U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 16, No. 2 February 2012

LITIGATION HIGHLIGHTS

Inside

Supreme Court Rules that False Statements on Tax Returns Involve "Fraud or Deceit" Under Aggravated Felony Provision

In ***Kawashima v. Holder***, 132 S. Ct. 1166 (Feb. 21, 2012), the Supreme Court held that a crime whose "elements necessarily entail fraudulent or deceitful conduct" "involves fraud or deceit" for purposes of the federal aggravated felony definition, regardless of whether fraud or deceit are statutory elements of the crime. In a 6-3 opinion the Court upheld the ruling of the Board of Immigration Appeals that convictions for making a false statement on a tax return in violation of 26 U.S.C. § 7206(1) and (2) are for offenses that "involve fraud or deceit" under 8 U.S.C. § 1101 (a)(43)(M).

The case involved Akio and Fusako Kawashima, whose guilty pleas resolved their criminal liability for what they admitted was multiple years of underreporting the income generated by their Los-Angeles-area restaurants. The Kawashimas pled guilty to charges that they understated the income of one restaurant in one year by $76,645, but they acknowledged cumulatively underreporting income for all of their restaurants by more than $1 million, and stipulated to actual tax losses totaling $245,126 for sentencing purposes. Akio Kawashima pled guilty to one count of willfully making and subscribing a false corporate tax return, in violation of 26 U.S.C. § 7206(1). Fusako Kawashima pled guilty to willfully assisting her hus-

(Continued on page 2)

A Reasonable Argument for Judicial Review of Immigration Judges' Negative Reasonable-Fear Determinations

In the last year, OIL defended several review petitions challenging an immigration judge's determination that an alien subject to an 8 U.S.C. § 1228(b) expedited removal order or § 1231(a)(5) reinstated removal order did not demonstrate a "reasonable fear" of persecution or torture. Some courts asked whether they had jurisdiction to review these claims. Regulations state that "no appeal shall lie" from the immigration judge's reasonable-fear determination. But regulatory attempts to shield determinations from judicial review are insufficient under *Kucana v. Holder*, __U.S.__, 130 S. Ct. 827 (2010), and absent clear and convincing evidence of congressional intent to the contrary, review of agency action is presumed. No statute directly precludes judicial or habeas review of reasonable-fear determinations, and Congress stated that "any determination" relating to claims under the United Nations Convention Against Torture could be reviewed as part of the final removal order. Judicial review is also consistent with the REAL ID Act, relevant precedent, and OIL's litigation positions in other contexts. Although the applicable review standard is beyond this article's scope, we argue that appeals courts should review an immigration judge's negative reasonable-fear determination as part of

(Continued on page 3)

False statements on tax returns involve fraud or deceit

(Continued from page 1)
band Akio in preparing that return, in violation of 26 U.S.C. § 7206(2).

In section 1101(a)(43)(M), "aggravated felony" is defined to include offenses that "(i) involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) [are] described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." The Court rejected the Kawashimas' argument that, because neither "fraud or "deceit" are formal elements of the statutes they pled guilty to violating, their offenses do not "involve fraud or deceit." In the opinion for the Court, Justice Clarence Thomas, examining the elements of the offenses, wrote that the convictions established that Akio Kawashima had knowingly and willfully submitted a tax return that was false as to a material matter, and that Fusako Kawashima had knowingly and willfully assisting her husband's filing of a materially false tax return. And because a dictionary definition of "deceit" at the time the aggravated felony provision was enacted was "the act or process of deceiving (as by falsification, concealment, or cheating)," Justice Thomas reasoned, each of these offenses necessarily entailed "deceit."

The Court also rejected the Kawashima's argument that the fact that clause (ii) of 8 U.S.C. § 1101(a)(43)(M) expressly refers to the crime of federal tax evasion and "revenue loss to the Government" means that clause (i) cannot also encompass other tax crimes whose elements necessarily entail fraudulent or deceitful conduct. Addressing this issue, which had divided the courts of appeals, Justice Thomas wrote that it is more likely that Congress expressly referred to the crime of tax evasion under 26 U. S. C. §7201 in clause (ii) "to remove any doubt that [it] qualifies as an aggravated felony." Justice Thomas wrote that neither fraud nor deceit is an element of tax evasion offense under §7201, and the elements of the crime do not necessarily involve fraud or deceit. He also wrote that a 1930s-era Supreme Court decision addressing a statute of limitations issue (*United States v. Scharton*, 285 U. S. 518 (1932)), "gave Congress good reason to doubt that" the crime of tax evasion would be viewed as a crime that "involves fraud," and thus would be understood to be an aggravated felony under the "offense that involves fraud or deceit" standard, and that the fact that clause (ii)'s language is tailored to match the type of offense that it covers "does not demonstrate that Congress also intended to implicitly circumscribe the broad scope of Clause (i)'s plain language."

The Court rejected the Kawashimas' argument that, because neither "fraud or "deceit" are formal elements of the statutes they pled guilty to violating, their offenses do not "involve fraud or deceit."

Finally, the Court rejected the Kawashimas' arguments that the statute should be construed in the light of the treatment of tax offenses under the United States Sentencing Guidelines, and that the rule of lenity should apply, observing that "[w]e think the application of the present statute clear enough that resort to the rule of lenity is not warranted."

In a dissenting opinion joined by Justices Stephen Breyer and Elena Kagan, Justice Ruth Bader Ginsburg wrote that she would read clause (i) as not including any tax offenses, given clause (ii). Although Justice Ginsburg did not take issue with the majority's reading of the language of clause (i), she reasoned that, when confronted with two plausible constructions of the statute, the rule of lenity "directs us to construe the statute in the Kawashimas' favor." And the "[f]ar more likely" possibility," Justice Ginsburg wrote, "is that "Congress did not intend to include tax offenses in §1101(a)(43)(M)(i), but instead drafted that provision to address fraudulent schemes against private victims, then added §1101(a)(43)(M)(ii) so that the 'capstone' tax offense against the Government" -- tax evasion – "also qualified as an aggravated felony." The Court's reading of the statute "sweeps a wide variety of federal, state, and local tax offenses—including misdemeanors—into the 'aggravated felony' category," she wrote. Justice Ginsburg argued that the Court's reading of the statute may discourage aliens from pleading guilty to tax offenses, "thereby complicating and delaying enforcement of the internal revenue laws."

Justice Ginsburg also criticized the Court's element-based evaluation of tax evasion crimes and its reading of *Scharton* to justify its decision. Noting the Department's concession that tax evasion offenses will almost invariably involve some affirmative acts of fraud or deceit, she wrote that the Court's construction depended on "a case 'most unlikely' to exist." *Scharton*, she wrote, is a "long-obsolete case"; and "[t]he suggestion that Congress may have worried about *Scharton* when framing legislation over 60 years later is hardly credible."

The Court's ruling affirms the order of removal against Akio Kawashima; Fusako Kawashima's case must now be returned to the agency for receipt of evidence relating to the amount of lost revenue tied to her crime.

By Bryan S. Beier, OIL
☎ 202-514-4115

A Reasonable Argument for Judicial Review of Immigration Judges' Negative Reasonable-Fear Determinations

(Continued from page 1)
the final removal order.

Legislative and Regulatory Basis for the Reasonable-Fear Process

In 1996, Congress authorized expedited forms of removal and barred "relief"—such as asylum—for two classes of aliens: (1) previously removed aliens who unlawfully reenter; and (2) aggravated felons. 8 U.S.C. §§ 1228(b) (expedited removal for aggravated felons), 1231 (a)(5) (reinstatement). Further, § 1231(a)(5) authorizes immediate removal of the alien upon reinstatement of the order. § 1231(a)(5) ("the alien shall be removed at any time after the reentry"). But withholding and deferral of removal are not relief; they are considered protection and not deemed covered by the relief bar.

In 1999, in response to the Foreign Affairs and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-227 (Oct. 21, 1998), which mandated that the Executive Branch issue regulations implementing the CAT, the Attorney General created a process for determining whether aliens subject to § 1228(b) and 1231(a)(5) removal orders have a "reasonable fear" of persecution or torture. 64 Fed. Reg. 8478 (Feb. 19, 1999). The reasonable-fear interview was designed as a screening process to "quickly identify and resolve frivolous claims to protection so that the new procedures cannot be used as a delaying tactic by aliens who are not in fact at risk." *Id*. at 8479. To be clear, a negative reasonable-fear determination is not the denial of withholding of removal or CAT protection; it is a finding that the alien has failed to make a threshold showing of eligibility to even apply for such protection.

