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PRESIDENT OUTLINES STRATEGY TO ENHANCE HOMELAND SECURITY THROUGH COMPREHENSIVE IMMIGRATION REFORM

During his recent visit to the border states of Arizona and Texas, President Bush outlined the strategy to enhance homeland security through comprehensive immigration reform. Speaking in Tucson on November 29th, the President stated that "securing the border is essential to securing the homeland." He emphasized the importance of enforcing immigration laws. "We are a nation built on the rule of law," he said, "and those who enter the country illegally violate the law." "America's immigration laws apply across all of America," he stated, "and we will enforce those laws throughout our land." The President told the audience that "the American people should not have to choose between a welcoming society and a lawful society. We can have both at the same time."

The President outlined a three-pronged plan to secure the border to improve interior enforcement, and to create a new temporary worker program (TWP). He also called on Congress to "end the cycle of endless litigation that clogs our immigration courts and delays justice for immigrants." "Some federal courts are now burdened with more than six times as many immigration appeals as they had just a few years ago," said the President. In particular, he noted a recent decision where a panel of the Ninth Circuit, "declared that illegal immigrants have a right to reliti-

> **The President called on Congress to "end the cycle of endless litigation that clogs our immigration courts and delays justice for immigrants."**

gate before an immigration court as many times as they want. This decision would encourage illegal immigrants who have been deported to sneak back into the country and to re-argue their case."

The following is a summary of the three-pronged strategy outlined by the President and in a White House Fact Sheet.

1. Securing the Border

■Return All Illegal Entrants Caught Crossing The Southwest Border – More than 85 percent of apprehended illegal immi-

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SUPREME COURT TO HEAR RETROACTIVE APPLICATION OF REINSTATEMENT OF REMOVAL STATUTE

On October 31, 2005, the Supreme Court granted a petition for a writ of certiorari to review the Tenth Circuit's decision in ***Fernandez-Vargas v. Ashcroft***, 394 F.3d 881 (10th Cir. 2005), in which the court upheld the Department of Homeland Security's ("DHS") application of the reinstatement statute to preclude the alien from applying for adjustment of status. The government had previously acquiesced to the petition for writ of certiorari.

The specific issue before the Court is whether the reinstatement statute at 8 U.S.C. §1231(a)(5), which provides for the reinstatement of a previous order of removal against an alien who has illegally re-entered the United States, applies to an alien

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GOVERNMENT SEEKS REHEARING EN BANC OF NINTH CIRCUIT'S RULING THAT BIA LACKS STATUTORY AUTHORITY TO ENTER A REMOVAL ORDER

In ***Lolong v. Gonzales,*** 400 F.3d 1215 (9th Cir. November 28, 2005) (*Fletcher,* Noonan, Thomas) (involving "disfavored group" asylum), the Solicitor General authorized a supplemental brief requesting that the Ninth Circuit additionally rehear *en banc Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), and on November 29, 2005 the supplemental brief was filed.

Molina-Camacho held that the BIA lacked statutory authority to order the alien deported where the IJ had found the alien deportable but granted relief, and did not order the alien deported (which is what happened in *Lolong*). The *Lolong* panel had ordered the parties to submit a

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PRESIDENT OUTLINES COMPREHENSIVE IMMIGRATION REFORM

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grants are from Mexico, and most are immediately escorted back across the border within 24 hours. To prevent them from trying to cross again, DHS is using interior repatriation whereby Mexican illegal entrants are returned to their hometowns, making it more difficult for them to attempt another crossing. The Administration is working to expand interior repatriation to ensure that when those who violate the country's immigration laws are sent home, they stay home.

■**End The Practice Of "Catch And Release"** – Because detention facilities lack bed space, most non-Mexican illegal immigrants apprehended are released and directed to return for a court appearance. However, 75 percent fail to show. Last year, only 30,000 of the 160,000 non-Mexicans caught coming across our Southwest border were sent home. Addressing this problem, the President has signed legislation increasing the number of beds in detention facilities by more than 10% over the next year.

The Federal government is also using "expedited removal" to detain, place into streamlined judicial proceedings, and deport non-Mexican illegal immigrants in an average of 32 days, almost three times faster than the usual procedure. The use of expedited removal is now being expanded across the entire Southwest border. The U.S. is also pressing foreign governments to take back their citizens more promptly, while streamlining bureaucracy and increasing the number of flights carrying illegal immigrants home.

■**Reform Immigration Laws** – The President is seeking to eliminate senseless rules that require the government to release illegal immigrants if their home countries do not take them back in a set period of time. Among those the government has been forced to release are murderers, rapists, child molesters, and other violent criminals. The President is also working with Congress to address the cycle of endless litigation that clogs immigration courts, rewards illegal behavior, and delays justice for immigrants with legitimate claims. Lawsuits and red tape must not stand in the way of protecting the American people.

■**Stop People From Illegally Crossing The Border In The First Place** – The Administration is increasing manpower, technology, and infrastructure at the Nation's borders, and integrating these resources in innovative ways. For example, Border Patrol agents are using unmanned aerial vehicles (UAVs) and infrared cameras to intercept illegal crossers.

> **"People in this debate must recognize that we will not be able to effectively enforce our immigration laws until we create a temporary worker program."**

2. Enforce Immigration Laws in the Interior

The President stressed in his speech in Tucson that "as we work to secure the border, comprehensive immigration reform also requires us to improve enforcement of our laws in the interior of the country. Better interior enforcement begins with better work site enforcement. American businesses have an obligation to abide by the law, and our government has the responsibility to help them do so."

To help businesses comply with immigration laws, the government is addressing document fraud and expanding a pilot program enabling businesses to screen the employment eligibility of new hires against Federal records.

The President has signed legislation that more than doubles the resources dedicated to worksite enforcement. The government is placing a special focus on enforcement at critical infrastructure.

3. Creation Of A New Temporary Worker Program

The President reaffirmed his proposal to create a new temporary worker program. "This program would create a legal way to match willing foreign workers with willing American employers to fill jobs that Americans will not do," he said. The President acknowledged that "there's a lot of opinions on this proposal," but stressed that "people in this debate must recognize that we will not be able to effectively enforce our immigration laws until we create a temporary worker program."

According to the White House, temporary workers will be able to register for legal status for a fixed time period and then be required to return home. This plan meets the needs of a growing economy, allows honest workers to provide for their families while respecting the law, and relieves pressure on the border. By reducing the flow of illegal immigrants, law enforcement can focus on those who mean this country harm. To improve worksite enforcement, the plan creates tamper-proof I.D. cards for every legal temporary worker.

The TWP does not create an automatic path to citizenship or provide amnesty. The President opposes amnesty because rewarding those who break the law would encourage more illegal entrants and increase pressure on the border. A TWP by contrast, would promote legal immigration and decrease pressure on the border. The President supports increasing the annual number of green cards, but for the sake of justice and security, the President will not sign an immigration bill that includes amnesty.

By Francesco Isgro, OIL

DISPOSITIVE MOTIONS IN NATURALIZATION CASES

Ed. Note: This is Part II of a two-part article discussing motion practices in cases involving application by aliens for naturalized citizenship.

IV. Motions to Dismiss for Improper Venue, Lack of Personal Jurisdiction, and Improper Service

Depending on the petitioner's place of residence, a complaint concerning a naturalization application may be susceptible to dismissal for improper venue, pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. That is because although INA §§ 310(c) and 336(b) permit judicial review under appropriate circumstances, those sections strictly limit such review to the district court "for the district in which the applicant resides." See 8 U.S.C. §§ 1421 (c) & 1447(b) *Bahet*, 2002 WL 971712, at *1; *Canela v. U.S. Dept. of Justice*, 2001 WL 664633, at *3 n.2 (S.D.N.Y. June 12, 2001). In the alternative, the court could transfer the action to the district court for the district in which the petitioner resides, pursuant to 28 U.S.C. § 1406 (a) (where venue is improper, court "shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought"), *see, e.g., Edme v. District Director*, 2004 WL 792708, at **1-2 (S.D.N.Y. Mar. 31, 2004) (transferring action to district of inmate's pre-incarceration residence); *Kim*, 2004 WL 540461, at *2 (transferring action to district of petitioner's residence).

