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Immigration Litigation Bulletin

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Govt's rehearing petition questions constitutional basis for right to effective assistance of counsel in immigration cases

Claims of ineffective assistance of counsel in immigration cases have increased dramatically in the last two decades. In recent years, the Department of Justice has vigorously contested the constitutional underpinnings of a right to effective assistance of counsel, arguing that there can be no such right in immigration proceedings given that aliens have no constitutional right to appointment of counsel at government expense. The circuits have generally been reluctant to address this specific argument, although the Seventh Circuit has viewed it favorably, *see Magala v. Gonzales*, 434 F.3d 523, 525-26 (7th Cir. 2005). The government recently made the argument for the first time in an *en banc* rehearing petition in *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007).

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Factual Background

Amarjeet Singh, a native and citizen from India, entered the United States in 1996 and filed an asylum application with the former Immigration and Naturalization Service ("INS"). He was represented by Lawyer #1. The INS placed Singh in deportation proceedings where he renewed his request for asylum (now represented by Lawyer #2). In 1997, an immigration judge denied Singh's application and the BIA affirmed. Singh, still represented by Lawyer #2, filed a petition for review that was dismissed by the Ninth Circuit as untimely.

Subsequently, Singh hired Lawyer #3 and filed a motion to reconsider with the BIA alleging ineffective assistance of counsel ("IAC") by Lawyer #2 for failing to file a timely review petition. The BIA denied the motion on the basis that Singh failed to comply with *Matter of Lozada*, 19 I & N Dec. 637 (BIA), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Singh then filed a petition for review with the Ninth Circuit which the court summarily denied stating that the "questions raised" "are so insubstantial as not to require further argument."

In 2005, Singh, now represented by current counsel (Lawyer #4), filed a habeas petition alleging IAC against *all three* of his former attorneys. Most significantly, Singh alleged that Lawyer #2 was ineffective for failing to file a timely petition for review of the first BIA decision. The government moved to dismiss relying principally on Con-

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OIL To Have A Director For District Court Litigation

In light of OIL's expansion in recent years, and consistent with OIL's renewed focus on district court litigation, the Civil Division has decided to create a new Director position within OIL. The new Director will oversee and coordinate OIL's litigation in the district courts.

Govt questions right to counsel under 5th Amendment

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gress' repeal of habeas jurisdiction over removal-related claims in Section 106 of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005). On May 31, 2005, the district court dismissed the petition for lack of jurisdiction. Singh filed an appeal.

Ninth Circuit's Decision

On August 24, 2007, the Ninth Circuit issued a published opinion affirming in part and reversing in part. A divided panel first found that there is a due process right to effective assistance of counsel in immigration proceedings. In a concurring opinion, Judge Wallace expressed doubt that there is such a right and called on the court to reconsider the issue en banc. The panel also held that the district court retained habeas jurisdiction to review Singh's claim that Lawyer #2 failed to file a timely petition for review. The panel reasoned that Singh's claim was not a challenge to a removal order, and therefore was not subject to certain jurisdiction-divesting statutes in 8 U.S.C. § 1252, as amended by the REAL ID Act.

En Banc Petition

On November 8, 2007, the government filed a petition for rehearing en banc. The government first argued that the Ninth Circuit's finding that an alien who retains private counsel has a constitutional right to effective assistance from that counsel in a civil immigration case conflicts with Supreme Court and Circuit precedent. Specifically, the Supreme Court has held that where there is no constitutional right to an attorney, a petitioner cannot claim constitutionally ineffective assistance of counsel. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991). Attorney ignorance or inadvertence in failing to comply with procedural requirements where there is no constitutional right to appointed counsel is not imputed to the State, and, therefore, is not a constitutional due process violation. *Id.* at 753. Under the Supreme Court's analysis, because there is no constitutional right to government appointed counsel in a civil immigration case, there is no constitutional right to effective assistance in such a case.

The government also sought rehearing on the jurisdictional question arguing that the panel's holding that habeas review remains available for review of Singh's claim is contrary to the plain language and clear intent of the REAL ID Act, and conflicts with circuit case law. Specifically, the panel misinterpreted 8 U.S.C. § 1252(b)(9) which expressly precludes habeas review over all removal-related claims, such as Singh's IAC claim, which sought to invalidate his removal order. More fundamentally, the panel erred in reasoning that the REAL ID Act's preclusion of habeas jurisdiction did not apply because Singh's IAC claim against Lawyer #2 (for failure to file a timely review petition) is not a challenge to a removal order. That determination is simply flawed because Singh sought to have his removal order set aside based on the alleged ineffective assistance. Thus, Section 106(a) of the REAL ID Act, as codified at 8 U.S.C. § 1252(a)(5), clearly applied to preclude habeas review over Singh's claim.

The government also noted in its petition that the panel's jurisdictional analysis frustrates the central purpose behind Congress' passage of the jurisdictional amendments in the REAL ID Act by inviting a large range of claims in district court stemming from events in removal proceedings that occurred after the date of a removal order. *See* REAL ID Act § 106(a); 151 Cong. Rec. H2813, 2873, 109th Cong., 1st Sess. (May 3, 2005). That would undo the intention of the REAL ID Act to channel all claims "arising from" a removal proceeding into the court of appeals, thus further complicating what Judge Wallace referred to as the "already overburdened immigration enforcement process." *Singh,* 499 F.3d at 981.

Claims of ineffective counsel: Issue Checklist

- Does the court have subject-matter jurisdiction? Jurisdiction is proper only in courts of appeals, not district court.
- Exhaustion - Has the alien presented the claim to the agency?
- *Matter of Lozada* - Has the alien sufficiently met the three *Lozada* requirements?
- Preserve the "*Coleman* argument" - No Fifth Amendment right to effective assistance of counsel.
- No constitutionally-protected interest. Can we argue that the alien has failed to establish a constitutionally-protected liberty or property interest because the underlying issue involves discretionary relief?
- Prejudice - Has the alien established the necessary showing of prejudice?
- Due diligence - If equitable tolling is being requested as a remedy, is such remedy available under the circuit's case law? Even if it is, can we argue that the alien has failed to establish due diligence?

Suggestions for Litigating IAC Claims

In defending against claims of ineffective assistance of counsel, whether in district court or the court of appeals, the litigator should consider several possible arguments. A checklist of such arguments is presented above (not meant to be exhaustive!). What arguments you are able to make will, of course, depend on the basis of the agency's decision

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Asylum Litigation Update

Forced Abortion Or Sterilization Cases Due To More Than One Child

Statutes

To qualify for asylum an alien must come within the definition of a "refugee." 8 USC § 1158(b). In pertinent part, "refugee" is defined as a person who has experienced "[past] persecution or [has] a well-founded fear of [future] persecution on account of [his] . . . political opinion. 8 U.S.C. § 1101(a)(42). In 1996 Congress added a special provision making persecution under Chinese family planning policies qualify as "political" persecution for purposes of refugee status and asylum. *See* Section 601 (a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat 3009, 3009-689 (codified as amended at 8 U.S.C. § 1001(a)(42)). Under this provision a person "shall be deemed to have been persecuted on account of political opinion" if he or she has been: 1) "forced to abort a pregnancy;" 2) "forced . . . to undergo involuntary sterilization;" 3) "persecuted for failure or refusal to undergo such a procedure;" or 4) " persecuted . . . for other resistance to a coercive population control program." *Id*. A person is "deemed to have a well founded fear of persecution on account of political opinion" if he or she "has a well founded fear that he or she will be forced to undergo such a procedure or be subject to persecution for such failure, refusal, or resistance." *Id*.

Meaning Of "Forced" Abortion Or Sterilization And "Persecution" In Cases Involving Economic Fines, Penalties, Or Harms

A recurring question has been whether fines, penalties, or economic incentives to encourage abortion or sterilization constitute a "forced" abortion or sterilization, or "persecution" for purposes of the definition of a "refugee." Several circuits have affirmed that mere fines by family planning officials are not sufficient to satisfy the definition of a refugee. *Zhang v. Gonzales*_ F.3d_, 2007 WL 2177951 (7th Cir. 2007); *Zhuang v. Gonzales*, 471 F.3d 884 (8th Cir. 2006); *Yang v. U.S. Atty' Gen*., 418 F.3d 1198 (11th Cir. 2005); *Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005); *Lin v. Ashcroft*, 371 F.3d 18, 21 (1st Cir. 2004).

In *Matter of T-Z,* 24 I&N Dec. 163, 168 (BIA 2007), the Board construed "forced" abortion or sterilization to refer to: 1) physical force or compulsion, or 2) objectively "genuine" "threatened harm[,] [that] if carried out, would rise to the level of persecution." In deciding when economic threats or harm rise to the "level of persecution," the Board construed that an alien must show something "more than mere economic discrimination." *Id.* "Economic difficulties must be above and beyond those generally shared by others . . . and involve noticeably more than mere loss of social advantages or physical comfort." *Id*. The Board concluded that economic measures or harm rise to the level of persecution when they amount to "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Id*. at 169, 171. "[T]he harm must be "of a deliberate and severe nature and such that is condemned by civilized governments." *Id. quoting* H.R. Rep. No. 95-1452, at 7, *as reprinted in* 1978 U.S.C.C.A.N. at 4706. The Board also concluded that "forced" does not refer to mere social pressure to choose an abortion or sterilization. *Id*. at 170. "The mere fact of submission to pressure only [establishes] . . . that the particular person's preference was altered." *Id*. "It is insufficient, by itself, to [establish]. . . the level of that pressure or whether it reasonably can be equated to "force." *Id*.

