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LITIGATION HIGHLIGHTS

Inside

Supreme Court Holds That Second Or Subsequent Simple Possession Offenses Are Not Aggravated Felonies Where The State Conviction Is Not Based On The Fact Of A Prior Conviction

On June 14, 2010, the Supreme Court decided *Carachuri-Rosendo v. Holder*, No. 09-60, 560 U.S. __, 2010 WL 2346552, which rejected the views of the Fifth and Seventh Circuits regarding how to determine whether a second or subsequent drug possession conviction constitutes an "aggravated felony" conviction. The issue is important because an "aggravated felony" conviction constitutes not only a ground of removability under 8 U.S.C. § 1227(a)(2)(A)(iii) for aliens admitted to the United States, but also a basis for denying myriad forms of relief – such as asylum and cancellation of removal for permanent residents, *see* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i), 1229b(a)(3).

In addition to their immigration consequences, "aggravated felony" convictions also result in a ten-fold increase in the statutory maximum sentence for an illegal re-entry into the United States by an alien previously removed following an "aggravated felony" conviction. *See* 8 U.S.C. § 1326(b)(2); *see also* U.S.S.G. § 2L1.2(b)(1)(C) & application note 3(A) (incorporating "aggravated felony" definitions into calculation of sentence for illegal re-entry following removal).

Numerous kinds of aggravated felonies are defined in subparagraphs under 8 U.S.C. § 1101(a)(43), including subparagraph (B), which refers to "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18." Section 924(c), in turn, refers in relevant

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Can The Filing Of A Lawsuit Against The Chinese Government Constitute The Expression Of A Political Opinion?

In ***Chen v. Holder***, __ F.3d __, 2010 WL 2301691 (7th Cir. June 10, 2010) (Easterbrook, Coffey, Hamilton), the Seventh Circuit held that the BIA erred by failing to address whether a Chinese asylum applicant's breach of contract lawsuit against the Chinese government, constituted an expression of a political opinion, such that no additional evidence of political opinion was required.

The petitioner testified that when the Chinese government took away a dozen of homes in her home town, including her parents', to construct a military building, officials promised that they would provide similarly sized plots of land, pay for the construction of homes within three months, and provide rent for transitional housing. The rent was paid but after four months, neither the land nor the money to build the new homes was forthcoming. Petitioner then filed suit against the local government. After the court dismissed the suit, officials showed up at petitioner's rented home with a warrant for her arrest. When petitioner's father refused to reveal her whereabouts, he was apparently beaten and

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Court Narrows Ag Felony Definition

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part to "any felony punishable under the Controlled Substances Act," 21 U.S.C. §§ 801 et seq. ("CSA"). 18 U.S.C. § 924(c)(2). In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Court interpreted these provisions to mean that state drug offenses must be punishable as felonies under the CSA before they would qualify as aggravated felonies. *See id.* at 55 & n.6, 58-60. While *Lopez* stated in dicta that recidivist drug possession qualified as an aggravated felony, *see id.* at 55 n.6, the Court did not further explain this statement because *Lopez* did not involve recidivism.

The possibility that recidivist drug possession could qualify as an aggravated felony follows from the part of the CSA that prohibits simple drug possession. Under 21 U.S.C. § 844(a), the maximum penalty for simple possession is usually one year's imprisonment, which makes the crime a federal misdemeanor, *see* 18 U.S.C. § 3559(a)(6), and therefore neither a "drug trafficking crime" nor an "aggravated felony." If, however, the offense is committed after a prior controlled substance conviction has become final and, further, the existence and validity of the prior conviction are established under procedures set forth at 21 U.S.C. § 851, then the statutory maximum for the subsequent possession conviction is two years' imprisonment (three, in the case of a third conviction), making the conviction a federal felony. *See* 18 U.S.C. § 3559(a)(5). The issue in *Carachuri* was when, in light of the federal regime, would an alien's second or subsequent possession conviction under state law qualify as an "aggravated felony"?