Although the government may also have grounds to move to dismiss a naturalization-related complaint for lack of personal jurisdiction and improper service of process, pursuant to Rules 12(b)(2) and (5) of the Federal Rules, *see, e.g., Tan v. U.S. Dep't of Justice, INS*, 931 F. Supp. 725, 726 n.1 (D. Ha. 1996), such motions will not be discussed in detail here because their principles are not naturalization-specific, see Fed. R. Civ. P. 4(i)(2) (governing service of process where government is a defendant); *see also, e.g., Stafford v. Briggs*, 444 U.S. 527, 553 n.5 (1980) ("service of process is the means by which a court obtains personal jurisdiction over a defendant"); *Printed Media Services, Inc. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993) ("If a defendant is improperly served, a federal court lacks jurisdiction over the defendant."); *Lampe v. Xouth, Inc.*, 952 F.2d 697, 700-01 (3d Cir. 1991) ("A court obtains personal jurisdiction over the parties when the complaint and summons are properly served upon the defendant."); *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991) ("valid service of process is necessary in order to assert personal jurisdiction over a defendant"); *but see Zhuang v. U.S. CIS*, 2005 WL 1324015, at **4-5 (D. Minn. June 1, 2005) (given particular provisions of naturalization statutes, stating "it is by no means clear that the Petitioner was required to serve a Summons and Complaint on the Respondent, in the manner prescribed by Rule 4(i)").

> A naturalization applicant bears the burden to demonstrate his eligibility for citizenship in every respect, by evidence that is "clear, unequivocal, and convincing."

V. Motions to Dismiss for Failure to State a Claim Upon Which the Court May Grant Relief, for Judgment on the Pleadings, and for Summary Judgment

A naturalization applicant bears the burden to demonstrate his eligibility for citizenship "in every respect," *see, e.g., Pangilinan*, 486 U.S. at 886, by evidence that is "clear, unequivocal, and convincing," *Berenyi*, 385 U.S. at 636; *Tieri v. INS*, 457 F.2d 391, 393 (2d Cir. 1972). Furthermore, any doubts regarding an applicant's fulfillment of statutory prerequisites must be resolved against the applicant and in the government's favor. *See, e.g., Macintosh*, 283 U.S. 626 (where denial of naturalization is concerned, "the United States is entitled to the benefit of any doubt which remains in the mind of the court as to any essential matter of fact"); *United States v. Schwimmer*, 279 U.S. 644, 649 (1929) ("When, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.").

Thus, the Supreme Court has historically held that where a naturalization applicant has failed to demonstrate conclusively that he meets the statutory prerequisites to naturalization, it is unnecessary for a reviewing court to conduct a *de novo* hearing on his application. *See Agosto v. INS*, 436 U.S. 748, 754 n.4 (1978) (evidence supporting naturalization application was "so inherently incredible in light of its internal inconsistencies as to justify denial of *de novo* judicial review of the citizenship claim"); *Pignatello v. Attorney General*, 350 F.2d 719, 723 (2d Cir. 1965) (review of a citizenship claim "[d]raw[s] on the familiar principles relating to summary judgment in the federal courts"; holding that *de novo* hearing may be unnecessary where citizenship claim is "frivolous"; remanding to district court because claim presented issues of fact); *see also Kovacs v. United States*, 476 F.2d 843, 845 (2d Cir. 1973) (where "record . . . generate[d] large doubts as to [naturalization applicant's] truthfulness. . . . Since those doubts are to be resolved against [him], the denial must stand") (citation omitted).

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MOTIONS IN NATZ CASES

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In naturalization cases, the decision whether to file a motion to dismiss a complaint for failure to state cognizable claim, pursuant to Rule 12 (b)(6), for judgment on the pleadings, pursuant to Rule 12(c), or for summary judgment, pursuant to Rule 56 (c), may depend on the level of detail in petitioner's own factual allegations. That is, if an initial petition contains sufficient factual allegations to demonstrate that petitioner is statutorily ineligible for naturalization, a Rule 12 (b)(6) motion may suffice to dispose of the case without further litigation. Otherwise, the government may find it necessary to provide the court with the administrative record of the proceedings culminating in the denial of petitioner's naturalization application (a certified copy of which is typically available from the CIS office that issued the denial) before making a Rule 56(c) motion.

It is appropriate for a district court to grant summary judgment for the government where a naturalization petitioner has failed to demonstrate he meets residency and physical presence requirements.

B. Where Petitioner Does Not Meet INA § 316's Residency or Physical Presence Requirements

The general requirements for naturalization set forth in INA § 316 specify that no person shall be naturalized unless he:

> immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years, . . . and has been physically present therein for periods totaling at least half of that time, . . . has resided continuously within the United States from the date of the application up to the time of admission to citizenship, and . . . during all the periods referred to in this subchapter has been and still is a person of good moral character.

8 U.S.C. § 1427(a)(1)-(3).

As commentators have stated:

> A basic prerequisite to naturalization, prescribed by every naturalization statute since the inception of our nation, is that the applicant must have resided in the United States for a specified period after his or her lawful admission to this country. . . . The purpose of such residence requirements has been to establish a period of probation during which applicants might be enabled to [*inter alia*,] shed foreign attachments.

7 Gordon, Mailman, & Yale-Loehr § 95.02[3][a], at 95-11; *see also Rogers v. Bellei*, 401 U.S. 815, 834 (1971) (recognizing "the importance of residence in this country as the talisman of dedicated attachment"); *Weedin v. Chin Bow*, 274 U.S. 657, 666-667 (1927) ("Congress at that time [when first legislating naturalization requirements in 1790] attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution.").

Thus, it is appropriate for a district court to grant summary judgment for the government where a naturalization petitioner has failed to demonstrate he meets residency and physical presence requirements. *See, e.g., Alvear v. Kirk*, 87 F. Supp.2d 1241, 1243-44 (D.N.M. 2000) (denying request for *de novo* hearing under INA § 310(c) and granting summary judgment to government where applicant "failed to present any evidence of residence, or his actual principal dwelling place in the United States during the five year period prior to filing his application for naturalization"); *Petition of Wright*, 42 F. Supp. 306, 307 (E.D. Mich. 1941) (alien had not established residence where, despite his "conscious effort to do certain things in this country which he thought would lead the naturalization officials to conclude he resided here, by sleeping and eating in this country as much as possible, taking his vacations here, and contributing to local charities, ... his wife and children remained in [Canada] and he returned to visit them on weekends").

B. Where Petitioner Lacks Good Moral Character

Although the naturalization statutes do not define "good moral character," and leave its determination to the CIS's discretion, *see* 8 U.S.C. § 1427(e), the INA nonetheless sets forth a nonexclusive list of factors that preclude a finding that a naturalization applicant exhibited such character during the five-year statutory residence period. *See* 8 U.S.C. § 1101(f); *see also Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1948) (holding that what constitutes good moral character to naturalize depends on "generally accepted moral conventions current at the time"; reversing district court's grant of citizenship to naturalization applicant who had euthanized his severely disabled son) (citations omitted) (L. Hand, J.). Among the grounds to conclude that an applicant failed to exhibit good moral character during the statutory period are, *inter alia*:

- whether applicant was convicted during the statutory period of certain enumerated crimes or previously deported or removed, *see* 8 U.S.C. § 1101(f)(3) (cross-referencing 8 U.S.C. §§ 1182(a)(2)(A) (crimes of moral turpitude or

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MOTIONS IN NATURALIZATION CASES

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controlled substance crimes), (a)(2)(B) (multiple crimes for which aggregate sentences were five years or more), (a)(2)(C) (controlled substance trafficking), (a)(2)(D) (prostitution and commercialized vice), (a)(6)(E) (alien-smuggling); and 8 U.S.C. § 1182(a)(9)(A) (previous removal));

- whether applicant was convicted during the statutory period of two or more gambling offenses, *see* 8 U.S.C. § 1101(f)(5);

- whether applicant has given false testimony to obtain an immigration benefit, *see* 8 U.S.C. § 1101(f)(6);

- whether applicant was convicted of an aggravated felony "at any time," *see* 8 U.S.C. § 1101(f)(8); *see also* 8 C.F.R. § 316.10(b)(1)(ii) ("An applicant shall be found to lack good moral character, if the applicant has been . . . [c]onvicted of an aggravated felony . . . on or after November 29, 1990.").

Thus, it is appropriate for a court to grant summary judgment where, for example, a naturalization applicant has been convicted of an aggravated felony. *See, e.g., Castiglia v. INS*, 108 F.3d 1101, 1103 (9th Cir. 1997) (decorated United States Army veteran who demonstrated he was "involved with the community and ha[d] led in educating youth about drugs" was nonetheless barred from naturalization by aggravated felony convictions prior to statutory residence period); *Chan v. Gantner*, 374 F. Supp. 2d 363, 367 (S.D.N.Y. 2005) (that Immigration Judge waived deportation based upon petitioner's aggravated felony conviction did not obviate conviction for naturalization purposes; holding that "because [petitioner] has been convicted of an aggravated felony, he is barred in perpetuity from establishing that he is a person of good moral character and therefore is incapable of satisfying the burden placed upon him on his application for naturalization"); *Hernandez v. Gantner*, 2005 WL 1155684, at **1-2 (S.D.N.Y. May 2, 2005) (granting summary judgment to government where alien challenging denial of naturalization applicant had been convicted of aggravated felony in 1991); *Boatswain v. Ashcroft*, 267 F. Supp. 2d 377, 386 (E.D.N.Y. 2003) ("fully agree[ing] with the Ninth Circuit's reasoning [in *Castiglia*] that § 1101(f)(8) constitutes a total bar to naturalization for a person who has at any time been convicted of an aggravated felony"), *aff'd* 414 F.3d 413 (2d Cir. 2005), *cert. denied*, ___S. Ct.___, 2005 WL 2494049 (Oct. 11, 2005); *see also Nelson v. United States*, 107 Fed. Appx. 469, 2004 WL 1770564 (6th Cir. Aug. 5, 2004) (affirming dismissal of complaint where alien's "felony drug conviction made him ineligible for citizenship," and holding that "[whether or not [he] was eligible for citizenship when he applied [for naturalization], he was not eligible when he filed the district court action") (unpublished decision); *cf. Nolan v. Holmes*, 334 F.3d 189, 203 (2d Cir. 2003) (discussing INA § 101(f)(8)).