The Reasonable-Fear Process

An alien who expresses fear of return is referred to a DHS asylum officer to determine if the alien has a "reasonable fear" of persecution or torture. 8 C.F.R. § 208.31(a)-(b). Regulations define reasonable fear as:

> a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.

8 C.F.R. § 208.31(c). If either the asylum officer or immigration judge find a reasonable fear, the alien is placed into withholding-only proceedings and allowed to file a Form I-589 for consideration of withholding and CAT protection—but not asylum. 8 C.F.R. § 208.31(e), (g)(2). The immigration judge's decision in withholding-only proceedings is appealable to the Board, and—in turn—if the alien is unsuccessful before the Board, the Board's decision is reviewable by the courts of appeals. 8 C.F.R. § 203.31(g)(i)-(ii); *see also Halibi v. Mukasey*, 283 Fed. Appx. 866 (2d Cir. July 15, 2008) (unpublished) (finding jurisdiction under 8 U.S.C. § 1252(a)(1) to review the denial of protection in "withholding-only" proceedings because such denial is the "functional equivalent of a removal order").

If the asylum officer finds no reasonable fear, the alien may seek review by an immigration judge. 8 C.F.R. § 208.31(f)-(g). But where the immigration judge finds no reasonable fear, "no appeal shall lie from the immigration judge's decision," and the case is returned to DHS for the alien's removal. 8 C.F.R. § 208.31 (g)(1). So the immigration judge's decision is the final agency action on the reasonable-fear question. But is it a final removal order and thus reviewable under 8 U.S.C. § 1252(a)?

We argue that courts of appeals have jurisdiction to review an immigration judge's negative reasonable-fear determination under 8 C.F.R. § 208.31 as part of a final order of removal.

Courts of Appeals Should Review the Immigration Judge's Negative Reasonable-Fear Determination as Part of the Final Removal Order.

We argue that courts of appeals have jurisdiction to review an immigration judge's negative reasonable-fear determination under 8 C.F.R. § 208.31 as part of a final order of removal—*i.e.*, as part of the petition for review of an 8 U.S.C. § 1228(b) administrative removal order or an 8 U.S.C. § 1231(a)(5) reinstatement order. The circuits will likely find jurisdiction because: (1) there is a presumption of judicial review of agency action; (2) Congress has not expressly divested courts of jurisdiction over this determination; (3) regulatory attempts to shield determinations from judicial review are insufficient under *Kucana*; and (4) circuit court review is consistent with relevant precedent and other OIL litigation positions.

Judicial review of agency action is presumed, absent clear and convincing evidence that Congress intended to bar review. *See Kucana*, 130 S. Ct. at 839. No statute specifically addresses judicial review of reasonable-fear determinations; it is a regulatory creature. Section 1228(a) states that nothing in that section creates any enforceable right against the Government, but similar language appears in the asylum and withholding statutes and has not barred courts from reviewing application denials. Section 1231(a)(5) bars judicial review of the prior removal order, but the reasonable-fear deter-

(Continued on page 4)

Review of no-reasonable fear determinations

(Continued from page 3)
mination is not part of the prior order; it is a determination made after reinstatement. And § 1231(a)(5) does not expressly bar habeas review, which is required to create a jurisdictional bar. *See INS v. St. Cyr*, 553 U.S. 289, 297 (2001).

Further, when Congress intends to preclude judicial review, it explicitly does so. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A) (limiting review of § 1225(b) expedited removal determinations). Courts construe ambiguities in jurisdiction-stripping language in favor of judicial review. There is thus no clear and convincing evidence that Congress intended to preclude judicial review of negative reasonable-fear determinations. Moreover, FARRA provides that review of "determinations made with respect to the policy" can be "part of the review of the final order of removal . . . ." FARRA § 2242(d).

Review of these determinations in the appeals courts is also consistent with the streamlining purpose of the REAL ID Act, relevant case law, and the Government's arguments in analogous contexts. The REAL ID Act provides that "[notwithstanding any other provisions of law . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of any cause or claim under [CAT] except as provided in [8 U.S.C. § 1252(e) (judicial review of 8 U.S.C. § 1225(b)(1) expedited removal orders)]." REAL ID Act, Pub. L. 109-13, Div. B, § 106(a)(1)(B), 119 Stat. 231, 310 (codified at 8 U.S.C. § 1252(a)(4)); 8 U.S.C. § 1252(a)(4) (codifying FARRA § 2242 (d)).

Further, because administrative removal orders and reinstatement orders are "order[s] of removal," they are subject to the INA's "zipper clause." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999). Under this clause, any questions of law and fact arising from an order of removal must be raised in a petition for review of that order. 8 U.S.C. § 1252(b)(9); *Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007). The "zipper" clause "consolidates or 'zips' judicial review of immigration proceedings into one action in the court of appeals." *Singh*, 499 F.3d at 976 (internal quotation marks omitted); *see also Foti v. INS*, 375 U.S. 217, 227 (1963) (rejecting narrow interpretation of "order of deportation" that referred only to adjudications of deportability, finding such interpretation "inconsistent with [the] manifest purpose of Congress" to consolidate immigration appeals in one proceeding and to "prevent[] successive dilatory appeals to various federal courts"); *Morazles-Izquierdo v. DHS*, 600 F.3d 1076, 1082 (9th Cir. 2010) (Government urged the Ninth Circuit to interpret the denial of adjustment as part of the "order of removal"—*i.e.*, the reinstatement order). District court review of the reasonable-fear determination—the only alternative to circuit court review—would undermine the streamlined nature of reinstatement and administrative removal procedures and provide the alien with bifurcated reviews of their removal orders and the related reasonable-fear determination.

OIL has argued that the final administrative removal order—and any denial of withholding and CAT protection—may be reviewed only through a review petition filed within thirty days of the final agency decision regarding withholding and CAT protection.

No court has issued a published decision addressing the judicial reviewability of a negative reasonable-fear determination. But the Fifth Circuit stated in dicta that an immigration judge's concurrence with the asylum officer's negative reasonable-fear determination is the "final agency action . . . because it is the end of the administrative review of DHS's Final Administrative Removal Order." *Umude-Louis v. Holder*, No. 09-60283, 2010 WL 742588 *2 (5th Cir. Mar. 4, 2010) (unpublished) (citing 8 C.F.R. § 1208.31(g)(1)). The Fifth Circuit then stated:

> the alien may then seek judicial review of the [immigration judge's] final order and the underlying Final Administrative Removal Order by timely filing a petition for review in a Circuit Court.

Id. But the court provided no authority or analysis to support the conclusion that judicial review of that order was proper in the courts of appeals in conjunction with the administrative removal order. *Id.* at *2-3.

Further, OIL has argued that the final administrative removal order—and any denial of withholding and CAT protection—may be reviewed only through a review petition filed within thirty days of the final agency decision regarding withholding and CAT protection. *See, e.g.*, *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010) (Government argued petition for review of reinstatement order was premature where it was filed prior to Board's decision on withholding denial); *but see G.S. v. Holder*, 373 Fed. Appx. 836, 841 (10th Cir. 2010) (unpublished) ("It appears no court has ruled [on] whether a [final administrative order of removal] is rendered nonfinal by an alien's election to pursue relief from the [order] through the reasonable fear process of 8 C.F.R. § 238.1," but declining to decide the issue).

Although a negative reasonable-fear determination is not a denial of withholding or CAT protection, it is the final agency determination on whether the alien satisfied the reasonable-fear screening determination—which dictates whether the alien will be placed into withholding-

(Continued on page 15)

FURTHER REVIEW PENDING: Update on Cases & Issues

Retroactivity – "admission" definition

The Supreme Court heard oral argument on January 18, 2012 in ***Vartelas v. Holder*** (S. Ct. 10-1211). The question presented is whether the 1996 amended definition of "admission," which eliminated the right of a lawful permanent resident to make "innocent, casual, and brief" trips abroad without being treated as seeking admission upon his return, is impermissibly retroactive when applied to an alien who pled guilty prior to the effective date of the 1996 statute.