The answer depends a great deal upon which word in the relevant statutes one emphasizes. For example, if one focuses on the word "felony" appearing in the relevant portion of the definition of "drug trafficking crime" in Section 924(c)(2), it may be possible to conclude that the specific details of one person's commission of a crime, including the person's criminal history, are entirely irrelevant and that the crime in question must be a felony without regard to any such details. *See Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009) (noting that the meaning of "felony" can vary according to context: it "sometimes refer[s] to a generic crime, say, the crime of fraud or theft in general, and sometimes refer[s] to the specific acts in which an offender engaged on a specific occasion"); *see also Chambers v. United States*, 129 S. Ct. 687, 690 (2009) (to same effect). If one focuses instead on the word "punishable," which also appears in Section 924(c)(2), the mere *potential* for felony punishment suggests a more case and fact-specific approach, but also raises questions about when in the course of a crime and subsequent criminal proceedings the relevant potential for punishment should be measured, and how high the potential for punishment must be before the crime can be considered "punishable" as a felony. Another word in the puzzle is the reference to being "convicted" of an aggravated felony in statutory bars to relief such as 8 U.S.C. § 1229b(a)(3), even though a conviction is not part of most statutory definitions for the term "aggravated felony."

At a minimum a second or subsequent possession conviction must be "based on the fact of a prior [drug] conviction" or "enhanced based on the fact of a prior [drug] conviction," before an aggravated felony might exist.

Before the Supreme Court's new decision, the Fifth and Seventh Circuits did not require that a drug possession conviction include a determination regarding the existence of a prior drug conviction before the subsequent crime could be considered recidivist possession and an aggravated felony. *See Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *rev'd*, No. 09-60 (U.S. June 14, 2010); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008). These decisions can be understood as viewing the word "punishable" in terms of whether an alien *could have been* punished as a recidivist at the time he or she committed his or her second offense. By contrast, the Second and Sixth Circuits as well as the Board of Immigration Appeals (in circuits that had not decided to the contrary) effectively ruled that "punishable" referred to the time of the second or subsequent conviction or sentencing, such that only a second or subsequent possession conviction that was actually based on or enhanced by a prior conviction could be an aggravated felony. *See Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008); *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008); *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (BIA 2007) (en banc), *review denied*, 570 F.3d 263 (5th Cir. 2009), *rev'd*, No. 09-60 (U.S. June 14, 2010).

In *Carachuri*, the Supreme Court took the latter approach, holding that at a minimum a second or subsequent possession conviction must be "based on the fact of a prior [drug] conviction" or "enhanced based on the fact of a prior [drug] conviction," before an aggravated felony might exist. 2010 WL 2346552, at *3, *11. In reaching this conclusion, the Court emphasized the need under 8 U.S.C. § 1229b(a)(3) for the alien to have been "convicted" of an aggravated felony before he would be barred from eligibility for cancellation of removal. *See id.* at *8. According to the Court, "[t]he text thus indicates that we are to look to the [subsequent] conviction itself as our starting place, not to what might have or could have been charged." *Id.* The Court thus rejected the government's argument that recidivism

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Where O' Where Has the Eleventh Circuit Gone?

An Exploratory Analysis of the Declining Percentage of Published Asylum-Related Wins

Over the past ten years, the government's win rate in the United States Court of Appeals for the Eleventh Circuit with respect to published asylum-related cases has declined. Using June 1, 2000, as a starting point, the government's win rate has declined to about 61%. *See* Figure 1. While this article attempts to provide some explanation for this decline, the small number of published cases discourages any conclusive determination. Regardless, by better understanding the possible bases of the decline, we might then have a chance for greater success in subsequent cases before the Eleventh Circuit.

Background

To research the decline in the government's win rate, I gathered information from asylum-related published cases issued in the past ten years. A case was included in the analysis if the agency considered an application for asylum, an application for withholding of removal, or a motion to reopen based on a fear of persecution, and the related persecution claim was subsequently reviewed by the Eleventh Circuit. Published cases were excluded if they were later vacated or solely dealt with claims for protection under the Convention Against Torture, jurisdictional issues based on the alien's status as a criminal, or jurisdictional issues regarding the Board's denial of *sua sponte* reopening. As of the date of this report, there were fifty-six cases included in the analysis.

Of the fifty-six cases, fifty involved asylum-related issues-- *e.g.*, past persecution, well-founded fear of future persecution, nexus, humanitarian asylum, untimeliness, frivolousness — as well as issues involving due process, exhaustion of remedies, credibility, and adequacy of the agency's decision. The other six cases involved motion to reopen issues, *e.g.*, changed country conditions, availability of evidence, materiality of evidence. *See* Table 1 (summarizing main issues slightly differently).

