

■ Second Circuit Finds Lack Of Jurisdiction To Review Discretionary Denial of Adjustment And BIA's Decision To Streamline

In ***Guyadin v. Gonzales***, __F.3d__, 2006 WL 1461135 (2d Cir. May 30, 2006), the court held that it lacked jurisdiction to review an IJ's discretionary decision not to grant adjustment of status. The petitioners, three members of a single family and citizens of Guyana entered the U.S. as visitors in 1995 and never departed. The INS was notified to their unlawful presence when in 1999, the police stopped them for speeding while they were returning from a visit to Niagara Falls. Subsequent to the commencement of the removal proceedings, the principal petitioner obtained the approval of a work-based visa petition. He then filed with the IJ an application for adjustment of status. The IJ determined that petitioner was eligible for adjustment but after weighing the positive and negative factors denied the application as a matter of discretion. In particular the IJ found that despite earning more than $100,000, petitioner had not paid his taxes, while his son was attending public schools funded by those residents who paid their taxes. On appeal, the BIA affirmed in an brief order issued under 8 C.F.R. § 1003.1(e)(5), noting petitioner's prolonged tax evasion.

The Second Circuit held that the IJ's decision to deny adjustment as a matter of discretion was "clearly within the category of decisions insulated from judicial review by the REAL ID Act."

The Second Circuit held that the IJ's decision to deny adjustment as a matter of discretion was "clearly within the category of decisions insulated from judicial review by the REAL ID Act." See 8 U.S.C. § 1252(a)(2)(B)(i). The court rejected petitioner's contention that he was raising a reviewable question of law. "An assertion that an IJ or the BIA misread, misunderstood, or misapplied the law in weighing factors relevant to the grant or denial of discretionary relief does not convert what is essentially an argument that the IJ and BIA abused their discretion into a legal question. Such legal alchemy would defeat the intent and the language of the INA," said the court.

The court also held that it lacked jurisdiction to review petitioner's claim that his case should have been referred to a three-member BIA panel pursuant to 8 C.F.R. §1003.1(e)(6). The court followed its recent decision in *Kambolli v. Ashcroft*, __F.3d__, 2006 WL 143116 (2d Cir. May 26, 2006), where it held that it lacked jurisdiction to consider a claim that the BIA had erred in deciding a claim under 8 C.F.R. §1003.1(e)(5). Finally, the court observed that the BIA's streamlining regulations "were enacted in response to a crushing backlog of immigration appeals, the continuing existence of which prevents the speedy resolution of proceedings vitally important to thousands of aliens." "[W]e will not cripple the BIA's procedures by subjecting to appellate review internal case-management decisions far removed from the actual substantive rights of aliens," said the court. "The BIA's members and the dedicated corps of immigration judges under the Board's supervision should be applauded for their continuing diligence, their integrity, and--as is shown in the records of nearly all immigration cases we encounter in this Court--their earnest desire to reach fair and equitable results under an almost overwhelmingly complex legal regime."

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■ Second Circuit Reverses Denial of Asylum Because BIA Did Not Engage In Individualized Analysis Of Changed Country Conditions

In ***Tambadou v. Gonzales***, __F.3d__, 2006 WL 1174057 (2d Cir. May 3, 2006) (Sack, Katzmann, *B.D. Parker*), the Second Circuit reversed the BIA's denial of asylum and withholding of removal based upon changed country conditions. The petitioner, a Muslim native of Mauritania, claimed persecution by the Mauritanian government because of his support for the Liberation Front of Africans in Mauritania (FLAM). The IJ denied asylum and withholding of removal because she concluded that petitioner had found a safe haven in Senegal, where he lived from 1990 to 1996. On appeal, the BIA denied asylum based on different grounds concluding, based on the Department of State 1996 country report, that petitioner

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"no longer [had] an objectively reasonable fear of future persecution" in Mauritania due to "fundamental change in circumstances."

The Second Circuit held that the BIA's changed-circumstances determination, its sole basis for denying relief, was not supported by "reasonable, substantial, and probative evidence in the record considered as a whole" since it relied on an outdated State Department country report on conditions in Mauritania, accepted general statements in the report as fact, and ignored the complexities of reported information. Specifically, the court noted that because the Report catalogued conditions as they existed in Mauritania in 1996, the court found it "difficult to see how the Report could be said to describe 'current' conditions" when the BIA considered the appeal in 2002. The court also faulted the BIA because it did not make an individualized assessment of petitioner's situation, and failed to consider his evidence contradicting conditions described in the Report.

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■ Second Circuit Remands For Determinations On The Likelihood Of Persecution Or Torture Based Upon Political Activity In The United States

In ***Tun v. INS,*** 445 F.3d 554 (2d Cir. 2006) (Oakes, Kearse, *Pooler*), the petitioner, a native and citizen of Burma, claimed that because of his pro-democracy political activities both before leaving Burma and as a member of the Burmese exile community in the United States, the authoritarian government in Burma had persecuted him while he was there and is likely to do so in the future. The IJ denied his claims for asylum, withholding, and CAT protection finding that petitioner was not a credible witness, that he was not an activist while in Burma, and that his activities with the Burma Activity Committee in the United States were contrived to support his asylum claim. The BIA summarily affirmed.

> The Second Circuit held that an applicant may establish eligibility for asylum solely on account of political activities since arriving in the United States.

The court held that substantial evidence did not support the adverse credibility finding but affirmed the IJ's finding that petitioner failed to sustain his burden of proving past persecution because he failed to present reasonably available corroborative evidence, since his parents, who allegedly knew of his persecution and his political activities and were living as permanent residents in the same city where the hearing took place, could have presented their testimony or any corroboration of the persecution and the political activities that allegedly motivated it.

The court found, however, that the IJ erred by failing to consider whether petitioner's political activities in the United States gave rise to a well-founded fear of future persecution. The court agreed with the Ninth Circuit holding in *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986), that an applicant may establish eligibility for asylum solely on account of political activities since arriving in the United States. Here, petitioner testified that he had engaged in pro-democracy dissident activities in the United States with other Burmese exiles and that he attended various demonstrations in front of the Burmese consulate. Additionally, expert testimony and the State Department Country Reports indicated that Burmese authorities would take severe action against returnees who engaged in such pro-democracy actions. The court rejected the IJ's alternative ground that petitioner's political activities in the United States were "self serving," finding that "there is no requirement that the political activities that give rise to the risk of persecution be motivated by actual political beliefs."

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■ Second Circuit Upholds Denial Of A Continuance Pending Adjudication Of A Visa Petition

In ***Morgan v. Gonzales,*** 445 F.3d 549 (2nd Cir. 2006) (*Cabranes*, Sotomayor, Gleeson (E.D.N.Y.)), the Second Circuit held that it had jurisdiction to review the IJ's discretionary denial of a continuance, but found that the IJ did not abuse his discretion by denying a fifth request for a continuance to await the outcome of the adjudication of a second visa petition. The petitioner, a citizen of Jamaica, entered the U.S. as a visitor in 1993, and never departed. He married a USC in 1999, but the visa petition was denied because of a lack of "bona fide marital relationship." Following the commencement of removal proceedings in 2002, petitioner sought to continue the hearing pending the adjudication of a second visa petition filed again by his "wife." The IJ denied a fifth request for continuance and found petitioner removable as an overstay. The BIA affirmed, finding that petitioner had not demonstrated good cause for a continuance.

Preliminarily, the Second Circuit found that it had jurisdiction to review the denial of a continuance under "a highly deferential standard of abuse of discretion." The court explained that IJs "are accorded wide latitude in calendar management" and that the court will not "micromanage their scheduling decisions." In rejecting the petitioner's due process argument, the court admonished that "immigration cases are not games" and the denial of continu-

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ance so that the alien could "develop a new claim" did not deprive him of a "fair opportunity to present whatever viable claims he could bring at the time his case was adjudicated."