Contact: John W. Blakeley
☎ 202-514-1679

Cancellation - Imputation

The Supreme Court heard oral argument on January 18, 2012 in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543). These two cases raise the question of whether the parent's time of legal residence be imputed to the child so that the child can satisfy the 7 years continuous residence requirement for cancellation.

Contact: Carol Federighi, OIL
☎ 202-514-1903

Aggravated Felony — Missing Element

In ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the Ninth Circuit has withdrawn its decision and received supplemental briefing on the effect of its *en banc* decision in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (2011), which overruled the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). The government *en banc* petition challenged the missing element rule.

Contact: Robert Markle, OIL
☎ 202-616-9328

Asylum—Particular Social Group

Over government opposition, the Ninth Circuit has ordered *en banc* rehearing of its prior unpublished decision in ***Henriquez-Rivas v. Holder***, 2011 WL 3915529, which upheld the agency's ruling that El Salvadorans who testify against gang members does not constitute a particular social group for asylum. Concurring judges on the panel, and the subsequent petition for rehearing, suggested en banc rehearing to consider whether the court's social group precedents, especially regarding "visibility" and "particularity," are consistent with each other and with Board precedent.

Contact: Manning Evans, OIL
☎ 202-616-2186

Conviction – Conjunctive Plea

An *en banc* panel of the Ninth Circuit, following December 12, 2011, oral argument on rehearing in ***Young v. Holder***, has requested supplemental briefing on whether it should overrule *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007). The panel decision, originally published at 634 F.3d 1014 (2011), ruled that where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. In its en banc petition, the government argued that the panel's opinion is contrary to the court's *en banc* decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

Contact: Bryan Beier
☎ 202-514-4115

Retroactivity - Judicial Decisions

The Ninth Circuit granted rehearing *en banc*, vacating its prior opinion, ***Garfias-Rodriguez v. Holder***, 649 F.3d 942 (9th Cir. 2011), in which the court had held that an alien inadmissible for reentering after accruing unlawful presence may not adjust his status under 8 U.S.C. § 1245(i). The court permitted supplemental briefing for the parties to address whether the court's decision, deferring to an agency precedent decision rejecting a prior circuit precedent, should be applied retroactively to cases pending at the time of the agency decision. The court also invited the parties to discuss whether the *en banc* court should overrule *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010). Oral argument is scheduled for the week of June 18, 2012.

John W. Blakeley
☎ 202-514-1679

Updated by Andy MacLachlan, OIL
☎ 202-514-9718

NOTED

"Tax lawyers said the ruling in the case of *Kawashima vs. Holder* sends an ominous warning to legal immigrants throughout the country, and especially to small-business owners whose tax liabilities may be large enough to attract IRS attention.

Under the court's holding, an immigrant who makes a false statement on a tax return could face not only tax charges but also automatic deportation." *Los Angeles Times* (February 26, 2012)

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds a Generalized Political Motive Underlying a Persecutor's Mistreatment does not Establish Persecution on Account of Political Opinion**

In *Guerrero v. Holder*, __F.3d__, 2012 WL 265841 (1st Cir. January 31, 2012) (Torruella, Lipez, *Howard*), the First Circuit held that petitioner failed to demonstrate the required nexus between his political opinion and the harm he suffered from guerillas in El Salvador.

Petitioner entered the United States illegally in February 1992. Later that year, he filed an affirmative asylum application. The application was not granted and 15 years later, in March 2007, DHS instituted removal proceedings against the petitioner. At his removal hearing petitioner conceded deportability but renewed his claim for asylum and withholding. He claimed that he had suffered mistreatment at the hands of the Farabundo Martí National Liberation Front ("FMLN") guerillas, who occupied a base in his home village throughout much of the more than decade-long Salvadoran civil war. Petitioner opposed the guerillas, who he believed would "turn El Salvador into another Cuba." Although he never openly resisted the guerillas for fear of harm, he asserted that it was well known in his village of only approximately three thousand inhabitants who supported the guerillas and who did not.

The IJ determined that petitioner had failed to demonstrate a nexus between petitioner's opinion (directed or imputed) and the mistreatment that he suffered. The BIA affirmed, agreeing that the petitioner had established neither a nexus between the allegedly persecutory acts and a statutorily protected ground nor an objectively reasonable fear of future persecution.

The First Circuit held that despite evidence the guerillas knew petitioner's political opinion and forced him and other villagers to attend political rallies, petitioner had not presented specific evidence that the guerillas targeted him as a means to punish him for pro-government, anti-guerilla views. "It is not enough to point to the guerillas' presumed knowledge of [petitioner's] opposition to their cause, or even to argue, as the petitioner does, that the guerillas had 'very little regard for his safety and well-being' because of it. To demonstrate persecution 'on account of' his political belief, the petitioner must also provide specific evidence that the FMLN targeted him as a means to punish him for the pro-government, anti-guerilla view that they attributed to him," explained the court. Accordingly, the court found that the record evidence did not "compel the conclusion that the petitioner's forced attendance at political rallies – much less any of the other incidents that comprise his claim – bore a nexus to a protected ground."

"To demonstrate persecution 'on account of' his political belief, the petitioner must also provide specific evidence that the FMLN targeted him as a means to punish him for the pro-government, anti-guerilla view that they attributed to him."

Contact: Anthony J. Messuri, OIL
☎ 202-616-2872

■ **First Circuit Holds "Witnesses to Serious Crimes" are not Cognizable as a Particular Social Group because of Lack of Social Visibility**

In *De Carvalho-Frois v. Holder*, __F.3d__, 2012 WL 230023 (1st Cir. January 26, 2012) (Boudin, *Selya*, Howard), the First Circuit held that a Brazilian national's professed social group – witnesses to serious crimes which the government is unable or unwilling to protect – lacked the requisite social visibility and upheld the agency's denial of asylum. The court determined the alien's situation was only known to a select few, and she had no immutable characteristic in common with others that rendered her socially visible. Thus, her claimed group was too amorphous to qualify as a "particular social group."

Contact: Lisa Morinell, OIL
☎ 202-532-4522

THIRD CIRCUIT

■ **Third Circuit Holds that Alien's Misrepresentation of Birth in Puerto Rico to Police Officer During Criminal Arrest Does Not Constitute a "Purpose or Benefit" Under 8 U.S.C. § 1182 (a)(6)(C)(ii)**

In *Castro v. Att'y Gen. of the U.S.*, __F.3d__, 2012 WL 456530 (3d Cir. February 14, 2012) (Sloviter, Greenaway, *Pollak*), the Third Circuit held that the BIA improperly determined that the petitioner, Castro, was inadmissible under INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii), for making a false claim of United States citizenship to obtain a benefit under the INA, and therefore ineligible for adjustment of status.

Castro, a citizen of Costa Rica, entered the United States on a visitor's visa in 1980 and never departed. In 1989 he married Alma who became a U.S. citizen in 1997. In 2006 Castro filed an application to adjust his status based on that marriage. In his application he disclosed that he had been arrested in 2004 in New Jersey and had pled guilty to a disorderly conduct municipal offense. The arrest report listed Castro's place of birth as Puerto Rico. DHS concluded that this triggered the inadmissibility bar under § 212(a)(6)(C)(ii), and therefore denied his application for adjustment.

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

On February 28, 2007, DHS instituted removal proceedings charging him with this inadmissibility ground and as an overstay. Castro then renewed his application for adjustment and also applied for cancellation. At a hearing held on March 4, 2008, Castro's counsel complained that he had not received a copy of the entire administrative record. However, when offered the opportunity by DHS counsel to review the record he declined to do so. DHS then presented the testimony of the police officer who had arrested Castro and had completed the arrest report. The officer said, in relevant part, that there was no chance that he could have misunderstood Costa Rica for Puerto Rico. Castro, on the other hand, testified that he had told the officer that he was from "Costa Rica" but that another passenger in the car was "Puerto Rican." When a day later Castro saw the arrest report, he said that he returned to the police station to have his place of birth corrected but was told by a police officer that it "was not a problem." The IJ credited the police officer testimony and from this he inferred that Castro had made a false claim to U.S. citizenship. The IJ also concluded, acknowledging that the issue was more difficult, that Castro made the claim in order to obtain a benefit – principally that because Castro was in the process of filing for adjustment, the arrest could have had an adverse consequence. Consequently, the IJ found him inadmissible under § 212(a)(6)(C)(ii) and denied the applications for benefits.