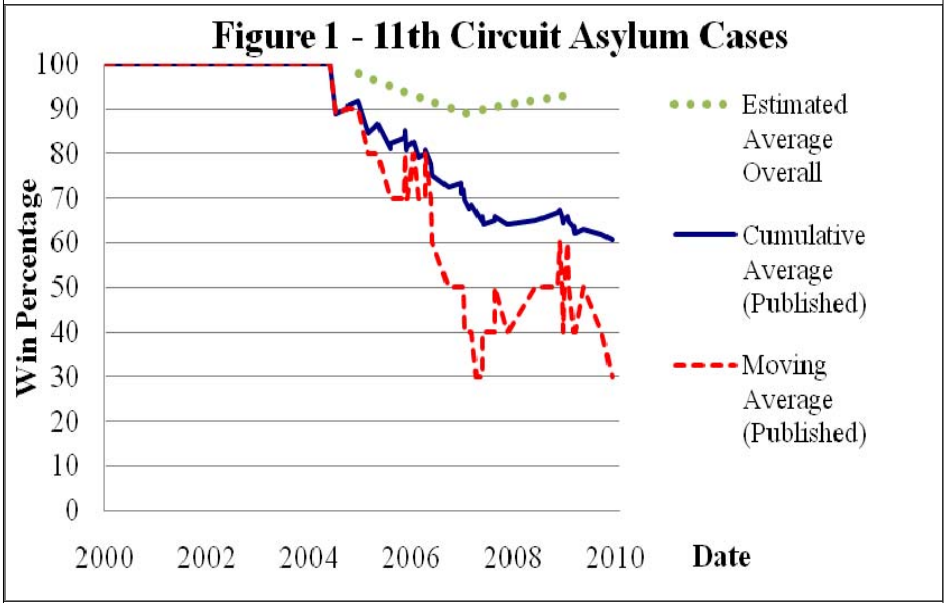

Table 1 – Main Issues

Category	Number of Cases	Wins
Persecution	34	21
Credibility	9	7
Changed Country Conditions	4	1
Other	9	5

Table 2 - Represented Countries

Country Name	Number of Cases	Wins
Colombia	17	10
China	13	8
Albania	3	3
Guatemala	3	3
Cuba	2	2
Indonesia	2	0
Togo	2	1
Venezuela	2	0
Twelve other countries	1 each	7

The most represented countries in the sampled cases were Colombia and China. *See* Table 2. All sixteen of the active judges in the Eleventh Circuit have been involved in at least one of the sample cases, while eighteen judges from a variety of courts have sat by designation in the sample cases. *See* Table 3. There were four total split decisions with the dissenting judge included with the prevailing side.

Nineteen cases were decided *per curiam*. *See* Table 4.

Table 4 – Per Curiam

Decided Per Curiam	Wins/Losses
Yes	13/6
No	21/16

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Statistical Analysis of Eleventh Circuit Asylum Decisions

An estimate of the government's overall win rate, including published and unpublished decisions, in asylum cases was also calculated for years 2005-2009. *See* Figure 1. As unpublished decisions were not available via Westlaw prior to 2005 for the Eleventh Circuit, no estimate of the government's win rate was calculated for 2000-2004.

Methodology

There are many factors in a given case which can have some impact on the end result. The end result of interest in this case is whether the Eleventh Circuit ruled in favor of the government and either dismissed or denied the petition for review. Any other result, *e.g.*, remand for clarification, was considered a loss. Explanatory factors of interest include the decision date, the pertinent issues of the case, the pertinent issues of the case, the petitioner's (petitioners') country of nationality, the panel judges, and whether the decision was issued *per curiam*.

Statistical models were carried out to determine the effect various factors had on the government's win rate. For comparison purposes, I estimated the government's overall win rate in asylum cases. As noted previously, unpublished decisions prior to 2005 were not available via Westlaw for the Eleventh Circuit.

Results

The government has won 34 of the 56 published decisions regarding asylum claims (~61%). Summary statistics for the given explanatory variables are provided in the tables of this report. In a statistical model of the generalized effects of the explanatory factors, only the date of the decision was found to be statistically significant. When the other explanatory factors were analyzed across time, none of the factors was statistically significant, even the date of decision. When the explanatory factors were analyzed separately across time, the date of decision factor was not significant for the persecution issue, the other country category, and the other judge category, suggesting that those factors (or lack thereof) may have an impact on the decline in the government's win rate. When analyzed across time, the persecution and the other country category showed an increase, albeit insignificant, in the government's win rate, while the other judge category showed an insignificant decrease in the government's win rate.