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■ **Second Circuit Remands To BIA To Determine In The First Instance Whether Affluent Guatemalans Constitute A Particular Social Group**

In ***Ucelo-Gomez v. Gonzales***, __F.3d__, 2006 WL 1264610 (2nd Cir. May 9, 2006) (Walker, Jacobs, Wallace (sitting by designation)) (*per curiam*), Guatemalan nationals based their asylum claim on their "membership in a social group composed of affluent Guatemalans who suffer persecution fueled by class rivalry in an impoverished society." The IJ found that a group made up of affluent Guatemalans was not a "readily-identifiable social group," since it was "too broad to define a social group for purposes of asylum" and that the characteristics of such group were not immutable and there was insufficient evidence that similarly-situated Guatemalans would be identified by would-be persecutors. The BIA affirmed without opinion.

On appeal, the Second Circuit held, following its ruling *Shi Liang Lin v. DOJ*, 416 F.3d 184 (2d Cir. 2005), and also relying on *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006), that it had to remand the case because the BIA had not decided whether affluent Guatemalans constitute a "particular social group." The court reaffirmed its view that "the BIA's summary affirmance of an IJ's decision does *not* constitute an official agency interpretation and therefore is not accorded *Chevron* deference. Finally, the court directed the BIA to issue a responsive opinion within 49 days because "there is a press of cases raising similar questions . . . and the common project of deciding asylum cases promptly will be advanced by prompt guidance."

> "The BIA's summary affirmance of an IJ's decision does *not* constitute an official agency interpretation and therefore is not accorded *Chevron* deference."

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■ **Second Circuit Finds Jurisdiction To Review Asylum Denial To A Visa Waiver Program Participant**

In ***Kanacevic v. INS,*** __ F.3d__, 2006 WL 1195925 (2d Cir. May 5, 2006) (Jacobs, Wesley, *Gibson*), the court affirmed the denial of asylum and withholding of removal to a national of Montenegro. The petitioner entered the United States with a fraudulent Slovenian passport and was processed as a participant in the Visa Waiver Program (VWP), which permits aliens from certain countries, including Slovenia, to visit the United States for 90 days or less without a visa. Apparently she told the immigration officials who questioned her at LA International Airport that she was coming to the U.S. to marry a Yugoslavian citizen who had a green card. Two years after her arrival, petitioner applied for asylum. The IJ did not find her credible and also found that, even if her story was true, she was not eligible for asylum. The BIA summarily affirmed.

Preliminarily the court held that the denial of an asylum application filed by an alien who had entered the United States under the VWP was a reviewable order notwithstanding the fact that participants in the VWP forfeit any right to challenge their removal order, except that they may apply for asylum. 8 U.S.C. § 1187(b). The court held that although the denial of asylum in a VWP case does not occur in the context of removal proceedings, "the denial of the asylum application was the functional equivalent of a removal order under the provisions of the VWP program" and, therefore, the court had jurisdiction. On the merits, the court held that the IJ's negative credibility findings were supported by substantial evidence.

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■ **Second Circuit Concludes That Records Of Airport And Asylum Interviews Were Sufficiently Reliable To Sustain An Adverse Credibility Determination**

In ***Diallo v. Gonzales,*** 445 F.3d 624 (2d Cir. 2006) (Kearse, *Sack*, Stanceu (USCIT)), the Second Circuit held that substantial evidence supported the determination of the IJ that petitioner's testimony in support of her asylum application was not credible, and that the record of petitioner's asylum interview was sufficiently reliable to be considered by the IJ in making the credibility determination.

The petitioner, a citizen of the Republic of Guinea, entered the United States on August 25, 2001, as a visitor and five months later applied for asylum. The asylum officer who interviewed petitioner wrote a summary of that interview which was eventually submitted to the immigration court where petitioner was referred for removal proceedings. Petitioner's asylum application did not mention an arrest and five-month detention in Guinea to which she testified. She also stated in her asylum interview that she had been raped, but later indicated that she had had never been raped. When the IJ questioned her at the hearing about the inconsistencies, the IJ found her explanation to be evasive, hesitant, and bordering on incoherent. Accordingly, the IJ made an adverse credibility finding and denied

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asylum on that basis. The BIA affirmed the credibility finding in a one-paragraph *per curiam* opinion.

The Second Circuit upheld the adverse credibility finding stating that it did not "think that 'any reasonable adjudicator would be compelled' to reject the IJ's stated reasons for discrediting [petitioner's] explanations." The court noted that "when an IJ considers an asylum applicant's explanation for apparent inconsistencies or contradiction in the record, the IJ is 'not required to credit [them] even if they appear plausible on a cold record.'"

"When an IJ considers an asylum applicant's explanation for apparent inconsistencies or contradiction in the record, the IJ is 'not required to credit [them] even if they appear plausible on a cold record.'"

The court also held that the record of the alien's asylum interview was sufficiently reliable to be considered by the IJ in determining that, due to inconsistencies between the alien's asylum application, the asylum interview, and the hearing testimony, the alien's testimony in support of her asylum application was not credible. The court rejected petitioner's contention that the normal asylum interviews should be subject for special scrutiny similar to airport interviews, where courts have expressed concerns about using those interviews in making adverse credibility determinations.

Similarly, the court found that the interview record in petitioner's case met the minimum standard of *Matter of S-S-*, 21 I&N Dec. 121 (BIA 1995), where the BIA provided guidance for analyzing the reliability of asylum interviews reports. Here, the record of the interview summarized petitioner's responses without describing the specific questions asked or recording the interview verbatim, and only the typewritten summary of the interview clearly described petitioner's statements regarding the events that she alleged constituted past persecution and grounds for fear of future persecution.

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■ **The Second Circuit Remands Case To The BIA To Determine Whether Petitioner's Status As A Boyfriend And Father Qualifies Him As A Refugee**

In ***Gui Ci Pan v. U.S. Attorney General***, __F.3d__, 2006 WL 1406360 (2d Cir. May 23, 2006) (Winter, Cabranes, Raggi) (*per curiam*), the petitioner, a native and citizen of the People's Republic of China, sought asylum claiming that he had been persecuted for violating the Chinese family planning policy and that he faced a well-founded fear of future persecution if returned to China. The IJ concluded that because petitioner had failed to "credibly establish" that he and his girlfriend had undergone either a traditional wedding ceremony or a legal marriage in China, petitioner had "no legal status to argue that there would be any consequences to him" under the Chinese family planning policy. The IJ also held that petitioner had not been subject to past persecution.

The court held that, although there was some ambiguity regarding petitioner's marriage, the IJ's factual findings regarding petitioner's marital status were supported by substantial evidence. In particular, the court noted that "Congress has specified that an IJ's 'administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,' 8 U.S.C. § 1252(b)(4)(B) (emphases added)." Here, the court found that it could not say that "'any reasonable adjudicator' would be 'compelled' to reach a contrary conclusion - - namely that [petitioner] did in fact marry his girlfriend."

The court also found, however, that the IJ evaluated petitioner's credibility only insofar as he found that petitioner was not married, and thus did not decide whether the testimony regarding the asylum claim was in fact credible. Accordingly, the court remanded the case for the IJ to make a "definitive general credibility finding" regarding petitioner's testimony. The court noted, however, that the unfulfilled threats against petitioner and his girlfriend did not appear to rise to the level of past persecution. As to the future persecution, the court stated that it was required under *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005), to remand the case so that the BIA may determine in the first instance whether petitioner's status as a boyfriend and father would allow him, under the circumstances presented, to qualify as a refugee under 8 U.S.C. § 1101(a)(42).

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■ **Second Circuit Holds That Government Must Establish Firm Resettlement Before Shifting Burden Of Proof To Asylum Applicant**

In ***Wangchuck v. DHS***, __ F.3d__, 2006 WL 12314685 (2d Cir. May 15, 2006) (Kearse, *Sack*, Stanceu), the petitioner challenged the BIA's conclusion that because he had been firmly resettled in India he was ineligible for asylum in the United States. Petitioner also challenged his removal to China.