"The language of the statute is not amenable to the expansive reading the government urges us . . . it is clear that the BIA's construction was, in this instance, 'unmoored from the purpose and concerns' of the statute."

Castro appealed the decision to the BIA and attached a letter dated September 27, 2006, from the Paterson police officer indicating that he had spoken with the arresting officer and it was possible that Castro could have said "Costo Rico" as opposed to "Puerto Rico." No separate brief was filed. On January 21, 2010, the BIA dismissed the appeal and declined to consider the letter noting that no evidence had been offered to show why the letter could not have been presented at the 2008 hearing. A majority of the BIA agreed with the IJ's finding of inadmissibility but, one member dissented.

On February 22, 2010, Castro filed a motion to reconsider arguing that the BIA had erred in adopting the IJ's inadmissibility finding and that the failure of DHS to provide him with the September 27, 2006, letter from the Paterson police department violated his due process rights. The BIA denied the motion on June 28, 2010. Castro then sought judicial review.

The Third Circuit initially rejected the government's contention that it could not review the inadmissibility finding because Castro had not sought judicial review of the earlier BIA merits decision. "Some review of the merits decision is required in order to determine whether the BIA erred in concluding, on reconsideration, that Castro had not shown any error of fact or law in that decision that would alter the outcome," said the court. The court then disagreed with Castro's contention that DHS's failure to offer the September 27 letter violated his due process rights. The court noted that DHS had made the file where the letter was located available to Castro's counsel at the March 8, 2008 hearing, but he declined to review it. The court then determined that because the burden was upon Castro to prove his admissibility, a reasonable trier-of-fact could have credited the police officer's testimony. Therefore, the BIA had properly concluded that Castro told the police officer that he was born in Puerto Rico.

On the merits, the court disagreed with the BIA's conclusion that Castro made a false claim for purpose of evading detection by immigration authorities because he wished to apply for adjustment of status. The court found that the purpose imputed by the BIA would apply virtually to any false claim of citizenship made by an alien unlawfully in this country. "The language of the statute is not amenable to the expansive reading the government urges us . . . it is clear that the BIA's construction was, in this instance, 'unmoored from the purpose and concerns' of the statute. *Judulang v. Holder*, 132 S. Ct. 476, 490," said the court. "At most," explained the court, the "purpose or benefit" imputed by the BIA to Castro was to minimize the risk that the police would report his arrest to DHS. "That is not, in and of itself, a legal benefit," concluded the court.

Contact: Lisa Damiano, OIL
☎ 202-616-4213

FOURTH CIRCUIT

■ **Fourth Circuit Joins Third in Holding that Review of Denial of CAT Protection Must be Bifurcated, Applying the "Clearly Erroneous Standard" to Factual Determinations Such as What Would Likely Happen if the Alien were Removed**

In ***Turkson v. Holder***, 667 F.3d 523 (4th Cir. 2012) (Agee, Diaz, *Gibney*), the Fourth Circuit reversed and remanded a BIA's decision which had reversed the grant of CAT deferral because the BIA had used only one standard in its review.

The petitioner, a native of Ghana, claimed that he was subjected to violence in his native country while distributing pamphlets for the political party of which his father was a leader. To escape the violence, he came to the United States on a false passport in 1995. He later married a United States citizen, and became a permanent legal resident. Petitioner committed a number of crimes in the United States and eventually DHS sought his

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
removal for having been convicted of an aggravated felony. At his removal hearing petitioner conceded the charge but sought asylum, withholding, and CAT protection. The IJ found him ineligible for asylum and withholding of removal based on his criminal record, but granted deferral of removal under the CAT. DHS appealed the decision and the BIA vacated the IJ's ruling. On October 25, 2010, petitioner was removed to Ghana.

Under a de novo standard of review, the BIA should have applied the CAT definition to the IJ's factual findings to determine whether the predicted conduct amounts to "torture."

The Fourth Circuit held that the BIA applied the wrong standard of review to the IJ's factual findings. In doing so, the BIA failed to follow its own regulations as well as the case law interpreting those regulations. The court, following *Kaplun v. Att'y Gen of the U.S.,* 602 F.3d 260 (3d Cir. 2010), and extending *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), held that the BIA should have addressed two sets of questions with different standards. First, the BIA should have examined the record to determine if the IJ's factual findings were clearly erroneous. The factual findings subject to this deferential level of review include the IJ's pronouncements about what happened to petitioner in Ghana in 1995, what conditions currently exist in the country, and how petitioner will likely be treated upon his return. Second, under a *de novo* standard of review, the BIA should have applied the CAT definition to the IJ's factual findings to determine whether the predicted conduct amounts to "torture." Accordingly the court remanded the for the BIA to review the IJ's order under the proper standard as articulated by the court.

Contact: Charles Greene, OIL
☎ 202-307-9987

■ Fourth Circuit Holds Vacated Conviction Remained Unchanged for Immigration Purposes

In ***Phan v. Holder***, __F.3d__, 2012 WL 286883 (4th Cir. February 1, 2012) (Gregory, Wynn, *Diaz*), the Fourth Circuit held that an alien's 2002 aggravated felony conviction for distribution of cocaine in a drug-free zone, which was set aside for rehabilitative purposes, remained unchanged for immigration purposes. The court held the conviction is an absolute bar to obtaining citizenship, and thus the alien's naturalization application was properly denied.

Contact: Monika L. Moore, AUSA
☎ 703-299-3700

■ Fourth Circuit Rejects Attorney General's Three-Step Framework to Decide Whether an Alien's Conviction Qualifies as a CIMT

In ***Prudencio v. Holder***, __F.3d__ 2012 WL 256061 (4th Cir. January 30, 2012) (*Keenan*, Traxler, Shedd), a majority of a Fourth Circuit panel rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), where the Attorney General had held that an agency adjudicator may look to evidence outside the conviction record to decide whether an alien's conviction is a crime involving moral turpitude. The panel majority held the statutory provisions were unambiguous, limiting the inquiry to the categorical and modified categorical approaches set forth in *Taylor v. U.S.*, 495 U.S. 575 (1990), and *Shepherd v. U.S.,* 544 U.S. 13 (2005). Judge Shedd found the agency could depart from the criminal law model and its approach was reasonable.

Contact: Jesse M. Bless, OIL
☎ 202-305-2028

SEVENTH CIRCUIT

■ Seventh Circuit Holds Substantial Evidence Supports Denial of Withholding of Removal to Asylum Applicant Making Chinese Population Control Claim

In ***Zheng v. Holder***, __F.3d __, 2012 WL 273756 (7th Cir. January 31, 2012) (*Posner*, Manion, Wood), the Seventh Circuit held that even after supplementing the record with the court's own research, substantial evidence supported the BIA's determination that the petitioner had not demonstrated eligibility for withholding of removal on the basis of China's population control practices. The court, citing the need for "evidence-based law," renewed its suggestion that the BIA or the Department of Homeland Security "adopt in asylum cases the equivalent of the vocational experts used by the Social Security Administration in disability cases."

Contact: Robert Michael Stalzer, OIL
☎ 202-532-2884

■ Seventh Circuit Rejects Social Group of "Albanian Women in Danger of Being Trafficked for Prostitution"

In ***Cece v. Holder***, 668 F.3d 510 (7th Cir. 2012) (Easterbrook, *Manion*, Rovner) the Seventh Circuit, held that an asylum applicant's proposed particular social group of young Albanian women in danger of being taken and trafficked for prostitution lacked common, immutable characteristics of a social group.

The asylum applicant, Cece, using a fake Italian passport, entered the United States in 2002 when she was 23 years old. Less than a year later, she applied for asylum and withholding of removal, asserting that she feared returning to Albania because she believed that, as a young woman living alone,

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

she would be kidnapped and forced to join a prostitution ring. She also contended that the police in Albania would not protect her because she is an Orthodox Christian and supports the Democratic party, which was not in power at that time.

Initially, the IJ granted Cece asylum in 2006. He concluded that she belonged to a particular social group comprised of "young women who are targeted for prostitution by traffickers in Albania," and that the Albanian government was unwilling or unable to protect women such as her. But that decision was vacated by the BIA, which rejected the notion that young Albanian women targeted for trafficking constitute a particular social group. On remand the IJ accepted the BIA's conclusion and denied her application. The BIA then dismissed Cece's appeal, emphasizing that Cece's proposed group was "defined in large part by the harm inflicted" on its members and did not "exist independently of the traffickers."

