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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

BIA has authority to enter order of removal where an IJ grants relief after finding alien removable

The Ninth Circuit sitting *en banc* in ***Lolong v. Gonzales***, __F.3d__, 2007 WL 1309564 (9th Cir. May 7, 2007), overruled *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), because its prior "interpretation of the BIA's power under the INA was overly narrow." The en banc court held that "where the IJ has previously determined that the alien is removable but grants" relief such as asylum or cancellation, "the BIA's decision to reverse the cancellation of removal reinstates the initial finding of removability, which, under the statute, is effectively an order of removal." On the merits, the court held that Lolong did not establish asylum eligibility because she had not provided "evidence that she had been, or is likely to be, specifically targeted for persecution by any individual or group in Indonesia," and that she had not established a pattern and practice of persecution of all ethnic Chinese Christians in Indonesia.

> "The BIA's decision to reverse the cancellation of removal reinstates the initial finding of removability, which, under the statute, is effectively an order of removal."

Lolong, an Indonesian woman of ethnic Chinese descent and a Christian, first entered the United States as a student in 1990. In 1998, while still a student, Indonesia experienced anti-Chinese rioting. Later that year, following news that one of her friends had been raped and her uncle severely beaten during the violence, Lolong applied for asylum. At her removal hearing, Lolong conceded removability but sought asylum on the basis that she feared persecution on account of her religion and ethnicity by militant Islamist groups that the Indonesian government was unwilling or unable to control. The IJ held that Lolong was eligible for asylum, finding her testimony fully credible and her fear of future persecution to be both subjectively genuine and objectively reasonable. Following the INS's appeal, the BIA reversed the IJ and concluded that Lolong's fear of future persecution in Indonesia was not objectively reasonable because "there was evidence that the Indonesian government had taken steps to bring militant Islamic groups-which were largely responsible

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En banc First Circuit questions government's interpretation of "persecutor" bar and remands

In ***Castaneda-Castillo v. Gonzales***, __F.3d__, 2007 WL 1491870 (1st Cir. May 23, 2007) (*en banc*), the First Circuit *en banc* vacated and remanded the BIA's decision finding that petitioner was not credible and, if credible, was not eligible for asylum because he was a "persecutor." A prior divided panel of the court had also reversed the adverse credibility findings but had held that under *Fedorenko* and its progeny, it was compelled to conclude that petitioner had not assisted or otherwise participated in the persecution of others. *See* 464 F.3d 112 (1st Cir. 2006). Following

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BIA can order removal in certain cases

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for the outbreaks of religious and ethnic violence-under control." The BIA vacated the IJ's decision and granted Lolong voluntary departure.

The BIA's decision was later reversed by a panel of the Ninth Circuit which found that Lolong, as a member of a disfavored group in Indonesia, had met her burden of showing a fear of particularized future persecution, *see* 400 F.3d 1215 (9th Cir. 2005). Subsequently, the government filed an *en banc* rehearing petition that challenged the panel's *ultra-vires* "disfavored group" asylum test and its jurisdiction under *Molina-Camacho*. Following the submission of supplemental briefs addressing, *inter alia*, the jurisdictional issue, the en banc court voted to vacate the panel opinion. *See* 452 F.3d 1027 (9th Cir. 2006).

Ninth Circuit case law requires that "petitioners alleging a pattern or practice of persecution by non-government actors also prove that the government is unable or unwilling to control those actors."

The *en banc* court first addressed the "jurisdictional conundrum" presented by the *Molina-Camacho*'s holding and the enactment of the REAL ID Act. Under the former, an alien in Lolong's cirumstances would have had to seek habeas relief in the district court because the BIA lacked authority to enter a final order and therefore the court of appeals would lack jurisdiction. However, under the REAL ID Act said the court, "Congress eliminated collateral review of orders of removal, leaving direct petition to this court the sole avenue for review." Thus, Lolong's inability to obtain judicial review may raise constitutional concerns which, said the court would be "prudent" to avoid by first reconsidering its precedent in *Molina-Comacho*. The court then found that the "IJ's grant of relief, whether in the form of asylum or withholding of removal on other grounds, necessarily requires the IJ to have already determined that the alien is deportable," and that under the INA, this determination constitutes an "order of deportation." In such cases when the BIA reverses the IJ, "the BIA simply reinstates the order of removal that has been entered by the IJ" said the court. Accordingly, the court reversed *Molina-Camacho*, and held that it had jurisdiction to review Lolong's appeal because she had conceded removability and the IJ had found that clear and convincing evidence supported a finding of removability.

On the merits, the court found that BIA's denial of asylum was consistent with governing law. The BIA had concluded, contrary to the IJ's findings, that absent evidence that the Indonesian government was either unable or unwilling to control these militant groups, "the mere fact that some attacks on Chinese or on Christians continue to occur" was insufficient to support a finding that Lolong's fear of future persecution was objectively reasonable. The court noted that it "has consistently held that a general, undifferentiated claim of the type brought by Lolong does not render an alien eligible for asylum." Furthermore, the court said that its case law requires that "petitioners alleging a pattern or practice of persecution by non-government actors also prove that the government is unable or unwilling to control those actors."

Here, the court found that Lolong had not made any argument that "she feared being individually targeted for persecution. Instead, she relied entirely on fears common to ethnic Chinese Christian women generally: a "pattern of rapes" perpetrated upon Chinese women, "a historical pattern of rioting" leading to "ethnically based violence" against ethnic Chinese, discrimination against ethnic Chinese women by the courts and the police, and the government's inability or unwillingness to control the groups responsible for this violence." "In sum" concluded the court, "Lolong has provided no evidence that she has been, or is likely to be, specifically targeted for persecution by any individual or group in Indonesia. The fear she has of harassment, discrimination, and sporadic violence may be a fear shared by millions of ethnic Chinese Christians in Indonesia . . . . Lolong has provided nothing that suggests that her fears are distinct from those felt by all other ethnic Chinese Christians in Indonesia. Nor has she shown that all ethnic Chinese Christians in Indonesia have, based on the circumstances there, a well-founded fear of persecution."

In a dissenting opinion, Judge Thomas, joined by Pregerson, Fisher, and Paez, concurred in the reversal of *Molina-Camacho*, but would have found that the BIA had erred as matter of law in its denial of asylum. In particular, the dissenters found "disturbing'" that the BIA had not addressed Lolong's claim "that the Indonesian government, for all its good intentions, is unable to control anti-Chinese and anti-Christian elements."

Contact: Frank Fraser, OIL
☎ 202-305-0193

Ed. Note: The government's case was argued by DAAG Jonathan Cohn.

Contributions To The ILB Are Welcomed!

E-DISCOVERY QUESTIONS AND ANSWERS

The December 1, 2006 amendments to the Federal Rules of Civil Procedure are the first since 1970 dealing with electronically-stored information. See Fed. R. Civ. P. 16, 26, 33(d), 34, 37(f), 45. The old rules pre-dated e-mail, most modern word-processing systems, and the technology we now use for creating and storing data. Consequently, there was a lot of catching up to do in the 2006 amendments to the Federal Rules.

While many litigators and judges are still struggling to understand how to conduct and preside over discovery involving electronically-stored information, others are very skilled and have a considerable amount of experience – much of it gained even before the Rules were updated. Consequently, it is only a matter of time until most government trial litigators and agency counsel will have to respond to an e-discovery demand.

The following are some questions and answers that have been circulated within OIL and to some attorneys in DHS and EOIR in recent months. We would like to give them broader circulation in this edition of the OIL newsletter.

E-DISCOVERY ISSUE #1: In general, how will the new rules change district court discovery practice?

A: Attorneys, clients and judges will have to attend to discovery matters much earlier and in much more detail. The rules contemplate discovery about discovery. What ESI (electronically-stored information) does the agency have, where and how is it collected and deleted? What keyword searches would be appropriate for the case? What testing should be used on samples of data to determine the appropriate keywords? These questions need to be answered at the beginning, and may not be answerable without a lot of work with our clients, consultation with opponents, and some preliminary discovery. As one magistrate judge put it, the days when you can plead ignorance about ESI are gone forever. Judges will really be irritated if you do not know your clients' systems of ESI.

E-DISCOVERY ISSUE #2: What is the first step in preparing to defend a complex e-discovery case?

A: Form a team that includes the litigating attorneys from OIL, the responsible agency attorney, an agency stakeholder on the operations side if possible, and an agency IT representative. The agency attorney's role is a familiar one, and the stakeholder should be someone with authority to direct necessary searches and take steps to ensure appropriate preservation of electronically stored information ("ESI") by agency personnel.

It is only a matter of time until most government trial litigators and agency counsel will have to respond to an e-discovery demand.

You will need the IT representative to learn where the agency's ESI is, and how to retrieve it. You will also need the agency IT rep. for technical assistance in responding to document production requests, and possibly in drafting your own ESI requests. Finally, it has become a common practice in complex cases – even before amendment of the rules – to take an IT representative to intial conferences where issues like the scope and methods of searching for ESI are negotiated. Consequently, the IT representative needs to be on board at the outset.

E-DISCOVERY ISSUE #3: Where can I find written guidance on handling discovery of electronically stored information ("ESI")?

A: 1. The Committee notes following Federal Rules of Civil Procedure 26-37 are full of helpful guidance.

2. *Sedonaconference.org*. Go to the right column and pull up "The Sedona Principles Addressing Electronic Document Production". A number of terms that attorneys must understand (e.g., "metadata") can be learned quickly from anther document that appears on the website: "The Sedona Conference Glossary For E-discovery And Digital Information Management."

E-DISCOVERY ISSUE #4: How will e-discovery issues be handled in at the pretrial conference and discovery planning conferences (F.R.Civ.P. 16, 26(f))? Is there a role for the agency's IT specialist at these conferences?