The petitioner, a Buddhist monk, was born in 1972 in the state of Himachal Pradesh, in northern India. His parents are natives of Tibet who fled to India in 1959 after China suppressed an uprising against its assertion of sovereignty over Tibet. The Indian government considered peti-

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tioner and his parents to be refugees. As a refugee, petitioner received a "Registration Certificate" from that government, which served as a residential permit and identity document. In 1997 petitioner entered the United States as a visitor. However, when he sought to return to India in 1998, he was apparently denied a visa by the Indian Consulate because his permit to travel abroad dad expired. Petitioner then applied for asylum and withholding claiming that as a result of his participation in pretests to commemorate the failed Tibetan uprising against Chinese rule, he had been detained and beaten by the Indian police. The IJ determined that petitioner had firmly resettled in India and that he had failed to show fear of future persecution in India or China. The IJ ordered him removed to India or, if India refused to accept him, to China. The BIA affirmed in a *per curiam* opinion.

The court found three errors with the decisions below. First, it held that the IJ and BIA erred because they had failed to determine the threshold question of petitioner's nationality, consistent with its holding in *Dhoumo v. BIA*, 416 F.3d 172 (2d Cir. 2005) (a "petitioner's nationality, or lack of nationality, is a threshold question in determining his eligibility for asylum"). Second, the court held that the IJ and BIA had employed erroneous legal standards when they found that petitioner had not shown that he "would be persecuted," that it was "more likely than not" that he would be persecuted, or that his removal to China would "necessarily result" in persecution. The court noted that "more likely than not" standard applies to withholding of removal rather than to asylum. Third, the court held that the BIA erred because it did not explain its basis for concluding that petitioner may be deported to China pursuant to 8 U.S.C. § 1231(b)(2), because it was "not clear, on this record, that he may be." The court noted that petitioner had not chosen to be removed to China, so he may not be removed there under subparagraphs (A), (B), or (C). Moreover, it was unclear whether petitioner is a Chinese "subject, national, or citizen," so the court could not tell whether he may be removed to China under subparagraph (D). 8 U.S.C. § 1231(b)(2)(D). In light of these errors the court vacated the decision and remanded to the BIA.

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Second Circuit Upholds Adverse Credibility Determination Despite Errors

In ***Lin v. Gonzales,*** __F.3d__, 2006 WL 1130909 (*Jacobs,* Leval, Rakoff (S.D.N.Y.)) (2d Cir. April 27, 2006), the Second Circuit upheld the IJ's denial of asylum based on an adverse credibility determination. The petitioner claimed that he fled China because he feared persecution, since his wife, who remains in China, had violated the population control policies, and he would be subject to forced sterilization by authorities.

> "Fact-finding is--for better or worse--an accretive, assimilative, layered, instinctive process that is based on signs that are both objective (such as factual discrepancies) and subjective (such as demeanor) . . . The immigration context is no different."

The court found that while the IJ erroneously characterized certain portion of petitioner's testimony, "the demeanor evidence and the discrepancies on which the IJ appropriately relied—when considered together—provide[d] substantial evidence for the adverse credibility finding." In so concluding, the court explained that "[f]act-finding is--for better or worse--an accretive, assimilative, layered, instinctive process that is based on signs that are both objective (such as factual discrepancies) and subjective (such as demeanor). . . . The immigration context is no different." The court was also "confident that the IJ would adhere to his decision, even absent his problematic findings."

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THIRD CIRCUIT

■ Third Circuit Finds That IJ's Conduct Denied A Full And Fair Hearing To Asylum Applicant

In ***Cham v. Gonzales***, 445 F.3d 683 (3d Cir. 2006) (*Barry*, Ambro, and Debevois (D.C.N.J.)), the Third Circuit vacated and remanded a denial of asylum holding that the IJ's conduct, denied petitioner a full and fair hearing in support of his asylum claim. In particular, the court found that the IJ presumed that petitioner's asylum application lacked merit before it had been presented and that the IJ's questioning was so belligerent that petitioner "was ground to bits." The court also found that the IJ "denied petitioner an opportunity to present evidence on his own behalf," when he did not consider evidence of persecution of petitioner's family members who had been unable to testify because of a work conflict.

The petitioner, a citizen of Gambia, entered the United States, allegedly on February 2, 2001, using the Gambian passport of his cousin. He then filed an application for asylum with the former INS. When that application was not granted he was referred for a removal hearing where he renewed his asylum claim. Petitioner claimed that his uncle, Dawda K. Jawara, was president of Gambia until he was ousted by a military coup in 1994. Petitioner and his family are members of the People's Progressive Party, a political group banned by

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Gambia's new regime. At the time of the coup, petitioner was 15 years old. Following the coup, petitioner lived in Senegal until 2001, when he left for the United States because he was told that people connected with those in power in Gambia were looking for him. Petitioner also submitted affidavits confirming his relationship to Jawara and also documented the fact that seven members of the Jawara family had been granted asylum in the United States. The IJ denied asylum finding that petitioner had failed to demonstrated that his application had been filed within one year of entry, that testimony was "totally incredible" and, that he therefore had fabricated his entire case. Assuming that petitioner's testimony was credible, the IJ found that he had not presented any evidence of persecution and had failed to establish fear of future persecution. Finally, the IJ found, that even assuming persecution, petitioner could return to Senegal where he had lived for years without any problems. On appeal, the BIA affirmed the denial of petitioner's substantive claims, but reversed the finding that petitioner had filed a frivolous application.

The court held that although petitioner had "no constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application." "A full and fair hearing would have provided [petitioner] with a 'neutral and impartial arbiter' on the merits of his claim and a 'reasonable opportunity to present evidence on his behalf," said the court. Here the court was severely critical of the IJ's conduct, indicating that his conduct "has been condemned in prior opinions of this court." Indeed, at the court's request, the Deputy Assistant Attorney General appeared at oral argument to explain what if any "procedures as followed when repeated conduct of this nature is seen." The court noted the coincidence that on the day that oral argument was heard, the Attorney General announced a "comprehensive review of the immigration courts." The court did not accept the government's argument that, putting aside the IJ's conduct, petitioner did not merit relief. "The standard for a due process violation, however, is not to high" said the court. The standard requires that "the violation of procedural protection . . . had the *potential* for affecting the outcome of the deportation proceedings." Here the court found that had petitioner "not been brow beaten, and had corroboration by his relatives been actually heard and considered, it is possible that material details surrounding his experience would have come to light, justifying relief from deportation." Therefore, concluded the court, petitioner "must be given a second, and a real, chance to 'create a record' in a deportation hearing that comports with the requirements of due process."

Although petitioner had "no constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application."

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■ **Third Circuit Reverses Adverse Credibility Finding In Asylum Case**

In ***Shah v. Gonzales***, 446 F.3d 429 (3d Cir. 2006) (*Barry*, Ambro, and Debevois (D.C.N.J.)), the court reversed a denial of asylum based on an adverse credibility finding because the IJ's conclusion was "not based on a specific cogent reason, but instead, is based on speculation, conjecture, or an otherwise unsupported personal opinion."

The petitioner, a citizen of Pakistan, rested her asylum claim principally on the fact that her father who was a well-known and respected leader of the local chapter of the Muttahida Quaumi Movement (MQM) had been killed by members of the Special Service Intelligence while visiting his doctor. Petitioner herself, was a member of the MQM Ladies Wing and was also of the Shia sect. Petitioner became more politically active following her father's death. As a result, she began receiving death threats both at home and at her work place. On one occasion, unidentified men burst in her home, beat her, and told her to stop working with the MQM. Petitioner submitted documentary evidence in support of her claim but the IJ excluded a number of documents because they had not been certified under 8 C.F.R. §287.6(b)(1)-(2). The IJ found petitioner's testimony and that of her husband totally incredible and found their asylum application "frivolous." The BIA reversed the "frivolous finding" but dismissed the appeal.