It is appropriate for a court to grant summary judgment where, for example, a naturalization applicant has been convicted of an aggravated felony.

C. Where Removal Proceedings Have Commenced Against Petitioner

In INA § 318, Congress explicitly barred the Attorney General from naturalizing an alien who has been ordered removed or deported from the United States, or against whom removal proceedings have commenced. See *Mosleh v. Strapp, 992 F. Supp. 874, 876 (N.D. Tex. 1998) United States v. Ali*, 757 F. Supp. 710, 713-14 (W.D. Va. 1991); *Shomberg v. United States*, 348 U.S. 540, 544 (1955); *see also Duenas v. United States*, 330 F.2d 726, 728 (9th Cir.1964); *Petition of Terzich*, 256 F.2d 197, 199-200 (3rd Cir. 1958); *Application of Martini*, 184 F. Supp. 395, 399 (S.D.N.Y. 1960).

However, in light of the IMMACT 90's amendments to the naturalization statutes, that viewpoint appears to losing ground. *See, e.g., Apokarina v. Ashcroft*, 93 Fed. Appx. 469, 471-72, 2004 WL 742286 (3d Cir. 2004) (reversing and remanding district court's dismissal of petition) (unpublished decision); *Dominguez v. Ashcroft*, 2004 WL 2632916, at *1 (D. Or. Nov 18, 2004) (reserving decision pending completion of removal proceeding against petitioner); *Saad*, 2004 WL 1359165, at **1-2 (considering merits of the application, but finding applicant otherwise ineligible for citizenship); *Ngwana v. Attorney General of the United States*, 40 F. Supp.2d 319, 322 (D. Md. 1999) (holding INA § 318 limits only Attorney General and does not bar judicial review); *Gatcliffe v. Reno*, 23 F. Supp.2d 581, 584 (D.V.I. 1998) (same).

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Ed. Note: A couple of words were inadvertently left out in Part III.A of the article, in the second paragraph of the third column of page 4 (between "'. . . judicial review of such denial'" and "s. 336(a) hearing process"). It should read: "'. . . judicial review of such denial.' 8 U.S.C. § 1421(c) (emphasis added). Thus, courts have typically dismissed the complaints of disappointed naturalization applicants who have failed to exhaust the INA s. 336 (a) hearing process."

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ASYLUM LITIGATION UPDATE

First Step In An Asylum Case: Make Sure The Alien Is Asking For Asylum From His Or Her "Country of Nationality," Or If No Nationality, Country of "Last Habitual Residence."

An alien is only eligible for asylum if he or she qualifies as a "refugee." 8 USC 1158(b). This is defined as someone who is unable or unwilling to return to his "country of nationality," or if "no nationality . . . any country in which [the alien] last habitually resided" because of past persecution or a well-founded fear of future persecution. 8 U.S.C. 1101(a)(42). *This codifies a core principle of asylum: that it provides protection against persecution in one's home country, not someplace else.*

The regulations repeat this requirement. *See* 8 C.F.R. 1208.13(b)(1) (applicant qualifies as a refugee if he establishes persecution "in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence"); 8 C.F.R. 1208.13(b)(1)(i)(A) and (B) (permitting past persecution presumption to be rebutted by showing a fundamental change in circumstances or ability to relocate "in the applicant's country of nationality, or if stateless, in the . . . country of last habitual residence"); 8 C.F.R. 1208.13(b)(2)(i)(C)(ii) (applicant does not have a "well-founded fear" of persecution if he/she could relocate elsewhere in the "country of nationality, or if stateless, in the . . . country of last habitual residence"); 8 C.F.R. 1208.13(b)(2)(iii)(A) (to show well-founded fear applicant need not show he/she would be singled out for future persecution if applicant can demonstrate a pattern or practice of persecution of similarly situated persons in the "country of nationality, or if stateless, in the . . . country of last habitual residence.").

Therefore the first step in any asylum case is to make sure that the alien claimed past persecution or a fear of future persecution in either (1) his or her "country of nationality" or (2) if no nationality, the country of last habitual residence. Palestinians are the best example of persons with no country of nationality. In cases involving Palestinians, they typically will be applying for asylum from a country of last habitual residence, such as Saudi Arabia, Jordan, or Israel.

The core requirement – that an alien can only get asylum for persecution in his or her country of nationality, not someplace else – can be overlooked by adjudicators, litigators, and the courts.

This core requirement – that an alien can only get asylum for persecution in his or her country of nationality, not someplace else – can be overlooked by adjudicators, litigators, and the courts. If you have a case where an alien is a national of one country, moved to a second country (such as a neighboring country or Europe) and applied for asylum claiming persecution in the second country, contact OIL, or discuss with your reviewer, or contact Margaret Perry, OIL Asylum Counsel. The case will need to be assessed to make sure the Immigration Judge and Board of Immigration Appeals were aware of this issue, and how best to proceed.

The following kinds of cases may raise such an issue: (1) cases involving Ethiopians or Eritreans claiming fear of persecution in one or both countries; (2) cases involving natives of Afghanistan, Iran, or other middle east countries seeking asylum from a European country; or (3) cases involving natives of Armenia or Azjerbaijan seeking asylum from Russia or some other neighboring country.

Withholding of removal, on the other hand, is not restricted to an alien's country of nationality or last habitual residence. Rather, withholding of removal provides protection against persecution in the country of removal – meaning the country to which the alien has been ordered removed. *See* 8 U.S.C. 1231(b)(3) ("the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country"). In most cases, an immigration judge will order an alien to be removed to his or her country of nationality. But that is not always the case. When it is not, withholding of removal is only available for the country to which the alien is to be removed.

(Next time: The Second Step In An Asylum Case: Make Sure The Alien Is Claiming Past Or Future Persecution Of Himself Or Herself, Not Someone Else)

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NOTED

SANTA ANA, Calif. - A total of 44 individuals, many of them based in Orange County's Little Saigon, were recently indicted for their roles in an elaborate scheme to obtain fraudulent immigrant visas for hundreds of Chinese and Vietnamese nationals based on sham marriages to U.S. citizens. The 13 separate indictments stem from a three-year, multi-agency investigation known as Operation "Newlywed Game."

According to the indictments, the marriage fraud scheme involved a loose-knit network of "facilitators," "recruiters," and "petitioners." At the heart of the conspiracy were the facilitators, who charged up to $60,000 to orchestrate sham marriages for foreign nationals with U.S. citizens for the purpose of submitting fraudulent immigrant visa petitions on behalf of the aliens.

OIL GUIDANCE ON REMAND OF IMMIGRATION CASES

Ed. Note; On November 10, 2005, Thomas W. Hussey, Director of the Office of Immigration Litigation, issued to all OIL attorneys the following guidance regarding remands of immigration cases:

This memorandum replaces my previous remand guidance of December 8, 2004. The principal changes are to alter the process by which we will effect remand determinations, and to incorporate the recent guidance by ICE Principal Legal Advisor Howard regarding prosecutorial discretion. Based on this guidance, it may be appropriate to remand cases when the alien presents sympathetic humanitarian factors, may be eligible for adjustment of status, or was ordered removed in absentia for minimal and excusable tardiness. Other circumstances may also present reasons to remand, as explained below. The Civil Division feels strongly that OIL attorneys should intensify their efforts to identify cases that are candidates for remand. The criteria and procedures described below apply to all matters handled by OIL attorneys, and may be shared with those attorneys in other Department components and the USAO's who have been assigned immigration cases.

The Civil Division feels strongly that OIL attorneys should intensify their efforts to identify cases that are candidates for remand.

Background

Most cases handled by the Office of Immigration Litigation involve the defense, on the administrative record, of decisions made by the Executive Office for Immigration Review and the Department of Homeland Security ordering aliens removed from the United States and denying their applications for immigration benefits or removal relief. The decision to initiate removal cases belongs to the Secretary of Homeland Security, not to OIL litigators. Similarly, the authority to set enforcement and adjudicatory policies and priorities belongs to EOIR and DHS. For these reasons, there is an initial presumption that we will defend those EOIR and DHS decisions that are challenged in court.