Economic measures or harm rise to the level of persecution when they amount to "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."

The Fifth Circuit has applied *Matter of T-Z-*. *Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007) (reversing IJ's and Board's decision that alien failed to show "forced" abortion based on social pressure and job loss). The Seventh Circuit has applied *Matter of T-Z-,* but remanded a case to determine: 1) what financial measures were used in the alien's particular province (Fujian) and 2) how to distinguish permissible economic inducement and encouragement from impermissible "force" or persecution. The Board's decision in *Matter of T-Z-* appears to be generally consistent with decisions in the Third and Ninth Circuits prior to *Matter of T-Z-*. *See Li v. Att'y Gen. of United States*, 400 F.3d 157 (3d Cir. 2005) (severe economic disadvantage for failure to comply with coercive population control program constitutes "persecution"); *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (abortion compelled under threat of wage reduction, job loss, and unreasonably high fines was a "forced abortion"); *Zhang .v Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (deliberate imposition of a substantial economic disadvantage could amount to "persecution," but remanding to determine whether the economic deprivation in that case rose to that level). *But see Ding v. Ashcroft*, 937 F.3d 1121, 1138-39 (9th Cir. 2004) (construing "forced" to "include[] compelling, obliging, or constraining by mental, moral, or circumstantial means in addition to physical restraint"); *Tang v. Gonzales*, 489 F.3d 987, 990 (9th Cir.

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Population control cases : more than one child

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2007) (same). It is unclear whether *Ding* and *Tang* equating "force" with "mental" "obliging" are inconsistent with the Board's language in *Matter of T-Z-* construing "forced" not to refer social pressure. This is a question the Board will have to resolve in the first instance.

Matter of T-Z- and cases cited above show that the question whether abortion or sterilization is "forced" because of fines or other economic measures is heavily fact based and requires an alien to produce the following kinds of evidence: 1) salary at the time of an alleged abortion; 2) the family's living situation; 3) overall economic effect of actual or threatened fines or penalties; and 4) the kinds of financial incentives used by local officials to enforce compliance with family planning policies. *See Matter of T-Z-*.

Claim Of Future Sterilization Because Of Birth Of Two Or More Children In US, China, Or A Combination Thereof

In a series of cases examining conditions in China, the Board has determined that physically coerced abortions or sterilizations are against national policy, but there may be local instances where this still occurs. Accordingly, the Board has determined that to prove a well-founded fear of future forced abortion or sterilization due to the birth of one or more children in China, the United States, or a combination thereof, an alien must show the following: 1) the policy of local family planning officials on birth of more than one child; 2) whether the birth of one or more children in the United States, in China, or a combination thereof is a violation of the local policy; 3) the local punishment for a violation; and 4) that the punishment rises to the level of "persecution." *Matter of J-W-S-*, 24 I & N Dec. 185 (BIA 2007) (direct appeal); *Matter of J-H-S-*, 24 I & N Dec. 196 (BIA 2007) (direct appeal); *Matter of S-Y-G-*, 24 I & N Dec. 247 (BIA 2007) (untimely motion to reopen); *Matter of C-C-*, 23 I & N Dec. 899 (BIA 2006) (timely motion to reopen). The Seventh Circuit has applied this approach. *See Xiu Ling Chen v. Gonzales,* 489 F.3d 861 (7th Cir. 2007). In that case, the Seventh Circuit relied on *Matter of C-C-, Matter of J-W-S- and Matter of J-H-S-* to affirm the Board's determination that a husband and wife failed to show a well-founded fear of forced abortion or sterilization in China due to birth of second foreign-born child. However, as shown in the first discussion regarding meaning of "forced" abortion or sterilization, the Seventh Circuit remanded the case to the Board to determine what financial measures were used in the aliens' local province and how the Board distinguishes permissible economic inducements from impermissible "force" or persecution.

The question whether abortion or sterilization is "forced" because of fines or other economic measures is heavily fact based.

Fujian Province Sterilization Or Abortion Cases

In *Gao v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), the Second Circuit remanded a case to the Board to determine whether documents that purported to be copies of local family planning policies for Fujian province show that aliens returning from the United States with more than one child face mandatory sterilization. In *Matter of S-Y-G*, 24 I & N Dec. 247 (BIA 2007), the Board examined these documents and determined that they do not establish a risk of future mandatory sterilization or abortion in Fujian province due to birth of two children in the United States or China. While several circuits have expressed concern about policies in Fujian province in light of *Gao*, the Board's decision in *S-Y-G-* should resolve those concerns. *S-Y-G-* should be cited in any case in which an alien is claiming error, or asking a court of appeals to remand a claim of future sterilization in Fujian province based on *Gao*.

Untimely Motions To Reopen Where There Is A Final Removal Order, Based On Birth Of Children In The US

Aliens who are subject to removal orders may seek to reopen their proceedings to file a successive application for asylum based on the birth of children in the United States. However, motions to reopen are subject to a time limit and must be filed within 90 days of a removal order, unless an alien can show "changed country conditions" or "changed circumstances arising in the country of nationality." *See* 8 U.S.C. § 1229a(c); *Matter of C-W-L-*, 24 I & N Dec. 346 (BIA 2007). The Board has concluded that the birth of children in the United States is a change in "personal" circumstances, not a change in "country conditions" or "circumstances arising in the country of nationality" within the meaning of the reopening statute or regulations. *Id*. Accordingly, where an alien files an untimely motion to reopen to apply for asylum based on the birth of two or more children, the motion will be denied as untimely, for failure to show changed country conditions excusing the late filing. *Id.* In decisions predating *Matter of C-W-L-*, the Seventh and Ninth Circuits have affirmed the Board's denial of reopening under these circumstances. *Cheng Chen v. Gonzales*, __F.3d__, 2007 WL 2389766 (7th Cir. 2007); *He v. Gonzales*, __F.3d__, 2007 WL 2472546 (9th Cir. 2007). While the Ninth Circuit suggested in dictum that an alien with two children may file a successive asylum application without having to move to reopen, "[d]ictum settles nothing, even in the court that utters it." *Jama v. ICE*, 543 U.S. 335, 352 (2005). This dictum is also contrary to

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District Court Litigation Update

OIL is currently defending a number of putative class actions challenging USCIS's policy and procedures regarding naturalization, most specifically background check-related delays. These cases include, in order of filing, *Antonishin v. Gonzales*, No. 06-2518 (N.D. Ill.), in which the court recently granted the government's motion to dismiss in part and remanded the individual 8 U.S.C. § 1447(b) claims to USCIS; *Adinaryan v. DHS*, No. 06-12672 (E.D. Mich.) (stipulated dismissal); *Yakubova v. Gonzales*, No. 06-3203 (E.D.N.Y.), in which discovery is ongoing following the court's refusal to certify a class and to dismiss the case; *Aziz v. Gonzales*, No. 06-4791 (C.D. Cal.) (voluntarily dismissed); *Zhang v. Gonzales*, No. 07-0503 (N.D. Cal.) (dismissed); *Ahmadi v. Gonzales*, No. 07-3455 (N.D. Cal.), in which the court granted the government's motion to dismiss in part, but retained jurisdiction over section 1447(b) claims), and *Tartakovsky v. Pierre*, No. 07-1667 (S.D. Cal.), where the district court team has filed a motion to dismiss; and *Roshandel v. Chertoff*, No. 07-1739 (W.D. Wash.), in which the team is preparing a motion to dismiss or remand.

AUSAs should note that some of OIL's recommendations on potential defenses to these suits have changed recently. If an AUSA is looking for new sample briefs or blurbs on specific issues, contact Betty Stevens (202-616-9752). If an appeal has been filed in one of these cases, contact Betty as soon as possible.

Adjudication Delay

There are also some "mixed" cases -- where the plaintiffs are alleging delays in both naturalization and adjustment of status applications. In *Kaplan v. Chertoff*, No. 06-5304 (E.D. Pa.), plaintiffs allege that lengthy adjudication times adversely impact those non-citizens receiving Supplemental Security Income benefits, causing them to lose those benefits. Litigation and further discovery in *Kaplan* are currently suspended pending the outcome of court-ordered settlement talks. In *Akhtar v. DHS*, No. 07-421 (N.D. Tex.), plaintiffs contest delays in both naturalization and adjustment cases. Deitz Lefort is currently awaiting a decision on the government's motion to dismiss or remand. Another mixed case alleging unreasonable delays in both naturalization and adjustment of status processing was recently filed in Kentucky, *Hani v. Gonzales*, No. 07-517 (W.D. Ky.). Nancy Safavi is currently preparing a motion to dismiss or remand in this case. In addition to the mixed cases, the teams are involved in many individual cases challenging adjustment-of-status delays. If you receive one of these cases, let Jeff Robins (202-616-1246) know so we can track it. Jeff also is working on a sample brief that addresses the major issues that OIL wants to ensure are raised in the district courts. Also, if an appeal is filed in one of the cases, let Jeff know as soon as possible.