Table 3 - Judges

Judge	Wins	Losses
Anderson	5	5
Barkett	3	7
Birch	6	2
Black	10	0
Carnes	7*	1
Cox	1	1
Dubina	6	3
Edmondson	3	2
Fay	2	6
Hill	4	0
Hull	8	1
Kravitch	6	6
Marcus	7	6
Pryor	13	8
Roney (deceased)	1	0
Tjoflat	5	3
Wilson	4**	4
Other (by designation)	11	11*

* represents a dissenting opinion

Analysis

The government's winning percentage in published asylum cases in the Eleventh Circuit has declined. This decline may have many explanations. As the date variable was no longer significant once the other explanatory factors were analyzed across time, the factors studied may explain the noted decline in the government's win rate. However, due to the small number of cases relative to the number of the factors of interest, no definitive statement can be made regarding the basis of the decline in the government's winning percentage.

While it is possible that the Eleventh Circuit has become more sympathetic to an alien's claims in its published asylum cases, there are other factors that could be at play. For example, the observed decline may be explained, at least in part, by

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Eleventh Circuit Statistics

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the court's mere selection of a judge to sit by designation. One may also argue that the observed decline could be explained by worsening conditions in the world combined with the agency's failure to recognize the change. However, even if world conditions have worsened, no agency failure to account for the change is reflected in the results of the study. Though the persecution issue or the country of nationality had an impact in the government's win rate, the presence of either factor reflected a lesser decline in the win rate. If the agency failed to recognize a worsening of conditions, *i.e.*, more successful persecution claims, worldwide, *i.e.*, in comparison to conditions in Colombia and China, these particular explanatory factors would have the opposite effect on the government's win rate.

The decline in the government's win rate may also be explained, in part, by more aggressive (or faulty) agency decisions or in a more aggressive (or faulty) approach in defending agency decisions.

Though the agency appears to be responsive to any general change in world conditions, the decline in the government's win rate may also be explained, in part, by more aggressive (or faulty) agency decisions or in a more aggressive (or faulty) approach in defending agency decisions. For example, in the changed country conditions context, it appears that either the agency decision or the government's defense of the agency decision was at least aggressive in light of the Eleventh Circuit's precedent decision in *Yaner Li v. U.S. Att'y Gen.*, 488 F.3d 1371 (11th Cir. 2007), in which the court granted a petition for review as evidence of increased enforcement of China's family planning policy satisfied the criteria to reopen proceedings. Following *Yaner Li*, the court granted petitions for review in *Zhang v. U.S. Att'y Gen.*, 572 F.3d 1316 (11th Cir. 2009), and in *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252 (11th Cir. 2009), on similar grounds. Indeed, the court in *Jiang* stated that the case was "startingly" like the case in *Yaner Li*, seeing "no discernable difference" in the evidence presented. 568 F.3d at 1257. Of course, the particular circumstances of *Zhang* and *Jiang* may have justified the government's approach in those cases. However, on the surface, the approach taken in these cases appears to be aggressive (or faulty). Though not as seemingly transparent as the *Yaner Li* string of cases, the government's approach in other contexts may or may not be similarly aggressive (or faulty). If winning published cases is a substantial factor in the government's approach in deciding and defending cases, the approach may need to be considered or weighed in light of the decline in the government's published win rate. The change in approach could encourage more remands. Though data was not readily available on whether oral argument was presented, requests for oral argument could signal to the Eleventh Circuit the importance of the issues litigated and more adequately address the concerns the court may have in the case. Of course, as divining whether a case will be published is highly speculative, the benefits from a change in approach may not outweigh the costs.

Before the government considers changing its approach to asylum adjudication and litigation, it should also keep in mind other possible explanations for the decline in the government's win rate in published asylum cases. One other possible explanation for the decline is that on the broader questions, the Eleventh Circuit has agreed with the government's positions, but as the law has become more refined, differences have emerged. The Eleventh Circuit may prefer publishing cases to help clarify these more refined, *i.e.*, borderline, cases. While the insignificance of whether a case was decided *per curiam* suggests that the theory does not fully explain the decline, the government's high overall win rate would seem to support this theory. A more detailed analysis of the Eleventh Circuit's published asylum decisions would be needed to validate the theory. While such an analysis is inherently subjective, it may help to further explain or illuminate any change in the Eleventh Circuit's approach in deciding whether to publish its decisions related to asylum.

Conclusion

Since 2000, the government's win rate in published asylum cases has declined to about 61% while its overall win rate has remained high, 89% and above. While the future impact of the decline in published wins is uncertain, further analysis is warranted to understand the Eleventh Circuit's basis for publishing cases. With increased knowledge, the government may be able to better approach cases that the Eleventh Circuit deems important enough to warrant a published decision.