A: Subjects you must be prepared to discuss at the first meet and confer session include: types of systems of ESI (electronically stored information) the agency has or once had, how ESI is backed up, preservation of ESI, format for production, testing or sampling of IT systems, protective orders, and amount of pre-production privilege review. There may have to be more than one pretrial conference and discovery planning conference, particularly if testing or sampling is to be accomplished before settling on the scope and method of search and format for production. The rules contemplate discovery about discovery. Visit *www.sedonaconference.org* for detailed guidance on e-discovery subjects to be prepared for at the meet and confer.

Experts at the e-discovery conference I attended strongly recommended bringing an articulate IT expert from the agency to the pretrial conference and the discovery planning conference and let the expert

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E-DISCOVERY COMING YOUR WAY

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speak at those conference. The expert should be prepared to talk candidly to your opponents and the judge (at pretrial conference) about subjects like agency network architecture, retention policies *and practices* (they are not the same), and how best to collect relevant information. Be careful in selecting and preparing your IT expert, because attorneys often bring experts to assist them with questions about ESI. It was recommended that we prepare the agency IT expert as you would for a 30(b)(6) deposition before any meet and confer the expert attends.

E-DISCOVERY ISSUE #5: In general, what are the agency's obligations to preserve ESI?

Once the agency is aware of possible litigation there is a duty to preserve ESI. The fact that the agency may not end up producing electronically-stored information (ESI) does not mean there is no duty to preserve it. Consequently, the preservation obligation is usually broader than the production obligation ultimately will be.

In deciding how broad a "litigation hold" is in a specific case, and to whom it should be communicated, the litigation team should be over-inclusive. Make sure agency records management and IT personnel understand what must be preserved. Like the production process, all steps taken in the preservation process need to be well-documented: litigators' communications to clients; agency management directions to institute a litigation hold and suspend routine destruction policies; and proof that the directions were disseminated by people with the necessary authority to employees who need to know. This is because decisions on when and how to preserve ESI are often challenged by spoliation sanctions motions. A court reviewing the preservation process is more likely to be satisfied if there is a timely, reasonable policy-based effort to implement a litigation hold, involving unambiguous communication by the agency to lower-level employees and branch offices.

Once the agency is aware of possible litigation there is a duty to preserve electronically-stored information (ESI).

E-DISCOVERY ISSUE #6: In general, what are the agency's obligations to produce ESI?

There is no obligation to produce electronically stored information (ESI) that is not reasonably accessible due to cost or burden, but you must identify it and the cost/burden issue is one for early discussion by counsel. For example, backup tapes made for disaster recovery may not reasonably be accessible, while backup tapes made daily or weekly may be easily accessible.

The requesting party initially picks the form of production of ESI (*e.g.,* with metadata), while the responding party can suggest a different form (*e.g.*, without metadata). Sequenced discovery may be suggested by the agency, and is recommended by experts. For example, produce samples without metadata first, and then have the requesting party identify specific documents where metadata will be needed.

To show undue burden, the agency may want to take photos (*e.g.*, a room full of backup tapes) and explain the production's expected impact on operations by diversion of resources. Courts are much more likely to be sympathetic to a burden argument based on harm to program efficiency and interruption of service to the public than they will be to objections based on dollar cost.

E-DISCOVERY ISSUE #7: What is "metadata" and do you have to produce it?

Generally, metadata is "information about the document or file that is recorded by the computer to assist the computer and often the user in storing and retrieving the document or file at a later date. The information may also be useful for system administration as it reflects data regarding the generation, handling, transfer, and storage of the data within the computer system." Sedona Principles for Electronic Document Production, July 2005, p. 5. (The Sedona glossary defines different types of metadata). Often metadata is not accessible by the computer user.

Rule 34(b) allows parties to request it, but you can object to its production. At a minimum, you must talk about it at the meet and confer stage and reach an agreement if possible. You cannot just unilaterally scrub metadata from produced data. You should never scrub metadata to the point where it no longer exists. Objections to production of metadata may succeed if you can show cost that far outweighs the benefit, undue burden in terms of time and resources, or that privileges will be inadvertently revealed.

If you have an e-discovery question, contact:

Mark Walters, OIL
☎ **202- 616-4857**

For additional resources on e-discovery see the list of documents available on the Justice Virtual Library at:

http://10.173.2.12/jmd/lib/antitrust/electronic_discovery.htm

Additional resources may also be found on the USABook web site at:

http://10.173.2.12/usao/eousa/ole/tables/subject/edisco.htm

SUMMARIES OF BOARD OF IMMIGRATION APPEALS DECISIONS

Board Formulates Standards For Determining When An Asylum Application May Be Found To Be Frivolous

In ***Matter of Y-L***-, 24 I&N Dec. 151 (BIA 2007), the Board, on remand from the Second Circuit, considered the Immigration Judge's determination that the alien's asylum application was frivolous, and established the requirements for when such a finding may be made.

First, the alien must be advised at the time of filing an asylum application of the consequences of filing a frivolous application. Second, the Immigration Judge must separately address the question of frivolousness and make specific findings that the applicant deliberately fabricated material elements of the asylum claim. Third, a determination of frivolous filing must be supported by the preponderance of the evidence in light of the severe consequences that flow from such a finding. In so holding, the Board expressly rejected the Second Circuit's suggestion that a frivolous finding be supported by "concrete or conclusive" evidence of fabrication.

Finally, the applicant must be given sufficient opportunity to account for any discrepancies or implausible aspects of the claim *before* the Immigration Judge makes a finding of frivolous application. In this case, because the Immigration Judge did not mention during the course of the hearing that she was contemplating a frivolousness finding, the Board held that the "frivolousness" determination did not meet the regulatory requirement that the alien be afforded a sufficient opportunity to explain perceived discrepancies, and therefore reversed that part of the Immigration Judge's decision.

Board Addresses Meaning Of "Forced Abortion" Within The Definition Of Refugee

In ***Matter of T-Z-***, 24 I&N Dec. 163 (BIA 2007), the Board, on remand from the Second Circuit, held that an abortion is "forced" by threats of harm when a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution. With respect to such threats, the Board found that nonphysical forms of economic harm – such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life – may amount to persecution, but that to do so required a showing of more than mere economic discrimination. Instead, the economic difficulties had to be above and beyond those generally shared by others in the country of origin and involved noticeably more than mere loss of social advantages or physical comforts.

The Board found that nonphysical forms of economic harm – such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food , housing, employment or other essentials of life – may amount to persecution.

Here, because the alien was unable to demonstrate that his wife's abortions were "forced" as a result of the threat of economic sanctions so severe that, if carried out, they would amount to persecution, the Board rejected the Immigration Judge's conclusion that the alien was eligible for asylum.

The Board further held that when an Immigration Judge denies asylum solely in the exercise of discretion and then grants withholding of removal, the Immigration Judge was required to reconsider the denial of asylum to take into account factors relevant to family unification. As the Immigration Judge failed to discuss or consider the impact of the asylum denial on the alien's ability to be reunited with his spouse and minor child in this case, the Board remanded the matter for such consideration by the Immigration Judge.

Contact: Song Park, OIL
☎ 202–616-2129

REGULATORY UPDATE

TPS extended for Nicaraguans and Hondurans

USCIS announced separately that the designation of Nicaragua and Honduras for Temporary Protected Status (TPS) has been extended for 18 months to January 5, 2009, from its current expiration date of July 5, 2007. The Notice automatically extends the validity of Employment Authorization Documents (EADs) issued under the TPS designation of Nicaragua and Honduras for six months, through January 5, 2008. 72 *Fed. Reg*. 29534 (May 29, 2007)(Nicaragua); 72 *Fed. Reg*. 29529 (May 29, 2007) (Honduras).

Material Support Exception

The Secretary of DHS announced, following consultations with the Secretary of State and the Attorney General, that as a matter of discretion in accordance his authority under INA § 212(d)(3)(B)(i), that subsection 212(a)(3)(B)(iv)(VI) of the INA shall not apply with respect to material support provided under duress to a terrorist organization as described in subsection 212(a)(3)(B)(vi)(I) or subsection 212(a)(3)(B)(vi)(II) if warranted by the totality of the circumstances. 72 *Fed. Reg.* 26138 (May 8, 2007)

FURTHER REVIEW PENDING: Update on Cases & Issues

Asylum – Particular Social Group

The Solicitor General has filed a petition for certiorari in ***Gao v. Gonzales***, 440 F.3d 62 (2d Cir. 2006). The question presented is:

> Whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that women whose marriages are arranged can and do constitute a "particular social group" of "women sold into forced marriages," and that the alien would suffer "persecution" "on account of" that status.

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

Asylum — Population Control Policy

The Second Circuit heard *en banc* arguments on March 3, 2007, in ***Lin,*** 02-4611, ***Dong,*** 02-4629, and ***Zou*** 03-40837, 416 F.3d 184 (2d Cir. 2005), consolidated cases. One of the questions before the court is:

> Whether the BIA reasonably construed IIRIRA Section 601(a)'s definition of "refugee" to: (a) include a petitioner whose legally married spouse was subject to an involuntary abortion or sterilization, *see Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1977); and (b) not include a petitioner whose claim is derivatively based on any other relationship with a person who was subject to such a procedure, unless the petitioner has engaged in "other resistance" to a coercive population control program, *see Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006).

Contact: Kathy Marks, AUSA
☎ 212-637-2800

Asylum—Adverse Credibility

Oral argument has been scheduled for June 18, 2007, in a petition for rehearing en banc in ***Suntharalinkam v. Gonzales,*** 458 F.3d 1634 (9th Cir. 2006), The question presented is whether numerous minor discrepancies cumulatively add up to support an adverse credibility determination, and were those discrepancies central to the asylum claim of a Sri Lankan alien suspected as being a Tamil Tiger terrorist.

Contact: Frank Fraser, OIL
☎ 202-305-0193

Asylum—Disfavored Group

On May 11, 2007. the Solicitor General filed an opposition to a petition for certiorari in ***Sanusi v. Gonzales***, 188 Fed. Appx. 510 (7th Cir. July 24, 2006). The question presented is whether an alien who has demonstrated membership in a disfavored group must also show individual singling out for persecution to establish it is more likely than not that life or freedom would be threatened.