However, this presumption can be rebutted. There may be instances when the assigned OIL attorney should not defend the challenged EOIR or DHS decision, but should seek to have the matter remanded. Our obligations as Department of Justice attorneys and as officers of the courts before which we practice suggest that not every case that arguably could be defended should be. As government counsel, we have in addition to our legal and ethical duties a responsibility to preserve the Department's credibility before the courts and to serve justice both in the arguments we make and the jurisprudence we help to create.

The presumption of defensibility may be rebutted where the assigned attorney and his or her reviewer conclude under the below criteria that a case should not be defended. For cases handled by OIL attorneys, remand is limited to those matters that I have reviewed and approved. The following criteria and procedures apply to the possible remand of immigration cases to EOIR or DHS.

Remand Criteria

A case may be appropriate for remand when (a) the court has jurisdiction, and (b) the case presents one or more of the following circumstances:

(1) where the agency decision contains a *material error of law*;

(2) where the agency decision contains a *material factual error*;

(3) where the agency decision is *contrary to circuit law* (and it would be inappropriate to seek to distinguish that law or to pursue non-acquiescence);

(4) where the agency has committed *material procedural error* (*e.g.,* where the case was affirmed without opinion despite the presence of a novel and substantial issue);

(5) where there are *material and unexplained discrepancies* between the initial and appellate agency decisions (*i.e.*, where the immigration judge and Board decisions do not "match");

(6) where the agency decision *lacks essential analysis or determinations* (*e.g.*, where the immigration judge or Board failed to make a determination required by applicable law, or failed to address a material claim properly raised and preserved);

(7) where the agency decision cannot be sustained without the court *invading the discretion* or adjudicatory authority of the Attorney General or Secretary (*i.e.*, where the reviewing court cannot decide the case without violating the principles of *SEC v. Chenery*, 332 U.S. 194 (1947), or *INS v. Ventura*, 537 U.S. 12 (2002));

(8) where the agency decision rests upon a *stale administrative record* (*i.e.*, where record defects threaten fundamental fairness or the court's ability to review, *see* Memorandum dated September 14, 2004);

(9) where defense of the case would place in substantial *risk significant agency policies or programs* (*i.e.*, where the decision to defend the case should be made by senior officers within the Department); or

(10) where defense of the case would be *patently inappropriate* (*i.e.*, where

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OIL GUIDELINES FOR REMAND

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the case is a compelling candidate for the possible exercise of prosecutorial discretion). This includes cases in which the immigration judge showed bias, hostility, or other inappropriate behavior that was not addressed and resolved by the Board (regardless of whether the alien raised the issue).

Additionally, a case may be appropriate for remand if it falls within the categories identified by ICE Principal Legal Advisor William J. Howard in his memorandum of October 24, 2005. These categories include cases where the alien (i) is an immediate relative of a service person, (ii) may be eligible for adjustment of status (*i.e.*, is the potential beneficiary of a clearly approvable I-130 or I-140 and I-485), (iii) presents sympathetic humanitarian factors *(e.g.*, cases involving serious, life-threatening medical circumstances), (iv) reasonably failed to register timely under NSEERS, (v) was ordered removed in absentia for minimal and excusable tardiness, or (vi) through ineffective assistance of counsel forfeited relief the grant of which could reasonably be anticipated.

Absent special circumstances, cases determined to fall within the ten paragraphs enumerated above (the OIL criteria) *will* be remanded. Cases determined to present the circumstances identified by Mr. Howard (the OPLA criteria) may be remanded.

Remand Procedures

For cases handled by the Office of Immigration Litigation, the following procedures apply to the possible remand of immigration matters:

(1) The assigned attorney should carefully assess the case as soon as possible to determine whether to recommend remand. All remand recommendations must be approved by the attorney's reviewer. To allow proper consideration of possible remand, the attorney and reviewer should make their assessment and recommendation no less than *ten days* before the case filing deadline.

(2) Where the assigned attorney and reviewer concur in the need for remand, the attorney should prepare a detailed recommendation specifying the name and nature of the case, the procedural posture of the litigation, the reasons for remand (identifying the pertinent criterion(ia) from the list above and/or Mr. Howard's October 24th memorandum), and means of defending the case in the absence of remand. The recommendation should be presented to me by e-mail, memorandum, and/or in person.

To allow proper consideration of possible remand, the attorney and reviewer should make their assessment and recommendation no less than *ten days* before the case filing deadline.

(3) ***For remand under the OIL criteria.*** If I approve the remand recommendation, the assigned attorney should inform DHS and EOIR that OIL has determined to remand the case. The assigned attorney should explain the basis for this determination, provide a draft of the remand motion and the date on which OIL will file the motion, and explain that should DHS or EOIR object to remand, reconsideration may be secured by a request communicated to me by the ICE Principal Legal Advisor or EOIR's General Counsel. The communication to DHS and EOIR should include pdf copies of the pertinent agency, immigration judge, and/or Board decision(s).

Absent extraordinary circumstances, DHS and EOIR should be notified of our remand determination no less than *one week* before our remand motion will be filed. In some cases, in lieu of remand, it may be appropriate for the Board to reopen the proceedings. Absent reopening or my decision to rescind the remand determination, the assigned attorney should file the remand motion on the specified date.

(4) ***For remand under the OPLA criteria.*** If I approve the remand recommendation, the assigned attorney should seek the views of DHS Appellate Counsel and EOIR (and/or other appropriate agency contacts) regarding remand. Any case in which the agency contact fails to respond or objects to remand should be brought to my attention. Where the DHS and/or EOIR contact concurs in remand, the assigned attorney should move the court to remand the matter to the Board of Immigration Appeals (or other appropriate agency component). The motion should be shared with the agency(ies) before filing.

(5) In all cases, the assigned attorney should inform DHS and EOIR of the filing of remand motions and the court's order(s) with respect thereto.

(6) Cases in which the opposing party or the court resists remand should be brought to my attention. In some such cases it may be appropriate for OIL to seek to have the Board or DHS reopen the matter so as to withdraw or terminate the agency decision under review. Such action will require a separate assessment and recommendation by the attorney and the reviewer and a further determination by me.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■First Circuit Rejects Due Process Challenge To The Retroactive Application Of The Expanded Definition Of Aggravated Felony

In ***Sena v. Gonzales,*** 428 F.3d 50 (1st Cir. 2005) (Boudin, Torruella, Howard) (*per curiam*), the First Circuit affirmed the BIA's denial of a discretionary waiver under former INA § 212 (c). The petitioner, an LPR since 1990, plead guilty in 1994 to the crime of "encourag[ing] or induc[ing] an alien to reside in the United States, knowing or in reckless disregard of the fact that such – residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv) (2000). He was convicted pursuant to this plea in May 1994 and sentenced to three years probation. In March 2000, an IJ ordered the petitioner deported on the basis that he had been convicted of an aggravated felony, and also determined that he was ineligible for 212(c) relief. Following *St. Cyr*, the case returned to the IJ who determined again that petitioner was ineligible for 212(c) because the ground on which petitioner was being deported – his prior conviction for encouraging or inducing illegal residency – was not comparable to any ground for which an alien could be excluded. The BIA affirmed.

Preliminarily, the First Circuit held that it had jurisdiction under the REAL ID act to consider the appeal. On the merits, the court rejected petitioner's due process challenge to the retroactive application of the amended felony definition. "Given the particular deference we must accord Congress when it legislates in the area of immigration, we cannot say it is irrational for Congress to choose to combat illegal immigration by deporting aliens who have been convicted of encouraging illegal immigrants to remain in U.S. territory, even if Congress's choice operates far more harshly than [petitioner] believes is fair," said the court. The court also held that petitioner was ineligible for a 212(c) waiver for his conviction of encouraging or inducing an alien to reside in the United States because the basis of deportation lacked a comparable ground of exclusion.

"Given the particular deference we must accord Congress when it legislates in the area of immigration, we cannot say it is irrational for Congress to choose to combat illegal immigration by deporting aliens who have been convicted of encouraging illegal immigrants to remain in U.S. territory."

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■Petitioner Who Claims A Due Process Violation On Basis of Missing or Inaccurate Transcript Must Show Specific Prejudice To Ability To Perfect An Appeal

In ***Kheireddine v. Ashcroft,*** 427 F.3d 80 (1st Cir. 2005) (Selya, *Lynch*, Restani), the First Circuit upheld the BIA's denial of asylum, withholding of removal and CAT protection to two brothers, who claimed that they were former members of Israel's South Lebanon Army (SLA). Petitioners entered illegally from Mexico in 2001 and lived in Boston until they were apprehended by the INS. Petitioners contended that as former SLA soldiers they had been persecuted by the Lebanese government and Hezbollah. The IJ did not find petitioners' claims credible and noted that they had not provided corroborative evidence. The BIA affirmed that decision and also rejected petitioners' contention that a missing transcript of an expert's opinion was material because the expert had testified why they could not corroborate their testimony.