The court found that the bulk of the IJ's inconsistencies "were picayune in nature and that his decision was, at bottom primarily based on one factual finding – his erroneous conclusion that [petitioner's] father was in fact alive at the time of the hearing." This conclusion was based on a misstatement, later retracted, by petitioner's husband that her "parents were presently in Pakistan. The court found that this did not constitute substantial evidence to establish that petitioner's father was alive.

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■ **Claim For Relief Based On Changed Conditions Was Not Time-Barred Because The Changes Occurred After IJ's Hearing**

In ***Filja v. Gonzales***, __F.3d__, 2006 WL 1302204 (3d Cir. May 12,

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2006)(Barry, Ambro, *Debevoise* (D.C.N.J.)), the court held that the BIA erred as matter of law when it held that petitioner's motion to reopen and remand was time-barred. Petitioner's asylum claim was based on his and his family's opposition to the ruling Communist Party. In 1991 the Democratic Party took control of the Albanian government. The IJ denied asylum in January 1997, based on adverse credibility finding. On March 19, 2002, the BIA reversed the IJ's adverse credibility finding, but nevertheless, denied asylum. Long before the BIA's decision but shortly after the IJ's, in June 1997, the Socialist Party returned to power in Albania. On October 7, 2003, petitioner and his family sought reopening of their asylum case on the basis of changed country conditions in Albania, ineffective assistance of counsel, and eligibility for CAT protection which had not been available at the time of the IJ hearing. The BIA denied the motion because it had not been filed within 90 days of the BIA's March 2002 opinion. The BIA rejected petitioner's argument that he came within the exception to the 90-day rule because there had been changes in conditions in Albania, stating, "we note that the asserted changes, including the election of Socialist Party members to the government, occurred prior to our decision in March 2002, and as such, this evidence even if deemed material was available and could have been discovered or presented at that time. See 8 C.F.R. § 1003.2(c)(3)(ii)." The BIA rejected the ineffective assistance counsel claim finding that even if counsel's performance was inadequate, no prejudice had been shown. Finally, the BIA denied CAT protection.

The court held that petitioner's motion to reopen was timely under the exception found at 8 U.S.C. § 1229a(c)(7)(C)(ii). This statute provides an exception to the limitation period for motions to reopen asylum proceedings based on changed country circumstances arising after the decision, "if such evidence could not have been discovered or presented at the previous proceeding." The court determined that although the language in the statute was ambiguous, "previous proceeding" can only refer to the hearing before the IJ. Moreover, when 8 C.F.R. § 1003.2(c)(3)(ii) is construed in conjunction with other § 1003 regulations, said the court, "the words previous hearing' can only refer to the proceedings before the IJ and not to the proceedings before the BIA." In addressing the ineffective assistance of counsel claim, the court noted that the BIA was required to consider the issues raised, and announce its decision "in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." Here, the court found that the BIA had provided an "inadequate explanation" for rejecting the ineffective assistance of counsel claim. Similarly, the court found that the BIA's discussion of the reasons for denying CAT protection was "insufficient, as is the faulty rationale that followed it."

The BIA was required to consider the issues raised, and announce its decision "in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted."

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■ **Third Circuit Admonishes BIA And Reverses Asylum Denial**

In ***Chavarria v. Gonzales***, __F.3d__, 2006 WL 1156150 (3rd Cir. May 3, 2006) (Smith, *Nygaard*, Fisher), the Third Circuit reversed the denial of asylum and withholding of removal, holding that not only were the BIA's factual findings not supported by substantial evidence, but also that the BIA "mischaracterized and understated the evidence" supporting petitioner's asylum claim. The petitioner, a Guatemalan citizen, claimed persecution on account of political opinion because on one occasion in 1992, he had witnessed two women being attacked by what he believed to be paramilitary forces. When he saw the men pulling the women's clothing he retrieved some towels from his car and helped them cover themselves. The women belonged to a group known as the National Coordination of Widows of Guatemala (CONAVIGUA). A few days later after this incident, petitioner saw a car circling his house and he recognized its occupants as the same men who had attacked the women. An article confirming the attack on the women also appeared in the newspaper, and it stated that an unidentified person had come to their aid. Fearing retaliation, petitioner came to the United States. However, unable to find a job, he returned to Guatemala. One night, while driving, he was stopped by armed men who robbed him and threatened him with his life if they ever saw him again. Petitioner again returned to the United States and pursued his asylum claim. The IJ denied asylum finding that petitioner's good Samaritan act was not an expression of political opinion. The BIA eventually affirmed finding that petitioner had not been subject to persecution on account of imputed political opinion and rejected the claim of future persecution.

The court determined that the nature and degree of the "imminent and concrete" threats petitioner faced when he returned to Guatemala, were on account of an imputed political opinion that petitioner was supportive of the CONAVIGUA movement. The court found that substantial evidence did not support the BIA's conclusion that the attackers threatened petitioner with death because they had just robbed him. "Lending more sup-

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port to our conclusion, the method of attack mimicked the attack perpetrated upon the CONAVIGUA members. There, the attackers tried to make their attack look like a robbery, taking the money of the women and threatening to kill them," said the court.

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■ **Third Circuit Determines That General Allegations Of Prison Conditions In Haiti Do Not Establish Probability Of Torture For Removed Criminal Aliens**

In ***François v. Gonzales***, __ F.3d__, 2006 WL 1360072 (3d Cir. May 19, 2006) (*McKee*, Smith, Van Antwerpen), a converted habeas appeal, the Third Circuit held that petitioner was not eligible for CAT protection rejecting his contention that as a criminal deportee he would be indefinitely held in a Haitian prison where he would be forced to endure appalling conditions that are tantamount to "torture." While concluding that the conditions in Haitian prisons are "inhumane and deplorable," the court held that those conditions do not constitute "torture" as previously found by the court in the controlling precedent of *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005). The court agreed with the district court's reasoning that "there must be some sort of underlying intentional direction of pain and suffering against a particular petitioner, more so than simply complaining of the general state of affairs that constitute conditions of confinement in a place, even as unpleasant as Haiti."

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> **"There must be some sort of underlying intentional direction of pain and suffering against a particular petitioner, more so than simply complaining of the general state of affairs that constitute conditions of confinement in a place, even as unpleasant as Haiti."**

FIFTH CIRCUIT

■ **Fifth Circuit Holds West Bank Palestinian Asylum Seekers Were Victims Of Circumstance**

In ***Majd v. Gonzales***, __F.3d__, 2006 WL 990740 (5th Cir. April 17, 2006)(King, Smith, Benavides), the Fifth Circuit granted the petition for panel rehearing, ordered its previous published opinion of March 8, 2006 withdrawn, and substituted a new opinion. The petitioner, a native of Libya holding a Palestinian passport entered the United States as a visitor with his wife and son. When he failed to depart he was charged as an overstay and placed in removal proceedings. Petitioner applied for asylum, withholding, and CAT claiming that as a Palestinian living on the West Bank, he had been persecuted by Israeli forces. The IJ denied the applications finding that petitioner's mistreatment had not been on account of a protected ground and that the harm inflicted did not rise to the level of torture. The BIA affirmed without opinion.

The court held that the record supported the IJ's determination that the discrimination and harassment suffered by the petitioner did not rise to the level of persecution on account of one of the five statutory grounds. Rather, petitioner and "his family have been the victims of circumstances, not the special targets of brutality." The court also found that most of the suffering had been inflicted without any specific intent on the part of the Israeli forces and that on the two occasions when the harm was inflicted intentionally it did not amount to torture.