Contact: Frank Fraser, OIL
☎ 202-305-0193

REAL ID Act — Jurisdiction To Review Untimely Filed Asylum Application

In ***Ramadan v. Gonzales***, 479 F.3d 647 (9th Cir. 2007), the Ninth Circuit held that the REAL ID Act permits review of the application of law to undisputed facts, and that the court has jurisdiction to review a decision not to consider an untimely filed asylum application.

The 9th Circuit has *sua sponte* requested the parties to file supplemental briefs on whether the case should be heard *en banc*. The revised decision upon panel rehearing had stated that no further petitions for rehearing or rehearing en banc will be entertained. The government brief is due on May 22, 2007.

Contact: Bryan Beier, OIL
☎ 202-514-4115

Jurisdiction — Sua Sponte Reopening

In ***Tamenut v. Gonzales***, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case.

On May 1, 2007, the government filed a petition for rehearing *en banc* contending that the court's holding that it has jurisdiction to review a BIA's denial of *sua sponte* reopening, is inconsistent with the relevant regulatory language, and is contrary to the overwhelming weight of precedent from other circuits.

Contact: Jennifer Paisner, OIL
☎ 202-616-8268

Constitution — Denial of 212(c) Relief Violates Equal Protection Clause

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

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

BIA—Power to Issue Removal Order

On April 30, 2007, the Solicitor General filed an opposition to a petition for certiorari in ***Lazo v. Gonzales***, 462 F.3d 53 (2d Cir. 2006). The question presented is whether an IJ finding of removability is an "order of removal."

Contact: Frank Fraser, OIL
☎ 202-305-0193

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **Court Lacks Jurisdiction To Review An IJ's Finding That Petitioner Failed To Establish Extreme Hardship Rendering Him Ineligible For A Waiver Of Inadmissibility**

In *Rodrigues-Nascimento v. Gonzales*, __F.3d__, 2007 WL 1345994 (1st Cir. May 9, 2007) (Boudin, *Torruella*, Lynch), the court held that it lacked jurisdiction to review an IJ's finding that petitioner failed to establish extreme hardship to his US citizen daughter thus rendering him ineligible for a waiver of inadmissibility under INA § 212 (h).

Petitioner, a native and citizen of Brazil, was placed in removal proceedings for having committed a crime involving moral turpitude. Petitioner then sought to adjust his status based on an approved I-140 labor petition and asked an IJ for a § 212(h) waiver of inadmissibility claiming that his removal to Brazil would cause extreme hardship to his U.S. citizen daughter. The IJ denied the request for waiver, finding that petitioner's substantial family ties in Brazil mitigated his claim of extreme hardship and further that his history of violent behavior weighed against granting such a discretionary waiver. The IJ also denied petitioner the privilege of voluntary departure due to his conviction for an aggravated felony. The BIA affirmed.

The court found that under INA § 242 (a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), it lacked jurisdiction to review the IJ's discretionary determination that petitioner failed to prove extreme hardship and the IJ's balancing of factors in consideration of his waiver of inadmissibility. Although the court noted that "an error may exist" in the IJ's denial of voluntary departure, it found that petitioner waived this claim because he did not adequately brief it before the BIA.

The court found that under INA § 242 (a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), it lacked jurisdiction to review the IJ's discretionary determination that petitioner failed to prove extreme hardship.

Contact: Richard Zanfardino, OIL
☎ 202-305-2807

■ **Petitioner's Motion To Reopen To File A Second I-751 Petition Was Properly Dismissed For Failure To Establish Conditional Residency And For Prior Marriage Fraud**

In *Molina De Massenet v. Gonzales*, __F.3d__, 2007 WL 1413211 (1st Cir. May 15, 2007) (Torruella, *Lynch*, Lisi), the court held that an IJ's denial of petitioner's second motion to reopen to apply for a second I-751 petition to remove the conditions on his permanent residency on the basis of marriage to a US citizen was not an abuse of discretion because petitioner had already filed a prior I-171 that had been rejected due to marriage fraud.

Petitioner, a native and citizen of the Dominican Republic, was admitted to the U.S. as a permanent residence on a conditional basis, based on her marriage to a U.S. citizen. The government, however, suspected the marriage was fraudulent and informed petitioner that it intended to deny the adjustment of status. Petitioner did not respond and the government, accordingly, rejected the adjustment of status and terminated her conditional residency. Consequently, petitioner was served with an NTA charging her as removable and alleging fraud. She was ordered removed in.absentia. However, an IJ reopened the hearing, whereupon petitioner admitted to marriage fraud and sought cancellation of removal. The IJ denied cancellation and granted voluntary departure. She did not appeal to the BIA. Petitioner then filed a second motion to reopen with the IJ seeking a hardship waiver for the joint filing requirement for adjustment of status based on marriage and claiming ineffective assistance of counsel. The IJ denied the motion, finding that petitioner could not file a second I-171 because her conditional residency had already been terminated following the denial of the first I-751. The court further held that it was too late to file for the waiver because she had admitted to fraud. Further, the IJ denied the ineffective assistance of counsel claim for total failure to meet the *Lozada* requirements. The BIA affirmed. Petitioner filed a petition for review of the denial of her second motion to reopen.

The court held that the IJ did not abuse his discretion in denying the motion to reopen. To the extent the motion challenged the original denial of her adjustment of status application, the court held that petitioner's brief failed to dispute the district director's denial of her application but "briefly alleged that her prior counsel had provided her with ineffective assistance" which the IJ properly labeled a "blurry claim" that failed to meet *Lozada*. Further, petitioner abandoned her claim of ineffective assistance of counsel by failing to brief the issue before the BIA. The court also affirmed the IJ's reasoning that petitioner was ineligible to file a second application for adjustment of status based on marriage because she was not a conditional resident when she filed her second application. The court noted that "it is not clear that [BIA precedent] would permit the filing of a second I-751 after an alien's first petition had been finally rejected on the basis of marriage fraud" but dismissed the issue for failure to exhaust. "In the end," the court said, "[petitioner]'s petition for review amounts to nothing more than a humanitarian plea" asking the court to "ignore her failure to establish a legal basis for her presence. The courts are not free to disregard the law."

Contact: Bill Erb, OIL
☎ 202-616-4869

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Summaries Of Recent Federal Court Decisions

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■ **Court Affirms IJ's Discretionary Denial Of Adjustment Of Status And Bypasses Jurisdictional Argument.**

In ***Mahmoud v. Gonzales***, __F.3d__, 2007 WL 1299877 (1st Cir. May 4, 2007) (*Boudin*, Lynch, Lipez), the court affirmed the BIA's discretionary denial of adjustment of status on the basis of petitioner's marriage to a U.S. citizen. The court explicitly bypassed the government's contention that it lacked jurisdiction to consider a discretionary denial of adjustment of status, stating that "the IJ and the Board would be upheld even if everything was reviewable under ordinary administrative law standards."

Petitioner had been placed in removal proceedings for overstaying his visa. He then conceded removability and requested voluntary departure. The IJ granted voluntary departure until February 11, 2004. In December 2003, petitioner married a U.S. citizen and moved the IJ to reopen his case for adjustment of status. The IJ denied the motion but the BIA remanded so that the IJ could provide further explanations for the denial. On December 2, 2004, the IJ explained that he did not believe the marriage was bona fide and in any event he was denying petitioner adjustment of status as a matter of discretion. The IJ noted the lack of favorable equities and petitioner's failure to depart by February 11, 2004. Subsequently, USCIS approved petitioner's visa petition, prompting him to file a motion to reopen with the BIA claiming that its approval was proof of a bona fide marriage. The BIA denied the motion as untimely and numerically barred and affirmed the IJ's denial of adjustment of status. The BIA agreed that petitioner did not warrant discretionary adjustment of status and that in any event his failure to depart precluded such relief.

Before the First Circuit, petitioner argued that his due process rights were violated by the lack of an evidentiary hearing on his motion to reopen for adjustment of status and by "systematic malaise" of the immigration process resulting in the IJ and BIA's predisposition to deny his claim. The court rejected both arguments, holding that neither an abuse of discretion occurred nor a violation of petitioner's due process rights. The court found that the IJ had properly weighed the positive and negative factors an denied adjustment of status as a matter of discretion. The court noted that the IJ had considered not only petitioner's "eve-of-departure marriage," but also petitioner's failure to depart and lack of any favorable humanitarian factors. The court stated "[e]ven if Congress had not limited review of factual and discretionary determinations, this is a perfectly rational explanation rooted in the record. Judgments about equities and last minute requests for relief and about the importance of voluntary departure agreements are exactly the kind of factors that one would expect a decision-maker to consider." Further, the court said, petitioner had made no proffer of equities favorable to adjustment of status. Finally, the court found that the immigration system did not suffer from a "systematic malaise" as petitioner had already once been granted a remand and there were no appearances of bias.

"Judgments about equities and last minute requests for relief and about the importance of voluntary departure agreements are exactly the kind of factors that one would expect a decision-maker to consider."

Contact: Greg Mack, OIL
☎ 202-616-4585

SECOND CIRCUIT

■ **Aliens Convicted of Aggravated Felonies Cannot Circumvent AEDPA's Bar Of 212(c) Relief By Also Applying For Adjustment Of Status**

In ***Ruiz-Almanzar v. Gonzales***, __F.3d__, 2007 WL 1321664 (2d Cir. May 8, 2007) (Sotomayor, *Katzmann*, Gertner), the court held that a § 212 (c) waiver is not available to a deportable alien notwithstanding the fact that he also seeks to apply for adjustment of status.

