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Immigration Litigation Bulletin

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THIRD CIRCUIT SUSTAINS INDEFINITE DETENTION OF INADMISSIBLE ALIEN

The issue of the prolonged detention of inadmissible aliens ordered removed continues to split the courts as the Third Circuit in ***Sierra v. Romaine***, __F.3d__, 2003 WL 22451726 (3d Cir. October 29, 2003), became the latest circuit court of appeals to hold that, notwithstanding the Supreme Court's opinion in *Zadvydas*, INA § 241 (a)(6) authorizes the indefinite detention of "inadmissible aliens who never have been admitted into the United States."

The Third Circuit held that INA § 241(a)(6) authorizes the indefinite detention of "inadmissible aliens who never have been admitted into the United States."

The petitioner is a Cuban national who arrived in Florida in 1980 during the Mariel boatlift. As many other Cubans who arrived as part of the boatlift, he was paroled into the United States. While on parole, petitioner engaged in a series of criminal acts, resulting in his conviction, *inter alia*, of carrying a deadly weapon and theft in the District of Columbia, and daytime housebreaking and theft in Maryland. As result of these convictions, the INS revoked his parole and instituted deportation proceedings. On January 6, 1992, an immigration judge ordered his exclusion and removal to Cuba. That decision was summarily affirmed by the BIA. However, because Cuba refused to take petitioner, he has remained in custody for most of the last 11 years. During this detention, the INS Cuban Review Panel has annually reconsidered releasing him on parole under 8 C.F.R. 212.12.

Petitioner has filed several challenges in the federal courts seeking habeas relief. *See Sierra v. INS*, 258 F.3d 1213 (10th Cir. 2001). This latest challenge was filed on May 15, 2000. Petitioner claimed that he was being detained in violation of the Fifth and Sixth Amendments and that the Supreme Court's decision in *Zadvydas* prohibited his potentially indefinite detention. The district court denied the petition finding the detention lawful and that *Zadvydas* did not apply to petitioner.

The Third Circuit preliminarily rejected the government's

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GOVERNMENT SEEKS REHEARING EN BANC IN ASYLUM CASES

The government has filed with the Ninth Circuit two petitions for rehearing *en banc* in asylum cases raising *Ventura* remand issues. Under *INS v. Ventura*, 1123 S. Ct. 353 (2002), the Supreme Court held that once an agency error is identified, "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Ventura* also reaffirmed the principle that the courts of appeals may not "intrude" upon the agency's role and "conduct a de novo inquiry into the matter being reviewed and reach its own conclusion."

In ***Baballa v. Ashcroft***, 335 F.3d 981 (9th Cir. 2003), the BIA held that petitioner had not been subject to past persecution on account of a protected

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OFFICE OF IMMIGRATION LITIGATION CONTINUES TO EXPERIENCE RECORD CASELOAD GROWTH

During the fiscal year just ended, the Office of Immigration Litigation again experienced a record year of caseload growth. OIL's caseload total for the fiscal year shattered last year's record total of over seven thousand new cases.

According to statistics maintained by the Civil Division's Office of Management Information, OIL took in the staggering total of over 12,000 case receipts in fiscal year 2003.

The twelve thousand civil immigration cases passing through OIL's doors during the fiscal year included both district court and appellate cases, and all case categories (i.e., cases per-

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Highlights Inside

THIRD CIRCUIT FINDS DETENTION OF INADMISSIBLE ALIENS AUTHORIZED UNDER INA § 241(a)(6)

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contention that petitioner's continuing detention was governed by the pre-IIRIRA statutory provisions because the case was governed by transitional rules under IIRIRA § 309(c)(1). The court noted that while those rules apply to aliens who were in exclusion or deportation proceedings as of April 1, 1997, petitioner only challenged his post-final order detention determination and thus his detention was governed by INA § 241(a)(6).

The court further noted that the government had shifted its position on this issue because it had previously argued that IIRIRA applied to petitioner's case. Moreover, said the court, interpretations contained in briefs are not entitled to *Chevron* deference.

On the merits, the court reviewed the *Zadvydas* decision noting in particular that in that case the Supreme Court had considered the legality of the indefinite detention of two lawful permanent resident aliens. Those aliens enjoyed certain constitutional privileges because they had gained entry into the United States. Because permitting their indefinite detention would have raised serious constitutional problems, the Court interpreted INA 241(a)(6) as limiting the post-removal detention to six-months, though the time may be extended if there is a likelihood of removal. The Supreme Court explained, however, that *Shaughnessy v. Mezei*, 345 U.S. 296 (1953), permitted the indefinite detention of unadmitted aliens. As the Third Circuit interpreted *Zadvydas*, "the distinction between aliens who have gained entry and those stopped at the border 'made all the difference' in [the Supreme Court's] earlier decision that Mezei's indefinite detention did not violate the Constitution."

The court also reviewed the various decisions from the courts of appeals as to whether *Zadvydas* limits only the government's authority to detain resident aliens or whether it applies to all categories of aliens. The court found persuasive the reasoning in *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003), and *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), where the courts held that the six-month presumption of reasonableness is inapplicable to inadmissible aliens. *But see Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2002), and *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), where other courts applied the *Zadvydas* detention limitation to inadmissible aliens.

The court agreed with the *Benitez's* reasoning that "because *Zadvydas* was so qualified in many respects and reads like an applied decision. . . the Supreme Court left the law and the statutory scheme intact with respect to inadmissible aliens who never have been admitted into the United States." Moreover, the court stated that creating a right to parole after six months for inadmissible aliens is undoubtedly a drastic expansion of the right of inadmissible aliens which runs contrary to Congress's intention to tighten immigration regulations.

In its petition for rehearing, the government contends that "the panel's eligibility determination turns the Supreme Court's decision in *Ventura* on its head."

The court concluded that "[i]nasmuch as *Zadvydas*'s holding is qualified in so many regards, and there is no need to construe section 241(a)(6) to avoid constitutional due process concerns for inadmissible aliens who never have been admitted into the United States, the Attorney General has the authority under section 241(a)(6) to detain [petitioner] indefinitely and *Zadvydas*'s six-month presumption of reasonableness is not applicable to him."