The court also rejected petitioner's claim that he qualified as a refugee pursuant to the 1951 Convention Relating to the Status of Refugees, adopting the holding of *Al-Fara v. Gonzales*, 404 F.3d 733 (3d Cir. 2005), that an alien cannot assert rights beyond those contained in the INA and its amendments.

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■ **Fifth Circuit Holds That Attorney General Has Discretion To Deem Arriving Aliens In Removal Proceedings Ineligible For Adjustment Of Status**

In ***Momin v. Gonzales***, __F.3d__, 2006 WL 1075235 (5th Cir. April 24, 2006) (Reavley, *Clement*, Prado), the Fifth Circuit upheld 8 C.F.R. § 245.1, the regulation that deems arriving aliens in removal proceedings ineligible for adjustment of status. The court joined the Eighth Circuit in upholding the regulation. The First, Third, Ninth, and Eleventh Circuits have found the regulation invalid.

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Ed. Note: On May 12, 2006, the Attorney General and the Secretary of Homeland Security published a Joint Interim Rule, entitled "Eligibility of Arriving Aliens in Removal Proceedings To Apply For Adjustment Of Status and Jurisdiction To Adjudicate Applications For Adjustment of Status," 71 Fed. Reg. 27585 (May 12, 2006) (to be codified at 8 C.F.R. parts 1, 245, 1001, and 1245). The Rule became effective on May 12, 2006, with a public comment period expiring on June 12, 2006. The Rule repeals 8 C.F.R. § 245.1(c)(8) and 8 C.F.R. 1245.1(c)(8). Thus, the effect of the repeal is to allow the designated administrative decisionmaker to "exercise discretion to grant applications for adjustment of status . . . by aliens who have been paroled into the United States and who have been placed in removal proceedings." 71

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Fed. Reg. at 27588.

■ **Denial Of A Continuance To Await The Adjudication Of A Pending Labor Certificate Is Not An Abuse Of Discretion**

In ***Ahmed v. Gonzales***, __F.3d__, 2006 WL 1064196 (5th Cir. April 24, 2006) (Jones, *King*, Dennis), the Fifth Circuit determined that it had jurisdiction to review the discretionary denial of a continuance, finding that 8 U.S.C. 1252(a)(2)(B)(ii) bars the courts from reviewing discretionary decisions specified only under that particular subchapter. On the merits, the court held that the slim prospect of relief from removal based on the mere possibility that the petitioner might, at some later date, be granted a labor certification that would, in turn, only enable an employment-based visa petition is too speculative to establish the requisite "good cause" for the granting of a continuance. The court also rejected petitioner's contention that his constitutional rights had been violated because the removal charges against him were the direct result of his registration under NSEERS. "This circuit has repeatedly held that discretionary relief from removal, including an application for an adjustment of status, is not a liberty or property right that requires due process protection," said the court.

"This circuit has repeatedly held that discretionary relief from removal, including an application for an adjustment of status, is not a liberty or property right that requires due process protection."

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■ **Fifth Circuit Concludes That Naturalized Parent Must Have Had Sole Legal Custody To Confer Derivative Citizenship On Her Child**

In ***Bustamante-Berrera v. Gonzales***, __F.3d__, 2006 WL 1030325 (5th Cir. April 20, 2006) (Jones, *Wiener*, Prado), the Fifth Circuit upheld the BIA determination that the requirement for derivative citizenship, that "the parent having legal custody of the child" be a naturalized citizen of the United States, is satisfied only when one of two living and legally separated parents is a naturalized U.S. citizen and that parent was vested with the sole legal custody over the child in question. The court also rejected petitioner's efforts to procure such a custody award through a *nunc pro tunc* order granted when petitioner was a twenty-three year-old man.

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■ **Fifth Circuit Holds That A Motion To Reconsider Constitutes A Collateral Jurisdictional Attack On A BIA's Previous Decision To Grant A Motion To Reopen And Terminate Proceedings**

In ***Guevara v. Gonzales***, __F.3d__, 2006 WL 1362791 (5th Cir. May 19, 2006) (King, Smith, Benavides), the Fifth Circuit addressed the issue of first impression of whether a motion to reconsider constituted a collateral jurisdictional attack on a BIA previous decision barred by *res judicata*. Subsequent to the BIA's initial decision affirming the IJ's order of removal, petitioner successfully moved to reopen, and the BIA terminated the removal proceedings. Approximately two and a half years later, the respondent, DHS, successfully moved the BIA to reconsider. In DHS's motion to reconsider before the BIA, it argued that the BIA did not have jurisdiction to grant petitioner's motion to reopen because he had been deported.

The principal issue before the court was whether DHS's motion to reconsider is part of a direct review of the order or a collateral attack. The court concluded that the BIA abused its discretion in granting the motion to reconsider because *res judicata* barred the collateral jurisdictional attack on the previous BIA's decision.

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SIXTH CIRCUIT

■ **Sixth Circuit Reverses Adverse Credibility Finding In Chinese Forced Sterilization Case**

In ***Chen v. Gonzales***, __F.3d__, 2006 WL 1235909 (6th Cir. May 10, 2006) (*Daughtrey*, McKeague, McCalla), the Sixth Circuit held that substantial evidence did not support the adverse credibility determination made by the IJ in denying the asylum applications of a Chinese couple who claimed that the wife was forced to undergo a sterilization procedure following the birth of their second child. The IJ had based his determination on the wife's failure to obtain verification from a United States physician of her sterilization, minor inconsistencies in the applicants' stories, the use of "notarial certificates" that had been fabricated in the past by other applicants, and on similarities with frequently fabricated elements in other asylum claims.

The court considered each of the bases for the credibility finding and concluded that none were supported by substantial evidence. The court also held that the determination that the asylum application was frivolous was not supported by evidence in record, where there was no basis for finding that the documents offered in support of the asylum claim or testimony was fabricated or implausible and inconsistent.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Failure To Criminalize Female Genital Mutilation Equals Government Acquiescence For CAT Analysis**

In ***Tunis v. Gonzales***, __F.3d__, 2006 WL 1312516 (7th Cir. May 15, 2006)(*Posner*, Easterbrook, Williams), the Seventh Circuit upheld the BIA denial of asylum and withholding of removal, characterizing the alien's drug trafficking conviction as a "particularly serious crime," but reversed the denial of CAT protection. The petitioner claimed that when she was 10 years old she was subjected to incomplete female genital mutilation and that she would be subjected to that treatment again if returned to Sierra Leone.

> "Female circumcision is legal in Sierra Leone, obviously well known to the government, and, considering the strong international condemnation of the practice, condoned and thus acquiesced in by the government, therefore entitling" petitioner to CAT protection."

The court held that even though female genital mutilation is performed by secret societies, "female circumcision is legal in Sierra Leone, obviously well known to the government, and, considering the strong international condemnation of the practice, condoned and thus acquiesced in by the government, therefore entitling [petitioner] to the Convention's protection." The court remanded the case for the BIA to investigate possible relocation and whether secret societies would force a mature female to undergo remedial female genital mutilation.

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■ **Seventh Circuit Concludes That *Sua Sponte* Denial Of Motion To Reopen Raises No Due Process Issue**

In ***Cevilla v. Gonzales***, __F.3d__, 2006 WL 1133148 (7th Cir. May 1, 2006) (*Posner*, Rovner, Sykes), the Seventh Circuit affirmed the BIA decision not too reopen *sua sponte* petitioner's case. The petitioner, a citizen of Mexico, sought cancellation of removal. That relief was originally denied for failure to meet the 10-year continuous residence and extreme hardship. Subsequently, petitioner sought reopening submitting new evidence of hardship. The BIA denied the motion as untimely and noted that it might have granted *sua sponte* reopening but for the failure to meet the 10-year requirement. The court concluded that although the REAL ID Act granted jurisdiction to review the denial of *sua sponte* reopening for questions of law and constitutional questions, no due process right attached to the failure to grant discretionary relief and that the "analysis that generated the finding, the procedure and evidence on which that analysis rested, and the finding itself are not so unreasonable as to constitute a denial of due process."