Petitioner, a native and citizen of the Dominican Republic and an LPR, was placed in removal proceedings due to a conviction for an aggravated felony. Petitioner sought § 212(c) relief, but was denied due to AEDPA's amendment of 212(c) barring relief to aliens with criminal convictions. Before the BIA, petitioner argued that AEDPA could not be retroactively applied to him because his criminal proceeding ended before AEDPA's effective date and that a remand was necessary so that he could apply for adjustment of status such that he would no longer be deportable under AEDPA's amendment. The BIA rejected petitioner's claims, holding that AEDPA's bar on 212(c) relief was not retroactive as applied to petitioner because it was enacted prior to his conviction and that he could not circumvent AEDPA's amendment by applying for adjustment of status.

Before the court, petitioner argued that the BIA erred in holding that the language of the AEDPA amendment is unambiguous and that the BIA's interpretation of the amendment should not be entitled *Chevron* deference. Specifically, petitioner claimed that the statute was ambiguous because it is silent as to whether 212(c) relief my be sought in conjunction with adjustment of status. The court rejected petitioner's argument. First, the court held that "a statute that categorically precludes 'deportable' aliens from discretionary relief need

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not specifically reference each subclass of affected aliens to be unambiguous. "Indeed," the court said, this was especially the case "given that Congress was likely aware that deportable aliens had historically been allowed to apply for 212(c) relief in conjunction with an application for adjustment of status." Second, because petitioner remained a deportable alien until his status was actually adjusted, he could not "qualify for adjustment of status without the 212(c) relief for which he is ineligible." Finally, the court refused to apply the rule of lenity requiring ambiguities in immigration statutes be construed in favor of the alien because "[i]t cannot be the case that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context."

"It cannot be the case that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context."

Contact: Andrew M. McNeela, AUSA
☎ 212-637-2800

■ **Second Circuit Holds That Aggravated Felon Is Ineligible For Cancellation Of Removal Regardless Of Eligibility For Waiver Of Inadmissibility**

In ***Peralta-Taveras v. Gonzales***. __F.3d__, 2007 WL 1469423 (2d Cir. May 22, 2007)(Parker, Raggi, Wesley) (per curiam), the Second Circuit held that an alien convicted of an aggravated felony is ineligible for cancellation of removal under INA § 240A, 8 U.S.C. § 1229b, even if the alien would be eligible for a waiver of inadmissibility on the basis of the aggravated felony under now-repealed INA § 212(c), 8 U.S.C. § 1182(c). The alien had been convicted of a pre-IIRIRA aggravated felony and a post-IIRIRA drug trafficking offense and had sought to "simultaneously" apply for benefits under § 212(c) (with respect to the aggravated felony) and § 240A (with respect to the drug charge).

Contact: Douglas P. Morabito, AUSA
☎ 203-821-3700

■ **Court Affirms BIA's Authority To Make An Independent Assessment Of Petitioner's Credibility**

In ***Berlortaja v. Gonzales***, __F.3d__, 2007 WL 1225502 (2d Cir. April 27, 2007) (Winter, *Cabranes*, Hall), the court affirmed the BIA's independent finding that petitioner had not testified credibly on his asylum application. In so holding, the court explained that the BIA was authorized to make an independent finding on credibility pursuant to former 8 C.F.R. § 1003.1(d)(3)(iv) and according to a stipulated agreement between petitioner and the government.

Petitioner, a native and citizen of Albania, claimed he was persecuted by the Communist Party. He testified that a political affiliate of his was shot and killed by Communists right before his eyes and that he was beaten and knocked unconscious by Communists at a political rally. In denying petitioner's asylum application for failure to make a prima facie case, the IJ did not make an explicit adverse credibility determination, but noted that petitioner had failed to mention in his asylum application either the murder of his political affiliate or that he was knocked unconscious at the rally. The BIA adopted and affirmed the decision and petitioner filed for review in the Second Circuit. While the petition for review was pending, petitioner and the government entered into a stipulated agreement that remanded the case to the BIA in order for it to consider two new precedents, *Qui v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003), and *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). Upon remand, the BIA again denied petitioner's appeal but also made an explicit adverse credibility finding based on the two omissions cited by the IJ. Petitioner challenged the BIA's authority to make an independent adverse credibility determination.

The Second Circuit held that the BIA had authority to make an *de novo* credibility finding under former 8 C.F.R. § 1003.1(d)(3)(iv) and was not prohibited from doing so by either the terms of the stipulated agreement or due process considerations. Specifically, the court noted that the stipulated agreement did not specify any limits to the BIA's authority upon remand. "Rather" the court said, "the stipulation simply noted the absence of an explicit credibility determination in the IJ's decision and directed the BIA to reconsider petitioner's case in light of *Qui* and *Secaida-Rosales*" - cases that were primarily concerned with credibility. The court also found that under former 8 C.F.R. § 1003.1(d)(3)(iv) the BIA was authorized to review the IJ's fact-finding de novo and could accordingly make its own credibility determination. Finally, the court rejected petitioner's contention that he had not been afforded an opportunity to address the adverse credibility finding because his initial brief to the BIA contained over six pages devoted to explaining why the IJ erred in his adverse credibility determination.

Contact: Michael James, AUSA
☎ 212-637-2880

■ **Petition For Review Denied Because Petitioner Failed to Challenge Basis Of BIA's Decision**

In ***Barnaby-King v. DHS***, __F.3d__, 2007 WL 1375286 (2d Cir. May 10, 2007) (Walker, Calabresi, Cote (SDNY)), the Second Circuit denied the petition for review because petitioner failed to challenge the basis

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of BIA's denial of § 212(i) waiver. The IJ had denied the waiver for failure to establish "extreme hardship" and as a matter of discretion. The IJ had also denied a motion for a continuance. On appeal, the BIA, reviewing the case de novo, denied the waiver solely on the basis of the failure to show "extreme hardship."

When petitioner sought judicial review, he claimed that the IJ had applied an erroneous standard of law and that the denial of the request for a continuance was an abuse of discretion. Although the court denied the petition, it noted in response to the government's jurisdictional argument, that *Zhang v. Gonzales*, 457 F.3d 172 (2d Cir. 2006), may no longer maybe controlling on the question of whether the court has jurisdiction to review a BIA's "extreme hardship" determination.

Jeffrey Ray, AUSA
☎ 816-426-3122

THIRD CIRCUIT

■ **Court Holds That Challenge To DHS's Denial Of An Asylee Relative Petition Is Not A Challenge To A Final Order Of Removal Under The REAL ID Act**

In ***Nnadika v. Gonzales***, __F.3d__, 2007 WL 1227474 (3d Cir. April 27, 2007) (*Sloviter*, Ambro, Pollak), the court held that under the REAL ID Act it lacked jurisdiction to consider petitioner's claim that DHS had improperly denied his asylee relative petition because it did not challenge the underlying order of removal.

Petitioner had been denied asylum in the United States by an IJ and affirmed by the BIA. Three years after the BIA's decision, petitioner filed a motion to reopen to adjust status based on his wife's asylee status. The BIA denied this motion as untimely. Petitioner then filed a habeas petition challenging the BIA's denial of his motion, arguing the court had mandamus jurisdiction and jurisdiction due to his detention. The district court disagreed and transferred his case to the Third Circuit pursuant to the REAL ID Act's mandate that all challenges to a final order of removal be heard in the courts of appeal. The Third Circuit held that the transfer was improper. The court stated that petitioner had asserted no arguments challenging his final order of removal. Instead, the court found that all petitioner's challenges addressed USCIS's failure to properly adjudicate his asylee relative petition. The court said that "only challenges that directly implicate the order of removal [] are properly the subject of transfer under the REAL ID Act." The court declined to decide whether INA § 212(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), barred it from reviewing DHS's discretionary decision to deny an asylee relative petition, leaving that decision to the District Court upon transfer.

Contact: Colette Buchanan, AUSA
☎ 973-645-2907

FIFTH CIRCUIT

■ **IIRIRA Does Not Have An Impermissibly Retroactive Application To Claim For Suspension Of Deportation**

In ***Garrido-Morato v. Gonzales***, __F.3d__, 2007 WL 1196510 (3d Cir. April 24, 2007) (*Jolly,* Higginbotham, Dennis), the court held IIRIRA's definition of aggravated felony to include harboring an alien was expressly retroactive and thus petitioner's prior conviction for harboring an alien made her ineligible for suspension of deportation.

Petitioner had been placed into removal proceedings in on March 13, 1996. Petitioner was convicted of harboring an alien on August 23, 1996. In September 1996, petitioner applied for suspension of deportation. Also in that month, Congress passed IIRIRA amending the definition of aggravated felony to include harboring aliens. In March 1997, an IJ rejected her application for suspension of deportation because she had committed an aggravated felony, to wit, harboring an alien. The BIA affirmed.

> The court held that "actions taken" includes actions and decisions of the Attorney General acting through an immigration judge or the BIA.

Before the Fifth Circuit, petitioner argued that application of IIRIRA to her claim was impermissibly retroactive. Specifically, she cited the language of IIRIRA § 321(c) to argue that its application to "actions taken on or after the enactment of this Act" was ambiguous and could include such actions as her guilty plea, the commencement of deportation proceedings, and her application for suspension of deportation - all "actions" that occurred before passage of IIRIRA. The government countered by arguing that "actions taken" was not ambiguous but referred to action by the representatives of the Attorney General to effectuate and adjudicate deportation orders against a particular alien. Thus, according to the government the IJ "took action" by denying petitioner's application for suspension of deportation - an "action" that occurred after passage of IIRIRA - and was thus required to apply IIRIRA's new definition of aggravated felony. The court agreed with the government, and held that "actions taken" includes actions and decisions of the Attorney General acting through an immigration judge or the BIA. "Applying this unmistakable language," the court said "there is no doubt that the IJ's [] ruling denying her hardship relief was an 'action taken' that caused the expressly ret-

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roactive definition of aggravated felony to apply."