The First Circuit, noting that "the problems of missing portions of transcript is a recurring one," set forth a framework for evaluating such claims. First, the court found that due process requires an adequate transcript to allow for meaningful and adequate review. Second, the court found that in this case the agency had failed to prepare a reasonably accurate and complete transcript. Third, a missing transcript without more, said the court, "does not require reversal or remand . . . rather the claimant must show 'specific prejudice to his ability to perfect an appeal' sufficient to rise to the level of a due process violation." Finally, in this case, the gaps in the expert testimony were filled in part by the expert's affidavit which was in the record. More importantly, the court noted that the IJ had rested the adverse credibility finding on petitioner's testimony and material inconsistencies and there was no suggestion that the outcome would have been any different if the BIA had reviewed the full transcript. "The petitioners have the burden to explain to us why the missing portion of the transcript is material to their claim here, and beyond vague references to testimony that seems to cut against their position, they have failed to do so," said the court.

On the merits, the court concluded that the IJ could deem petitioners even less credible when they failed to back up their claims with information that was reasonably available.

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■Guatemalan Denied Request For Asylum Where He Failed To Demonstrate A Well-Founded Fear Of Future Persecution

In ***Palma-Mazariegos v. Gonzales,*** 428 F.3d 30 (1st Cir. 2005) (Boudin, *Selya,* Howard), the First Circuit upheld the BIA's denial of asylum and withholding of removal. The petitioner claimed that in 1991 he left Guatemala due to the threat of death from guerillas for failure to join them, and

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that he faced death if he returned to his country. The IJ, without making any finding as to whether the petitioner had established past persecution, went directly to the issue of future persecution and concluded that the petitioner lacked a well-founded fear of future persecution because conditions in Guatemala had changed dramatically since 1991. The IJ based his conclusion largely on the DOS Country Report for 2002, which indicated that peace accords signed in 1996 had brought down the final curtain on the armed conflict between the Guatemalan government and the guerillas.

The court held that it was permissible for the IJ to bypass the determination of whether petitioner had shown past persecution noting that "it is sometimes risky business to make a determination on the issue of future persecution without first answering the logically antecedent question of whether past persecution has occurred." Here the court found that the government had provided enough evidence both to rebut the presumption of future persecution and to show that there is no sufficient likelihood that the petitioner will face persecution should he be returned to Guatemala. In particular, the court found that the Country Report directly addressed petitioner's allegation of persecution by the guerrillas. The court declined to follow Ninth Circuit precedents which, according to petitioner, supported his argument that a DOS Report is insufficient to rebut presumption of future persecution. Additionally, the court found that while the Country Report acknowledged that human rights abuses continue in Guatemala it "also attests that the threat of violence afflicts all Guatemalans to a roughly equal extent, regardless of their membership in a particular group or class. Accordingly, that threat will not support a finding of a well-founded fear of future persecution."

"It is sometimes risky business to make a determination on the issue of future persecution without first answering the logically antecedent question of whether past persecution has occurred."

Contact: Stephanie Browne, AUSA
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■Indonesian Asylum Applicant Fails To Show Persecution On Account of Christian Religion

In ***Nikijuluw v. Gonzales,*** 427 F.3d 115 (1st Cir. 2005) (*Selya*, Coffin, Howard), the First Circuit affirmed the IJ's decision to remove the petitioner due to his failure to establish past and future persecution. Petitioner, a citizen of Indonesia, claimed asylum on account of his religious beliefs as a Christian. The court agreed with the IJ's findings that petitioner did not suffer persecution where he was never arrested, detained or threatened by the government on account of his religious beliefs. The court noted the petitioner had not established persecution, and instead found he had suffered "sporadic private discrimination" at most for his religious beliefs. The court found the petitioner did not establish an objective fear of persecution where the DOS Country Report indicated violence against Christians were in significant decline, and where petitioner's family lived safely in Indonesia. The evidence presented by the alien was found to be extremely sketchy and nothing in the record, other than the alien's own unfounded suspicion, suggested his daughter's disappearance stemmed from religious jihad, much less that the Indonesian government conspired in, or condoned her disappearance.

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■First Circuit Upholds IJ's Denial Of Withholding To Applicant From Syria

In ***Sulaiman v. Gonzales***,__ F.3d __, 2005 WL 3100063 (1st Cir. November 21, 2005) (Boudin, *Stahl*, Lynch), the First Circuit affirmed the denial of withholding and CAT to an applicant who had been living in the U.S. for 17 years. The petitioner claimed that he had been persecuted on account of his Kurdish ethnicity. The court held that the significant harassment perpetrated against the petitioner did not rise to the level of persecution required for withholding of removal, and did not give rise to an inference of torture. The court also held that the exclusion of evidence submitted by petitioner one day late was not an abuse of discretion.

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SECOND CIRCUIT

■Second Circuit Holds Opposition To Government Corruption May Constitute Persecution On Account Of Political Opinion

In ***Zhang v. Gonzales,*** 426 F.3d 540, (2d Cir. October 13, 2005) (*Sotomayor,* Parker, Hall), the Second Circuit reversed and remanded the BIA's denial of asylum, finding that opposition to government corruption may constitute persecution on account of political opinion. The petitioner claimed the local Tax Bureau and Bureau of Industry and Commerce extorted his small business of thousands of Yuan Renminbi. The police kicked and beat the petitioner for making false charges, but the petitioner continued to make several attempts to challenge the extortion of businesses to no avail. The court points to several important considerations that must be undertaken when determining whether an alien's attempt to oppose a government's economic practice manifests a political opinion. One is the political context in which the dispute took

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place, the other is whether the alien's actions were directed toward a governing institution. The court found the IJ did not did not examine these considerations, but rather relied on an improper and impoverished view of what may constitute political opposition.

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■Second Circuit Remands Asylum Case Involving Chinese Coercive Population Control Policy Based On Newly Refined Standards For Credibility Analysis

In ***Lin v. Gonzales,*** 428 F.3d 391 (2d Cir. 2005) (*Pooler*, Parker, Castel), the Second Circuit, reversed the IJ's denial of asylum and withholding of removal. The petitioner claimed that he left China due to the population control policy and that his wife had been forced to undergo two involuntary abortions after they already had one child. The court determined that because the IJ made significant errors regarding the alien's credibility and the sufficiency of his evidence, and because it could not discern what her conclusions would have been absent those errors, the case had to be remanded for further development of some of the petitioner's claims.

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■Adverse Credibility Determination Upheld In Population Control Asylum Case

In ***Yang v. Gonzales,*** __ F.3d __, 2005 WL 2892917 (2d Cir. November 3, 2005) (Miner, Sack, Sotomayor) (*per curiam*), the Second Circuit affirmed the IJ's adverse credibility determination. The petitioner claimed asylum based on alleged persecution in connection with China's coercive family planning policy. The IJ and the BIA did not find petitioner credible due to a number discrepancies, inconsistencies, and implausibilities. The court determined that a reasonable adjudicator would not be compelled to find otherwise on the specific grounds listed by the BIA in affirming the IJ.

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> An IJ may rely on an asylum applicant's inconsistent account to conclude that he was not credible without actively soliciting an explanation for such inconsistency.

■IJ Need Not Solicit Explanation For Inconsistencies To Rely On Such Statements For Adverse Credibility Determination

In ***Majidi v. Gonzales,*** __ F.3d __, 2005 WL 3046240 (2d Cir. November 15, 2005) (*Cabranes,* Raggi, Sand), the Second Circuit upheld the BIA's denial of asylum and withholding of removal to Bangladeshi alien. The court determined that nothing in the record would have alerted a reasonable factfinder that the alien was describing two different incidents, as he alleged, and held that an IJ may rely on an asylum applicant's inconsistent account to conclude that he was not credible without actively soliciting an explanation for such inconsistency.

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■Case Remanded Where IJ's Opinion Did Not Identify Specific Inconsistencies In Making Adverse Credibility Determination

In ***Latifi v. Gonzales,*** __ F.3d __, 2005 WL 3074137 (2d Cir. November 17, 2005) (Feinberg, Calabresi, B. Parker) (*per curiam*), the Second Circuit reejected the BIA's denial of asylum to an applicant from Albania. The IJ determined the applicant was not credible, noting that the his statements to immigration officials upon his arrival in the United States were inconsistent with those made during a later credible fear interview, and further differed from testimony at the immigration hearing. The court held that the IJ did not identify specific inconsistencies, that any present inconsistencies were minor, and the applicant provided an adequate explanation, which the IJ failed to evaluate for such discrepancies.