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■ **Delay In Adjudicating Application For Adjustment Of Status Does Not Estop Denial Of The Application**

In ***Castillo v. Ridge***, __ F.3d. __, 2006 WL 1042369 (8th Cir. April 21, 2006) (*Wollman*, Lay, Arnold), the court affirmed the district court's grant of summary judgment, which had dismissed the alien's action for a writ of mandamus to compel USCIS to favorably adjudicate his application for adjustment of status. The court held that however troubling the emails implying that the agency intentionally delayed adjudication until the alien's divorce proceedings had been completed, they did not constitute the basis for a ruling that the alien was clearly and indisputably entitled to a favorable adjudication of his request for a waiver of inadmissibility.

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EIGHTH CIRCUIT

■ **Eighth Circuit Finds Liberian Citizen Had Been Subject To Past Persecution During The Taylor Government**

In ***Bah v. Gonzales***, __F.3d__, 2006 WL 1312324 (8th Cir. May 15, 2006) (Loken, *Melloy*, McMillian), the court reversed the BIA's finding that petitioner, a citizen of Liberia, had failed to demonstrate past persecution. The court held that there was sufficient evidence in the record to compel a finding of past persecution. In particular, the court found that petitioner witnessed his father's murder at the hands of Taylor's forces, and that the murder was motivated by two prohibited reasons: membership in a tribal group and imputed political opinion. Petitioner was forced to live for six years as a refugee in Sierra Leone and he and his family had been threatened by Taylor's forces with death after he returned to Liberia. Petitioner's house had been burned in an apparent retribution for his campaign against the reelection of Taylor. Petitioner had also been imprisoned twice based on the belief that he was smuggling rebels into the country. Accordingly, the court determined that there existed a presumption of a well-founded fear of future persecution, and remanded the case with the burden on the government to establish changed conditions.

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■ **Eighth Circuit Holds That District Court Lacked Jurisdiction To Consider Habeas Challenge**

In ***Ochoa-Carrillo v. Gonzales***, __

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F.3d__, 2006 WL 1132359 (8th Cir. May 1, 2006) (*Loken*, Gruender, Benton), the Eighth Circuit dismissed a habeas petition converted into a petition for review. The court previously had denied petitioner's prior petition for review of her reinstated expedited removal order. The court held that the limited habeas review of expedited removal orders may not occur in connection with review of expedited reinstatement proceedings, as the statute provides that the prior order of removal is not subject to being reopened or reviewed in appeals of reinstatement orders.

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■ **Eighth Circuit Affirms Asylum Denial To Applicant From Sierra Leone Based On Adverse Credibility Findings**

In *Fofanah v. Gonzales*, __F.3d__, 2006 WL 1277121(*Loken*, Melloy, McMillian) (8th Cir. May 11, 2006), the Eighth Circuit held that the determination by the BIA that alien, who was native and citizen of Sierra Leone, was not credible was supported by specific, cogent reasons, and thus was fatal to his claims for asylum, withholding of removal, and CAT protection. The court agreed with the IJ's finding that petitioner's testimony regarding his father's death, his flight from Sierra Leone to United States, and whether his family was safely living in Sierra Leone, all critical to his claims of past persecution and fear of future persecution, was inconsistent and inadequate. The court also stated that the IJ's "credibility findings are entitled to much weight because the IJ sees the witness testify and is therefore in the best position to determine his or her credibility."

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NINTH CIRCUIT

■ **Ninth Circuit Holds That The BIA Need Not Exceed The Scope Of The Mandate After Remand by the Ninth Circuit**

In *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168 (9th Cir. 2006) (*Wallace*, Hawkins, Thomas), the Ninth Circuit ruled that the BIA was not required to go beyond the mandate of the court's prior remand. The court had previously upheld the BIA's decision that mere threats against the petitioner did not constitute persecution, but remanded for consideration of the question of whether the alien had a well-founded fear of persecution. The petitioner, a Mexican citizen, and a member of the National Action Party (PAN), claimed that he had been persecuted by the Institutional Revolutionary Party (PRI) which was in power at the time he submitted his asylum application. On remand, the BIA found that petitioner did not have a well-founded fear of persecution, and declined to address petitioner's new argument that the Notice to Appear was defective. The court upheld the BIA's conclusion that petitioner did not have a well-founded fear in Mexico where the government had changed following the 2000 election when the PAN candidate Vicente Fox became president. The court also held, deciding a question of first impression, that the BIA was "bound the scope of [the court's] remand to resolve the only remaining issue," and therefore it properly refused to address petitioner's new contention that the NTA was defective.

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■ **Alien's Conviction For Being Under The Influence Of A Controlled Substance Did Not Fall Within The Scope Of The Federal First Offender Act**

In *Aguiluz-Arellano v. Gonzales*, __F.3d__, 2006 WL 1133327 (9th Cir. May 1, 2006) (Thompson, Nelson, *Gould*), the court also found that it had jurisdiction under the REAL ID Act to consider whether petitioner's conviction for being under the influence of a controlled substance was not a conviction for purposes of 8 U.S.C. 1227 (a)(2)(B)(i) because it could have been subject to the Federal First Offender Act if it had been prosecuted in federal court. On the merits, the court held that even if an alien's conviction may be dismissed under state law following participation in a substance abuse treatment program, if it is a second conviction for a drug-related offense then the FFOA will provide no relief and it cannot be set forth as a safety net to avoid removal. Here, the court found that petitioner's conviction was his second conviction for a drug offense, and therefore the FFOA could not have applied if he had been prosecuted in federal court.

Even if an alien's conviction may be dismissed under state law following participation in a substance abuse treatment program, if it is a second conviction for a drug-related offense then the FFOA will provide no relief.

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■ **The BIA Erred When It Found Alien Ineligible For A Waiver of Inadmissibility Under INA § 212(h) On the Basis That She Was Not Lawfully Continuously Residing In The United States**

In *Yepez-Razo v. Gonzales*, 445 F.3d 1216 (9th Cir. 2006) (Hug, *Pregerson*, Clifton), the court held that petitioner had been lawfully residing in the United States since the date of

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her application for Family Unity program benefits under INA § 212(h), and therefore the BIA erred in finding her ineligible for a waiver of inadmissibility based on a five-month gap in her immigration status resulting from the government's mishandling of her case.

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TENTH CIRCUIT

■ Termination Of Asylum Status Upheld Where Applicant Had Not Answered Question In Asylum Application

In ***Diallo v. Gonzales***, __F.3d__, 2006 WL 1305225 (10th Cir. May 12, 2006) (Tymkovich, *McKay*, Baldock), the court upheld the termination of asylum status and the denial of a second asylum application. The petitioner, a citizen of Mauritania, arrived in Miami sometime in 1992 and immediately went to New York City. In New York, he purchased a counterfeit employment authorization document ("EAD"), which bore his picture but not his true name. The name on the EAD was Abdoul Diallo, a man he claims he has never met. In 1995, petitioner moved to Colorado where he used the EAD to work and obtain a driver's license and social security card. In 1996, he applied for asylum allegedly using his true name, Djiby Diallo. He did not disclose on the application that he had an EAD under the name Abdoul Diallo. The IJ denied his application because he did not believe petitioner's story of persecution. However, petitioner successfully appealed the IJ's decision to the BIA and was granted asylum on September 26, 1997. Thereafter, he obtained work authorization in his own name and ceased using the alias. He also obtained refugee travel documents under his own name, which he used to travel to Senegal and Italy. His last entry into the United States was in 2002.