By Francesco Isgro, OIL

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REHEARING EN BANC SOUGHT IN NINTH CIRCUIT ASYLUM CASES

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ground and that he had failed to establish a well-founded fear of persecution. The Ninth Circuit panel reversed the finding of past persecution, found petitioner eligible for asylum and withholding of removal and remanded the case for the exercise of discretion as to asylum. In the petition for rehearing, the government contends that once the panel overturned the BIA's finding of no past persecution, under *Ventura* it was obligated to remand for additional investigation or explanation into the claims of past persecution and for an administrative determination on the rebuttable presumption of future persecution.

In ***Singh v. Ashcroft***, 340 F.3d 802 (9th Cir. 2003), the BIA denied petitioner's asylum claim based on an adverse credibility finding. The Ninth Circuit panel found that the evidence compelled a finding that petitioner was credible and, "because the adverse credibility decision was the sole basis for the denial of asylum," then concluded that substantial evidence compelled it to find that petitioner was eligible for asylum. As in *Baballa*, the panel remanded only for the exercise of discretion as to asylum.

In its petition for rehearing, the government contends that "the panel's eligibility determination turns the Supreme Court's decision in *Ventura* on its head." Moreover, the government argues, as it did in the *Baballa*'s rehearing petition, that the decision conflicts with the decision in *Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003), where another panel properly applied *Ventura* to remand an asylum case to the BIA.

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OIL EXPERIENCES INCREASED IMMIGRATION CASELOAD

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sonally and jointly handled by OIL attorneys, monitored cases, and cases delegated to U.S. Attorneys' offices). The total number of cases handled personally by OIL attorneys, or in which litigation responsibility was shared with a U.S. Attorney's Office, was nearly 7,000 cases -- nearly as many as the total number of case receipts for the previous fiscal year. Of the nearly 7,000 personally/jointly handled cases in fiscal year 2003, the vast majority were review petitions handled by OIL attorneys in the various courts of appeals. Those cases involve challenges by aliens to removal decisions issued by the Board of Immigration Appeals.

Much of the growth in OIL's caseload can be attributed to the increase in the total number of decisions issued by the Board during the fiscal year as a result of the recent Board reform regulations. The percentage of Board decisions challenged in federal courts during the fiscal year also increased to approximately 15% of all Board cases (up from a traditional level of about 5%).

OIL's attorneys have worked hard to keep up with their ever-burgeoning dockets. For several months now, each OIL attorney has received, on average, a new appellate briefing assignment once each week. To help alleviate this grueling pace, nearly 40 attorneys have been detailed to OIL by other Department of Justice components -- 19 from within the Civil Division, 12 from the Executive Office for Immigration Review, two from the Civil Rights Division, two from the Antitrust Division, one from the Environment and Natural Resources Division, and one from the Tax Division. The office also anticipates additional funding in the fiscal year 2004 budget to enable OIL to hire additional attorneys and staff to meet the increased (and increasing) workload demands.

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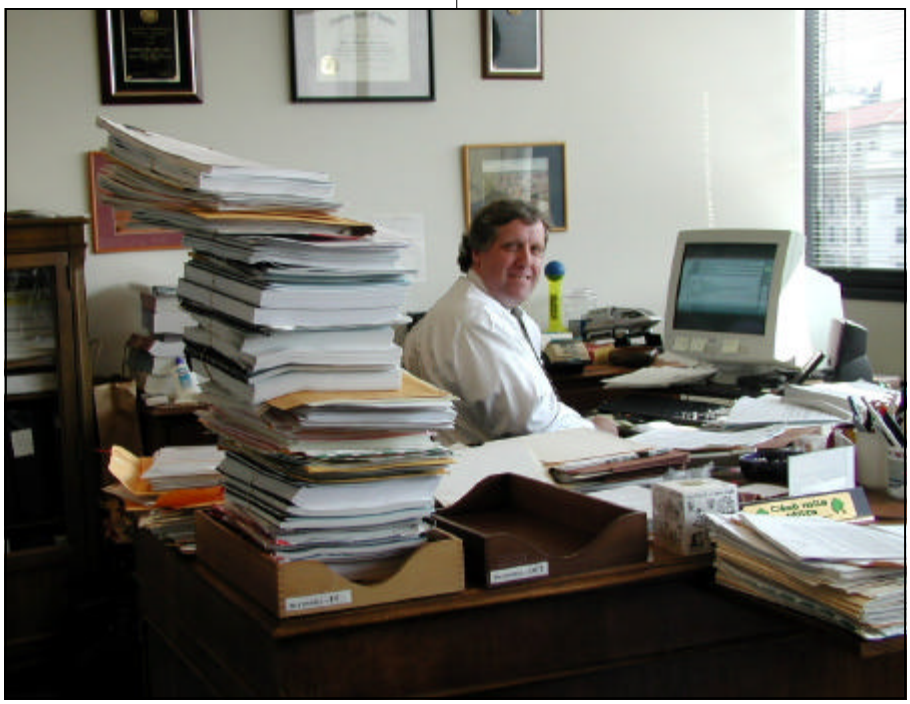

David McConnell, OIL's Deputy Director for Operations tries to keep up with his in-box.

DHS PROPOSES SEVIS FEE

The Department of Homeland Security has published a proposed rule which would authorize the collection of a $100.00 fee from aliens who are applying for certain nonimmigrant student visas. 68 *Fed. Reg.* 61148 (Oct. 27, 2003). The amount of the fee is expected to cover the costs associated with administering and maintaining the Student and Exchange Visitor Information System (SEVIS).

In 1996, Congress directed the former INS to establish a self-funded program to collect information about nonimmigrant foreign students. *See* IIRIRA § 641. The agency previously published regulations to implement the substantive statutory requirements. *See* 67 *Fed. Reg*. 76256 (December 11, 2002). The Department of State also previously published implementing regulations. *See* 67 *Fed. Reg.* 76307 (December 12, 2002).