AUSAs should note that some of OIL's recommendations on potential defenses to these suits have changed recently.

In *Hootkins v. Chertoff*, No. 07-5696 (C.D. Cal.), plaintiffs seek to extend the holding of *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) nationwide, through the method of seeking certification of a nation-wide class. Plaintiffs challenge the agency's interpretation of 8 U.S.C. § 1151(b)(2)(A)(i), which requires the denial of a family-based petition if the United States citizen spouse dies before the petition has been adjudicated and before the second anniversary of the marriage. Briefing on the government's motion to dismiss is ongoing, and a hearing is currently scheduled for December 10. If you have any similar cases, please contact Betty (202-616-9752) as soon as possible.

In other adjustment-related litigation, Benjamin Zeitlin and Stacey Young are defending *Carreon-Moctezuma v. Cejka*, No. 07-145 (S.D. Tex.). This case involves aliens who are applying for employment authorization (EAD) concurrently with adjustment of status, who claim that USCIS is improperly requesting further evidence, thus delaying the grant or denial of interim employment authorization. The government is working on its motion to dismiss, which is due on or before December 10, 2007. Arthur Rizer is defending two actions which challenge USCIS procedures for issuing replacement green cards, *Pantoja-Castillo v. Sanchez*, No.07-204 (S.D. Tex.) and *Alvarez v. Chertoff*, No. 07-150 (E.D. Tex). Both complaints challenge the USCIS practice of asking applicants for replacement green cards to provide copies of their criminal history. In both cases, the government has filed a motion to dismiss; no class has yet been certified.

Special Immigrant Juvenile

More litigation centers around special immigrant juvenile ("SIJ") policies and procedures. One of the earliest cases -- *Perez-Olano v. Chertoff*, No. 05-3604 (C.D. Cal.) -- is being handled by Saul Greenstein and Mike Truman (who are not on the district court teams). *Perez-Olano* is a putative nation-wide class action challenging policies, procedures, and delays in SIJ cases. No class has yet been certified in this case, although discovery is ongoing. Another case in this area is *Abonouan v. Chertoff*, D. Mass 07-11501, where plaintiffs were denied SIJ status by the Boston district USCIS office. A motion to dismiss and an opposition to plaintiffs' motion for summary judgment have been filed by Melissa Liebman

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District court litigation update

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for defendants in this case.

TPS and U Visas

Some of the lawsuits challenge procedures and regulations. In *Bautista-Perez v. Keisler*, No 07-4192 (N.D. Cal), Max Weintraub is defending a nationwide putative class action challenging the statutory authority of DHS/USCIS to collect fees from Temporary Protective Status ("TPS") applicants beyond the $50 registration fee limitation contained in 8 U.S.C. § 1254a. Plaintiffs sought and were denied a TRO, and they moved for a preliminary injunction, which was also denied after arguments. Currently pending are plaintiffs' motion for class certification and defendants' motion to dismiss. In *Catholic Charities CYO v. Chertoff*, Jeff Robins is defending the length of time it took to publish the "U" visa regulations and other USCIS procedures surrounding U visa applicants. The court granted in part the government's motion to dismiss, and plaintiffs have filed a fourth amended complaint.

In *Zamora-Garcia v. Moore*, No. 05-331 (S.D. Texas), the aliens claim that the agency procedure of providing notice only to the individual who posted bond, and not to the alien who is to be removed, violated the aliens' liberty interests.

Visa Availability, Revocation

In *Ptasinska v. Department of State*, No. 07-3795 (N.D. Ill.), the plaintiff alleged that her application for adjustment of status would be denied due to the unavailability of visa numbers starting in July 2007, after the June 2007 Visa Bulletin announced world-wide availability on most employment-based immigrant visas. After granting the motion to dismiss, the Court recently requested that Dietz Lefort respond to plaintiff's Rule 59(e) motion. In *American Sociological Ass'n v. Chertoff*, No. 07-11796 (D. Mass), Adam Habib, a South African, American-educated human rights activist and scholar of democracy and governance challenges his "exclusion" from the United States on First Amendment grounds when, although he arrived with what he thought was a valid nonimmigrant visa, he was refused entry at JFK airport, returned by plane to South Africa, and later informed that his visa had been "prudentially revoked" under INA § 222(I) as a result of information the government learned indicating that he may not be eligible for the visa. He was later denied a visa due to information indicating he had engaged in terrorist-related activities, and was informed that the State Department would not recommend a waiver of his inadmissibility. Chris Hollis is working on the government's response to the complaint. In another Department of State-related petition, *Svensborn v. Keisler*, No. 07-5003 (N.D. Cal.), petitioners alleged that the consul in Stockholm had failed to adjudicate the spouse's application for a derivative Diversity Visa, despite a denial under 8 U.S.C. § 1201(g) in August. Although the court initially issued an injunction requiring further adjudication, after further briefing by Chris Hollis and Betty Stevens, the court dissolved the injunction and dismissed the petition in November.

Bonds

Benjamin Zeitlin and Stacey Young are also working on *Zamora-Garcia v. Moore*, No. 05-331 (S.D. Texas), a case in which a class of aliens, who have posted cash bonds, are claiming that DHS has failed to supply them with proper notice of their scheduled removal. The aliens claim that the agency procedure of providing notice only to the individual who posted bond, and not to the alien who is to be removed, violated the aliens' liberty interests. The district court has certified a class and discovery will commence in the near future.

Successive Asylum

Betty Stevens and Craig Kuhn are defending DHS's regulation giving jurisdiction over second or successive applications for asylum solely to the immigration courts after a charging document has been filed, in *Doe v. Poulos*, No. 07-5362 (C.D. Cal.). As the immigration courts will consider such applications after a final order has been issued only if reopening is granted, the plaintiff claims this practice violates the INA. Defendants have filed a motion to dismiss and plaintiff has countered with a motion for summary judgment. Argument on the motions is set for December 3 in Los Angeles. If you have similar cases pending in the Courts of Appeals, or similar monitored cases in the district court, please let Betty know (202-616-9752).

Standing

C. Barrington Wilkins is representing the government in *Rocha v. Gonzalez*, No. 07-1115 (D. Ct.). Rocha, a U.S. citizen minor, alleges that the government is violating his civil rights by attempting to remove his father, who has no legal status in the country. The government has filed a motion to dismiss.

Stays

Ending this month's report on the best possible note, in *Issa v. ICE*, No. 07-4313 (6th Cir.), the petitioner, a German citizen who entered the United States on May 8, 2007 under the visa waiver program ("VWP") and overstayed his visa, filed a petition for review and a motion for emergency stay of removal/deportation with the Sixth Circuit. On November 2, 2007, the Sixth Circuit denied the petitioner's stay of removal and reaffirmed its previous decision in *Lacey v. Gonzales*, 499 F.3d 514 (6th Cir. 2007), holding that it lacked jurisdiction to review an order of removal entered under the VWP. The court further held that under 8 U.S.C. § 1187(b), the petitioner waived any right to contest, other than on an application for asylum, any action for his removal. Flor Suarez worked on this case. Flor will be able to assist with questions on visa waiver cases (202- 305-1062).

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FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

The Supreme Court has granted a petition for certiorari in ***Dada v. Keisler***, an unpublished Fifth Circuit decision. The question presented is:

> Does the filing of a motion to reopen removal proceedings automatically toll the period within which an alien must depart the United States under an order granting voluntary departure?

Oral argument has been scheduled for January 7, 2008.

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Particularly Serious Crime

The Supreme Court has granted a petition for certiorari in ***Ali v. Achim***, 468 F.3d 462 (7th Cir. 2007). The questions presented are:

(1) Do only aggravated felonies count as particularly serious crimes (PSC) under the withholding of deportation bar?
(2) Are PSC determinations in the asylum and withholding context discretionary under 8 U.S.C. 1252(a)(2)(B)(ii) and hence unreviewable?
(3) Does the REAL ID "question of law" exception to jurisdictional bars at 8 U.S.C. 1252(a)(2)(D) permit review of a claim that the BIA misapplied its precedent?

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Asylum — Particular Social Group

On July 20, 2007, the government filed a petition for panel rehearing in ***Hassan v. Gonzales***, 484 F.3d 513 (8th Cir. 2007). The court's decision could be construed as deciding, in the first instance and without prior resolution of the question by the Attorney General, that all Somali women constitute a "particular social group" and that the alien, who underwent female genital mutilation in Somalia as a child, suffered persecution "on account of" that status so as to qualify for asylum.

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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.