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THIRD CIRCUIT

■Third Circuit Rules That Withdrawal Of Application For Admission Breaks Period Of Physical Presence

In ***Mendez-Reyes v. Attorney General,*** 428 F.3d 187 (3d Cir. 2005) (Scirica, *Van Antwerpen*, Aldisert), the Third Circuit affirmed the BIA's determination that the alien's voluntary withdrawal of his application for admission in lieu of removal proceedings served to end his previously accrued period of continuous physical presence necessary to qualify for cancellation of removal. The petitioner, a Mexican citizen, claimed that after living in the U.S. since 1985, he took a brief trip abroad in May 1998. Upon his return at Newark International Airport on May 16, 1998, he was referred to secondary inspection which was to take place on July 28, 1998. At that inspection, petitioner withdrew his application for admission and departed the country. However, he reentered in August 1998, and based on that unlawful reentry he was placed in removal proceedings on September 6, 2002. An IJ determined that under *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002), petitioner could not establish eligibility for cancellation because his withdrawal of the application for admission broke

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the 10 year continuous physical presence requirement. In that case the BIA had held that the continuous physical presence is also broken when an alien voluntarily departs under threat of deportation.

Preliminarily, the court found that under the REAL ID Act it had jurisdiction to review the denial of cancellation because petitioner raised two questions of law. First, whether the withdrawal of the application for admission constituted a break in the physical presence, and second, whether the BIA's decision in *Romalez-Alcaide* was entitled to deference.

> "The fact that Congress has declared that a departure of more than 90 days shall constitute a break in physical presence does not necessarily mean that departures of less than 90 days shall not constitute a break in physical presence."

The court held that the provision of the cancellation statute addressing breaks in or termination of physical presence was silent on the precise question at issue. The court rejected petitioner's contention that since the statute identified the 90/180 day departure breaks, those were the only conditions constituting a break in the continuous presence. "The fact that Congress has declared that a departure of more than 90 days shall constitute a break in physical presence does not necessarily mean that departures of less than 90 days shall not constitute a break in physical presence, " said the court. Consequently, the court considered the second step of the *Chevron* analysis and determined that the BIA in *Romalez-Alcaide* had adopted a reasonable construction of the statute.

Finally, the court determined that the IJ did not err in applying *Romalez-Alcaide* to petitioner because "petitioner's acquisition of permission to withdraw his application is identical to being granted voluntary departure insofar as petitioner obtained that permission in order to avoid the perils of removal proceedings."

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■Third Circuit Determines That The Evidence In The Record Does Not Support The IJ's Adverse Credibility Determination

In ***Butt v. Gonzales***, __ F.3d __, 2005 WL 3116631 (3d Cir. November 23, 2005) (Roth, *Ambro*, Shapiro), the Third Circuit reversed the adverse credibility determination by the IJ and remanded the case for review of the asylum and withholding applications without reference to the adverse credibility determination. The court held that the inconsistent evidence identified by the IJ could just as well be interpreted as consistent. The court declined the alien's request to rule in his favor on the merits of his asylum claim, instead remanding to the BIA to consider the matter in the first instance, treating the alien's testimony as credible.

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FIFTH CIRCUIT

■Texas Assault Conviction Is Not A Crime Of Violence

In ***Gonzalez-Garcia v. Gonzales,*** __ F.3d __, 2005 WL 3047411 (5th Cir. November 15, 2005) (*Davis,* Smith, Dennis), the Fifth Circuit determined that petitioner's conviction for assault did not constitute a crime of violence, and thus could not constitute a crime of domestic violence, because the offense only required the perpetrator to have knowingly caused offensive or provocative physical contact with another and did not require the use of physical force against another. The court determined that under *Landgraf*, the cancellation of removal stop-time rule was impermissibly retroactive. "Because the clock-stopping provision attaches new legal consequences to actions completed before its enactment and because Congress has not expressly made it retroactive, the statute is impermissibly retroactive and Gonzalez is entitled to seek 212(c) relief," said the court.

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SIXTH CIRCUIT

■Adverse Credibility Finding Against Asylum Applicant From Albania Sustained

In ***Shkabari v. Gonzales,*** 427F.3d 324 (6th Cir. 2005) (*Bogg,* Sutton, Rice), the Sixth Circuit affirmed the IJ's denial of asylum finding the petitioners not credible. Petitioners are a family of three from Albania who claim that they were persecuted on account of their affiliation with the Democratic Party. Although the principal petitioner submitted several documents purporting to show their membership in the Party, the IJ did not find his testimony, or the documents credible. The court found that the documents contained inconsistencies which consequently detracted from the petitioner's credibility in general. One document in particular, a translated certificate from a doctor which was presented to corroborate petitioner's stories of persecution conflicted with his own testimony alleging he could not go to the hospital to be treated due to his political affiliation. Though the court found several faults with the IJ's analysis, this discrepancy as well as other inconsistencies in the alien's testimony were enough to determine the IJ's adverse credibility finding was not unreasonable.

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SEVENTH CIRCUIT

■Seventh Circuit Upholds Denial Of Rescission Of *In Absentia* Order Of Removal Based On Alien's Spurious Identity-Theft Claim

In ***Murtuza v. Gonzales,*** 427 F.3d 508 (7th Cir. 2005) (Bauer, Posner, *Evans*), the Seventh Circuit upheld an IJ decision affirmed by the BIA, not to rescind an order of removal entered *in absentia*, where the petitioner failed to show non-receipt of the notice of the hearing. Petitioner, a Pakistani national, came to the attention of the former INS when he was subject to the NSEER registration requirement, and the INS discovered the outstanding order of deportation. After being released from custody petitioner sought to reopen the in absentia order. Petitioner claimed that in 1997 another person had used his personal information to submit an application for an "amnesty settlement" that included a false address. Accordingly, he claimed that he didn't know of the hearing scheduled for August 29, 2001, when he was ordered removed in absentia. The IJ did not believe petitioner's story noting that the application for adjustment bore a similar signature as that on petitioner's affidavit and that background information was otherwise accurate. Accordingly, the IJ concluded that notice had been properly sent to the address provided by the petitioner.

The court held that the IJ had not abused his discretion concluding that the "inherent implausibility" of petitioner's identity theft story combined with the similarity of the signatures supported the IJ's finding that petitioner had not met his burden of showing lack of receipt. "Even though one could argue that this was a close call, it was a call the IJ was, based on the circumstances, entitled to make," said the court.

"Even though one could argue that this was a close call, it was a call the IJ was, based on the circumstances, entitled to make," said the court.

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■IJ's Adverse Credibility Determination Reversed Because Not Grounded on Specific Cogent Reasons

In ***Tabaku v. Gonzales,*** __F.3d__, 2005 WL 2387497 (7th Cir. September 29, 2005) (Ripple, *Wood,* Sykes), the Seventh Circuit vacated the BIA's removal order on the grounds that the adverse credibility finding by the IJ was insufficient. Petitioners, a married couple from Albania, claimed their lives would be at stake if they were returned to Albania for attempting to free women in Albania's sex-slave trade.

The court found the IJ did not reach the question of whether the petitioners fell within a protected group, but instead relied almost entirely on an adverse credibility determination on insufficient evidence. The court did not find the IJ's credibility determination grounded on "specific cogent reasons" where the IJ disregarded the petitioner's contention that his brother and father were hiding in Albania without detection because according to the IJ, "everyone knows where everyone is." Nor did the IJ believe the petitioner's claim that his accomplice, a "church driver," would fail to report witnessing a rape and murder as it is "not only a moral obligation, but . . . a legal obligation."

The petitioners also raised, and the court dismissed, their procedural due process claim because they did not offer any evidence to show the violation would have caused a different outcome.

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■Seventh Circuit Affirms Denial Of Asylum To Applicant From Chad Where He Failed To Show A Well-Founded Fear Of Future Persecution

In ***Djouma v. Gonzales,*** __ F.3d __, 2005 WL 3041945 (7th Cir. November 15, 2005) (*Posner*, Kanne, Williams), the Seventh Circuit upheld the BIA's denial of asylum and withholding of removal. The petitioner left Chad after allegedly being detained and beaten by government officials who were trying to determine the whereabouts of his uncle, a government official who had fled the country. The court determined that because the petitioner was unlikely to have information of interest to the Chadian government, he failed to show that it was more likely than not that he would be tortured if he returned to Chad.

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EIGHTH CIRCUIT

■Adverse Credibility Determination Upheld Against Somali Asylum Applicant Who Had Been Convicted of Crime Involving Moral Turpitude

In ***Sheikh v. Gonzales,*** 427 F.3d 1077 (8th Cir. 2005) (*Riley*, Bright, Gibson), the Eighth Circuit affirmed the IJ's denial of petitioner's applications for asylum, withholding of removal, and protection under the Convention Against Torture.