This latest proposal addresses only the imposition and collection of the SEVIS fee. According to the proposed rule, education institutions were opposed to an earlier DHS proposal that would have directed them to collect the SEVIS fee from the prospective foreign students. Accordingly, under this latest proposal the students would have to pay the fee directly to DHS by either an electronic or paper-based method. The fee would have to be paid before the prospective student submits the visa application to the U.S. embassy or consulate.

The fee would apply to students who seek a F-1, F-3, J-1, M-1, or M-3 visa. The fee payment would be reduced to $35 for a J-1 nonimmigrant participating in a summer/travel, *au pair*, or camp counselor program.

By Francesco Isgro, OIL

US BORDERS TO GO HIGH TECH

The Department of Homeland recently unveiled the United States Visitor and Immigrant Status Indicator, commonly referred to the US-VISIT Program. The program is expected to be in place at airports and seaports by December 31, 2003, to meet the congressionally mandated deadline. US-VISIT will capture more complete arrival and departure data for those aliens who require a visa to enter the United States. "The new program is designed to enhance the security of U.S. citizens and visitors, expedite legitimate travel and trade, ensure the integrity of the immigration system, and safeguard visitors' personal privacy," said Asa Hutchinson, Under Secretary of Border & Transportation.

US-VISIT uses scanning equipment to collect "biometric identifiers," such as fingerprints, in an inkless process, along with a digital photograph of the visitor. Together with the standard information gathered from visitors about their identity and travel, the new program will verify the visitor's identity and compliance with visa and immigration policies. The new procedures are expected to add just seconds to the entry and exit process.

At exit points, visitors will check out at kiosks by scanning their visa or passport and repeating the simple inkless fingerprinting process. The exit confirmation will be added to the visitor's travel records to demonstrate compliance. Land border processing will be introduced in phases in 2005 and 2006.

Congress first directed the establishment of an automated entry and exit control system in 1996. *See* IIRIRA § 110. Following September 11, Congress enacted the Patriot Act and the Enhanced Border and Visa Entry Reform Act. These laws required DHS to speed up the implementation of the program, and to introduce the concept of biometrics to establish a technology standard to be used in the US-VISIT System.

THE "DREAM" BILL REPORTED OUT OF SENATE JUDICIARY COMMITTEE

On October 23, 2003, the Senate Judiciary Committee by a vote of 16-3 ordered to be reported the Development, Relief, and Education for Alien Minors Act for 2003, more familiarly known as the DREAM Act (S.1545). A similar bill entitled the "Student Adjustment Act," (H.1684), has been introduced by Representatives Chris Cannon (a Republican from Utah), Howard Berman (a Democrat from California), and Lucille Roybal-Allard (a Democrat from California).

The bill would authorize the Secretary of Homeland Security to cancel the removal of, and adjust to conditional permanent resident status, an alien who: (1) entered the United States prior to his or her sixteenth birthday, and has been present in the United States for at least five years immediately preceding enactment of this Act; (2) is a person of good moral character; (3) is not inadmissible or deportable under specified grounds of the Immigration and Nationality Act; (4) at the time of application, has been admitted to an institution of higher education, or has earned a high school or equivalent diploma; and (5) from the age of 16 and older, has never been under a final order of exclusion, deportation, or removal.

Section 5 of the bill sets forth the conditions for conditional permanent resident status, including: (1) termination of status for violation of this Act; and (2) removal of conditional status to permanent status.

Finally the bill provides for: penalties for false application statements; confidentiality; fee prohibitions; and a General Accounting Office report respecting the number of aliens adjusted under this Act.

As reported out of the Senate Judiciary Committee, DREAM Act beneficiaries would have to register under SEVIS and would be ineligible for federal financial aid grants, including Pell Grants and Federal Special Education Opportunity Grants. Students, however, would still be eligible for federal loans and work study programs.

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IRISH SOLDIERS RECEIVE POSTHUMOUS CITIZENSHIP

On October 30, 2003, Eduardo Aguirre, Director of U.S. Citizenship and Immigration Services (USCIS), posthumously naturalized twenty-eight Irish soldiers who gave the ultimate sacrifice in the service of the U.S. military during the Korean War.

"There is no more fitting way, for a grateful nation, to pay homage to these fine soldiers than to bestow them with posthumous citizenship, the most that we can offer in return. . . America is emboldened by their memories." said Aguirre.

Posthumous naturalization is an honorary status of U.S. Citizenship granted to an alien or non-citizen whose death incurred on active duty with the U.S. Armed Forces during specific military hostilities. The Posthumous Citizenship Restoration Act of 2002 makes it possible for the United States Government to appropriately celebrate non-citizens who die during a time of military conflict.

Director Aguirre shared the heroic stories of soldiers who fought and died in a battle for freedom of a people and preservation of a way of life. He gave the compelling example of Corporal Patrick Sheahan, who carried four fallen soldiers, while under heavy fire, to a safe perimeter and later protected his company by charging enemy embankments. His courage, which led to his death, earned him a Silver Star.

Summaries Of Recent Federal Court Decisions

ASYLUM

■Second Circuit Holds Alien's New Justifications For Implausible Testimony Do Not Merit Disturbing Adverse Credibility Finding.

In ***Chen v. INS,*** __F.3d__ (2d Cir. September 19, 2003) (Cabranes, Parker, Rakoff (by designation)), the Second Circuit, in a *per curiam* decision, upheld the BIA's denial of asylum and withholding of removal based on an adverse credibility finding.

The petitioner, a citizen of the People's Republic of China, arrived at Orlando International Airport on July 15, 1994, without a passport or visa. He was immediately apprehended and interviewed by immigration officials with the use of a Mandarin interpreter. At that time he indicated that he escaped from China because he had been involved in the student uprising. Subsequently, petitioner filed an application where he stated that he had belonged to an organization known as the "underground groups" and that he had been mistreated on account of his political opinion. Petitioner repeated the same general story at his immigration hearing. However, the immigration judge found a number of discrepancies between his testimony and the earlier asylum application. Accordingly, the immigration judge denied asylum and withholding of deportation based on an adverse credibility finding. On appeal, the BIA did not disturb those findings, noting that the IJ had based her adverse credibility finding in part on the fact that petitioner's "manner was hesitant and unconvincing during his hearing."