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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 July 19, 2007, the court ordered that the case be submitted to the en banc court without oral argument.

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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.

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REAL ID Act — Question of Law

The question raised in the petition for rehearing en banc in ***Gui Yin Liu v. INS***, 475 F.3d 135, 138 (2d Cir. 2007), is whether a court can review the factual basis of an IJ's untimely asylum applicant finding.

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Criminal Alien — Conviction
Modified Categorical Approach

The government has filed a petition for rehearing en banc in ***U.S. v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007). The question is whether a minute order can be considered under the modified categorical approach

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Constitution
Ineffective Assistance of Counsel
REAL ID Act

On November 8, 2007, the government filed a petition for rehearing en banc in ***Singh v. Gonzales***, 499 F.3d 969, 980 (9th Cir. 2007). The questions raised are: Does district court have jurisdiction over ineffective assistance of counsel claim that counsel failed to file timely petition for review or does 8 USC 1252(a)(5) & (b)(9) preclude district cout jurisdiction? Is there a Fifth Amendment constitutional due process right to effective counsel in immigration removal proceedings?

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds That Assault Under the Rhode Island General Statute Is A "Crime Of Violence"**

In *Lopes v. Keisler*, __F.3d__, 2007 WL 3121593 (Lynch, Stahl, Oberdorfer) (1st Cir. October 26, 2007), the First Circuit held that a conviction for assault under Rhode Island's assault and battery statute satisfies 18 U.S.C. § 16(a)'s definition of a crime of violence because it has as an element the "attempted use, or threatened use of physical force against the person or property of another." The court rejected the alien's argument that it was required to apply a strict categorical approach and held that it would consider whether the crime the alien actually committed – as demonstrated by the record of conviction – constitutes a crime of violence. Regarding the record of conviction, the court noted that 8 U.S.C. § 1229a(c)(3)(B) describes the documents the government can use to prove a criminal conviction in removal proceedings. The court then held that the official record of plea, verdict, and sentence indicated that the alien had pled *nolo contendere* to assault.

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■ **First Circuit Upholds Rejection Of Past Persecution Claim Based On An Isolated Incident And Upholds Finding Of No Objective Well-Founded Fear**

In *Journal v. Keisler,* __F.3d__, 2007 WL 3133873 (*Torruella*, Lynch, Howard) (1st Cir. October 29, 2007), the First Circuit upheld the finding that one isolated incident not requiring medical treatment did not rise to the level of persecution. The court held that an important factor in determining whether an alien's alleged incidents arise to the level of persecution is whether the mistreatment was systematic, rather than a series of isolated incidents. The court also upheld a finding that the alien had not proven an objective well-founded fear because: 1) the alien's mother and sisters had safely relocated to Port-au-Prince and suffered no further harassment; 2) the alien testified to no other threatening incidents while in Haiti; 3) and he was able to obtain an official passport four years after his flight from Haiti.

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■ **BIA Properly Denied Motion To Reopen Where The Evidence Presented Could Have Been Submitted Prior To The BIA's Denial Of Petitioner's Initial Appeal**

The First Circuit held that it lacked jurisdiction to review a denial of a motion to reopen to apply for cancellation where the BIA had denied that relief based on petitioner's failure to establish the requisite hardship.

In *Parvez v. Keisler*, __F.3d__, 2007 WL 3227387 (1st Cir. Nov. 2, 2007) (*Lipez*, Tashima, Howard), the First Circuit held that it lacked jurisdiction to review a denial of a motion to reopen to apply for cancellation where the BIA had denied that relief based on petitioner's failure to establish the requisite hardship. The court found, however, that under the REAL ID Act it had jurisdiction to review constitutional claims and questions of law. The court also found that the BIA did not abuse its discretion in declining to reopen petitioner's removal proceedings so that he could file an asylum application because he failed to show a well-founded fear of persecution in Bangladesh.

Petitioner was placed in removal proceedings in 2003 whereupon he sought cancellation of removal claiming his removal would cause exceptional and extremely unusual hardship to his U.S. citizen child. An IJ denied the requested relief. During the pendency of his appeal to the BIA, an important relative in Bangladesh died; a relative material to his cancellation application. The BIA subsequently denied his appeal. Petitioner then filed a motion to reopen claiming that his relative's death constituted new, material evidence for purpose of cancellation and also sought reopening in order to file an asylum application based on his political opinion and "status as a westernized Bangladeshi." The BIA denied the motion, finding the evidence was not "new" and that petitioner did not have a well-founded fear of persecution.

The First Circuit affirmed the BIA's denial of the motion to reopen. The court rejected petitioner's claim that the BIA contravened its own regulations by failing to find that his relative's death following the IJ's ruling did not constitute new evidence. Rather, the court said this "argument fails to recognize that [petitioner] had an opportunity to file a motion with the BIA prior to its ruling on his appeal." Moreover, the court rejected petitioner's claim that the BIA failed to address all the evidence of hardship submitted, finding the argument directly contradicted by the language of the BIA's decision. The court also affirmed the BIA's findings that petitioner lacked a well-founded fear of persecution due to the fact that petitioner's sister and mother "whose religious and political views seem similar to [petitioner]" had so far not suffered persecution in Bangladesh.

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■ **IJ Properly Determined That Pakistani Petitioner Was Not Persecuted On Account Of His Sunni Faith When He Refused To Sell His Residence To A Shi'i Muslim**

In *Butt v. Keisler*, __F.3d__, 2007 WL 3202830 (1st Cir. Nov. 1, 2007) (Lynch, *Cyr,* Howard), the court upheld an IJ's decision to deny asylum to a

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Pakistani Sunni claiming that he was persecuted because he refused to sell his house to an individual of Shi'ia faith.

Petitioner claimed that in 2000, a Shi'i man named Hussein approached petitioner and offered to buy his house. Petitioner claimed that when he told Hussien that he only wanted to sell the top floor of his house, Hussien made veiled threats about religious violence in Pakistan. Petitioner also claimed that he refrained from filing a police report against Hussien when the police warned him that filing a complaint often resulted in the complainant being kidnapped or murdered. While petitioner was away on business in the United States, his wife entered into an agreement to sell the entire house to a Sunni, which petitioner alleged resulted in two incidents of stalking by unknown persons. In 2002, petitioner and his family came to the U.S. and sought asylum, leaving behind his mother to complete the sale of the home. An IJ denied asylum, however, finding that the veiled threats and the two stalking incidents did not rise to the level of persecution. Additionally, the IJ cited petitioner's failure to request asylum during his business trips to the U.S. - erroneously stating that petitioner had more than one business trip to the U.S. - and the facts that he voluntarily returned to Pakistan after the business trips and that his mother never received any threats due to sale of the residence. The BIA affirmed.

Before the First Circuit, petitioner argued that the IJ's factual error recounting more than one business trip to the U.S. prejudicially diminished his fear of persecution. Petitioner additionally argued that there was no evidence in the record to support the IJ's finding that petitioner's mother never received any threats from Hussein and that the IJ failed to cite certain documents he submitted to support his claim. The court rejected these claims. First, the court found no prejudice in the IJ's factual error, as other evidence of record amply supported the IJ's determination that petitioners did not have a well-founded fear of persecution as the events petitioner described did not even constitute persecution. Moreover, the court found that the events described were not motivated on account of a protected ground - in this case, religion - as Hussien's actions were merely a "reaction of a buyer faced with a seller's recalcitrance in culminating a sale that the buyer believes will be financially and mutually advantageous." Further, that the events lacked a nexus to the Pakistani government as the police were "willing to take petitioner's complaint against Hussein if he insisted, but merely advised him that Hussein 'won't do anything serious' unless [petitioner] filed a complaint." Finally, the court found that the IJ specifically cited the documentary evidence that petitioner claimed the IJ ignored and that the IJ reasonably inferred that petitioner's mother would have received threats from Hussein as she, too, was involved with selling the house at one point.

"The exhaustion of remedies doctrine extends not only to claims omitted from an appeal to the BIA but also to claims that were 'insufficiently developed before the BIA.'"

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■ **First Circuit Rules It Lacks Jurisdiction To Review Arguments That Alien Failed To Raise Before The BIA**

In ***Sunoto v. Gonzales***, 504 F.3d 56 (1st Cir. 2007) (*Lipez*, Gibson, Stahl), the First Circuit held that it lacked jurisdiction to review petitioner's challenge to an IJ's denial of applications for asylum and withholding, where the alien had not presented any of his contentions to the BIA. The court also ruled that, while the alien had raised due process challenges to the IJ's adverse credibility finding that resembled contentions he had raised before the BIA, the court extended the exhaustion doctrine to claims that were insufficiently developed before the BIA. "The exhaustion of remedies doctrine extends not only to claims omitted from an appeal to the BIA but also to claims that were 'insufficiently developed before the BIA,'" said the court. Nonetheless, the court found that petitioner's due process claims lacked merit where the IJ's finding was supported by the fact that the alien had admittedly filed a fraudulent asylum application, presented false testimony, and had an evasive demeanor during his testimony.