"A social group 'cannot be defined merely by the fact of persecution' or 'the shared characteristic of facing danger . . . young Albanian women who fear being trafficked for prostitution have little or nothing in common beyond being targets."

The court held that the applicant's proposed social group was insufficiently defined by the fact that its members were persecuted and the shared characteristic of facing danger. The court explained that members of a social group, must share a common immutable or fundamental characteristic beyond the risk, past or present, of harm. Thus, even if members of Cece's proposed group fear forced prostitution, "a social group 'cannot be defined merely by the fact of persecution' or 'the shared characteristic of facing danger, said the court.'" Moreover, "young Albanian women who fear being trafficked for prostitution have little or nothing in common beyond being targets."

In a dissenting opinion, Judge Rovner disagreed with the majority's social group analysis. "Just because all members of a group suffer persecution, does not mean that this characteristic is the only one that links them," she wrote. In this case, she said, "although it is true that these women are linked by the persecution they suffer – being targeted for prostitution – they are also united by the common and immutable characteristic of being women between the ages of sixteen and twenty-seven who meet the profile of the traffickers."

Contact: Lyle Jentzer, OIL
☎ 202-305-0192

NINTH CIRCUIT

■ **Ninth Circuit Holds Conviction for Threats "With Intent to Terrorize" Is a Categorical CIMT**

In ***Latter-Singh v. Holder***, __F.3d__, 2012 WL 516055 (9th Cir. February 17, 2012) (Berzon, *Bybee*, Whelan), the Ninth Circuit held an alien convicted under California Penal Code § 422 of making threats "with intent to terrorize" was removable on the basis of a crime involving moral turpitude.

The petitioner entered the United States illegally in January 1993 and received a grant of asylum in September of that year. He never obtained legal permanent residency in the United States. Petitioner came to the attention of asylum officers after he was convicted for making threats "with intent to terrorize" in violation of California Penal Code § 422. The NTA alleged, among other charges, that petitioner was subject to removal from the United States pursuant to INA § 242 (a)(2)(A)(i)(I) as an alien convicted of a crime involving moral turpitude. Petitioner then submitted a new application for asylum and an application for adjustment, among others. The IJ, and on appeal the BIA, determined that he was ineligible for these reliefs because of the conviction for a CIMT, which also constituted a particularly serious crime.

The court agreed with the BIA and held that the conviction constituted a categorical crime involving moral turpitude because: (1) "the underlying conduct threatened is itself a crime of moral turpitude"; (2) the statute "criminalizes only that conduct which results in substantial harm"; and (3) "the *mens rea* required by § 422 constitutes the evil intent required to render conduct morally turpitudinous."

Contact: Puneet Cheema, OIL
☎ 202-353-7725

■ **Conviction for Possession of False Identification Document Terminated Alien's Accrual of Continuous Physical Presence**

In ***Gomez v. Holder***, __F.3d __, 2012 WL 400357 (9th Cir. February 9, 2012) (Thomas, *Gould*, Bybee), the Ninth Circuit held an alien arrested by the United States Border Patrol, convicted in federal district court of possession of a false identification document, and held in jail for five days before being returned to Mexico, was subjected to a "formal, documented process" sufficient to break his continuous physical presence. The court held the criminal conviction was the functional equivalent of an adjudication of inadmissibility. Consequently, petitioner was statutorily ineligible for cancellation of removal.

Contact: Channah Farber,OIL
☎ 202-532-4126

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

■ **Ninth Circuit Holds Agency Must Consider the Direct and Indirect Effects of Persecution to Family Members in Determining Whether an Infant Has Suffered Past Persecution**

In ***Mendoza-Pablo v. Holder***, 667 F.3d 1308 (9th Cir. 2012) (Tashima, *Rakoff (serving by designation);* Rawlinson (*concurring and dissenting*)), the Ninth Circuit ruled that "where a pregnant mother is persecuted in a manner that materially impedes her ability to provide for the basic needs of her child, where that child's family has undisputedly suffered severe persecution, and where the newborn child suffers serious deprivations directly attributable not only to those facts, but also to the material ongoing threat of continued persecution of the child and the child's family, that child may be said to have suffered persecution and therefore be eligible for asylum under the INA."

The case involved an asylum applicant who is a member of an indigenous Mayan ethnic group in Guatemala. His family originally hailed from Todos Santos. In 1982, when petitioner's mother was eight months pregnant with him, Guatemalan government forces burned Todos Santos to the ground because villagers were viewed as members of the guerilla groups. Petitioner's immediate family escaped the attack by hiding in the mountains. Shortly thereafter petitioner was born, several weeks premature. Petitioners family then moved to Mexico. Almost twenty years later, petitioner entered the United States illegally.

When the former INS apprehended him, he was placed in removal proceedings where he sought asylum, withholding, and CAT protection. An IJ determined that petitioner had not been persecuted because he had never witnessed the atrocities and had never confronted the Guatemalan military forces that attacked Todos Santos. On appeal, the BIA upheld that determination holding that petitioner's "second hand exposure" to the civil war in Guatemala was insufficient to establish past persecution.

The Ninth Circuit, in holding that petitioner had suffered past persecution, considered the harm suffered by his family members. The court explained that petitioner's mother was persecuted because she fled from her home village because she was in an immediate danger. "The persecution of [petitioner's] pregnant mother directly informs everything that happened to him in the weeks and months thereafter," said the court. The BIA's view that petitioner "did not suffer past persecution because his exposure to persecution was 'second hand' reflects an incorrect view of the applicable law," concluded the court. Thus, the court remanded to the BIA "to take account of the indirect effects of persecution as well as the direct effects, at least where, as here, the connection between the two is so immediate and strong."

The BIA's view that petitioner "did not suffer past persecution because his exposure to persecution was 'second hand' reflects an incorrect view of the applicable law."

In a concurring in part and dissenting in part opinion, Judge Rawlison agreed in principle that an infant may be subject to persecution, but disagreed with the majority that the petitioner had been subject to persecution as an infant. "Faced with a lack of evidence [of persecution], it is incomprehensible that the majority purports to be compelled to reverse the BIA's ruling," he wrote.

Contact: Yamileth Handuber, OIL
☎ 202-532-4098

■ **Ninth Circuit Holds Substantial Evidence Supports Post-REAL ID Act Adverse Credibility Determination**

In ***Oshodi v. Holder***, __F.3d__, 2012 WL 232997 (9th Cir. January 26, 2012) (O'Scannlain, *Rawlinson*, Cowen) , the Ninth Circuit, held that substantial evidence supported the BIA's post-REAL ID Act adverse credibility determination. The case had been remanded to the BIA to consider, among other matters the REAL ID Act's impact on the BIA's finding that petitioner's claims had not been sufficiently corroborated and the Act's impact on the IJ's credibility determination. On remand, the BIA determined that the REAL ID Act had codified the BIA's corroboration standards and that petitioner had failed to sufficiently corroborate his claim.

The Ninth Circuit held that the IJ had not erred in basing his credibility determination on petitioner's failure to produce corroborating evidence. The court declined to resolve the issue of whether the REAL ID Act or due process requires advance notice that an applicant need to provide corroborating evidence because petitioner in this case had been advised to produce corroborating evidence. In a footnote, the court further noted that in its recent decision, *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), the purported holding that an IJ must provide an applicant with notice and opportunity to produce evidence was dicta.

Here, the court found that the IJ correctly considered the totality of the circumstances including the facts that petitioner (1) provided

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)
inconsistent evidence about his identity, his property in Nigeria, the makeup of his family, and his family members' involvement in politics; and (2) failed to provide reasonably available corroboration. Although the BIA did "not extensively examine" the issues identified in the remand order, the court found that it had sufficiently complied with its instructions.

Contact: Imran Zaidi, OIL
☎ 202-305-4241

■ **Repeal of Section 212(c) Is Impermissibly Retroactive When Applied to Aliens Who Are Convicted After a Stipulated Facts Trial**

In *Tyson v. Holder*, __F.3d__, 2012 WL 248001 (9th Cir. January 27, 2012) (McKeown, M. Smith, *Brewster*), the Ninth Circuit held that a stipulated facts trial is sufficiently similar to a guilty plea for purposes of applying *INS v. St. Cyr*, 533 U.S. 289, 319 (2001), where the Court held that that the repeal § 212(c) did not apply retroactively to "aliens who, in reliance on the possibility of § 212(c) relief, pleaded guilty to aggravated felonies." Here the court concluded that by electing a stipulated facts trial, the petitioner had waived certain constitutional rights and "essentially guaranteed" that she would be convicted of at least one of the criminal charges, and therefore showed "objectively reasonable reliance" on the continued availability of § 212(c).