On review to the Second Circuit, petitioner argued that the BIA's adverse credibility finding was not reasonable because each of the inconsistencies it relied upon could be explained. The court held that even if petitioner's justifications for the discrepancies "were plausible, these explanations cannot constitute a sufficient basis for overruling the BIA's credibility determination." The substantial evidence standard, said the court, requires petitioner "to do more that simply offers a 'plausible' alternative theory; instead he must demonstrate that a reasonable fact-finder would be compelled to credit his testimony."

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Even if petitioner's justifications for the discrepancies "were plausible, these explanations cannot constitute a sufficient basis for overruling the BIA's credibility determination."

■First Circuit Holds That Asylum Applicant Who Persecuted Others in Uganda is Barred From Asylum Relief

In ***Kiyaga v. Ashcroft***, 2003 WL 22299613 (1st Cir. Oct. 8, 2003) (unpublished) (Selya, *Stapleton*, Howard)) the First Circuit, upheld an IJ's denial of asylum and withholding of removal to a former member of the Ugandan People's Defense Force ("UPDF"). The IJ determined that the Fourth Division of the UPDF, where petitioner served, was responsible for human rights violations against civilians on account of their nationality and political opposition towards the ruling government. Citing to *Fedorenko*, the IJ held that petitioner was accountable for the actions of the Fourth Division because he was present when the incidents occurred. The BIA affirmed without opinion the IJ's finding. The court found that petitioner had met his burden of demonstrating past persecution but that he was statutorily ineligible for relief because the record established that he had assisted in the persecution of others in Uganda.

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■Second Circuit Holds BIA Properly Denied Reopening In Coercive Population Control Case

In ***Guan v. BIA***, 345 F.3d 47 (2d Cir. 2003) (Meskill, Miner, Straub), the Second Circuit, in a *per curiam* decision, upheld the BIA's denial of an untimely motion to reopen to apply for asylum. Petitioner argued that the BIA should have reopened her case to consider evidence of her newly-born children and the threat she would be sterilized on her return to China, pursuant to BIA precedent that allows an untimely motion to reopen in light of the statutory amendment extending refugee protection against coercive population control programs. The court ruled that petitioner's case was not covered by the BIA precedent and that the birth of a child in this country was not a change of circumstances in the country of deportation that qualified her for the regulatory exception to an untimely motion.

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■Seventh Circuit Upholds Immigration Judge's Adverse Credibility Finding In Bulgarian Asylum Case

In ***Krouchevski v. Ashcroft***, 344 F.3d 670 (7th Cir. September 11, 2003) (Easterbrook, *Rovner*, Evans), the Seventh Circuit affirmed the Immigration Judge's determination that the alien was not credible, and therefore ineligible for asylum and withholding of deportation. The court found that the alien's attempts on appeal to rectify the inconsistencies and implausibilities identified by the Immigration Judge did not constitute substantial evidence warranting reversal. The court additionally held that the alien's supporting documentary evidence was insufficient to establish the truth of his claim because the evidence "could corroborate any number of stories."

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■Sixth Circuit Holds That It Lacks Jurisdiction To Review Decision That Asylum Application Was Untimely

In ***Castellano-Chacon v. Ashcroft***, 341 F.3d 533 (6th Cir. 2003) (*Boggs*, Gilman, Dowd (D. Ohio)), the Sixth Circuit affirmed the BIA's denial of petitioner's applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The court joined five other circuits in holding that it is barred from reviewing a BIA decision denying an asylum application as untimely. The petitioner argued that he were returned to Honduras, his native country, he would be persecuted as a result of his former membership in a particular social group identified as "tattooed youths." The court found that as a category, "tattooed youth do not share an innate characteristic, nor a past experience, other than having received a tattoo. Furthermore, the concept of refugee simply cannot guarantee an individual the right to have a tattoo." Accordingly, the court denied petitioner's applications for withholding of removal and CAT protection.

"Tattooed youth do not share an innate characteristic, nor a past experience, other than having received a tattoo . . . the concept of refugee simply cannot guarantee an individual the right to have a tattoo."

The court also rejected petitioner's contention that his due process rights had been violated because during the immigration hearing the IJ had announced his desire to complete the hearing expeditiously. In particular he contented that by barring his counsel from presenting opening and closing statements he was effectively denied a fair hearing. The court found that petitioner had failed to identify any specific prejudice resulting from the IJ's action. However, the court suggested that the IJ instead of barring opening and closing arguments could have exercised his broad discretion to control the duration and scope of those arguments thereby serving both the interests of due process and expediency.

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■Eighth Circuit Holds Mentally Disabled Jamaicans Do Not Comprise Particular Social Group For Asylum Purposes

In ***Raffington v. INS***, 340 F.3d 720) (8th Cir. 2003) (Hansen, Gibson, *Loken*), the Eighth Circuit upheld the BIA's denial of petitioner's motion to reopen to apply for asylum based on the claim that she would be persecuted on asylum because of her membership in a particular social group comprised of mentally ill persons in Jamaica. The petitioner entered the United States unlawfully in 1988, and was placed in deportation proceedings in 1994. Petitioner conceded her deportability but applied for suspension of deportation. In September 2001, the BIA denied that application finding that petitioner did not meet the 7-years continuous presence requirement. Petitioner did not appeal that decision. Instead, she filed a motion to reopen to apply for asylum arguing that she belonged to a persecuted social group, namely "mentally ill patients." The BIA denied the motion finding that she had not presented a prima facie case of persecution.

Preliminarily, the court noted that to overturn the denial of asylum "the alien must meet the heavy burden of demonstrating that the evidence was so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution," and that when asylum is first sought in a motion to reopen the Supreme Court's decision in *Ventura* dictates that review of "whether the BIA abused its discretion in finding a no prima facie case be even more deferential."