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■ **First Circuit Holds That *Fleuti* Doctrine Is No Longer Viable**

In ***Perez De Vega v. Gonzales***, 503 F.3d 45 (1st Cir. 2007) (Lynch, *Lipez*, Howard), the First Circuit held that a lawful permanent resident who left the United States for a brief "Fleuti" visit to the Dominican Republic, her home country, was properly found inadmissible and removable upon her return because she had been convicted of a crime involving moral turpitude. The court found that "the current version of the INA deems a lawful permanent resident, who leaves the United States and then returns, to be "seeking admission" if that person fits within any of the six categories enumerated in 8 U.S.C. § 1101(a)(13)(C). The purpose, duration, and nature of the LPR's departure from the United States — the elements of the *Fleuti* doctrine-are irrelevant to the legal determination of whether she must undergo the admission process upon her return."

The court further found that even if the statute was ambiguous, it would

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have deferred to the agency's reasonable interpretation that *Fleuti* was no longer controlling for the reasons set forth by the BIA in *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (1998).

The court also held that a continuance without a finding of guilt, contingent on the alien's payment of restitution, constituted an aggravated felony conviction where the Tender of Plea form established that the total loss to the victim exceeded $10,000. Petitioner was therefore ineligible for cancellation of removal.

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SECOND CIRCUIT

■ Second Circuit Holds That The BIA Lacks Authority To Issue Removal Orders In The First Instance

In ***Rhodes v. Keisler***, __F.3d__, 2007 WL 3284706 (2d Cir. November 7, 2007) (Feinberg, McLaughlin, *Calabresi*), the Second Circuit held that the BIA lacked authority to issue a removal order in the first instance where, as in this case, an IJ had not determined that the Jamaican alien was removable. The court explained that "in order for the BIA properly to have ordered petitioner's removal when the IJ did not find him removable, the BIA must be an 'administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable. 8 U.S.C. § 1101(a)(47)(A)."

The court found that the statute was unambiguous and that the government had not presented "a construction of the statute that would be entitled to *Chevron* deference." Consequently, the court ruled that a valid final order had not been issued, vacated the BIA decision and remanded the case. The court also determined that it lacked jurisdiction to review petitioner's challenge to the BIA's determination that his conviction in Connecticut for first-degree larceny constituted an aggravated felony.

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■ Second Circuit Affirms That "Affluent Guatemalans" Are Not A Social Group For Asylum Purposes

In ***Ucelo-Gomez and Espana-Espinoza v. Mukasey*** __F.3d__, 2007 WL 4139343 2d Cir. November 21, 2007) (Jacobs, Walker, Wallace) (*per curiam*), the Second Circuit upheld *Matter of A-M-E & J-G-U*, 24 I&N Dec. 69 (BIA January 31, 2007), where the BIA held that "affluent Guatemalans" are not a "particular social group" within the meaning of our asylum and withholding of removal laws. The court had previously remanded the case to the BIA to determine in the first instance whether affluent Guatemalans constituted a particular social group. *See Ucelo-Gomez v. Gonzales*, 464 F.3d 163 (2d Cir. 2006).

The court held that it was reasonable for the BIA to construe "particular social group" to require not only a shared immutable or fundamental group characteristic, but also social visibility, particularity and well-defined boundaries."

In its decision the BIA held, following *Matter of Acosta*, that members of a particular social group must share some common characteristic that members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." The BIA then considered two factors identified in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006): (1) membership in a purported social group requires a certain level of "social visibility" and (2) the definition of the social group must have particular and well-defined boundaries.

The BIA found that affluent Guatemalans are not more frequently targeted by criminals than the rest of the Guatemalan populations and that violence and crimes are pervasive at all socio-economic levels. The BIA also concluded that the terms "wealthy and "affluent" are highly relative and subjective and consequently could not provide the sole basis for membership in a particular social group.

The court held that it was reasonable for the BIA to construe "particular social group" to require not only a shared immutable or fundamental group characteristic, but also social visibility, particularity and well-defined boundaries, and a group that is not defined exclusively by persecution of its members. "Our own precedent validates the idea that class status does not establish a social group with sufficient particularity," said the court.

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■ Second Circuit Upholds Denial Of Continuance While Appeal Of I-130 Denial Was Still Pending Before BIA

In ***Pedreros v. Keisler*** 503 F.3d 162 (2d Cir. 2007)(Leval, Calabresi, Gibson) (*per curiam*), the Second Circuit held that the agency did not abuse its discretion by denying a continuance when an alien's appeal of his denied I-130 petition was still pending before the BIA. Where, as here, the alien failed to provide any meaningful argument or evidence as to why the District Director's decision regarding the I-130 was erroneous, the agency was not obligated to grant the alien's continuance request.

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■ **Second Circuit Holds That It Lacks Jurisdiction To Review The Discretionary Denial Of Relief Under Former INA § 212(c).**

In ***Noble v. Keisler***, 505 F.3d 73 (2d Cir. 2007) (Pooler, *Sack*, Wesley), the Second Circuit held that it did not have the authority to review the BIA's discretionary determination that the alien's positive equities and evidence of rehabilitation failed to outweigh sufficiently the seriousness of his criminal history to warrant exercise of its favorable discretion. The court concluded the BIA did not reject a finding of fact by the IJ that the alien was rehabilitated, but instead evaluated the nature and extent of his rehabilitation as one equity among many in exercising its discretion. "We do not discount the possibility, of course, that in another case, the BIA's declining properly to defer to factual findings by the IJ regarding rehabilitation as required by section 1003.1(d)(3)(i) will amount to an error of law. But here, we think, as in *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006), the BIA was engaging in a recalculation of the equities in declining to grant a discretionary waiver of removal despite the IJ's conclusion to the contrary," said the court.

The court also held that the term "actions taken" referred to decisions of the BIA and Immigration Judge applying the new aggravated felony definition after September 30, 1996.

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THIRD CIRCUIT

■ **Third Circuit Holds That A Misdemeanor Smuggling Conviction Is An Aggravated Felony**

In ***Biskupski v. Attorney Gen. of the United States***, 503 F.3d 274 (3d Cir. 2007) (McKee, Fisher, *Chagares*), the Third Circuit held that an alien's 1994 misdemeanor conviction for alien smuggling under 8 U.S.C. § 1324 (a)(2)(A) was "plainly and unambiguously included" within the term "aggravated felony" defined by 8 U.S.C. § 1101(a)(43)(N), as amended by § 321(a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). IIRIRA § 321(c) made the amendments in IIRIRA § 321(a) applicable to "actions taken" after September 30, 1996, the effective date of IIRIRA. The court also held that the term "actions taken" referred to decisions of the BIA and Immigration Judge applying the new aggravated felony definition after September 30, 1996.

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FIFTH CIRCUIT

■ **Fifth Circuit Affirms Dismissal Of Declaratory Judgment Seeking To Establish Citizenship**

In ***Rios-Valenzuela v. Department of Homeland Security***, 506 F.3d 393 (5th Cir. 2007) (Higginbotham, Davis, Wiener), the Fifth Circuit affirmed the dismissal of a petition for declaratory judgment seeking to establish that petitioner was a United States citizen. The petitioner, a native of Mexican, who had previously been prosecuted for illegal reentry, asserted a claim of derivative citizenship in removal proceedings. The removal proceedings were dismissed, without prejudice, so that petitioner could file an N-600 application for certificate of citizenship. After the N-600 was denied, petitioner filed his petition for declaratory judgment pursuant to 8 U.S.C. § 1503(a).

The district court granted the government's motion for dismissal, which had asserted that the district court lacked jurisdiction under 8 U.S.C. § 1503(a)(1) because the citizenship claim arose during the removal proceedings. The Fifth Circuit rejected petitioner's arguments that the district court had improperly construed 8 U.S.C. § 1503(a)(1) and that the court's construction of 8 U.S.C. § 1503(a)(1) violated his due process rights.

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■ **Fifth Circuit Holds That Immigration Judges Are Vested With Jurisdiction To Determine Whether An Approved Visa Qualifies For Portability Pursuant To INA § 204(j)**

In ***Sung v. Keisler,*** __F.3d__, 2007 WL 3052778 (Garwood, Jolly, Stewart) (5th Cir. October 22, 2007), the Fifth Circuit, adopted the reasoning of the Fourth Circuit in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), and held that an alien's portability claim under INA § 204(j) involved an adjustment of status determination, not an employment-based visa petition determination, where only USCIS had jurisdiction to determine such issues.

The court concluded that because Immigration Judges were vested with exclusive jurisdiction to determine adjustment of status applications once removal proceedings were initiated, Immigration Judges had jurisdiction to make INA § 204(j) determinations, including the jurisdiction to make the factual finding necessary to ascertain whether employment classifications are the same or similar as required by the statute. Because the court found the Immigration Judge's and BIA's interpretations of INA § 204(j) were inconsistent with congressional intent, the case was remanded to the BIA for further consideration.