The petitioner, who entered the United States in May 1997, as a refugee from Somalia, received lawful permanent resident in July 1998. In 1999, petitioner was convicted in North Dakota of encouraging or con-

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tributing to the deprivation or delinquency of a minor, a misdemeanor. As a result, he was ordered removed as an alien who had been convicted of a crime involving moral turpitude. During the removal hearing, petitioner sought asylum on the basis that he feared returning to Somalia because of his membership in a minority clan. The IJ denied the request on several grounds. First, the IJ found that petitioner and his mother were not credible. Second, the IJ denied petitioner's application for asylum "as a matter of discretion because of [his] conviction," finding it significant petitioner had sexual intercourse with a minor. Third, the IJ denied petitioner's asylum claim on the merits. The BIA affirmed without opinion.

The court held that the adverse credibility finding was supported by multiple, material inconsistencies among petitioner's refugee papers, his testimony, his asylum application, his mother's refugee application, and his mother's testimony. The court also concluded that the IJ did not abuse her discretion in alternatively denying the application as a matter of discretion, in light of the alien's conviction for sexual intercourse with a minor.

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■Alien Convicted Of Child Abuse Is Ineligible For Cancellation Of Removal

In ***Loeza-Dominguez v. Gonzales,*** 428 F.3d 1156 (8th Cir. 2005) (Riley, Fagg, *Colloton*), the Eighth Circuit ruled that the nonpermanent resident alien, who pled guilty to malicious punishment of his stepson under Minnesota law, was ineligible for cancellation of removal because the immigration statute precludes such relief from aliens convicted of child abuse. The alien's conviction documents showed that he repeatedly struck his stepson on his back and legs with an electrical cord. The court held that it was rational and consistent with the statute for the BIA to determine that "child abuse" encompassed any form of cruelty to a child's physical, moral, or mental well-being, even if it did not result in physical injury, and that the alien's conviction constituted child abuse. The court also held that it lacked jurisdiction to consider petitioner's contention that his case was inappropriate for affirmance without opinion by the BIA.

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■Eighth Circuit Affirms Denial Of Asylum to Applicant From Liberia Despite A Previous Grant Of Asylum To His Brother

In ***Bropleh v. Gonzales,*** 428 F.3d 712 (8th Cir. 2005) (Melloy, *Lay*, Benton), the Eighth Circuit affirmed the denial of asylum, withholding or removal, and CAT protection to an asylum applicant from Liberia, based on an overall lack of credibility, even though his brother had been granted asylum by the same immigration court months before.

The court held that expert forensic testimony was not necessary to support the IJ's conclusion that suspicious burn marks on the alien's passport were "spectacularly inconsistent" with his claim that they were caused by a house fire. The IJ inferred that petitioner had altered his passport to conceal the fact that he had been denied a visa to the United States. The court also ruled that by choosing not to present any evidence in support of his adjustment application, he effectively abandoned that application.

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NINTH CIRCUIT

■Decisions Regarding The Changed Circumstances Exception To The One Year Asylum Bar Are Not Reviewable Under the REAL ID Act

In ***Ramadan v. Gonzales,*** 427 F.3d 1218 9th Cir. 2005) (Pregerson, *Hawkins*, Thomas), the Ninth Circuit held that it lacked jurisdiction to review an untimely filed asylum application and affirmed the BIA's denial withholding of removal.

The court held that while the REAL ID Act amendments to the immigration statute allow for the review of "questions of law," the changed circumstances exception to the one-year asylum bar presented issues of fact which were not reviewable.

The petitioner, an Egyptian citizen, last entered the U.S. as a nonimmigrant in September 1999. In June 2001, she filed an asylum application claiming *inter alia*, that she would be persecuted on account of her religion and political opinions that she expressed while in the United States. An IJ determined that petitioner had not filed the asylum application within one year of entering the U.S. and that the threats that she received while in the U.S. were not materially different from the prior ones as to constitute "changed circumstances" that could excuse the late filing. The BIA summarily affirmed.

In an issue of first impression, the court held that while the REAL ID Act amendments to the immigration statute allow for the review of "questions of law," the changed circumstances exception to the one-year asylum bar presented issues of fact which were not reviewable. "The existence of 'changed circumstances' that materially affect eligibility for asylum is a predominantly factual determination, which invariably turn on the facts of a given case," said the court.

The court also held that while the

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evidence of record may support the inference that Muslim fundamentalists intended to punish petitioner on account of her religious beliefs or political opinion, the record did "not compel it."

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■Ninth Circuit Reverses District Court's Denial Of EAJA Motion

In ***Carbonell v. INS***, __ F.3d __, 2005 WL 3078592 (9th Cir. November 18, 2005) (Lay, *Reinhardt*, Thomas), the Ninth Circuit vacated and remanded the district court's denial of attorney's fees and costs under EAJA. The Ninth Circuit concluded that, because the alien had obtained a court order incorporating a voluntary stipulation to stay his deportation, he qualified as a prevailing party for purposes of EAJA and held that the order awarded him a substantial portion of the relief sought. The court concluded that the court order materially altered the relationship between the alien and the government, because the government was required to do something directly benefitting the alien that it otherwise would not have had to do.

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TENTH CIRCUIT

■Tenth Circuit Upholds BIA's Denial Of Discretionary Relief To German Alien Because He Presented No Reviewable Legal Questions And No Meritorious Constitutional Claims

In ***Schroeck v. Gonzales,*** __ F. 3d __, 2005 WL 3047966 (10th Cir. November 15, 2005) (Tymkovich, Porfilio, *Baldock*), the Tenth Circuit affirmed the BIA's denial of the alien's request for a discretionary waiver of inadmissibility and adjustment of status. The court held that pursuant to the REAL ID Act of 2005, it had jurisdiction to review the alien's constitutional argument, but that the alien had no constitutional double jeopardy rights that could have been violated when the IJ, in denying the alien's request, allegedly adjudicated the alien guilty of a crime on which charges had been dismissed with prejudice.

Because the alien had obtained a court order incorporating a voluntary stipulation to stay his deportation, he qualified as a prevailing party for purposes of EAJA.

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ELEVENTH CIRCUIT

■Asylum Applicant From China Fails To Establish Persecution on Account of "Other Resistance To Coercive Population Control Program"

In ***Huang v. U.S. Attorney General***, __ F.3d __, 2005 WL 2877389 (11th Cir. September 8, 2005) (Anderson, Wilson, Fay) (*per curiam*), the Eleventh Circuit upheld the BIA's denial of asylum to a Chinese applicant who claimed persecution on account of "other resistance to a coercive population control program" under INA § 101(a)(42(B). The petitioner testified that in August 2001, when she was 17 years old, the local family planning authority required her to attend a gynecological checkup. During her examination, a male doctor touched her breasts and her "private part" causing her great pain. When she was ordered to a second checkup, she refused to attend, and as a result was detained by family planning agencies for 26 days. Four days after her release from detention, petitioner made arrangements to travel to the U.S. by making a $3,000 down payment to a "leader" who charged her $30,000. Petitioner testified that if returned to China she would again be forced to attend mandatory checkups and, if she refused, would again be detained or face even more serious punishment. The IJ did not find petitioner credible. The BIA, in a *per curiam* opinion, stated that even accepting petitioner's claim as credible, she had failed to meet her burden of proof.

Preliminarily, the court rejected petitioner's argument that the BIA's was incapable of review because it did not adopt the IJ's reasoning, but rather simply gave a conclusion that petitioner could not meet her burdens of proof, without an explanation of the BIA's reasoning. The court found that the BIA's reasoning was self-evident in its decision: upon review of the evidence, it found that the facts, as petitioner alleged them, did not satisfy her burdens of proof with respect to asylum, withholding of removal, or CAT.

On the merits, the court determined that a "reasonable adjudicator would not be compelled" to find that petitioner's gynecological examination rose to the level of "persecution" or that she had been persecuted on account of other resistance to a coercive population control program. In particular, the court distinguished petitioner's case from *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004),where Li had described the gynecological examination as "rape-like." "Unlike in *Li*, where the forced gynecological exam was preceded and accompanied by threats, lasted 30 minutes, and was performed under resistance requiring physical restraint, the exam here lasted 20 minutes, and although Huang described it as painful, she did not indicate that it was sexually assaulting," said the court.

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RETROACTIVITTY OF REINSTATEMENT BEFORE SUPREME COURT

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whose illegal re-entry predated the effective date of the provision.

The petitioner, a citizen of Mexico, was deported from the United States on several occasions, including in October 1981. In January 1982, he re-entered the United States without inspection. On April 1, 1997, the new reinstatement provision enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 ("IIRIRA"), became effective.

> The issue before the Court is whether the reinstatement statute applies to an alien whose illegal re-entry predated the effective date of the provision.