The court found that petitioner's assertion that "mentally ill or mentally ill females are being or have been persecuted in Jamaica on account of this shared characteristic was unsupported by the record." The court also found that a report by the Pan America Health Organization indicating that Jamaica devotes limited resources to treating those of who are mentally ill, did not establish a pattern of government persecution on account of this disability. Moreover the court determined that mentally ill Jamaicans are not "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." "The mentally ill are too large and diverse group to qualify," said the court.

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CONVENTION AGAINST TORTURE

■Ninth Circuit Denies Government's Panel Rehearing Petition Asking Court To Clarify The Meaning of "Awareness" And "Acquiescence" Under the Convention Against Torture

In *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), *rehear'g denied* (September 25, 2003) (Browning, Pregerson, Reinhardt), the Ninth Circuit denied the government's petition for panel rehearing where the court had vacated a BIA order denying protection under the Convention Against Torture. The applicant, a Chinese national, alleged that Chinese officials would acquiesce to his torture by smugglers. The court held that the BIA's interpretation of "acquiescence," requiring that officials be "willfully accepting" of torture by a third party, was contrary to Congress' intent to

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require only "awareness." The government's petition conceded that "willful acceptance" was not required, but asked the court to clarify that "awareness" does not included mental states such as "deliberate indifference," "recklessness," or "negligence."

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CRIMES

■Second Circuit Holds Board Wrongly Relied On Presentence Report To Find Alien Convicted Of Aggravated Felony

In ***Dickson v. Ashcroft***, 346 F.3d 44 (2d Cir. 2003) (McLaughlin, Leval, *Sotomayor*), the Second Circuit vacated and remanded a case in which the BIA relied on the factual narrative contained in a pre-sentence report to determine that the alien was convicted of an aggravated felony.

Under the categorical approach, "every set of facts violating a statute must satisfy the criteria for removability in order for a crime to amount to a removal offenses."

The petitioner, a citizen of Jamaica, entered the United States in 1986, at the age of six. In 1998, he became a lawful permanent resident. In December 2000, petitioner was arrested and later pled guilty to unlawful imprisonment under NY Penal Code § 135.10. Subsequently, the INS instituted removal proceedings and an IJ found him removable on the basis that he had been convicted of an aggravated felony under INA § 237(a)(2)(A)(iii). During the removal hearing the INS introduced the pre-sentence report (PSR) that had been prepared for petitioner's state criminal proceedings. The BIA affirmed the IJ's decision.

The Second Circuit applied the "categorical approach" to determine whether petitioners conviction for unlawful imprisonment, constituted a crime of violence and thus an aggravated felony. Under the categorical approach, "every set of facts violating a statute must satisfy the criteria for removability in order for a crime to amount to a removal offenses." Where a criminal statute encompasses diverse classes of criminal acts, the court found that the statutes can be considered "divisible statutes." When a conviction is reviewed under a divisible statute, the categorical approach permits reference to the record to determine whether the conviction was under the branch of the statue that permits removal.

Here the court determined that the statute in question was divisible. It determined that, "whether accomplished by force, intimidation or deception, the unlawful imprisonment of a competent adult under New York law always involves either the use or risk of force and will always be a crime of violence under 18 U.S.C. § 16." However, "when the unlawful imprisonment is of an incompetent person or a child under sixteen, [the offense] is not a crime of violence because it neither has an element the use of force nor categorically involves a substantial risk that force may be used."

The court then found that the BIA could properly consult the PSR as part of the record of conviction to determine if petitioner was convicted of a crime. However, the BIA could not rely, as it did, on the PSR's narrative statement because it could contain inaccurate hearsay or unproven or inadmissible allegations. Accordingly, the court remanded the case to the IJ to make the legal determination in the first instance whether documents that are properly considered establish that petitioner is removable as charged.

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■Ninth Circuit Reverses BIA Decision Finding Alien Removable For Drug Trafficking Aggravated Felony And Controlled Substance Offense

In ***Lara-Chacon v. Ashcroft,*** __F.3d__, 2003 WL 22319576 (9th Cir. October 10, 2003) (Noonan, *Tashima*, Wardlaw), the Ninth Circuit reversed the BIA's order finding the petitioner's removable based on his conviction for money laundering under an Arizona statute. The court held that the record did not establish the petitioner's conviction of an aggravated felony because, under the modified categorical approach, a pre-sentence report alone could not "unequivocally establish" the elements of the conviction. The court further found that petitioner had not been convicted of a crime relating to a controlled substance violation because Arizona's money laundering offense does not require proof of the underlying crime, and because a money-laundering conviction under the Arizona statute could involve proceeds from a number of illegal activities unrelated to controlled substances.

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■Second Circuit Holds That Sexual Assault In The Second Degree Is A Crime of Violence

In ***Chery v. Ashcroft***, __F.3d__, 2003 WL 22359492 (2d Cir. October 17, 2003) (Van Graafeiland, *McLaughlin*, Cabranes), the Second Circuit reversed the district court's finding that petitioner's conviction of sexual assault in the second degree under Connecticut law did not constitute a crime of violence, and therefore not an aggravated felony for purpose of removal.

The petitioner is a citizen of Haiti, and a permanent resident. In 1998, he was arrested upon a complaint by the mother of a 14-year-old that petitioner had sexually assaulted her daughter. Petitioner was eventually convicted and sentenced to 5 years' imprisonment.

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An IJ and later the BIA held that petitioner was removable on the basis that the offense was a crime of violence and therefore an aggravated felony. The district court reversed that finding, holding that under the "categorical approach," the felony conviction did not constitute a crime of violence because it did not inherently involve the use of force.

The Second Circuit found that because the state statute under which petitioner was convicted criminalizes sexual intercourse with a victim who is unable to give consent, there is a substantial risk that physical force may be used in the course of committing the offense. The court further noted that "in cases involving sexual crimes against children, courts have repeatedly recognized a substantial risk that physical force will be used to ensure compliance." Accordingly, the court concluded that because the alien had been convicted of an aggravated felony crime of violence, the district court erred in granting the habeas petition.