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■ **Fifth Circuit Holds That District Court Lacks Jurisdiction Over Naturalization Application While Alien Is In Removal Proceedings**

In ***Saba-Bakare v. Chertoff,*** __F.3d__, 2007 WL 3245896 (Garwood, *Jolly*, Stewart) (5th Cir. November 5, 2007), the Fifth Circuit upheld the district court's dismissal for lack of jurisdiction to review the denial of a naturalization application pursuant to 8 U.S.C. § 1421(c), because the applicant, a Nigerian citizen, was in removal proceedings. During removal proceedings USCIS had responded to a motion to terminate by issuing a letter stating that petitioner was not prima facie eligible for naturalization and then had erroneously interviewed him and denied the naturalization application. Despite this mistake, the Fifth Circuit affirmed the district court's decision that it lacked jurisdiction to review the application's denial and also held that the 1990 amendments to § 1421 superseded *Matter of Cruz*, 15 I&N Dec 236 (BIA 1975). The court noted USCIS's concession that the court could review the prima facie ineligibility determination and denial of the motion to terminate upon review of a final removal order.

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■ **Fifth Circuit Holds That Injury To A Child Is A Crime Of Violence**

In ***Perez-Munoz v. Keisler***, __F.3d__, 2007 WL 3257182 (Jolly, *Davis*, Wiener) (5th Cir. November 6, 2007), the Fifth Circuit held that the alien's conviction under Texas Penal Code § 22.04(a)(3) for causing injury to a child was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). The court concluded that because Texas Penal Code § 22.04(a)(3) was a divisible statute, it could consider the charging document to determine to which of the disjunctive elements the alien pleaded guilty. The court determined that the alien was convicted of the offense for committing an intentional act and ruled that causing bodily injury to a child by an intentional act satisfied the definition of a crime of violence at 18 U.S.C. § 16(b).

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■ **Fifth Circuit Holds That State Insurance Fraud Conviction Constitutes An Aggravated Felony**

In ***Martinez v. Mukasey,*** __F.3d__, 2007 WL 3358397 (5th Cir. November 14, 2007) (DeMoss, Dennis, Owen) (*per curiam*), the Fifth Circuit held that a Mexican alien's insurance-fraud conviction constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i), defining an aggravated felony as an offense involving fraud or deceit in which the loss to the victim(s) exceeds $10,000. Using the categorical approach, the court concluded that the plain language of both subsections necessarily entailed fraud or deceit. Using the modified categorical approach, the court held that the loss exceeded $10,000 based on review of the written plea agreement, which reflected that the alien had agreed he was jointly and severally liable for $11,467.36 in restitution.

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SIXTH CIRCUIT

■ **Substantial Evidence Supported IJ's Determination That Beating Petitioner Experienced At The Hands Of A Sunni Mob Did Not Constitute Persecution By The Pakistani Government On Account Of His Shia Faith.**

In ***Mohammed v. Keisler***, __ F.3d__, 2007 WL 3225394 (6th Cir. Nov. 2, 2007) (Boggs, *Martin*, Sutton), the court held that substantial evidence supported an IJ's denial of petitioner's asylum application based on his determination that the Pakistani government did not target petitioner on account of his Shia Muslim faith and that the events described did not rise to the level of persecution.

Petitioner claimed that he went to a Sunni mosque in Pakistan to pray, but was beaten and chased out of the mosque due to his adherence to Shia Islam. He claimed that the Pakistani police then detained him for 3 days and later slapped and kicked him when he returned to the police station to ask for his passport. An IJ denied petitioner asylum, finding that petitioner had not shown that the event at the mosque occurred at the direction or acquiescence of the Pakistani government. In making this determination, the IJ noted expert affidavits submitted by petitioner stating that Shias are not protected in Pakistan, but relied on the United Kingdom Home Office Report concluding that Shia Muslims, though the minority faith in Pakistan, are generally protected by the Pakistani government. The IJ also found that the events at the police station did not rise to the level of persecution. The BIA affirmed without opinion.

The court held that the record supported the IJ's conclusion that "the Pakistani government did not sanction, either affirmatively or by inaction, the mob that beat [petitioner]."

The court affirmed the IJ's decision. The court held that the record supported the IJ's conclusion that "the Pakistani government did not sanction, either affirmatively or by inaction, the mob that beat [petitioner]." The court also approved the IJ's citing to the Home Office Report in the face of conflicting evidence as "[w]hile it is possible a future immigration judge might find differently, given the conflicting evidence in the record, we are not 'compelled' to a

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contrary conclusion." The court then held the detention, slapping, and kicking at the police station did not rise to the level of persecution.

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■ **Sixth Circuit Finds That Petitioner Had No Reliance Interest In § 212(c) Relief Because He Was Not Deportable As An Aggravated Felon At The Time Of His Conviction**

In ***Morgan v. Keisler***, __ F.3d__, 2007 WL 3131687 (6th Cir. Oct. 29, 2007) (Batchelder, *Gilman*, Stafford), the court affirmed the BIA's determination that petitioner was ineligible for section 212(c) relief under the AEDPA due to his conviction for an aggravated felony, as defined by retroactive application of the IIRIRA.

Petitioner, an LPR, pled guilty to aggravated assault on June 4, 1996. At the time of his guilty plea, a conviction for aggravated assault did not constitute an aggravated felony and therefore did not subject petitioner to deportation. Because petitioner's conviction did not subject him to deportation, he had, obviously, no need at the time to seek a waiver of deportation under former section 212(c). However, when IIRIRA took effect about a year later on April 1, 1997, it retroactively classified petitioner's conviction for aggravated assault as an aggravated felony and making petitioner subject to deportation. Consequently, petitioner sought section 212(c) relief. An IJ denied the relief, however, reasoning that because petitioner was now retroactively an aggravated felon as of the date of his conviction on June 4, 1996, he was also retroactively subject to AEDPA § 440(d) which barred § 212(c) relief for aggravated felons convicted subsequent to April 24, 1996. Moreover, the IJ found that petitioner could not claim reliance on the existence of 212(c) relief under *St. Cyr*, as at the time of his guilty plea and before the retroactive application of IIRIRA, petitioner had no need of 212(c) relief. The BIA affirmed, adding that petitioner also failed the statutory counterpart rule.

The Sixth Circuit affirmed the reasoning of the IJ. The court found that Congress explicitly meant for IIRIRA's definition of aggravated felony to be retroactive. The court supported this conclusion by citing *St. Cyr* and noting how the Supreme Court specifically stated that "IIRIRA's amendment of the definition of 'aggravated felony' [] clearly states that it applies with respect to 'convictions . . . entered before, on, or after' the statute's enactment date." Thus, the court reasoned, petitioner was convicted of an aggravated felony and therefore ineligible for § 212(c) relief pursuant to AEDPA § 440(d). Conversely, the court found that even if IIRIRA was not retroactively applicable, petitioner could show no reliance interest in the now-repealed § 212(c) relief that would have preserved his claim to that relief as "only aggravated felonies constituted deportable offenses under § 212(c), so [petitioner] would have had no basis to seek a waiver under that subsection." Because the court affirmed the IJ's determination that petitioner was ineligible for section 212(c), it found no need to reach the statutory counterpart issue.

The court ruled that INA § 242(g), 8 U.S.C. § 1252(g) deprived it of jurisdiction to consider the Attorney General's decision to commence removal proceedings.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That It Lacks Jurisdiction To Review An Alien's Obligation To Register Under NSEERS**

In ***Hussain v. Keisler***, 505 F.3d 779 (7th Cir. 2007) (Flaum, Evans, *Williams*), the Seventh Circuit held that it lacked jurisdiction to review a Pakistani petitioner's equal protection challenge to the National Security Entry-Exit Registration System (NSEERS). Specifically, petitioner contended that his obligation to register under NSEERS violated his right to equal protection because it targeted aliens from Arab and Muslim countries. The court ruled that INA § 242(g), 8 U.S.C. § 1252(g) deprived it of jurisdiction to consider the Attorney General's decision to commence removal proceedings, and that, by its plain language, INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D)'s authorization to review certain constitutional claims or questions of law does not apply to § 242(g). The court also held that petitioner's removal proceedings were fundamentally fair where the Immigration Judge correctly advised him that he was required to establish changed or exceptional circumstances justifying his untimely asylum application.

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■ **Seventh Circuit Upholds Denial Of Motion For Stay Of Removal Where Motion Failed To Present Sufficient Information**

In ***Zheng v. Mukasey***, __F.3d__, 2007 WL 3308108 (Coffey, Ripple, Williams) (*per curiam*) (7th Cir. November 9, 2007), the Seventh Circuit held that a Chinese petitioner who failed to state the reasons supporting an ineffective assistance of counsel claim against his former attorney, or how that representation prejudiced his claim, was not entitled to a stay of removal pending review of the denial of his motion to reopen proceedings. Additionally, the court stated that it could not assess petitioner's likelihood of success on the merits of his case where he failed to address any of the requirements for a stay of removal as articulated in *Sofinet v. INS*, 188 F.3d

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703, 706 (7th Cir. 2006). The court held that where an alien fails to address these requirements, a motion for a stay will be denied.