Contact: Lawrence Ludka, AUSA
☎ 361-888-3111

SIXTH CIRCUIT

■ Sixth Circuit Holds That It Is Without A Statutory Basis To Review BIA Decision Not To Reopen

In ***Jaber v. Gonzales***, __ F.3d__, 2007 WL 1470098 (6th Cir. May 22, 2007)(Siler, Moore, Rogers), the Sixth Circuit denied a Lebanese alien's petition for review, which originated as a habeas petition and was transferred to the Sixth Circuit under the REAL ID Act. In transferring the case, the district court converted the habeas petition to a petition for review of the original BIA decision which affirmed the Immigration Judge's order of removal. Before the Sixth Circuit, the alien challenged only the BIA's later decision not to reopen. The court held that because the alien had not filed a petition for review of the BIA's decision not to reopen, and that decision was outside the scope of the district court's transfer of the case, the court was without a statutory basis to review that decision.

Contact: Derri Thomas, AUSA
☎ 313-226-9100

■ Sixth Circuit Reverses Adverse Credibility Determination And Finds No Changed Country Conditions In The Republic Of The Congo

In ***Mapouya v. Gonzales***, __F.3d__, 2007 WL 1452233 (6th Cir. May 18, 2007) (Martin, Clay, *Polster*), the court reversed an IJ's adverse crediblity determination and found the BIA's determination of changed country conditions in the Republic of the Congo not supported by substantial evidence.

Petitioner, a native and citizen of the Republic of the Congo, sought asylum because he claimed the supporters of President Sassou-Nguesso persecuted him for his political beliefs during the Congolese civil war of 1997-1998. An IJ denied his claim, finding that petitioner's testimony was not credible and that changed country conditions rebutted his fear of persecution. The IJ cited three inconsistencies: first, that the asylum application described petitioner as a "fighter" and his testimony said he was not a fighter, but a "supporter"; second, that petitioner stated the house he owned was burned down by the army, then testified that it was his parents house that was burned down; third, that testimony of petitioner's witness stated that he fled to Mali before coming to the US, when petitioner stated that he fled to Gabon. The BIA affirmed.

The court concluded that "the IJ's erroneous adverse credibility determination permeated and infected the IJ's subsequent factual finding and legal conclusions as to [his other claims]."

The court reversed the adverse credibility finding. First, the court found that "fighter" was a mistranslation by the person transcribing petitioner's asylum application and that it was wrong for the IJ to assume that the word "fighter" had a "militaristic meaning." Further, the court criticized the IJ for failing to offer any explanation of why this alleged discrepancy would even be significant. Second, the court found no inconsistency regarding which house was burned down. According to the court, petitioner had explained to the IJ that he owned his parents house through inheritance, thus he "owned" the house that was burned down. Further, the court found this part of his testimony to be irrelevant to his asylum claim. Third, the court found the discrepancy over where petitioner fled to before coming to the US was irrelevant and that petitioner had submitted a UNHCR document corraborating that he entered Gabon from the Congo.

Finally, the court concluded that "the IJ's erroneous adverse credibility determination permeated and infected the IJ's subsequent factual finding and legal conclusions as to [his other claims]," and thus remanded for a determination of whether petitioner had met his burden of proof for asylum. The court also held that the BIA erred in its finding of changed country conditions because the BIA failed to consider the letters from friends petitioner submitted saying that army forces were still looking for him.

In a dissenting opinion Judge Clay would have found that substantial evidence supported the BIA's finding of changed country conditions, noting the Department of State Reports stating that no political killings had occurred in the last year and the fact that the civil war had been over for some time now.

Contact: Surrell Brady, OIL
☎ 202-353-7218

SEVENTH CIRCUIT

■ Court Holds That Detention Prior To A Criminal Conviction Counts As Part Of A Term Of Imprisonment In Determining § 212(c) Eligibility

In ***Moreno-Cebrero v. Gonzales***, __F.3d__, 2007 WL 1364390 (7th Cir. May 10, 2007) (Bauer, Cudahy, *Wood*), the court held that detention prior to a criminal conviction counts as part of a term of imprisonment in determining the eligibility of a removable alien under former INA § 212(c).

Petitioner, an LPR, was placed in removal proceedings for having been convicted of an aggravated felony. He sought section 212(c) relief, but was denied it because an IJ found that petitioner had been convicted of an

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aggravated felony for which he had served a term of imprisonment of at least 5 years. In so holding, the IJ included petitioner's pretrial detention in his calculation of time served. Petitioner appealed the IJ's use of his pretrial detention in calculation time served to the BIA. The BIA affirmed without opinion.

The Seventh Circuit concluded that because the Bureau of Prisons credits a criminal for his time served in custody prior to his conviction when determining whether a criminal has served his sentence, "[t]he only sensible result is to count that period as time that he 'served for such a felony' for purposes of 212(c)." The court rejected petitioner's argument that the BOP's definition of "term of imprisonment" in 18 U.S.C. § 3585 refers solely to the period that commences on the date the prisoner enters custody after conviction because it failed to address the "second half of § 3585, which addresses credit for prior custody toward the service of the term of imprisonment." Further, the court stated that "[petitioner]'s argument would create a senseless distinction between defendants convicted of the same crimes based on whether or not they made bail before trial." The court also supported its holding by finding that immigration laws use the amount of time for which a person is incarcerated as a proxy for the seriousness of the crime. "We have no reason to thing that it mattered to Congress whether the person served time before the conviction or after: it is the overall service of a term of imprisonment that reflects the seriousness of the crime and the culpability of the alien," said the court.

Contact: Manny Palau, OIL
☎ 202- 616-9027

■ **Adverse Credibility Determination Reversed Because IJ Improperly Relied On His Own Beliefs On What A Common Christian Would Know About The Bible**

In ***Jiang v. Gonzales***, __F.3d__, 2007 WL 1394551 (7th Cir. May 14, 2007) (Kanne, Wood, *Evans*), the court reversed an IJ's adverse credibility determination and denial of asylum to an applicant from China claiming persecution on account of his Christian beliefs.

> "The IJ assumed that [petitioner] would be familiar with and understand this particular biblical text [render unto Caesar the things that are Caesar's]. [] This is a bit like concluding that someone is not a baseball devotee because he can't explain the intricacies of the balk rule."

Petitioner claimed asylum on the basis that the Chinese government had ransacked his underground Christian church, confiscated its religious materials, and then imprisoned and beat him for many days. An IJ denied the claim, finding that petitioner had failed to credibly testify. Specifically, the IJ found that petitioner lacked knowledge about Christianity, that his story of how he obtained an expensive Chinese passport and was smuggled to the US the day after he was let out of jail was implausible and inconsistent, and that medical records submitted detailing the injuries suffered from the beatings were "suspect." The IJ also found that the events described did not rise to the level of persecution. The BIA summarily affirmed.

The court reversed the adverse credibility determination. First, the court found that "the IJ impermissibly relied on personal beliefs and his perceived common knowledge when concluding that [petitioner] 'has, at best, a rudimentary if any knowledge of Christianity." The court explained that "the IJ assumed that [petitioner] would be familiar with and understand this particular biblical text [render unto Caesar the things that are Caesar's]. [] This is a bit like concluding that someone is not a baseball devotee because he can't explain the intricacies of the balk rule." Second, the court found that "the manner in which [petitioner] was smuggled out of China has nothing to do with his claim of religious persecution" and criticized the IJ for assuming that someone could not be smuggled out of China in one day without citing to any evidence for the assumption. "And," the court said, "contrary to the IJ's assumption, the [report on China from the United Kingdom's Immigration and Nationality Directorate] submitted by [petitioner] reveal that many of those smuggled out of China do not pay any portion of their fee before leaving," refuting the IJ's disbelief that petitioner could not come up with the money for a fake passport in just one day. Third, the IJ's characterization of the medical records as suspect because they stated in "colloquial and layman's language" that [petitioner] sustained unbearable pain and discomfort "ignore[d] the hospital records' more precise description of [petitioner]'s diagnosis [] fails to recognize that a more professional tone could have been simply lost in translation." Finally, the court found the IJ abused his discretion in determining that the ransack of the home church and the subsequent detention and beatings did not rise to the level of persecution.

Contact: Manny Palau, OIL
☎ 202- 616-9027

■ **BIA Properly Dismissed Petitioner's Asylum Claim Because He Failed To Claim Persecution In Jordan, Claiming A Fear Of Persecution Only In The West Bank**

In ***Zahren v. Gonzales***, __F.3d__, 2007 WL 1437469 (7th Cir. May 17, 2007) (Manion, Wood, *Evans)*, the court affirmed the BIA's denial of asylum to an applicant from the West Bank who claimed persecution on the basis of his conversion to Christianity from Islam. The court upheld the denial of asylum because petitioner only addressed a fear of persecution in the

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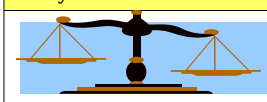

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West Bank, not to Jordan where he was ordered removed.

Petitioner claimed asylum based on his fear that his conversion to Christianity while in the U.S. would cause him to face death at the hands of his strictly Muslim family back in the small West Bank community of Hebron where he was born. An IJ found petitioner credible, but denied asylum and ordered him removed to Jordan. While petitioner had repeatedly identified himself as a "stateless" Palestinian, he admitted to possessing Jordanian citizenship and had a birth certificate issued by Jordan and had entered the country using a Jordanian passport. The BIA affirmed but remanded for consideration of voluntary departure.

The court first dismissed the government's argument that it lacked jurisdiction over the petition due to lack of a final order of removal because the BIA had remanded the case for consideration of voluntary departure. Because the IJ had subsequently granted voluntary departure, the court chose to treat the BIA's order as final "without deciding whether an order of removal is 'final' if there remains an unresolved application for voluntary departure." The court then affirmed the finding that petitioner did not have a reasonable fear of persecution in Jordan. All of petitioner's briefs and his oral argument had addressed only the situation in Hebron, thus the court held it had no basis to question the BIA's order of removal to Jordan. While the court was very skeptical as to whether petitioner actually possessed Jordanian citizenship allowing removal to Jordan, citing a United Nations High Commission Report stating that Jordanian passports issued to people born in the West Bank confer no citizenship rights because the West Bank is no longer part of Jordan, the court held that it must accept the administrative findings of fact as conclusive and that petitioner failed to challenge those findings.