"In cases involving sexual crimes against children, courts have repeatedly recognized a substantial risk that physical force will be used to ensure compliance."

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■Ninth Circuit Finds That A Conviction For Making Terrorists Threats Under California Law Is An Aggravated Felony

In ***Rosales-Rosales v. Ashcroft***, __F.3d__, 2003 WL 22359438 (9th Cir. Oct. 17, 2003) (Reinhardt, Graber, *Rhoades* (District Judge)), the court held that a violation of California Penal Code § 422, making terrorist threats, constituted an aggravated felony under former INA § 241(a)(2)(A)(iii). Consequently, it held that it lacked jurisdiction to consider the petition for review.

The petitioner was originally charged in 1994 with deportation for entering the United States without inspection. While the case was pending, petitioner was convicted of making terrorists threats under California law and sentenced to two years of imprisonment. The INS lodged an additional charge of deportability, contending that petitioner had been convicted of a crime of violence that constituted an aggravated felony. The IJ and later the BIA order petitioner deported as an aggravated felon.

The court found that petitioner's case was controlled by IIRIRA's transition rules. It found that it had jurisdiction to consider the jurisdictional question presented by the appeal. The court found that § 422 of the California Penal Code, on its face, is an offense that has an element of the use of physical force against a person or property of another. Accordingly, the offense is a crime of violence, and therefore an aggravated felony.

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CRIMINAL PROSECUTION

■Ninth Circuit Finds Prejudice In Underlying Removal Hearing, Reverses Alien's Conviction For Being Found In The United States After Deportation

In ***United States v. Ubaldo-Figueroa***, __F.3d__, 2003 WL 22359439 (9th Cir. October 17, 2003) (*Pregerson*, Reinhardt, Archer (Fed. Cir.)), the Ninth Circuit sustained the alien's challenge to his criminal indictment based on a collateral attack against the underlying removal proceedings. The court held that the alien was prejudiced by the Immigration Judge's failure to inform him that he had the right to appeal his removal order, given that he had two plausible grounds for appeal. Specifically, the court found that the alien could have pursued his claim that retroactive application of the expanded aggravated felony definition is unconstitutional, and that he could have sought a discretionary waiver of deportation.

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DETENTION

■Ninth Circuit Finds That IIRIRA Detention Statute Applies to Aliens With Pre-IIRIRA Final Orders

In ***Martinez-Vazquez v. INS***, __F.3d__, 2003 WL 22244774 (9th Cir. Oct. 1, 2003) (Alarcon, *Gould*, Clifton), the Ninth Circuit rejected the government's appeal finding that petitioner's detention was governed by INA § 241(a)(6) and not by the pre-IIRIRA statutory provisions. The petitioner, a Mariel Cuban with a long history of serious criminal convictions was last taken into INS custody in October 2001. On January 18, 2002, he filed a habeas corpus petition arguing that his continued detention was improper under the Supreme Court's ruling in *Zadvydas v. Davis*, 533 U.S. 678 (2001).

The district court initially agreed with the government's argument that *Zadvydas* did not apply to the indefinite detention of inadmissible aliens. However, the court reversed itself following the contrary conclusion by the Ninth Circuit in *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002). The government then unsuccessfully moved for reconsideration arguing that petitioner's continued detention was authorized by the pre-IIRIRA statute. The government raised the same argument on appeal.

The Ninth Circuit held that IIRIRA's transition rule, under § 309(c)(1), did not preserve former INA § 236(e) as a source of authority to detain aliens. "The rule was intended to preserve pre-IIRIRA procedures for ongoing 'proceedings' initi-

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ated under pre-IIRIRA law. [Petitioner's] continued detention is not an 'ongoing proceedings,'" said the court. The court noted that its ruling was consistent with the Supreme Court's treatment of INA § 236(e) in *Zadvydas*, where the final order against Zadvydas had been issued in 1994 but the Court applied INA § 241(a)(6).

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JUVENILES

■Third Circuit Finds That District Director Did Not Abuse His Discretion In Denying Juvenile's Request For Consent To A State Court Dependency Hearing.

In ***Yeboah v. Ashcroft***, __F.3d__, 2003 WL 22245560)) (3d Cir. September 29, 2003)(*Roth*, Greenberg, Ward), the Third Circuit held that the INS District Director's decision to deny petitioner's request for consent to a state juvenile court dependency hearing, for purposes of determining whether he qualifies for special immigrant juvenile status, was neither arbitrary nor capricious. The court ruled that the District Director does not usurp the role of the juvenile court in weighing evidence of abuse and abandonment, and that the District Director could consider the intentions of the juvenile alien's parents in making the determination whether to consent to a dependency hearing.

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NOTICE

■Ninth Circuit Affirms BIA's Summary Dismissal Of Inadequate Notice Of Appeal

In ***Rojas-Garcia v. Ashcroft,*** 339 F.3d 814 (9th Cir. 2003) (O'Scannlain, *Gould*, Bolton (by designation)), the Ninth Circuit affirmed the BIA's summary dismissal of petitioner's appeal, where petitioner failed to file a promised brief and his Notice of Appeal did not state the grounds for appeal with sufficient particularity. The court said that counsel's failure to file the planned brief was caused by mistakes in counsel's handling of the case, and not by any deficiency in the BIA's procedures.

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■Ninth Circuit Remands To Board For Consideration Of Supplemental Evidence Offered By Alien On Appeal

In ***Manjiyani v. Ashcroft***, 343 F.3d 1018 (B. Fletcher, Gould, Murguia (D. Ariz.)) (9th Cir. 2003), the Ninth Circuit, in a *per curiam* decision, granted petitioner's petition for rehearing and vacated the court's order. The court had previously denied her petition to compel reopening of her deportation proceedings. At the petitioner's request, the court supplemented the record with her application for adjustment of status, which she argued established that the former INS failed to provide her with notice that deportation proceedings had been instituted against her. The court remanded the case to the BIA for consideration of the petitioner's motion to reopen deportation proceedings in light of the complete record.