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■ **BIA Failed To Articulate A Reasoned Response In Denying Petitioner's Motion To Reopen**

In ***Mekhael v. Mukasey***, __F.3d__, 2007 WL 3403646 (7th Cir. November 16, 2007) (*Posner*, Kanne and Rovner), the Seventh Circuit held that the BIA failed to adequately articulate its reasoning in denying a motion to reopen. The petitioner is a Christian who feared returning to Lebanon because of tensions between Muslims and Christians. The petitioner based his motion to reopen on changed circumstances in Lebanon which occurred after his July 2005 removal hearing, arising from the brief war between Israel and Hezbollah in July 2006. Post-war legislation was introduced in Congress to grant temporary protected status based on the conflict and other recent events of Muslim terrorism.

The court rejected the BIA's determination that the post-hearing evidence of the Hezbollah-Israel war was merely "cumulative." "The Board's decision was remarkable, since the petitioner's evidence concerned dramatic, portentous events that had occurred after the administrative record was closed, and so could not have been discovered before the July 2005 hearing," said the court. Accordingly, it vacated the BIA's order and remanded the case for further consideration.

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■ **Seventh Circuit Holds That It Has No Jurisdiction To Review An Alien's Motion For Bail Outside Of Habeas Proceedings And Where The Alien Was Not Lawfully Admitted To The United States**

In ***Bolante v. Keisler***, __ F.3d__, 2007 WL 3170144 (7th Cir. Oct. 31, 2007) (Easterbrook, *Posner*, Kanne), the court held that it lacked jurisdiction over petitioner's motion for bail pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii) because petitioner was an alien not lawfully admitted to the United States and seeking relief from removal proceedings. The court explained that while there is inherent judicial authority to grant bail to a person asking for habeas relief pursuant to Rule 23 of the Federal Rules of Appellate Procedure, "asking for bail outside of the habeas corpus setting [requires] an exercise of a court's common law powers and thus, unlike a ruling based on the Constitution, is subject to legislative curtailment."

"To allow a court to admit such an alien to bail while he is challenging a removal order would be inconsistent with these provisions [8 U.S.C. §§ 1225(b)(1)(B)(ii) and 1182(d)(5)(A)] ."

In this case, pursuant to 8 U.S.C. §§ 1225(b)(1)(B)(ii) and 1182(d)(5)(A), Congress had expressly curtailed the court's authority to grant bail to alien not lawfully admitted to the United States by granting the agency the powers to detain the alien pending review of their application for asylum and the unreviewable discretion to grant parole to such an alien. "To allow a court to admit such an alien to bail while he is challenging a removal order would be inconsistent with these provisions," the court said.

The court distinguished the present case from *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Demore v. Hyung Joon Kim*, 538 U.S. 310 (2003), because those cases based their analysis on the due process clause, and not the excessive bail clause of the Eighth Amendment. Rather, the court analogized petitioner's claim to *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), where the Supreme Court held that an alien not lawfully admitted to the United States but seeking entry had no right to be released from detention.

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■ **Seventh Circuit Holds That Attorney Rendered Ineffective Assistance By Not Pursuing VAWA Cancellation**

In ***Sanchez v. Keisler***, 505 F.3d 641 (7th Cir. 2007) (Ripple, Rovner, *Wood*), the Seventh Circuit held that the alien's attorney was ineffective for failing to pursue cancellation of removal under the Violence Against Women Act ("VAWA"), and remanded the case for consideration of the application. The count noted that it did not need to decide where "the constitutional boundaries for [an ineffective assistance of counsel] claim lie. It is enough that aliens have a statutory right to retain counsel, and that adequacy of representation is an important factor in assuring that the statutory right to a fundamentally fair proceeding is respected."

The court then disagreed with the BIA's analysis that the attorney had not pursued VAWA cancellation in order to avoid testimony that might preclude a grant of voluntary departure. The court found no basis on which to support the BIA's conclusion that petitioner's former counsel "was exercising any professional judgment at all when he abandoned the VAWA theory and obtained voluntary departure." The court further held that, although regular cancellation and a motion to reopen had both been denied as a matter of discretion, a different conclusion might result upon considering the VAWA evidence.

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EIGHTH CIRCUIT

■ **A Fundamental Change In Circumstances Pursuant To 8 C.F.R. § 1208.13(b)(i)(A) Includes Personal Circumstances Of The Applicant**

In ***Ixtlilco-Morales v. Keisler***, __ F.3d__, 2007 WL 3225541 (1st Cir. Nov. 2, 2007) (Benton, *Bowman,* Shepard), the court affirmed the BIA's determination that petitioner's claim of persecution during his childhood on account of his homosexuality was properly rebutted by the fact that petitioner was no longer a child. Further, the court found substantial evidence supported the BIA's determinations that attacks on homosexuals and HIV-positive individuals in Mexico are not so widespread as to constitute a well-founded fear of persecution, and that inadequate medical care for HIV-individual positive did not rise to the level of persecution.

Lack of care for HIV-positive individuals in Mexico "was not an attempt to persecute homosexuals or those with HIV."

Petitioner claimed he feared persecution in Mexico based on his homosexuality and HIV-positive status. Specifically, he claimed he would be persecuted in Mexico because his family abused him as a child due to his homosexuality and because Mexico lacked adequate health care for HIV-positive individuals. An IJ denied the claim, finding that petitioner failed to allege persecution by the Mexican government or actors the government was unwilling to control as he failed to ever report the abuse to the authorities. Further, the IJ found that discrimination against homosexuals in Mexico did not rise to the level of persecution. The BIA disagreed with the IJ's findings, but still denied the claim. The BIA found that petitioner had experienced past persecution in the form of domestic abuse as a child giving rise to a rebuttable presumption of future persecution, despite the fact that he never reported the abuse to the authorities, but found the presumption rebutted by a "fundamental change in circumstances," to wit, that petitioner was no longer a child. Additionally, the BIA found that while attacks on homosexuals and those with HIV in Mexico are "certainly troubling," petitioner did not establish a well-founded fear of future persecution on account of either of those grounds because the "attacks have not been so widespread as to support" the claim. Finally, the Board found that lack of care for HIV-positive individuals in Mexico "was not an attempt to persecute homosexuals or those with HIV."

Before the Eighth Circuit, petitioner argued that the BIA engaged in improper fact-finding when it determined that petitioner was no longer a child, and that a "fundamental change in circumstances" pursuant to 8 C.F.R. § 1208.13(b)(i)(A) referred only to changed country conditions, and not changed personal circumstances, such as petitioner's age. The court rejected both arguments. First, the court found that the BIA's determination of petitioner's age was not fact-finding, but simply a calculation of "age progression" taken from the IJ's findings as to petitioner's age. Second, the court found that petitioner's "limited reading of [8 C.F.R. § 1208.13 (b)(i)(A)] is incorrect" and not supported by the purpose of the rule found in the Federal Register. Specifically, the court found that the "text of 8 C.F.R. § 1208.13(b)(i)(A) speaks broadly of a 'fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution,' and there is no indication that the drafters intended to exclude changes in an applicant's personal situation as a means of rebutting the presumption." Finally, the court found substantial evidence supported the BIA's conclusions that attacks on homosexuals and HIV-positive individuals in Mexico occur, but are not so widespread as to support a fear of persecution and that inadequacies in health care was not an attempt to persecute people with HIV.

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NINTH CIRCUIT

■ **On The Government's Second Petition For Rehearing, Ninth Circuit Holds That The Immigration And Nationality Act Bars *Bivens* Claims Against An Immigration Officer**

On November 15, 2007, the Ninth Circuit, departing from its two earlier published opinions in this case, issued a third published decision in ***Sissoko v. Rocha***, __F.3d__, 2007 WL 3378220 (9th Cir. Nov. 15, 2007) (*Berzon*, Skopil, Noonan), holding that a provision of the INA § 242(g), 8 U.S.C. § 1252(g), bars *Bivens* claims based upon an INS officer's decision to place the alien in expedited removal proceedings in 1997. The court held that § 1252(g), which bars claims arising from the decision to "commence proceedings" against an alien, deprived the courts of jurisdiction over any claim arising from the alien's arrest and detention, including his *Bivens* claims.

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■ **Attempted Public Sexual Indecency To A Minor Under ARS § 13-1403(B) Not Categorically An Aggravated Felony**

In ***Rebilas v. Keisler***, __ F.3d__, 2007 WL 3226503 (9th Cir. Nov. 2, 2007) (Hawkins, Thomas, *Bea*), the court reversed the BIA's determination that petitioner's conviction for at-

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tempted public sexual indecency to a minor under ARS § 13-1403(B) constituted an aggravated felony as sexual abuse of a minor under INA § 101(a)(43)(A), (U). In so holding, the court applied the *Taylor* approach to find that the Arizona statute defined sexual indecency to a minor more broadly than the BIA's definition of sexual abuse of a minor adopted from 18 U.S.C. § 3509(a)(8) and thus was not categorically an aggravated felony.