Contact: Josh Braunstein, OIL
☎ 202- 305-0194

EIGHTH CIRCUIT

FGM Qualifies As Persecution As A Matter Of Law And Somali Women Qualify As A Particular Social Group

In ***Hassan v. Gonzales***, __F.3d__, 2007 WL 11308848 (8th Cir. May 7, 2007) (Wollman, *Smith,* Benton), the court reversed an IJ's denial of asylum based on petitioner's claim of FGM. The court also denied application of the fugitive disentitlement doctrine to petitioner's voluntary departure from the United States.

> The court held that Somali women are a persecuted social group based on the prevalence of FGM in Somalia.

Petitioner, a native and citizen of Somalia, claimed persecution on the grounds that she had undergone FGM and that her three daughters would be forced to undergo FGM if they returned to Somalia with her. An IJ denied petitioner asylum, finding that because she had already experienced FGM, she no longer had a reasonable fear of persecution if returned to Somalia. The IJ also found that petitioner's three daughters could remain with their father, an asylee residing in the U.S. The BIA affirmed. Pursuant to the BIA's order of departure, petitioner left the U.S. to Canada but she filed a petition for review and requested a stay of deportation.

Before the court, the government argued that petitioner had waived her asylum claim under the fugitive disentitlement doctrine. Pursuant to this doctrine, the government claimed that because petitioner had failed to meet with government officials to discuss her stay of deportation, she had failed to "appear before the relevant tribunal" and consequently the court could waive her right to appeal. The court declined to apply the doctrine, stating that the fugitive disentitlement doctrine was meant to "punish those who evade the reach of the law" and here petitioner voluntarily departed to Canada pursuant to a government order and thus it was not an attempt to evade the law. The government also argued that FGM did not rise to the level of persecution. The court rejected this argument as well, holding that "we now join the growing number of sister circuits that have considered this issue and concluded that there is 'no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution." In addition, the court held that Somali women are a persecuted social group based on the prevalence of FGM in Somalia. Thus, because the court found that petitioner had suffered past persecution on account of her gender, the court ordered the case remanded so that the burden of proof could properly be shifted to the government to rebut her claim of future persecution. The court rejected the government's argument that a remand wasn't necessary because petitioner had no claim for future persecution as she cannot be subjected to FGM a second time, stating "[w]e have never held that petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow." Further, the court found a remand necessary for consideration of derivative asylum because the father of petitioner's three daughters had recently had his asylum terminated and was ordered removed to Somalia.

Contact: Joanne Johnson, OIL
☎ 202- 305-7613

■ **Court Affirms BIA's Denial Of A Motion To Reconsider Due To Petitioner's Failure To Depart**

In *Lubale v. Gonzales*, __F.3d__,

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2007 WL 1264075 (8th Cir. May 2, 2007) (Wollman, Gibson, *Murphy*), the court held that the BIA properly denied a motion to reconsider a finding that petitioner's failure to voluntarily depart precluded him from seeking adjustment of status.

Petitioner, a native and citizen of Uganda, sought asylum but had the application denied by an IJ. The BIA affirmed the denial of asylum but granted voluntary departure. After the voluntary departure period expired, petitioner filed a motion to reopen with the BIA seeking adjustment of status based on marriage to a U.S. citizen. The BIA denied the motion because of petitioner's failure to depart and because DHS opposed the motion. Petitioner then filed a motion to reconsider the denial of his motion to reopen arguing that exceptional circumstances prevented his departure, namely his wife's delivery of a stillborn child during the pendency of his first appeal to the BIA. The BIA held that his wife's delivery of a stillborn did not constitute an exceptional circumstance because it occurred during the pendency of his initial appeal to the BIA - the appeal which ultimately granted voluntary departure.

Before the Eighth Circuit, petitioner argued that the BIA abused its discretion by failing to consider his wife's stillborn child as an exceptional circumstance justifying his failure to depart. In affirming the denial of the motion to reconsider, the court also noted that "because [petitioner]'s removal proceedings commenced after the effective date of the IIRIRA, the BIA lacked authority to apply an "exceptional circumstances" justification for his failure to depart." Finally, the court dismissed a claim for ineffective assistance of counsel due to failure to exhaust.

Contact: Cindy Ferrier, OIL
☎ 202-353-7837

■ **IJ Abused Discretion In Granting DHS's Motion To Reopen Petitioners' Asylum Proceedings Because The Evidence Presented In The Motion Was Not Previously Unavailable**

In ***Ivanov v. Gonzales***, __F.3d__, 2007 WL 1189425 (8th Cir. April 24, 2007) (Smith, *Bowman*, Colloton), the court held that an IJ abused his discretion by granting DHS's motion to reopen petitioners' asylum proceedings based on new, material evidence of fraud because the evidence presented by DHS was previously available.

Petitioners had sought asylum initially based on their claim that they were persecuted in Georgia due to their non-Georgian nationality, but later revised their applications to include the fact that petitioner was Jewish and additionally persecuted on account of her faith. During the removal hearing DHS was granted a continuance in order to verify the petitioners' birth certificates and documents. Seven months later, DHS faxed a verification request to the U.S. Embassy in Georgia. Less then three weeks after DHS contacted the embassy, the IJ conducted the final hearing and granted asylum to petitioners. Later that day, the Embassy in Georgia faxed a one-page response to DHS stating that the female petitioner's birth certificate was false. On that basis, DHS filed a motion to reopen claiming petitioners had committed fraud in their asylum applications. After four additional hearings, the IJ granted the motion and the BIA affirmed, noting that DHS had raised serious issues and citing the IJ's authority to reopen cases at his discretion.

The Eighth Circuit reversed the BIA's decision and held that the IJ had abused his discretion in granting the motion to reopen. The court found that the evidence of fraud was not previously unavailable as required by 8 C.F.R. § 1003.23(b)(3), stating that the documents DHS requested had been available in the civil archive in Georgia prior to the IJ's final hearing date but that DHS had waited seven months to request the documents. "While we appreciate that DHS's workload compels the judicious use of its limited investigative resources, this fact cannot excuse the agency from complying with the regulatory requirements for motion to reopen" said the court, holding that "no part of the regulation exempts DHS from the requirement that a party seeking to reopen proceedings must show that the evidence it offers was not available [] at the former hearing."

> "No part of the regulation exempts DHS from the requirement that a party seeking to reopen proceedings must show that the evidence it offers was not available [] at the former hearing."

Contact: Patricia Smith, OIL
☎ 202-353-8841

■ **Refugees Who Adjust Status May Be Subject To Removal Without Termination Of Refugee Status**

In ***Xiong v. Gonzales***, 484 F.3d 530 (8th Cir. 2007) (Wollman, Bye, and Smith), the Eighth Circuit held that an alien who enters the U.S. as a refugee, subsequently adjusts his status to a permanent lawful resident, and is thereafter convicted of an aggravated felony or a crime of moral turpitude may be placed in removal proceedings, even though his refugee status was never terminated. The court also held that it lacked jurisdiction to review the BIA's alternative finding that petitioner was removable by reason of having committed a criminal offense covered in section 1227(a)(2)(A)(iii) of 8 U.S.C. § 1252(a)(2)(C), namely an aggravated felony.

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

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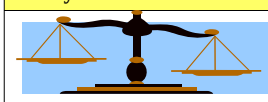

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NINTH CIRCUIT

■ **An Expedited Removal Interrupts Continuous Physical Presence For Purposes Of Cancellation Of Removal**

In *Juarez-Ramos v. Gonzales*, __F.3d__, 2007 WL 1330910 (9th Cir. May 8, 2007) (*Nelson*, Graber, Ikuta), the court held that an expedited removal order interrupts an alien's continuous physical presence for the purpose of cancellation of removal.

Petitioner, a native and citizen of Mexico, had previously been ordered removed subject to voluntary departure in 1994 and again in 1999 pursuant to an expedited removal order. When placed in removal proceedings a third time, petitioner sought cancellation of removal. An IJ denied the relief, stating that the voluntary departure order in 1994 and the expedited removal in 1999 interrupted his required ten years of continuous physical presence making him statutorily ineligible for cancellation of removal. The BIA affirmed.

Petitioner sought review in the Ninth Circuit, arguing that pursuant to *Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005), his continuous physical presence was not interrupted by the expedited removal because "so little process" was involved. The court rejected petitioner's argument and distinguished petitioner's case from *Tapia*. The court held that an expedited removal proceeding was more analogous to a formal removal proceeding than a brief turnaround at the border because the statutory bar to readmission that accompanies an expedited removal "reflects a congressional intent to sever an alien's ties to this country." Addressing dicta in *Tapia* stating that aliens who avoid formal proceedings at the border are arbitrarily rewarded, the court explained, "[w]e can respond to such anticipated criticism only by noting that a line must be drawn somewhere. It is within Congress's discretion to draw the line between denials of reentry that are memorialized and executed pursuant to an expedited removal order and those that are not. And that is what we conclude Congress has done." Because the court found petitioner ineligible for cancellation of removal, it found no need to reach petitioner's challenge to the government's evidence regarding his voluntary departure.

> "It is within Congress's discretion to draw the line between denials of reentry that are memorialized and executed pursuant to an expedited removal order and those that are not."

Contact: Erica Miles, OIL
☎ 202-353-4433

■ **Administrative Appeals Office Did Not Abuse Its Discretion By Denying Petitioner's Application For Legalization For Lack Of Continuous Residence**

In *Pedroza-Padilla v. Gonzales*, __F.3d__, 2007 WL 1412655 (9th Cir. May 15, 2007) (Kozinski, *O'Scannlain*, Bybee), the court held that the Administrative Appeals Office of the former INS did not abuse its discretion in finding that petitioner's order of deportation interrupted his continuous residence in the U.S. for purposes of legalization under INA § 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i).