On March 30, 2001, petitioner married a United States citizen and sought legal status on this basis. On November 7, 2003, DHS issued a notice of its intent to reinstate petitioner's previous deportation order pursuant to 8 U.S.C. 1231(a)(5). On November 17, 2003, DHS issued an order reinstating petitioner's previous deportation order.

Petitioner sought review in the Tenth Circuit Court of Appeals of the reinstatement of his previous deportation order. He argued that, because he had illegally re-entered the country before IIRIRA's effective date, the application of 8 U.S.C. 1231(a)(5) to him would be impermissibly retroactive. The government argued in response that application of the current reinstatement provision to petitioner does not have a retroactive effect, and that the reinstatement provision renders petitioner ineligible to apply for adjustment of status.

The Tenth Circuit denied the petition for review. The court first agreed with the majority of circuits and held that Congress did not evince an unambiguous intent concerning the temporal scope of Section 1231(a)(5).

The court then turned to the second step of the inquiry under the Supreme Court's retroactivity decisions, and concluded that Section 1231(a)(5) worked no retroactive effect in this case. The court recognized that certain courts of appeals have found that Section 1231(a)(5) would have a retroactive effect in the case of an alien who had applied for adjustment of status before IIRIRA's effective date or at least had become married to a United States citizen before that date. The court explained, however, that petitioner had neither applied for adjustment of status nor become married by IIRIRA's effective date. The court concluded that, in those circumstances, petitioner "had no protectable expectation of being able to adjust his status."

On September 27, 2005, the Solicitor General filed a brief which did not oppose the granting of the petition for certiorari because of the circuit conflict and the significance of the issue. According to the brief, "[t]he question whether Section 1231(a)(5)'s reinstatement provisions may be applied to such aliens when they are found within the country is of significant practical importance to the effective and efficient enforcement of the Nation's immigration laws."

In that brief, the government first noted that the "courts of appeals disagree on whether, under the first step of the retroactivity inquiry, Congress prescribed the applicability of Section 1231(a)(5) to an alien whose illegal re-entry predated the provision's effective date." The Sixth and Ninth Circuits have concluded that Congress mandated with requisite clarity that Section 1231(a)(5) does not apply to an alien who illegally re-entered the United States before IIRIRA's effective date. *See Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez v. INS*, 239 F.3d 1037, 1050-1053 (9th Cir. 2001). Eight courts of appeals (including the Tenth Circuit in *Fernandez-Vargas*) have disagreed with the Sixth and Ninth Circuits, and have held that Congress did not prescribe the temporal reach of Section 1231(a)(5). *See Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento Cisneros v. United States Attorney Gen.*, 381 F.3d 1277, 1283 (11th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 12-13 (1st Cir. 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 299 (5th Cir. 2002); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 865 (8th Cir. 2002); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 108 (4th Cir. 2001).

The Solicitor General argued that the majority view is correct. "The text of Section 1231(a)(5) contains no indication of an intent to foreclose its application to aliens who had illegally re-entered the United States before IIRIRA's effective date." Section 1231(a)(5) contains no suggestion that the applicability of its rules for reinstatement of a previous removal order might turn on the timing of the re-entry. Rather, it provides generally for reinstatement of a previous removal order upon a finding "that an alien *has reentered* the United States illegally," without indicating any distinction based on when that re-entry occurred. 8 U.S.C. § 1231(a)(5) (emphasis added).

On the retroactivity issue, the Solicitor General argued that applying Section 1231(a)(5) to any alien whose illegal re-entry predated IIRIRA's effective date would not have an impermissibly retroactive effect. "Because the provision aims to streamline the process for removing aliens who are found to have illegally re-entered the country, its application to reinstatement proceedings that take place after IIRIRA's effective date is inherently prospective."

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Supreme Court To Hear Reinstatement Case

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As to the reinstatement statute's bar on discretionary relief, the government argued that "Section 1231(a)(5)'s elimination of discretionary relief does not have a retroactive effect with respect to an alien whose illegal re-entry predated IIRIRA's effective date." "As an initial matter, Section 1231(a)(5) did not have the effect of converting conduct that was lawful when it took place into unlawful conduct. Rather, the immigration laws have long proscribed -- and made criminal -- an illegal re-entry by an alien who was previously ordered removed. See, e.g., 8 U.S.C. 1326."

"Elimination of discretionary relief does not have a retroactive effect with respect to an alien whose illegal re-entry predated IIRIRA's effective date."

Nor does the application of Section 1231(a)(5) to an alien whose illegal re-entry predated IIRIRA's effective date implicate the concerns of detrimental reliance or unfair notice that gave rise to the Supreme Court's finding of a "retroactive effect" in *INS v. St. Cyr*, 533 U.S. 289, 321-324 (2001). While the Court reasoned in *St. Cyr* that an alien might have made a different decision concerning whether to enter a guilty plea if discretionary relief from removal were unavailable to him, an alien whose unlawful re-entry predated IIRIRA's effective date could make no comparable claim that his decision whether to effect an illegal re-entry might vary depending on whether he would be eligible for discretionary relief from removal if his unlawful presence were to be discovered.

Finally, the Solicitor General noted that an alien who unlawfully re-enters the United States generally is not qualified at that time to obtain an adjustment of status or other form of discretionary relief that would enable him to remain here lawfully. *See* 8 U.S.C. 1255(i)(2). An alien therefore could have no reasonable expectation of obtaining discretionary relief at the time of his illegal re-entry. Additionally, although application of Section 1231(a)(5)'s bar against discretionary relief from removal to petitioner has the effect of rendering him ineligible to apply for an adjustment of status, an "adjustment of status is merely a procedural mechanism by which an alien [who is already in the United States] is assimilated to the position of one seeking to enter the United States." "Because Section 1231(a)(5)'s application to petitioner ultimately affects the procedures by which, and the location from which, he may seek discretionary admission into the country, the provision's application is not retroactive in effect."

The petition noted that some courts have found there to be an impermissibly retroactive effect from the application of Section 1231(a)(5) to preclude an application for adjustment of status *pending* at the time of IIRIRA's effective date. The petition also noted that the circuits disagree on whether Section 1231(a)(5) produces a retroactive effect when applied to an alien who had not filed an application for adjustment of status by IIRIRA's effective date but had become married to a United States citizen by that date. This case, however, does not raise any of those sorts of issues because petitioner neither became married nor applied for adjustment of status before IIRIRA's effective date. The Solicitor General noted, however, that the Court's resolution of the issues in this case "will substantially inform the proper resolution of the various other retroactivity questions potentially raised by Section 1231(a)(5)."

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LOLONG

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supplemental brief addressing whether *Molina-Camacho* deprived the court of jurisdiction, whether Lolong had a judicial remedy available, whether the absence of a remedy presented a constitutional problem, and whether *en banc* rehearing therefore was warranted. The government brief argued that *Molina-Camacho* deprived the *Lolong* panel of jurisdiction; Lolong had no remedy in federal court in light of the REAL ID Act and *Molina-Camacho*; the absence of a remedy did not present a constitutional problem; but the court should rehear *Molina-Camacho en banc* because the ruling was incorrect, conflicted with circuit precedent, and presented questions of exceptional importance. *Lolong*'s order for supplemental briefs was prompted by the government's en banc rehearing petition that challenged the panel's ultra-vires "disfavored group" asylum test and its jurisdiction under *Molina-Camacho*.

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PRESIDENT'S REMARKS ON EXPEDITED REMOVAL

"Under expedited removal, non-Mexicans are detained and placed into streamlined proceedings. It allows us to deport them at an average of 32 days, almost three times faster than usual. In other words, we're cutting through the bureaucracy. Last year we used expedited removal to deport more than 20,000 non-Mexicans caught entering this country illegally between Tucson and Laredo. This program is so successful that the Secretary has expanded it all up and down the border. This is a straightforward idea. It says, when an illegal immigrant knows they'll be caught and sent home, they're less likely to come to the country. That's the message we're trying to send with expedited removal."

INSIDE OIL

OIL Holiday festivities will be held on December 13-14. On December 13, OIL will host the **Annual White Elephant Holiday Party**. The activities will begin at 12:30 with a Fajita Luncheon. At 1:30, Deputy Director David McConnell will lead the Annual White Elephant Gift Trading game. OIL employees have been asked to donate their favorite baked creations and to compete in the Annual OIL Bake-Off Contest.

On December 14th, from 4:00-7:00 pm, OIL will host its **Holiday Celebration** at the Aria Trattoria, located at the Ronald Reagan Trade Center.

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Congratulations to **Kurt B. Larson** who recently married Lindsey Biagina Borgia.

OIL welcomes law student intern **Angela Oh**, who is currently attending the UDC David A. Clark School of Law.

You'll never know what "white elephant" you will be bringing home!

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

Office of Immigration Litigation

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

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