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REMOVAL

■Seventh Circuit Holds That BIA May Cure Apparent Error By Reissuing Final Order Of Removal

In ***Firmansjah v. Ashcroft***, __F.3d__, 2003 WL 22359255 (7th Cir. October 17, 2003) (Easterbrook, *Manion*, Kanne), the Seventh Circuit held that the BIA has the discretion to cure an apparent error by reissuing a final order of removal, and that the court retains jurisdiction over such a reissued order. The BIA reissued petitioner's final order of removal, with instructions that the decision "shall be treated as entered as of today's date," after petitioner's attorney filed a motion for reissuance contending that he had not timely received the notice of decision. Following briefing on the question of jurisdiction, the court held that an administrative agency may extend the time for appeal by reissuing a decision for lack of notice, and that there is no obstacle to judicial review of the decision.

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RIGHT TO COUNSEL

■Ninth Circuit Holds Counsel's Miscalendaring Hearing Date Constituted Ineffective Assistance Of Counsel And An Exceptional Circumstance Requiring Reopening.

In ***Lo v. Ashcroft,*** 341 F.3d 934 (9th Cir. 2003) (Hall, Thompson, Berzon), the Ninth Circuit reversed the BIA's denial of the petitioners' motion to reopen based on ineffective assistance of counsel. The petitioners and counsel had been provided written and oral notice of their hearing date. On the day before their scheduled hearing, petitioner contacted his attorney's office to tell him that his wife was having severe back pain, and that they would not be able to attend the hearing. The attorney was not in his office but his secretary informed the petitioner that the hearing was not until "Monday, the 24th," three days later. The petitioners accepted this statement without further inquiry, failed to appear, and were ordered removed in absentia.

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In the motion to reopen, petitioners asserted that the medical condition was an "exceptional circumstances" meriting rescission of the order. Additionally, they asserted, and counsel conceded, that reopening was warranted due to ineffective assistance of counsel. The IJ and later the BIA denied the motion finding that petitioners had not complied with *Matter of Lozada*.

The Ninth Circuit held that given the underlying policy of *Matter of Lozada*, namely to assess the bona fides of the substantial number of ineffective assistance claims, it has not "insisted upon strict compliance" with the *Lozada* requirements. Here, both the petitioners and counsel presented affidavits to explain the reason for being absent from the hearing. The court found that there was "no suggestion for collusion" and that petitioners did all they reasonably could to have their cases heard promptly. Accordingly, the court held that under the circumstances a bar complaint was not required under *Lozada*, and that the BIA had abused its discretion in denying the motion to reopen. .

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VISAS

■District Court Overturns H-1B Visa Extension Denial

In ***Evangelical Lutheran Church in America v. INS***, __F.Supp.2d__, 2003 WL 22461687 (D.D.C. Oct. 30, 2003), the court held that the INS abused its discretion when it denied plaintiff's motion to extend the term of an H-1B visa. The alien and his sponsoring employer had failed to timely file for an extension of the H-1B visa. They claimed that the employer had not retained an attorney and that it was inexperienced in immigration matters. The INS denied the motion finding that it was the alien's responsibility to maintain a valid nonimmigrant status. Plaintiffs then filed another motion with the INS to reconsider its earlier decision. The INS again denied the extension finding that the employer's inexperience with H-1B visas and its failure to have an outside counsel did not constitute extraordinary circumstances to justify the grant of an untimely filed motion for an extension. Plaintiffs again, for the third time, sought unsuccessfully reversal of that decision. They then filed a habeas petition challenging, *inter alia*, the denial of the extension.

Preliminarily, the court rejected all jurisdictional arguments presented by the government. The court decided not to follow a decision by the Sixth Circuit finding that INA § 1252(a)(2)(B)(ii), divested courts of jurisdiction to review a denial of an H-1B visa extension. *See CDI Information Services v. Reno*, 278 F.3d 616 (6th Cir. 2002). On the merits, the court found that the INS had not adequately explained its reasons for denying the extension "because the court cannot discern the path that led to the INS's decision in this case, the court cannot uphold the agency's determination," said the court. Accordingly, the court remanded the case to the INS for further explanation.

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VOLUNTARY DEPARTURE

■Ninth Circuit Finds Immigration Judge's Warnings Concerning Failure To Voluntarily Depart Inadequate

In ***Ordonez v. Ashcroft,*** __F.3d __, 2003 WL 22251377 (*Tashima*, Berzon, Clifton) (9th Cir. October 2, 2003), the Ninth Circuit reversed a BIA's decision denying the petitioner's motion to reopen to apply for consideration of previously unavailable evidence of extreme hardship for purpose of suspension of deportation.

This is the second time that the court has reversed the BIA in this case. This case commenced on May 31, 1995, when the INS charged petitioner with unlawfully entering the United States. Previously, the court held that the BIA had abused its discretion by failing to consider the "extreme hardship" in the context of petitioner's claim of persecution if returned to Guatemala. *See Ordonez v. INS*, 137 F.3d 1120 (9th Cir. 1998). On remand petitioner submitted a supplemental brief and eventually the BIA again found no showing of extreme hardship. The BIA also granted voluntary departure. Petitioner did not depart at the end of the voluntary departure period. Instead, he filed a motion to reopen for consideration of previously unavailable evidence. The BIA denied the motion because the alien had failed to depart voluntarily as ordered by an IJ, which disqualified him from suspension of deportation. The BIA also held that petitioner had not demonstrated extreme hardship.

On appeal, the court held that the IJ's warnings about the consequences of failing to depart voluntarily as required under INA § 240B, were insufficient. Specifically, the court found that "the oral advisory provided by the IJ did not identify the types of relief for which [petitioner] would become ineligible if he failed to depart." Additionally, the court held that the BIA's alternate adverse credibility finding violated petitioner's due process right because petitioner had not been given an opportunity to explain the alleged inconsistencies. Accordingly, the case was remanded for the second time to the BIA.