Petitioner, a native and citizen of Mexico, had been previously deported from the U.S. in 1985. He subsequently reentered in 1986, whereupon the former INS initiated deportation proceedings against him. Petitioner then applied for adjustment of status pursuant to 8 U.S.C. § 1255a. The application was denied by an INS District Director due to lack of continuous residence within the meaning of 8 U.S.C. § 1255a(g)(2)(B)(i) because he had been previously deported. Subsequent to the denial, the INS promulgated an implementing regulation stating that an alien shall be regarded as having resided continuously if the alien's departure was not based on an order of deportation. The Administrative Appeals Office then affirmed the denial, noting that a challenge to the implementing regulation had recently been dismissed in *Proyecto San Pablo v. INS*, 4 F.Supp.2d 881 (D.Ariz. 1997). By the time petitioner next appeared before an IJ, the Ninth Circuit had reversed *Proyecto San Pablo* and a district court had ordered the INS to readjudicate all claims for legalization previously denied on the basis of continuous residence. Consequently, petitioner argued that his deportation proceedings should be terminated and that he qualified for suspension of deportation. An IJ rejected this argument after applying IIRIRA's stop-time rule and the BIA affirmed without opinion. After the BIA's denial, the Administrative Appeals Office readjudicated petitioner's legalization application pursuant to the district court's order and again denied the application because he continued to be ineligible for legalization due to lack of continuous residence. Petitioner appealed both the decision of the IJ and the Administrative Appeals Office to the Ninth Circuit.

The Ninth Circuit rejected petitioner's contention that the IJ improperly denied his suspension of deportation by retroactively applying the stop-time rule from IIRIRA and that the Administrative Appeals Office abused its discretion by finding that he had not continuously resided in the US since 1982. First, the court held that the language of IIRIRA "plainly indicates that it applies to a case such as [petitioner]'s. Also, we are satisfied that application of the stop-time rule in this instance is not unconstitutionally retroactive after *INS v. St. Cyr*." Second, the court held that the Administrative Appeals Office did not

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abuse its discretion because "[c]learly, with respect to maintenance of continuous residence, it was not congressional intent to provide relief for absences under an order of deportation." The court noted that Congress had created certain waivers for grounds of inadmissibility, but no waivers concerning continuous residence.

Contact: Erica Miles, OIL
☎ 202-353-4433

■ Citizenship Bar Does Not Apply To Aliens Who Seek Discharge From Voluntary Military Service Based On Alienage

In ***Gallarde v. INS***, __F.3d__, 2007 WL 1377610 (9th Cir. May 11, 2007) (Bright, Tashima, *Bea*), the court held that neither the language of INA § 315, 8 U.S.C. § 1426, or its legislative history expressed an intent by Congress to permanently bar aliens who voluntarily enlisted in the military and sought discharge on the basis of alienage from applying for citizenship.

Petitioner, a native and citizen of the Philippines, enlisted in the U.S. Navy in 1991. Six months shy of completing his four year service obligation, he was granted an honorable discharge on the basis of alienage. In 1997, he applied for naturalization. The former INS denied the application, ruling that petitioner was barred from becoming a citizen under § 315. A district court upheld the INA's decision, holding that § 315's language stating that an alien discharged from a "liability" to the U.S. military on the basis of alienage barred that alien from obtaining citizenship.

In the Ninth Circuit, petitioner argued that § 315 only applies to aliens who request discharge on the basis of alienage from compulsory service, not voluntary enlistment. The court agreed. The court found that § 315's phrase "training or service in the Armed Forces" unambiguously referred only to aliens drafted into the military. The court reached this conclusion by first comparing section 315 to sections 328 and 329 which allow an alien with an honorable discharge to apply for accelerated naturalization if he has served honorably for a period of one year. The court said that, "were we to hold, as the Government proposes, that 'training or service in the Armed Forces,' as used in § 315, includes voluntary military services, we would render § 329's limited penalty superfluous and the absence of such a penalty in § 328 insignificant." The court then looked to the historical context of section 315 to determine that § 315 was created as part of the Selective Service statutes instituting the draft. Therefore, the court reasoned, when the INA "separated the historically combined right of an alien to avoid the draft from the penalty for exercising that right; an aliens' right to exemption remained in [the Selective Service statutes]." Finally, the court disagreed with the government's position that allowing discharged aliens to seek citizenship would create "an exodus of aliens from the Armed Forces", reasoning that the military still retains discretion to grant an alien discharge from the military.

> "When a petitioner raises a claim based on a purported procedural defect of the proceedings before the IJ, the *only* administrative entity capable of independently addressing that claim is the BIA."

Contact: Sam Bettwy, AUSA
☎ 619-557-7119

■ BIA Erred By Issuing A Streamlined Decision When Petitioner Claimed The IJ Made A Procedural Error

In ***Montes-Lopez v. Gonzales***, __F.3d__, 2007 WL 1438705 (9th Cir. May 17, 2007) (Goodwin, *Thomas*, Bea), the court held that the BIA errs by issuing a streamlined decision when an alien claims the IJ made procedural due process errors.

Petitioner, a native and citizen of El Salvador, had applied for asylum. During his removal proceedings, petitioner was granted numerous continuances to afford him time to find representation. An IJ refused to grant any more continuances when petitioner appeared in court again without counsel but with a letter from the attorney who prepared his asylum application stating that the attorney had been suspended. The IJ determined that petitioner knew about this attorney's unavailability long before his scheduled hearing date and thus refused to grant another continuance. On appeal to the BIA, petitioner argued the his right to counsel was violated by the IJ's failure to grant a continuance. The BIA affirmed the decision of the IJ without opinion.

The court held that "by summarily affirming the IJ's decision, the BIA ignored - and denied review of - [petitioner]'s claim that his right to counsel was violated by the IJ." The court explained that "[w]hen a petitioner raises a claim based on a purported procedural defect of the proceedings before the IJ, the *only* administrative entity capable of independently addressing that claim is the BIA."

Contact: Jennifer Lightbody, OIL
☎ 202-616-9352

TENTH CIRCUIT

■ Tenth Circuit Holds That A Final Order Of Removal Remains A Predicate To The Exercise Of Jurisdiction After Real ID Act

In ***Hamilton v. Gonzales***, __ F.3d__, 2007 WL 1252476 (10th Cir. May 1, 2007) (*O'Brien*, Ebel, Tymkovich), the Tenth Circuit held that

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the REAL ID Act did not alter the requirement in INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), that courts of appeals review only final orders of removal. The alien challenged the revocation of his visa, but the court concluded that the plain language of § 1252(a)(1) did not extend to such cases.

The petitioner, a U.S. citizen, sought a visa on behalf of his adopted son, a native of South Korea. The regional director for INS first granted the visa but revoked it upon the finding that petitioner's son was adopted after the age of sixteen, the cut-off age for immigration purposes. In his appeal, petitioner claimed that the court had jurisdiction to review the revocation under INA § 242(a)(1), 8 U.S.C. § 1252(a)(2)(D), as amended by the REAL ID Act, which extends the appellate courts' jurisdictions to hear "constitutional claims and questions of law" that arise in otherwise non-reviewable immigration actions. The court stated first that, under 8 U.S.C. § 1252(a)(1), the courts only review "final orders of removal," *i.e.*, an IJ's order affirmed by the BIA. The court further held that § 1252(a)(2)(D) of the REAL ID Act provided jurisdiction to reach legal questions, but only in the context of a final administrative order of removal. Because a visa revocation is not a final order of removal, the court found that it lacked jurisdiction to review petitioner's claim.

Contact: Thomas B. Fatouros, OIL
☎ 202-305-7599

■ **Tenth Circuit Holds That BIA Has No Statutory Authority To Enter An Order Of Removal In The First Instance**

In ***Sosa-Valenzuela v. Gonzales***, __ F.3d__, 2007 WL 1252477 (10th Cir. May 1, 2007) (O'Brien, Ebel, *Tymkovich*), the Tenth Circuit held that, absent an express finding of removability by the IJ, the BIA has no independent statutory authority to order a petitioner removed in the first instance. Because the BIA lacked authority to issue a final order of removal, the court held it lacked jurisdiction over the petition for review and remanded to the IJ for a finding on removability.

The petitioner, a lawful permanent resident from Mexico, who pleaded guilty for first degree assault and unlawful possession of firearm, sought a waiver from removal under the now repealed INA § 212(c). The IJ granted the waiver but made no explicit finding of deportability. DHS appealed the IJ's decision to the BIA. The BIA concluded that petitioner was not eligible for a waiver and ordered him deported to Mexico. On appeal, the court dismissed the case for lack of jurisdiction to review removal proceedings in the absence of a "final order of removal."

The court found that the IJ's § 212(c) waiver finding was not a substitute for a finding of deportability and that "an order of removal by the IJ is required before the BIA may order removal. This may include an express order of removal or, more generally, a finding of deportability."

The court addressed two issues: (1) what constitutes a "final order of removal" for purposes of appellate jurisdiction under 8 U.S.C. section 1252(a)(1) and section 1101(a)(47)(A); and whether (2) the BIA has independent statutory authority to issue an order of removal in the first instance. The court held that (1) an IJ must first either issue an order of removal or make a finding of deportability to confer the court with appellate jurisdiction; and (2) the BIA does not have the independent statutory authority to issue an order of removal in the first instance.