In May 2004, DHS instituted removal proceedings alleging that petitioner had procured his asylum status through fraud and that he had filed an unsuccessful asylum application in 1994 under the name of Abdoul Diallo. The IJ terminated the prior grant of asylum and denied his latest asylum application on the basis of changed country conditions and because it had not been filed within one year of his last entry into the United States. On appeal, the BIA affirmed the termination of asylum concluding that petitioner had obtained his asylee status through fraud and willful representation. The BIA noted that petitioner had failed to disclose the use of an alias in his 1996 application and that he had used a false EAD. It also held that petitioner's application was untimely and deferred to the IJ's adverse credibility findings in denying asylum.

> "Asylum seekers must be held accountable for the veracity of statements that they swear under oath."

The Tenth Circuit held that there was "insubstantial evidence" in the record to support the finding that petitioner had filed a previous asylum application. The court noted that the a record contained a report of a fingerprint analysis concluding that Djjby Diallo and Abdoul Diallo are the same person, but the exhibits to the report were not attached. However, the court held that petitioner committed fraud because he failed to answer Question 16 in his asylum application which asked for other names used by the applicant, even though petitioner was using an EAD under the name of Abdoul Diallo. "Asylum seekers must be held accountable for the veracity of statements that they swear under oath," said the court.

The court reversed the BIA's determination that petitioner's latest asylum application was not timely. Preliminarily, the court rejected the government's contention that the court lacked jurisdiction to review the timeliness issue. The court found that under the REAL ID Act it could review a narrow category of issues regarding statutory construction as the one presented by the petitioner's appeal. The court held that the one-year period started to run when petitioner's asylum status was terminated and not when petitioner last entered the United States. On the merits, the court held that substantial evidence supported the adverse credibility findings.

The court said that that it did not need to consider the IJ's decision concerning changed country conditions because the BIA had affirmed the IJ's decision based entirely on its finding that the alien committed fraud in his asylum application.

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ELEVENTH CIRCUIT

■ The Eleventh Circuit Reverses IJ's Decision Because He Failed To Give Reasoned Consideration To Application For Withholding Of Removal

In ***Tan v. U.S. Attorney General***,__F.3d__, 2006 WL 1132410 (11th Cir. May 1, 2006) (Dubina, Marcus, Pryor), the court found that the IJ failed to make adequate findings about whether petitioner, who allegedly suffered past persecution on account of race, was entitled to withholding of removal. The petitioner, a native and citizen of Indonesia, alleged that she had suffered past persecution on account of her race. She credibly testified that she had been a victim of a sexual assault by Muslim men who yelled racial slurs at her and harassed other persons of Chinese descent, and she presented both a Country Report prepared by the U.S.

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State Department and other evidence of persecution by Muslims against persons of Chinese descent in Indonesia. The IJ found petitioner and her husband removable because they failed to file timely applications for asylum and establish past persecution or a well-founded fear of future persecution for withholding of removal. The court noted that while finding petitioner's account of sexual assault credible, the IJ failed to explain why he found the attack was not based, at least in part, on petitioners race, and remanded the case for further proceedings.

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■ **Eleventh Circuit Applies Deferential Standard To Uphold Denial Of Asylum Based On Alleged Persecution Of Applicant By FARC**

In ***Silva v. Gonzales***, __F.3d__ 2003 WL 1195512 (11th Cir. May 5, 2006)(Hull, Pryor; Carnes, dissenting), a majority of the court's panel upheld the denial of asylum and withholding of removal to an applicant from Colombia. The petitioner entered the United States as a visitor on March 8, 2000. Just before her visa expired she applied for asylum contending that because of her political activity, she was persecuted in Colombia by the FARC, a Marxist paramilitary group. Petitioner stated in her application that, while working on a political campaign in September 1999, she received a written death threat that was signed by the FARC. Following the written death threat, the FARC started calling her daily at her house and restaurant, and, on October 9, 1999, two men shot at her car while she was driving and hit the rear window. After the shooting she decided to leave the country, which she did on March 8, 2000. The application also stated that the FARC continued calling petitioner daily until she left the country and that on the last call she was told that she was missed on October 9 but would not be missed again. The INS did not grant asylum but referred petitioner for a removal hearing. Following an asylum hearing where petitioner appeared pro se because she had been unable to obtain counsel, the IJ determined that petitioner had not been persecuted and had shown no fear of future persecution on account of a protected ground. The IJ determined that the threats petitioner received could not be classified as persecution and that petitioner did not know who shot at her and why.

The majority accused the dissent of using a "vivid imagination to draw inferences in favor of [petitioner] and ignore competing inferences that favor the findings of the IJ, contrary to our deferential standard of review.

The majority held that petitioner's evidence that she had received a single, written threat about her political activity and several threatening, but not overtly political, phone calls, and that two unknown men had fired shots at her car for unknown reasons did not compel a conclusion that the threats were more than mere harassment or that the shooting incident was on account of her political opinion. The panel found after reviewing each of the incident in the light most favorable to the finding of the IJ, that the record did not compel the conclusion that petitioner had suffered political persecution. In particular, the court noted that petitioner's "testimony compels the conclusion that the 'condolence note' was on account of her political opinion, but this event does not qualify as persecution. Although we assume, for the sake of argument, that the shooting incident qualifies as persecution, apart from closeness in time, [petitioner] did not offer any evidence to connect the shooting with the 'condolence note' or her political activity in general. The record does not compel the conclusion that the shooting was on account of her political activity. Similarly, the record does not compel the conclusion that the harassing, anonymous telephone calls [petitioner] received were on account of her political opinion."

The majority's opinion drew a strong dissent from Judge Carnes calling the majority's approach "a virtuoso exercise in deconstructionism. It proceeds by disassembling the whole of the evidence and then explaining why each part by itself is insufficiently compelling. This is like a man who attempts to demonstrate that a bucket of water is not really that by emptying it cup by cup, asserting as he goes along that each cupful is not a full bucket's worth until, having emptied the whole, he proclaims that there just wasn't a bucket of water there." The majority, on the other hand, accused the dissent of using a "vivid imagination to draw inferences in favor of [petitioner] and ignore competing inferences that favor the findings of the IJ, contrary to our deferential standard of review. Because imaginative inferences are all that support its opinion, the dissent is left in the position of one who, trying to fill a leaky bucket with water, must first plug all the holes. [Petitioner's] testimony is full of holes, and the dissent impermissibly draws inferences in Silva's favor to plug those holes."

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■ **REAL ID Does Not Restore Jurisdiction To Review Cancellation Hardship Determinations**

In ***Martinez v. U.S. Attorney General***, __F.3d__, 2006 WL 1041742 (11th Cir. April 21, 2006)(Black, Barkette, Cox), the court held in a matter of first impression that it lacks jurisdiction to review the BIA's discretionary determination that a cancellation applicant failed to demonstrate exceptional and extremely unusual hardship to a qualifying relative.

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VISA REVOCATION NOT SUBJECT TO JUDICIAL REVIEW

(Continued from page 1)

employment-based immigrant visa petition, and sought to classify Zhao under the E-1-3 visa category, which permits executive and managerial intracompany transferees to become permanent residents under 8 U.S.C. §1153 (b)(1)(C). Following the approval of the visa petition, Zhao and his family applied for adjustment of status. Subsequently, the former INS notified the appellants that it intended to revoke its prior approval of the I-140 because Zhao had not established that he worked in an executive or managerial capacity. The INS Office of Administrative Appeals (OAA) affirmed that decision. The appellants then filed a complaint in the district court challenging the validity of the revocation. The district court dismissed the complaint for lack of jurisdiction and subsequently denied a motion for reargument based on a contrary interpretation by the Ninth Circuit in *ANA International, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004).

The Third Circuit also rejected the interpretation of the *ANA* panel majority that 8 U.S.C. 1252(a)(2)(B)(ii) did not bar its jurisdiction over visa revocation decisions. Instead, it agreed with the "persuasive" dissent of Judge Tallman, who pointed out that following the majority's logic it would be "difficult to contemplate what would be an unreviewable discretionary act."