Contact: Anna Nelson, OIL
☎ 202-532-4402

TENTH CIRCUIT

■ **Tenth Circuit Invalidates Regulatory Bar to Motions to Reopen Filed by Aliens Who Have Been Removed or Have Departed from the United States**

In *Contreras-Bocanegra v. Holder*, __F.3d__, 2012 WL 255879 (10th Cir. January 31, 2012) (*Lucero*), the Tenth Circuit overturned *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), and joined its sister circuits in holding that the departure bar regulation impermissibly interferes with Congress's intent to afford aliens a statutory right to a motion to reopen. The court reasoned that IIRIRA did not include codification of the regulatory departure bar and that IIRIRA's purpose was to expedite alien departures, as shown in part by the repeal of the parallel judicial bar. The court rejected the argument that the departure bar should be upheld as an exercise of categorical discretion, because that would contravene congressional intent.

Contact: Greg Mack, OIL
☎ 202-616-4858

DISTRICT COURTS

■ **Southern District of Texas Finds That State Department Is Not Bound by Full Faith and Credit Clause and Tenth Amendment of U.S. Constitution in Deciding Passport Eligibility**

In *Sanchez v. Clinton*, No. 11-2084 (S.D. Tex. January 24, 2012) (Rosenthal, J.), the District Court for the Southern District of Texas dismissed the alien's claims brought under the Full Faith and Credit Clause and the Tenth Amendment challenging the State Department's decision not to issue the alien a passport based on the alien having both Mexican and Texan birth certificates. The alien argued that because he obtained the Texan birth certificate through an administrative hearing before the Texas Department of Health, the State Department was bound by the agency's findings regarding his place of birth per the Full Faith and Credit Clause and the Tenth Amendment. The district court held that the Full Faith and Credit Clause does not apply to passport proceedings given that passport eligibility is a matter of federal and not state law, and that the Tenth Amendment does not apply because the federal laws regarding passport eligibility do not require the State Department to defer to a state agency's findings regarding place of birth. The case is now in discovery on the alien's 8 U.S.C. § 1503 claim.

Contact: Regan Hildebrand, OIL
☎ 202-305-3797

■ **Western District of Texas Upholds Agency's Denial of I-140 Immigrant Petition for Alien Worker on Issue of Ability to Pay**

In *Sunesara v. USCIS*, No. 11-cv-49 (W.D. Tex. February 7, 2012) (Sparks, J.), the United States District Court for the Western District of Texas granted summary judgment to the government on plaintiffs' complaint for APA review of the denial of the I-140 petition. Plaintiffs offered a variety of accounting methods, and attempted to introduce new evidence before the district court, in asserting that they demonstrated the requisite "ability to pay" the proffered wage. The court conducted a detailed analysis of the ability-to-pay issue and found that the agency's denial was proper and justified. The court also noted that in APA cases new evidence cannot be submitted in the reviewing court and the parties are bound by the evidence in the administrative record.

Contact: Gary Anderson, AUSA
☎ 210-384-7100

■ **District of Hawaii Grants Summary Judgment in Favor of DHS on Naturalization Denial**

In **Ding v. Gulick**, No. 11-cv-70 (D. Haw. January 31, 2012) (Mollway, J.), the District Court for the District of Hawaii granted the government's motion for summary judgment, upholding USCIS's denial of the plaintiff's naturalization application. The plaintiff applied for naturalization under 8 U.S.C. § 1430,

(Continued on page 14)

This Month's Topical Parentheticals

ADJUSTMENT

■ *Crocock v. Holder*, __ F.3d __, 2012 WL 573399 (2d Cir. Feb. 23, 2012) (affirming BIA's finding that petitioner is ineligible to adjust status due to his inadmissibility for falsely representing himself to be a U.S. citizen, and reasoning that petitioner failed to meet his burden of demonstrating that he did not falsely represent himself when he checked the "citizen or national" box on an I-9 Employment Eligibility Verification Form)

ADMINISTRATIVE CLOSURE

■ *Matter of Avetisyan*, 25 I.&N. 688 (BIA Jan. 31, 2012) (holding that IJs and the BIA may administratively close removal proceedings even if a party opposes such closure if it is otherwise appropriate under the circumstances; setting forth relevant factors in considering whether administrative closure would be appropriate)

ASYLUM

■ *Mendoza-Pablo v. Holder*, __ F.3d __, 2012 WL 373085 (9th Cir. Feb. 7, 2012) (holding that asylum applicant, a native of Guatemala, established past "persecution" triggering presumption of well-founded fear of future persecution in Guatemala, based on harms witnessed by applicant's mother in Guatemala causing applicant's premature birth and malnutrition during first 3 months of life, his family's departure to Mexico, and applicant's assumed ongoing malnutrition, lack of schooling, and difficulty in finding employment in Mexico due to unlawful status in that country)

■ *Cece v. Holder*, __ F.3d __, 2012 WL __ (7th Cir. Feb. 6, 2012) (holding that "young Albanian women targeted for prostitution by traffickers" are not a "particular social group," because a PSG cannot be defined by the past, or feared future persecution or the "shared characteristic of facing danger," and young Albanian women who fear being trafficked for prostitution have "'little or nothing in common beyond being targets")

■ *Arevalo-Giron v. Holder*, __ F.3d __, 2012 WL 266024 (1st Cir. Jan. 31, 2012) (holding it was unnecessary to decide if "single women [in Guatemala] with perceived wealth" or "status of a former 'child of war'" constitute particular social groups, because the female asylum applicant failed to show past persecution or a well-founded fear of future persecution on account of membership in either purported group)

■ *Matter of L-S-*, 25 I.&N. 705 (BIA Feb. 17, 2012) (holding that an asylum applicant may warrant a discretionary grant of humanitarian asylum based not only on compelling reasons arising out of the severity of the past persecution, but also on a "reasonable possibility that he or she may suffer other serious harm" under 8 C.F.R. § 1208.13(b)(1)(iii)(B); such harm may be wholly unrelated to the applicant's past harm and need not be inflicted on a statutory qualifying ground, but the harm must be so serious that it equals the severity of persecution; with regard to this inquiry, adjudicators should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer).

■ *Guerrero-Acevedo v. Holder*, __ F.3d __, 2012 WL 265841 (1st Cir. Jan. 31, 2012) (pre-REAL ID Act case holding that evidence did not compel the conclusion that past, forced attendance at political rallies and recruitment by guerrillas to perform menial labor during El Salvador's civil war was at least in part "on account of" the male applicant's known anti-guerrilla political opinion, because (i) it was just as reasonable to infer that this was on account of guerrilla's political and military strategies, and (ii) where the evidence supports "two or more competing inferences, the [agency's] choice among those inferences cannot be deemed erroneous")

■ *Zheng v. Holder*, __ F.3d __, 2012 WL 603635 (2d Cir. Feb. 27, 2012) (according deference to BIA's decision in *Matter of X-M-C-*, 25 I.&.N Dec. 322 (BIA 2010), that INA and its regulations permit IJs to enter a frivolousness finding on any filed asylum application, regardless of whether it has been withdrawn; further concluding that notwithstanding alien's admission to having filed a false application, IJ had discretion to choose not to initiate a frivolousness inquiry and BIA and IJ erred in concluding otherwise)

■ *Zheng v. Holder*, __ F.3d __, 2012 WL 273756 (7th Cir. Jan. 31, 2012) (holding that the evidence does not compel the conclusion that past arrest, detention, and beating of Chinese woman was "on account of" her opposition to China's one-child policy, where the evidence on motive was "opaque" because: i) the motive for resisting arrest of cousin may have been to protect cousin rather than opposition to one-child policy; ii) there is a distinction between opposing a policy and resisting arrest, which is presumably a crime in virtually all countries; and iii) beatings in jail may have been on account of sadism or misogyny of police, or their anger for having fought with family planning officials, rather than applicant's opposition to family planning policy)