The court explained that under INA § 101(a)(47)(A), 8 U.S.C. § 1101 (a)(47)(A), an order of deportation is "the order . . . concluding that the alien is deportable or ordering deportation," and under INA § 101(a)(47)(B), 8 U.S.C. § 1101 (a)(47)(B), an "order of deportation" becomes "final" when the BIA affirms the IJ's order or the period for seeking BIA's review had expired. Since the court's jurisdiction was premised on the existence of a "final order of removal," and there was none here, the court dismissed the case. The court found that the IJ's § 212(c) waiver finding was not a substitute for a finding of deportability and that "an order of removal by the IJ is required before the BIA may order removal. This may include an express order of removal or, more generally, a finding of deportability. Neither occurred in this case. Consequently, no final order of removal yet exists, and we lack jurisdiction under § 1252(a)." The court also briefly addressed petitioner's contention that even without a final order of removal, the court had jurisdiction because of the REAL ID Act providing jurisdiction on the courts to review "constitutional claims or questions of law" under 8 U.S.C. § 1252(a)(2)(D). The court rejected this contention stating that § 1252 (a)(2)(D) did not provide jurisdiction independent of a final order of removal.

Contact: Jennifer L. Lightbody, OIL
☎ 202-616-9352

Contributions To The ILB Are Welcomed!

"Persecutor" bar raises more questions

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the government's petition for rehearing that decision was vacated.

The petitioner was an officer in the Peruvian army in July 1985 when his patrol was involved in a significant operation to search and engage the Shining Path guerillas in a village named Llocllapampa. Petitioner's patrol was one of the two patrols assigned to block the escape routes from the village. Two other patrols were assigned to enter the village. Petitioner and his men, who wore Peruvian military uniforms, stationed themselves about three to five miles from the village on different sides of a path. Petitioner also stated that he could only communicate with his military base and could not contact the other patrols. Petitioner testified that when the two patrols entered the village they massacred civilians. Petitioner stated that he did not find out about the massacre until several weeks later when he heard it on the radio, and also heard that one the lieutenant who led one of the patrols into the village had admitted to executing civilians. This massacre was subsequently investigated by the Peruvian Senate Human Rights Commission which found that sixty-nine civilians had been killed, including many women and children. The Commission concluded that the army's operation amounted to genocide but that petitioner's unit was not involved in any confrontations with fugitive civilians. The massacre was also documented by the 1985 Department of State Country Report on Human Rights. Petitioner and other officers were subsequently tried by a military court martial. Petitioner stated that he was found innocent of the charges of first degree murder, homicide, and abuse of authority.

Following the conclusion of the court martial, petitioner returned to duty and was promoted to the rank of captain. However, he and his family began to receive death threats from the Shining Path, and on one occasion explosives were set off in front of his parents' home. In 1989, the Shining Path allegedly attempted to kidnap petitioner's daughter, and in 1990 one of his neighbors who was also in the military was murdered in his home. Fearing for his life, petitioner and his family obtained visitors' visas and on August 19, 1991, arrived in Miami, Florida.

Petitioner affirmatively applied for asylum in 1993 claiming that he and his family had been persecuted by the Shining Path. When that application was not granted in 1999, he was referred for a removal hearing. Petitioner then renewed his asylum request and testified in support of his claim. On October 4, 2004, the IJ concluded that petitioner was barred from applying for asylum because he had assisted in persecution of others, finding first that he was not credible. Alternatively, the IJ found that even if credible, petitioner and his family were still barred from applying for asylum. The BIA affirmed the adverse credibility finding and also found that even assuming credibility, petitioner had assisted or otherwise participated in the persecution of others and could not apply for asylum.

The court did not accept the government's view that culpable knowledge was not required because of the lack of an explicit scienter requirement in the statute. "The term 'persecution' strongly implies both scienter and illicit motivation."

The *en banc* court, first acknowledged the difficulty of applying an "all-embracing answer" to the question of whether the persecutor bar applies, but then stated that the narrow dispute in the case was the "legal question whether the persecutor bar would apply to [petitioner] if he had no prior or contemporaneous knowledge of the murder of civilians." The government contended that such culpable knowledge was not required by the statute, but rather any conduct with an "objective effect" of facilitating persecution by others would suffice to trigger the bar. The court was not persuaded by these arguments. In particular, the court did not accept the government's view that culpable knowledge was not required because of the lack of an explicit scienter requirement in the statute. "The term 'persecution' strongly implies both scienter and illicit motivation," said the court. The court noted that *Federonko* and other cases cited by the government, "focus on the question of whether certain conduct constitutes 'assistance,' not on the issue of scienter."

The court found that the "government's better argument turn[ed] on the need for some flexibility in applying the statute to gray areas and the latitude implicitly confided to the Attorney General in administering the scheme." "There may well be gray-areas where less than full and detailed knowledge may suffice," said the court. Here if petitioner's version of his state of mind is accepted, namely that he had no prior or contemporaneous knowledge of the murder of civilians, "presumptively the persecutor bar should not apply," held the court. Because the IJ and the BIA "rested their decision upon a misunderstanding of the legal elements of persecution," said the court, the ordinary remedy is a remand to allow the matter to be considered under the proper legal standards. On remand, said the court, the government can develop a more favorable case, "but this would have to be done expressly and persuasively, and not by a vague reference to the "totality of . . . conduct' that conflates the question of 'assistance' with the question whether one possessed such scienter as may be required under the circumstances."

The court then noted that that the case would have been different if the evidence had clearly established petitioner's guilty knowledge

NOTED

FROM A RECENT ANNOUNCEMENT FOR AN IMMIGRATION LAW SEMINAR

Immigration-law representation and practice management have never been more difficult. The ever-changing law is mind-bogglingly complex, agency regulations are either indecipherable or nonexistent, and the bureaucratic response is typically confused, nonsensical or unforgiving.

Media bloviators befuddle, inflame and frighten the public about America's "Broken Borders". ICE conducts unannounced raids of employers and sweeps of the hapless alien parents of U.S. citizen children. USCIS launches a new website that spits out more error messages than answers. CBP snares both overstays and legitimate travelers alike who apply for admission at ports of entry.

The DOL's buggy PERM program perplexes long-time and new practitioners. DOS and DHS are hamstrung by delays in FBI security clearances. The AAO rubber-stamps USCIS denials while pretending to be impartial. The State Department reports monthly quota backlogs that move at a chelonian pace. Future H-1B hopefuls are stuck like insects in amber while awaiting May 1 and October 1.

A newly reconstituted, Democrat-controlled Congress is set to attempt a grand resolution on comprehensive immigration reform legislation with President Bush

Case involving persecutor bar to asylum remanded

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or that his denial of knowledge was unworthy of belief. However, the court further found that there was no direct evidence that of petitioner's knowledge and that the IJ's and the BIA's credibility findings were "independently vulnerable." The court said that first the IJ and BIA needed to make specific findings with record support that petitioner lied, or evaded answering or was significantly inconsistent in his response to subsidiary questions; and second, "an inference that because he lied on these subsidiary matters, his denial of advance or contemporaneous knowledge of a massacre was also false." "*Falsus in uno, falsus in obmnibus*" said the court "is the most plausible method in this case" to discredit petitioner. The court noted that the REAL ID Act, the fact-finder is entitled to draw the *falsus in omnibus* inference, but that Act did not apply to this case and even if it did it would not cure the problems with the IJ and BIA reasoning. The court considered the basis for the adverse credibility findings and found them flawed. The court then concluded that a remand was necessary for further consideration of the credibility issue because the record did not compel the IJ and the BIA to believe petitioner's story.

On remand, said the court, "the IJ and Board are free to adopt the position, or to assume arguendo, that knowledge is required in this case and then to explain plausibly why it disbelieves [petitioner]'s denial. They are also free to adopt (and then seek to defend on appeal) a legal standard as to scienter different than the presumptive one that we have framed, or to take additional evidence or to do both. If they do alter the standard, they may have to provide a new evidentiary hearing so [petitioner] can seek to meet it."

Contact: Blair O'Connor, OIL
☎ 202-616-4890

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NOTICE REGARDING SECOND CIRCUIT ORAL ARGUMENTS

Please be aware that the video argument option remains unavailable for Second Circuit cases. Assistant US Attorneys assigned to Second Circuit arguments should therefore continue to notify OIL Deputy Director David McConnell if they are unable to travel to New York for these cases. Mr. McConnell will assign OIL attorneys to attend these arguments. If you receive notice of a Second Circuit argument and require assistance, please email him at *david.mcconnell@usdoj.gov*. You may also contact Mr. McConnell for assistance with arguments in other circuits, or if you need guidance with respect to any immigration case.

INSIDE OIL

OIL welcomes the following five new attorneys:

Sharon M. Clay graduated from Howard University, with a degree in Psychology. She later attended University of Baltimore School of Law. Prior to joining OIL, she was In-house Counsel for a construction company and later worked for consulting firm, where she provided litigation support to the U.S. Citizenship and Immigration Services and OIL.

Kathleen Kelly graduated Arizona State University in 1998, and Albany Law School in 2002. She accepted a commission in the United States Navy Judge Advocate General's Corps after graduation, and served four years active duty military service as defense counsel, legal assistance attorney, administrative attorney, and White House military aide.

Nairi Mary Simonian graduated cum laude from UCLA with a degree in Comparative Literature and a minor in English. She then attended American University-Washington College of Law and graduated in 2005. Her previous legal experience includes serving as a research associate for a Department of Justice grant program on prisoner rights at the Washington College of Law and the DOJ's Antitrust division.

Barrington Wilkins graduated from the University of Maryland with a degree in criminal justice/gov't politics. Subsequently, he attended law school at Brigham Young University. Prior to coming to OIL, he was a prosecutor in the Navy's Judge Advocated General's Office, and a criminal prosecutor at the U.S. Attorney's Office (Washington, DC).

Joseph Darnell Hardy graduated from the University of Connecticut. And received his JD from George Washington University law School. Prior to joining OIL, he clerked with the District Court of Maryland. He was also a summer intern in the Appellate Litigation Section of the Department of Veterans Affairs.

L to R: Joseph Hardy, Nairi Mary Simonian, Kathleen Kelly, Sharon Clay

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended 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.

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.

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.

Office of Immigration Litigation

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

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

Contributors:
Tim Ramnitz, Micheline Hershey, OIL