The court also rejected appellants' argument that because the Secretary can only revoke a visa "for good and sufficient cause," he must first consider the definition of managers and executives as defined in the statute, and that those definitions constitute reviewable nondiscretionary factors. The statutory phrase "*for what [the Secretary] deems to be* good and sufficient cause," said the court, cannot be modified to read "for good and sufficient cause," because to do so "is to commit what logicians describe as the fallacy of vicious abstraction." This fallacy occurs when a statement is removed from its context, thus changing the meaning of the argument. Here, "The operative fact required to exercise discretion under § 1155 is not merely the cause of the revocation, but the Secretary's judgment that such cause exists," said the court.

The statutory phrase "*for what [the Secretary] deems to be* good and sufficient cause," said the court, cannot be modified to read "for good and sufficient cause," because to do so "is to commit what logicians describe as the fallacy of vicious abstraction."

The court distinguished its holding from that in *Soltane v. U.S. Department of Justice*, 381 F.3d 143 (3d Cir. 2004) where it held that the denial of a visa application was subject to judicial review because the language in 8 U.S.C. 1153(b)(4), providing for the granting of visas was not specific enough to vest unreviewable discretion to the Attorney General. By contrast, the court said, "even by most cursory comparison of the statutes it is apparent that §1155 is light-years away from the provision that was before [the court] in *Soltane*." On the other hand, the court found support in its decision in *Urena-Tavarez v. Ashcroft*, where it held that a denial of a waiver under 8 U.S.C. § 1186(a)(c)(4) was unreviewable under § 1252 (a)(2)(B)(ii).

The court also found that it lacked jurisdiction to review appellants' claim of violations of their Fifth Amendment due process rights because it would require the court to revisit and review the Attorney General's [Secretary] exercise of discretion made pursuant to 8 U.S.C. § 1155." The court also noted that even under the REAL ID Act, appellants' claims raised under 28 U.S.C. §§ 1331 & 2201 and 5 U.S.C. § 702, would not have been subject to judicial review.

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Ed. Note: An example of the fallacy of vicious abstraction is to quote Alexander Pope as having said that "Learning is a dangerous thing," when the full quote reads: "A little learning is a dangerous thing; drink deep, or taste not the Pierian spring. There shallow draughts intoxicate the brain, and drinking largely sobers us again." In Greek mythology, the Pierian spring in Macedonia was sacred to the Muses.

USCIS WARNS OF POTENTIAL FOR IMMIGRATION FRAUD

On April 9, 2006, USCIS issued the following public notice:

> Although Congress has been debating immigration legislation, all customers should be advised that currently no temporary worker program exists for aliens unlawfully present in the United States. Congress has not passed any legislation that would create a temporary worker program. Therefore, there are no benefits currently available because this program does not exist. Customers should not pay any fees or fines to any person or organization claiming they can help apply for or receive benefits for a temporary worker program. Be wary of persons or organizations that claim they can assist in applying for benefits that do not exist.

INCREASED RESOURCES SOUGHT TO SUPPORT DRAMATIC INCREASE IN IMMIGRATION LITIGATION

(Continued from page 1)

(2) a dramatic rise in appellate cases resulting primarily from increased challenges to immigration enforcement actions. The AAG testified as follows regarding immigration litigation:

> The Office of Immigration Litigation defends the Government's immigration laws and policies and handles challenges to immigration enforcement actions. At no time in history has this mission been so important, and never before has it consumed as many of the Department's resources as it does today.
>
> Immigration attorneys defend the Government's efforts to detain and remove foreign-born terrorists and criminal aliens. Since 9/11, OIL has handled and assisted in hundreds of cases involving aliens of national security interest. On average, OIL defends the detention and removal of approximately 1,500 criminal aliens each year. Vigorous defense of these cases is critical to our national security and the safety of our communities. OIL also provides liaison and training to all of the Government's immigration agencies, enabling enforcement efforts at and within our borders to enjoy dependable support before the courts.
>
> Immigration litigation has been the fastest growing component of the Civil Division's docket. The Division is responsible for handling or overseeing all Federal court challenges to decisions of the Board of Immigration Appeals ("BIA"), and the number of these challenges has grown significantly in recent years. OIL's docket of pending cases has nearly tripled in the past four years, growing from 6,200 cases in FY 2002 to over 17,000 cases in FY 2005.
>
> This growth stems from several factors. In 2003, much of the growth was attributed to the Department's streamlining reforms, which increased the productivity of the BIA and thus helped clear a sizable backlog of cases. The backlog has since been cleared. Now, the growth stems primarily from heightened immigration enforcement activities pursued by the Department of Homeland Security and the rapid increase in the rate at which aliens appeal BIA decisions to the Federal courts, which has increased from 6 percent to 29 percent over the past four years. There is no reason to expect this rate to subside. Aliens now must turn to the courts to get the delay in removal that was once reliably provided simply by an administrative appeal to the BIA.
>
> This enormous growth has driven OIL's caseload per attorney to over 155 in FY 2005, more than doubling the historic caseload of 60 cases per attorney. Favorable congressional action on the Division's FY 2007 request would play a large part in addressing OIL's rising caseload. Without additional resources in FY 2007, the attorney caseload is expected to remain at the untenable level of 155 cases per attorney. The Division and the Department have responded to this crisis, assigning immigration cases to other attorneys throughout the Department. These stopgap measures, which task attorneys who lack experience and efficiency in handling immigration matters, are not a permanent solution.
>
> The Office of Immigration Litigation will continue to face an overwhelming workload in FY 2007. Therefore, the President requests in his FY 2007 budget a program increase of 114 positions (86 attorneys), 57 FTEs, and $9,566,000 for immigration litigation.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

QUOTABLE

"Immigration cases are not 'games' . . . . Indeed, they are not, and we will not, nor should an IJ be required to, indulge [petitioner's] attempts to introduce needless delay into what are meant to be 'streamlined' proceedings."

Morgan v. Gonzales, __F.3d__, 2006 WL 1030228 (2d Cir. April 20, 2009) (*Cabranes, J.*)

INDEX TO FEDERAL COURTS*

*See p. 23 for the Cases Index

NOTED

U.S. Attorney David E. Nahmias, for the Northern District of Georgia, recently announced the indictment of six people involved in a multi-state amnesty fraud. According to the indictment, a pastor of a local church held herself out as a consultant to aliens seeking amnesty in the United States under a program known as the "Catholic Social Services/Lulac/Newman Amnesty Program" *See CSS v. USCIS*, No. 86-1343 (E.D. Cal.). Under the CSS settlement agreement certain aliens who were illegally in the U.S. were eligible to apply for temporary residence status. In order to be eligible, an alien had to meet certain requirements, including having been present in the United States unlawfully from prior to January 1982.

INSIDE OIL

A warm welcome to the following new Summer Law Students: **Pierre Gaunaurd**, American University; **Yamileth Handuber**, Howard University; **Rebecca Hoffberg**, Boston University; **Aaron Nelson,** Cardozo (Yeshiva University); **Erica Onsager,** University of Chicago; **Anjali Shaykher**, American University; **Daniel Swanwick**, Georgetown University; and **Sherrie Waldrup**, Washington University in St. Louis.

The annual **OIL-DHS-EOIR Picnic** will be held at the June 15th Washington Nationals game versus the Colorado Rockies. The Picnic will begin at 11:00 a.m. at the National's Pepsi Picnic Tent, which is located outside of RFK Stadium near Gate F. The tent closes at the end of the first inning. The Nationals play the Rockies beginning at 1:05 p.m. For additional information contact Stacy Paddack at 202-353-4426.

From Left to Right: Anjali Shaykher, Aaron Nelson, Yamileth Handuber, Daniel Swanwick, Rebecca Hoffberg, Pierre Gaunaurd, Erica Onsager

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 Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

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

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