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WAIVER - 212(c)

■Third Circuit Holds That Statute Does Not Violate Equal Protection, That Alien Who Pled Guilty Under Open Plea Agreement Is Ineligible For Waiver Of Deportation

In ***DiPeppe v. Quarantillo***, __F.3d__, 2003 WL 21731753 (3d Cir. July 28, 2003) (Becker, McKee, Hill

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(sitting by designation)), the Third Circuit reversed the district court. It held that the immigration statute's waiver-of-inadmissibility provision (INA § 212 (h)) does not violate equal protection in distinguishing between legal permanent residents and non-legal permanent residents, that the repeal of INA § 212(c) was permissibly retroactive to the alien because she could not have reasonably relied on a waiver when she pled guilty to manslaughter, and that the government was not estopped from applying the § 212(c) relief bar by its 8-year delay in filing the charging document in immigration court.

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VAWA

■Ninth Circuit Finds That Non-Violent Actions By Husband Constituted "Extreme Cruelty" Under Violence Against Women Act

In ***Luis-Hernandez v. Ashcroft,*** __F.3d__, 2003 WL 22289896 (Reavley (by designation), Tashima, *Paez*) (9th Cir. October 7, 2003), the Ninth Circuit, reversed the BIA's denial petitioner's applications for suspension of deportation under the Violence Against Women Act ("VAWA"), and for adjustment of status. The court found that it had jurisdiction to review whether petitioner's husband's actions constituted "extreme cruelty" for purposes of VAWA, and then held that the non-violent actions of petitioner's husband in the United States constituted "extreme cruelty" because they were a link in a chain of violent batterings that took place in Mexico. The court also ruled that the BIA erred by denying adjustment as a matter of discretion on the ground that petitioner's marriage was no longer viable.

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RECENT CRIMINAL PROSECUTION CASES

■***United States v. Thiongo***, 344 F.3d 55 (1st Cir. Sept. 15, 2003) (Allowing the prosecution to cross-examine the defendant about her prior bad act of serving as a legal witness to a sham marriage designed to avoid immigration laws was not an abuse of the district court's discretion, in prosecution of charges related to two-year conspiracy to gain aliens' illegal admission into United States, as such act was probative of defendant's truthfulness).

■***United States v. Jurado***, __F.Supp.2d__, 2003 WL 22018791 (E.D.N.Y. July 27, 2003) (The IJ in this case undisputedly erred in not giving the alien a hearing on his application for section 212(c) relief, a procedural error that rendered his proceedings fundamentally unfair).

Court finds that fingerprint exemplar after fingerprints taken of defendant at the time of his arrest for illegal reentry were suppressed as the fruit of a race-based arrest, an egregious violation of the Fourth Amendment.

■***United States v. Hajbeh***, __F.Supp.2d__, 2003 WL 22231552 (E.D. Va. Sept. 25, 2003) (Since proffered testimony of proposed deponent was merely cumulative and corroborative of the testimony that the defendant himself was going to present, it was not material to the defense, and therefore fell outside the purview of Rule 15(a) of the Federal Rules of Criminal Procedure).

■***United States v. Lara-Unzueta***, __F.Supp.2d__, 2003 WL 22382820 (N.D. Ill. Oct. 16, 2003) (Alien who was indicted for illegal reentry was not entitled to dismissal of the indictment based upon her contention that her underlying removal order was improper; alien failed to demonstrate that she exhausted her administrative remedies, that she was deprived of an opportunity for judicial review, or that the entry of her removal order was fundamentally unfair).

■***United States v. Ubaldo-Figueroa***, __F.3d__, 2003 WL 22359439 (9th Cir. Oct. 17, 2003) (In this case, the alien's underlying deportation proceedings deprived him of due process because the IJ did not inform him that he had the right to appeal his removal order; the IJ also did not inform him that he may be eligible for relief under former Section 212(c); the district court erred in finding that these constitutionally inadequate procedures did not result in prejudice because, but for those inadequate procedures, the alien could have raised and likely succeeded on his retroactivity claim and his claim to be eligible for relief under INA § 212(c)).

■***United States v. Ortiz-Hernandez***, 276 F.Supp.2d 1119 (D.Or. Aug. 19, 2003) (The exclusionary rule operated to foreclose the government's acquisition of identity evidence in the form of fingerprint exemplar after fingerprints taken of defendant at the time of his arrest for illegal reentry were suppressed as the fruit of a race-based arrest, an egregious violation of the Fourth Amendment).

■***United States v. Lucio-Lucio***, __F.3d__, 2003 WL 22436260 (10th Cir. Oct. 28, 2003) (The 10th Circuit joins all its sister circuits in holding that the crime of driving while intoxicated, by itself, is not a "crime of violence" under 18 U.S.C. § 16).

■***United States v. Lugo***, __F.Supp.2d__, 2003 WL 22439738 (S.D. Tex. Oct. 23, 2003) (Court denies motion to suppress statements given to Border Patrol agents who questioned defendant at county jail and at Border Patrol Office).

■***United States v. Leon Paz***, 340 F.3d 1003 (9th Cir. 2003) (Defendant was denied due process in removal proceeding when immigration judge erroneously told him that he was not eligible for relief from removal).

CASES SUMMARIZED IN THIS ISSUE

Contributions To The ILB Are Welcomed!

INSIDE OIL

OIL bids farewell to Trial Attorneys **Michael T. Dougherty** and **Patricia L. Buchanan.** Mr. Dougherty has accepted a policy position at the Department of Homeland Security in the Directorate of Border and Transportation Security. Ms. Buchanan is transferring to the United States Attorney's Office for the Southern District of New York in Manhattan.

OIL welcomes back Trial Attorneys **John S. Hogan**, **Edward C. Durant**, and **Stephen Flynn**, who had been deployed to Iraq during Operation Iraqi Freedom.

On October 20-23, 2003, OIL hosted its Ninth Annual Immigration Law Seminar. More than ninety students from the Department of Homeland Security, EOIR, Department of State, and OIL, attended the seminar.

Students take a 5-minute break during the Ninth Annual Immigration Law Seminar

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

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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