CANCELLATION

■ *Gomez v. Holder*, __ F.3d __, 2012 WL 400357 (9th Cir. Feb. 9, 2012) (holding that petitioner was subject to "formal, documented process" sufficient to break his continuous physical presence in U.S. for pur-

(Continued on page 13)

This Month's Topical Parentheticals

(Continued from page 12)
poses of cancellation eligibility where he departed U.S., was convicted of possession of a false identification document while attempting to return illegally, and subsequently left country with DHS escort)

■ *Guamanrrigra v. Holder*, __ F.3d __, 2012 WL 593113 (2d Cir. Feb. 24, 2012) (joining five other circuits in holding that service of NTA followed by service of a separate notice indicating the date and time of the removal hearing satisfies the notice requirements of section 239(a)(1); further holding that once a petitioner has been served with notice complying with § 239(a)(1), the stop-time rule of § 240A(d)(1) is triggered, regardless of any imperfections in subsequent notices regarding changes in time or place of proceedings)

CRIMES

■ *Kawashima v. Holder*, __ U.S. __, 2012 WL __ (Feb. 21, 2012) (holding that violation of 26 U.S.C. §§ 7206(1) & (2), are crimes involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), and are therefore aggravated felonies when the loss to the government exceeds $10,000; reasoning that the elements of willfully making and subscribing a false corporate tax return, in violation of § 7206(1), and of aiding and abetting in the preparation of a false tax return in violation of § 7206(2), establish that the crimes involve deceit)

■ *Phan v. Holder*, __ F.3d __, 2012 WL 286883 (4th Cir. Feb. 1, 2012) (holding that petitioner's conviction remains unchanged for immigration purposes because it was set aside on rehabilitative grounds having nothing to do with the merits of the underlying judgment; thus USCIS properly concluded that petitioner is ineligible for naturalization)

■ *United States v. Costello*, __ F.3d __, 2012 WL 266864 (7th Cir. Jan. 31, 2012) (reversing conviction for harboring alien and rejecting government's interpretation that harboring equates to merely providing an alien a place to stay)

■ *Matter of Castro Rodriguez*, 25 I.&N. 698 (BIA Feb. 14, 2012) (holding that an alien convicted of possession of marijuana with intent to distribute under state law has the burden to show that the offense is not an aggravated felony because it involved a "small amount of marijuana for no remuneration" within the meaning of 21 U.S.C. § 841(b)(4), which the alien may establish by presenting evidence outside of the record of conviction) (clarified *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008))

■ *Latter-Singh v. Holder*, __ F.3d __, 2012 WL 516055 (9th Cir. Feb. 17, 2012) (applying *Skidmore* deference and holding that a conviction under Cal. Pen. Code § 422 is a CIMT because it criminalizes only the willful threatening of a crime that would result in death or great bodily injury, and requires the intent and result of instilling sustained and imminent grave fear in another)

■ *Castro v. Att'y Gen. of United States*, __ F.3d __, 2012 WL 456530 (3d Cir. Feb. 14, 2012) (holding that the BIA erred in concluding that 8 U.S.C. § 1182(a)(9)(6)(C)(ii)'s "purpose or benefit" requirement was satisfied where petitioner misrepresented himself as a U.S. citizen to a police officer for the purpose of minimizing the risk that the officer would report his arrest to DHS)

CRIMINAL PROSECUTION

■ *United States v. Reyes-Bonilla*, __ F.3d __, 2012 WL 360771 (9th Cir. Feb. 6, 2012) (holding that in order to mount a successful collateral attack on a prior removal order under 8 U.S.C. § 1326(d), an alien who was not properly advised of his right to counsel must show that he was actually prejudiced by the violation)

■ *United States v. Valdiviez-Garza*, __ F.3d __, 2012 WL 360168 (11th Cir. Feb. 6, 2012) (holding that the indictment for illegal reentry must be dismissed because the government is collaterally estopped from attempting to establish the essential element of alienage where a jury in a previous federal criminal prosecution for illegal reentry found against the government on that issue)

■ *United States v. Lang*, __ F.3d __, 2012 WL 502698 (1st Cir. Feb. 16, 2012) (rejecting defendant's argument that admission of Form N-445 (naturalization form) in a criminal trial violated the Confrontation Clause because the USCIS officer who reviewed the form with defendant at the interview and checked off his answers on the form was not available at trial for cross-examination; the court reasoned that because the N-445 Form was not testimonial, its admission did not violate the right to confrontation)

DUE PROCESS

■ *Ibrahim v. DHS*, __ F.3d __, 2012 WL 390126 (9th Cir. Feb. 8, 2012) (holding that plaintiff, who claimed U.S. mistakenly placed her on the "No-Fly List," and has prevented her from returning to the U.S. after she flew to Malaysia for a conference, established a "significant voluntary connection" with the U.S. such that she has the right to assert claims under the First and Fifth Amendments)

JURISDICTION

■ *National Immigration Project of the Nat. Lawyers Guild v. DHS*, __ F.3d __, 2012 WL 375515 (S.D.N.Y. Feb. 7, 2012) (granting in part and denying in part plaintiffs' motion for summary judgment in FOIA action against DHS, DOJ and DOS, in which plaintiffs sought disclosure of portions of emails that contain factual

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

which requires that she live in marital union with her United States citizen husband for the three years preceding the application. The court held that the statute requires that the couple actually reside together in order to be living in marital union, and that there was not a genuine issue of material fact on whether the plaintiff satisfied that requirement. USCIS also denied the application for lack of good moral character; however, the court did not address that issue.

Contact: Melanie Keiper, OIL-DCS
☎ 202-532-4112

■ **Northern District of Illinois Finds that It Lacks Jurisdiction to Review a Registry Applicant's Appeal of an Administrative Denial**

In ***Thompson-Arellano v. Holder***, No. 11-cv-5664 (N.D. Ill. January 23, 2012) (Bucklo, J.), the District Court for the Northern District of Illinois dismissed the plaintiff's complaint seeking review of the denial of his registry application pursuant to 8 U.S.C. § 1259. The plaintiff alleged that the court had jurisdiction because the decision was based only on statutory grounds and did not include any discretionary basis. The court, following the plain language of 8 C.F.R. § 249.2, noted that the regulation explicitly states that "no appeal shall lie" from the denial of a registry application. The court further held that the regulation also provides that the plaintiff can renew his claim in currently pending removal proceedings.

Contact: Craig Oswald, AUSA
☎ 312-886-9080

■ **Northern District of California Grants Summary Judgment to Plaintiffs in Action Challenging the 2008 Amendments to the Special Immigrant Religious Worker Visa Regulations**

In ***Shia Ass'n of Bay Area v. United States of America***, No. 11-cv-1369 (N.D. Cal. February 1, 2012) (Conti, J.), the plaintiffs filed a complaint challenging United States Citizenship and Immigration Services' (USCIS) 2008 amendments to 8 C.F.R. § 204.5(m) and the resulting USCIS decision denying a special immigrant religious worker visa petition that was filed on behalf of a Shia Imam. The District Court for the Northern District of California granted summary judgment to the plaintiffs. The court determined that the amended regulation is *ultra vires* because it requires the beneficiary to have been in lawful immigration status for the two years before the Form I-360, Special Immigrant Religious Worker visa petition is filed if he or she is inside the United States during that time. The court reasoned that the requirement conflicts with the statute, which permits beneficiaries to accrue up to 180 days of unauthorized employment while in the United States. The court also held that the Department of Homeland Security violated the plaintiffs' due process rights when it did not permit the plaintiffs to return to the United States, even though the plaintiffs' advance parole documents had expired by the time they returned to the United States.

Contact: Melissa Leibman, OIL-DCS
☎ 202-305-7016

■ **Southern District of Florida Dismisses Case Seeking Review of LIFE Act Legalization Application for Lack of Jurisdiction**

In ***Khalid v. Rhew***, No. 11-23106 (S.D. Fla. January 27, 2012) (Ungaro, J.), the District Court for the Southern District of Florida granted the government's motion to dismiss for lack of jurisdiction. The alien sought review of the denial of his application for adjustment of status under the LIFE Act and its amendments. The court held that Congress unambiguously limited jurisdiction over such claims, requiring that they be raised in the circuit courts in conjunction with the review of an order of removal pursuant to statute. Because the alien was not subject to an order of removal, the court found judicial review presently unavailable.