Petitioner was convicted of two counts of attempted sexual indecency to a minor under ARS § 13-1403(B). Subsequently, an IJ found petitioner removable as an aggravated felon and the BIA affirmed. The Ninth Circuit reversed the BIA's decision. First, applying the *Taylor* categorical approach, the court held that the Arizona statute covered conduct that was not proscribed by INA § 101(a)(43)(A), (U). Specifically, the court stated that while 18 U.S.C. § 3509(a)(8) defines sexual abuse to a minor as "the employment, use, persuasion, inducement, or coercion of a child," the Arizona statute covered broader situations where the convict's behavior was "reckless" and where the child was merely present and did not actually witness the act.

Further, the court found that Arizona's definition of "attempt" as "any step" towards commission of the crime was additionally more board than the federal definition of a "substantial step." Finding that the Arizona statute did not categorically proscribe conduct that constituted an aggravated felony, the court next employed the modified categorical approach to determine that the documents submitted did not prove petitioner was convicted for sexual abuse of a minor.

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■ **Ninth Circuit Awards Attorney's Fees And Warns Government Not To Use Previously Rejected Argument Regarding The "Position of the United States."**

In ***Singh v. Gonzales***, 502 F.3d 1128 (9th Cir. 2007) (Hawkins, Berzon, Silver) (*order*), the Ninth Circuit granted petitioner's motion for attorney's fees and costs in the amount of $3,807.04. The court noted that it had rejected in a previous case the contention that only the litigation positions of the Department of Homeland Security before the court of appeals, and not the decisions of the BIA and Immigration Judges, were relevant in assessing whether the "position of the United States" was substantially justified, and warned the government that repetition of this argument in the court again would be considered sanctionable behavior. The court rejected the government's remaining arguments and deemed the requested fees reasonable.

The court held that all three aliens were prevailing parties under EAJA because their cases had been remanded for further consideration by the BIA.

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■ **Ninth Circuit Holds That Aliens Are Prevailing Parties In Cases Remanded Pursuant To The Government's Unopposed Motions**

In ***Li v. Keisler***, 505 F.3d 913 (9th Cir. 2007) (Kozinski, Gould, Callahan) (*per curiam*) the Ninth Circuit granted the aliens' requests for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), in two consolidated petitions for review, and denied the fee request in a third petition. The court held that all three aliens were prevailing parties because their cases had been remanded for further consideration by the BIA. In two of the cases, the court held that the government's positions were not substantially justified because the BIA decisions, when issued, were contrary to clearly established law. The court upheld the government's substantial justification defense in the third case, as there was no circuit guidance on the precise issue raised by the alien, and the Board's decision was otherwise within its discretion.

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■ **Ninth Circuit Holds That Pretrial Diversion Renders Irrelevant, For Immigration Purposes, The Expungement Of A Subsequent Narcotics Conviction.**

In ***Melendez v. Gonzales***, __F.3d__, 2007 WL 2713121 (Schroeder, Trott, *Feess*) (9th Cir. September 19, 2007), the Ninth Circuit held that an alien who has been granted pretrial diversion of a state narcotics charge, which neither required a guilty plea nor resulted in a finding of guilt, received ameliorative "first offender" treatment. Such status precludes invoking the expungement of a subsequent narcotics conviction to avoid the immigration consequences of that conviction. Although the pretrial diversion question was not directly before the court, it held that the error in the BIA's initial decision did not require remanding the case because remand would be futile in light of the BIA's proper denial of the alien's motion for reconsideration.

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■ **Northern District Of California Vacates Order Of Mandamus And Denies Petition For Writ Of Mandamus In Derivative Diversity Visa Claim**

In ***Svensborn v. Keisler***, __F. Supp.2d.__, 2007 WL 3342751) (N.D. Cal. November 7, 2007) (*Henderson*), the district court denied a petition for writ of mandamus requesting that the consular section of the United States Embassy in Stockholm adjudicate a derivative visa application of the spouse of a successful FY 2007 diversity visa program applicant. The court vacated its previous order granting the writ, and held that no outstanding duty was owed to the aliens, as the consular section fulfilled its duty to adjudicate when the consular officer denied the visa application under 8 U.S.C. § 1201(g) on August 16, 2007. As no non-discretionary duty remained, the court denied the petition for writ of mandamus in its entirety.

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TENTH CIRCUIT

■ **Aliens Cannot Raise Procedural Challenges To The BIA's Decision In The First Instance Before The Court**

In ***Sidabutar v. Gonzales*** 503 F.3d 1116 (Heny, *Tymkovich*, Holmes), the Tenth Circuit upheld the BIA's conclusion that the alien did not demonstrate past persecution or a well-founded fear of future persecution in Indonesia. The Tenth Circuit held that it lacked jurisdiction over the alien's procedural challenges to the BIA's decision because they were raised for the first time before the court, rather than through a motion to reconsider or reopen filed with the BIA.

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INEFFECTIVE ASSISTANCE OF COUNSEL

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(if there is one), but litigators should in ***every case*** preserve the argument that there is no constitutional basis for a right to effective assistance of counsel in an immigration case. *See, supra* (setting forth argument based on Supreme Court's decision in *Coleman v. Thompson*).

Further Guidance For Your Case

If you have a case that raises an issue of ineffective assistance of counsel where the alien claims that the ineffective assistance occurred *outside* of removal proceedings, such as an alleged failure to file a timely petition for review in the court of appeals, please contact Papu Sandhu (202-616-9357), Brian Beier (202-514-4115), or David Kline (202-616-4856). If you have a *district court case* raising an ineffective assistance of counsel claim, please contact David Kline. For copies of the *Singh* rehearing petition, sample briefs, and other materials on this issue, please contact Papu Sandhu.

By Papu Sandhu, OIL
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Editor's Note: On December 13, 2007, the Ninth Circuit denied the government's petition for rehearing en banc.

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Population control cases : more than one child

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the Board's construction of the interplay between the reopening and successive asylum statues in *C-W-L-*, construing that an alien who is subject to a final order of removal must move to reopen in order to file a successive asylum application. The Board's decision is entitled to *Chevron* deference and trumps Ninth Circuit dictum. The Second and Eleventh Circuits have also addressed this issue in dicta. *Guan v. BIA*, 345 F.3d 47, 49 (2d Cir. 2003); *Li v. U.S. Atty' Gen.*, 488 F.3d 1371, 1276-77 (11th Cir. 2007).

This article is based on "Issues Arising in Coercive Population Control Claims: Survey of Board of Immigration Appeals and Federal Court Decisions" by Lisa de Cardona and Dee Brooks at the Board of Immigration Appeals, with research assistance by Monique Miles. *See* Board's "Immigration Law Advisor" (September 2007), Vol. 1. No. 9. http://eoirweb/library/lib_index.htm.

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INSIDE OIL

Congratulations to the following OIL attorneys and support staff who were honored at the Civil Division Wards Ceremony held on December 5, 2007.

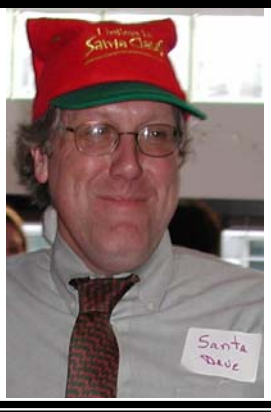
Assistant Director **Mark Walters** received the Dedicated Service Award. This award recognizes employees with more than 15 years of service in the Civil Division who have demonstrated a record of outstanding actions and accomplishments. Mr. Walters, who joined OIL twenty-three years ago, is the Civil Division representative to the Rules Committee of the United States Court of Appeals for the Ninth Circuit.

Senior Litigation Counsel, **Elizabeth Stevens** received a "Special Commendation Award" in recognition of her outstanding accomplishments in the workplace enforcement cases.

OIL's **Second Circuit Litigation Team,** led by Senior Litigation Counsel **Lisa Arnold,** received a "Special Commendation Award" in recognition of particularly outstanding service in responding to the flood of Second circuit immigration cases.

DAVE' S ANNUAL WHITE ELEPHANT AFFAIR

OIL's Annual White Elephant Affair, Gift Exchange and Luncheon, will be held on the afternoon of Tuesday, December 18th, 12:00-3:00 pm at the Liberty Square Building, suite 5421. In addition to the luncheon and the game, there will be a Holiday Baking Contest.



The Annual White Elephant tradition was started by Deputy Director David McConnell, many many years ago. The event has been renamed in his honor.

Other members of the team sharing the award were: **Robbin Blaya, Jamie Dowd, Jennifer Keeney, Keith McManus,** and **Thankful Vanderstar**.

Angela Green

Paralegal **Angela Green** received the Award for Excellence in Paralegal Support. This award is given in recognition of outstanding achievements in the paralegal field over a sustained period of time.

Stacey Bullock, and paralegal **Gloria Rosado**, received the Award for Excellence in Administrative Support. This award is given in recognition of outstanding achievements in the field of legal and general administrative support over a sustained period of time.

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

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