Contact: Tim Belsan, OIL–DCS
☎ 202-532-4596

This Month's Topical Parentheticals

(Continued from page 13)
descriptions of the putative policy which the Office of Solicitor General asserted in *Nken*, namely, how removed aliens who have prevailed in their PFRs are returned to the U.S.)

PROSECUTORIAL DISCRETION

■ *Rodriguez v. Holder*, __ F.3d __, 2012 WL 360759 (9th Cir. Feb. 6, 2012) (directing the government to advise the court by March 19, 2012, whether it intends to exercise prosecutorial discretion and, if so, the effect, if any, of the exercise of such discretion on the petitioner's pending rehearing petition)

WAIVERS

■ *Lopez-Loera v. Holder*, __ F.3d __, 2012 WL 400653 (9th Cir. Feb. 9, 2012) (remanding 212(c) case in light of *Judulang*, and noting that "we take no position on any decision of the BIA that rests on *Abebe v. Mukasey*")

■ *Rangel-Zuazo v. Holder*, __ F.3d __, 2012 WL 432283 (9th Cir. Feb. 13, 2012) (withdrawing prior decision and remanding 212(c) case in light of *Judulang*)

Regulatory Update

Reorganization of Regulations on the adjudication of DHS Practitioner Disciplinary Cases

DOJ is amending its regulations, 8 CFR 1003 and 1292, governing the discipline of immigration practitioners by (1) removing unnecessary regulations and inappropriate references to DHS regulations, (2) making technical amendments to EOIR practitioner disciplinary regulations and (3) clarifying the final rule of Professional Conduct for Practitioners. Specifically, 8 C.F.R. § 1292.3 will be removed and replaced with a cross reference to 8 C.F.R. § 1003 (g) and the corresponding DHS provision, 8 CFR 292.3. In 8 CFR §§ 1003.101(a) and 1003.107(b) the terms "expulsion" and "expelled" will be replaced by "disbarment" and "disbarred" but the meaning and effect will remain the same. Lastly, a revision of 8 CFR § 1003.106(a)(1) will clarify the procedures in summary disciplinary cases, providing that a case in summary disciplinary proceedings will be referred to an adjudicator if the practitioner makes a prima facie showing that there is a material fact at dispute. Lastly, it clarifies that the Board will refer cases not subject to summary disciplinary proceedings to the Chief Immigration Judge whenever the practitioner makes a timely answer. 77 *Fed. Reg.* 2011 (January 13, 2012).

Recognition and Accreditation

EOIR is considering amendments to regulation 8 C.F.R. § 1292.2 which govern the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR will hold two public meetings to discuss (1) documentation to establish eligibility for recognition, (2) fraud prevention (3) a nominal fee provision amendment, (4) the effectiveness of the current withdrawal of recognition procedures, and (5) defining "low-income" by incorporating Federal Poverty Guidelines. The meeting on accreditation will focus on (1) what type of required training should accredited representatives go through, (2) fraud prevention, and (3) adequate supervision of accredited representatives. The meetings will take place on 14th and 21st of March at 1 p.m. 77 Fed. Reg. 9590 (February 17, 2012).

By Jasmin Tohidi, OIL

INDEX TO CASES SUMMARIZED IN THIS ISSUE

We encourage contributions to the Immigration Litigation Bulletin

Contact: Francesco Isgro

No Reasonable Fear

(Continued from page 4)

only proceedings or returned to DHS for removal. Thus, it should be reviewed by the courts of appeal as part of the final removal order.

Derek C. Julius, Senior Litigation Counsel
☎ (202) 532-4323

Benjamin Mark Moss, Trial Attorney
☎ (202) 307-8675

Safeguarding Integrity of Immigration Benefits Adjudication Process

On February 15, 2012, Alejandro N. Mayorkas, Director USCIS, testified before the House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement. Following are excerpts from his testimony:

It is of paramount importance to me that no USCIS employee, whether because of any perceived pressure to process an immigration benefit quickly or for any other reason, ever adjudicates a case other than in accordance with what the law and the facts warrant. This is an ethic I have articulated and reinforced since I first became the Director of USCIS. Indeed, in a public question-and-answer session in early 2010, an immigration attorney articulated her hope that USCIS adjudicators will exercise their discretion "to get to yes." My response was clear and direct on this point: "[T]he discretion to get to yes can be as pernicious as the discretion to get to no. It's supposed to be the discretion to get to 'right'."

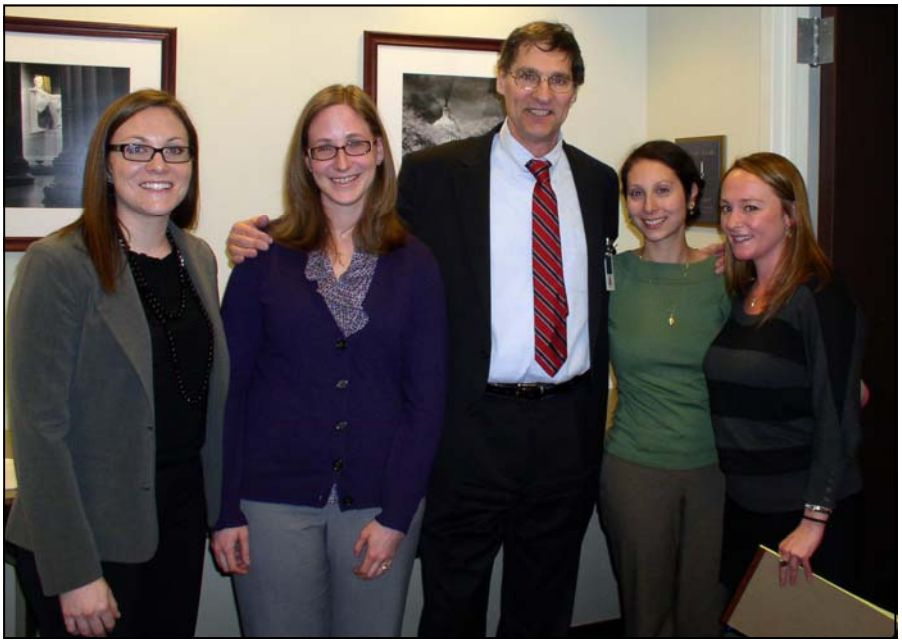
In a conversation with the USCIS workforce last year, I reiterated to an employee who expressed concern about the effect of time pressure on adjudicative quality: And if in fact there is a supervisor that is instructing an individual to just be fast at the expense of quality, then that's something that one should raise to the top leadership . . . who would not tolerate that instruction and who, I can assure you, would find that instruction to be not consistent with the teachings of the program nor the agency as a whole.

INSIDE OIL

Stephen Legomsky, the new Chief Counsel of USCIS was the featured guest at OIL's Lunch & learn Brownbag held on February 21, 2012.

Legomsky, who is the John S. Lehmann University Professor at the Washington University School of Law, was appointed Chief Counsel, on October 24, 2011.

He is an authority on U.S., comparative, and international immigration, refugee, and citizenship law and policy. His latest book, *Immigration and Refugee Law and Policy* (co-authored starting with the current fifth edition), has been the required text at 175 law schools since its inception. He has won several awards, including the American Immigration Lawyers Association's annual award, given to one immigration law professor in the United States, and Washington University's Arthur Holly Compton Award, given annually to one university faculty member for career accomplishments. He has also been appointed to visiting positions at Oxford University, Cambridge University, and other universities in the United States, Mexico, New Zealand, Europe, Australia, Suriname, Singapore, and Israel. A member of the American Law Institute, he founded and chaired the Immigration Law Section of the Association of American Law Schools.



Stephen Legomsky pictured here with OIL attorneys and his former students at Washington University School of Law L to R: Jessica Malloy, Ilissa Gould, Claire Workman, Jessica Sherman.

A former actuary, he was a court law clerk for the U.S. Court of Appeals for the Ninth Circuit and then headed a division of the Ninth Circuit central legal staff in San Francisco.

Legomsky received his D.Phil. from the University of Oxford; his J.D. from the University of San Diego (Day Division), where he graduated first in his class and was Notes and Comments Editor of the San Diego Law Review; and his B.S. in mathematics from the Worcester Polytechnic Institute.

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.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

Office of Immigration Litigation

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

If you would like to receive the *Immigration Litigation Bulletin* electronically send your email address to:

linda.purvin@usdoj.gov