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Notes:

To be more precise, logistic regression models were carried out. With the limited number of cases, it was expected that some grouping of a factor would be necessary to have enough power to determine whether the factor had some effect. Judges sitting by designation were grouped. Also, countries other than China and Colombia were grouped. With respect to the issues decided in a given case, I narrowed a case to its main issue and classified the issue

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FURTHER REVIEW PENDING: Update on Cases & Issues

VWP — Waiver, Due Process Particularly Serious Crimes

In June 2009, the government filed a petition for panel rehearing and opposed petitioner's petition for rehearing and rehearing en banc in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the BIA determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

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Aggravated Felony — Missing Element

The government has filed a petition for rehearing en banc in *Aguilar-Turcios v. Holder*, 582 F.3d 1093 (9th Cir. 2009), the court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction. The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) — incorporating the Department of Defense Directive prohibiting use of government computers to access pornography — was not an aggravated felony under 8 U.S.C. § 1101(a) (43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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Derivative Citizenship Equal Protection

On March 22, 2010, the Supreme court granted certiorari in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court will consider the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 USC 1326? The decision being reviewed is *U.S. v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008).

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Due Process– Duty to Advise

In ***U.S. v. Lopez-Velasquez***, 568 F.3d 1139 (9th Cir. 2009), the court held that defendant's due process rights were violated when the IJ did not inform him that he was eligible for discretionary relief even though defendant was indeed not eligible under the law as it then existed. On March 8, 2010, the Ninth Circuit granted rehearing en banc and vacated the panel's opinion.

The question presented is: Whether an illegal reentry defendant had a due process right to be advised in his underlying deportation proceeding of his potential eligibility for discretionary relief under INA 212(c), where the defendant was not then eligible for that discretionary relief, but there was a plausible argument that the law would change in defendant's favor.

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Convictions - State Expungements

On July 7, 2010, the Government filed a petition for en banc rehearing in *Nunez-Reyes v. Holder*, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel applied equal protection principles and held that the alien's state conviction for using or being under the influence of methamphetamine was not a valid "conviction" for immigration purposes (just as a disposition under the Federal First Offender Act would not be), and thus could not be used to render him ineligible for cancellation of removal. The government argued in its petition that the court's "equal protection" rule conflicts with six other circuits, is erroneous, and disrupts national uniformity in the application of Congressionally-created immigration law.

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Aggravated Felony — Pre-1988

On June 14, 2010, the government filed a petition for rehearing en banc in ***Ledezma-Garcia v. Holder***, (9th Cir. 2010), where the Ninth Circuit had held that the Anti-Drug Abuse Act of 1988, that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988. The petitioner had been order removed from the U.S. based on his commission of an aggravated felony of sexually molesting a minor. The question presented to the court is whether the Anti-Drug Abuse Act that made aliens deportable for aggravated felony convictions applies to convictions entered prior to its enactment on November 18, 1988.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Agency Acted Within Its Discretion In Denying Motion To Reopen For Adjustment Of Status

In *Chi v. Holder*, 606 F.3d 6 (1st Cir. 2010) (Lipez, Howard, *Thompson*), the court upheld the BIA's denial of a motion to reopen by the BIA. The petitioner, a Chinese citizen, had entered this country illegally in 1989 and was placed in removal proceedings in 1995. In July 1998, the BIA ordered his removal from the United States with an alternate grant of voluntary departure. Petitioner never left the country. In 2006, petitioner asked the BIA to reopen his case because he was the beneficiary of an I-140 visa petition filed by his employer and eligible to adjust his status. DHS joined in the motion to reopen and the BIA remanded the case to the IJ to consider the application for adjustment. However, because petitioner had failed to depart voluntarily he faced a ten-year period of ineligibility for adjustment of status relief.

Petitioner conceded at a November 2007 hearing that he had another nine months left on the ten-year ban, but asked the IJ for a continuance. The IJ ruled that petitioner's demonstrated lack of credibility undercut his bid for discretionary relief, including his request for adjustment of status. Consequently, the IJ denied petitioner's continuance motion, denied his adjustment of status application, and ordered him removed. The BIA affirmed in April 2009, holding that petitioner had received a full and fair hearing and that even though the ten-year ban had now ended, his well-documented credibility problems precluded him from receiving discretionary relief.

Petitioner then filed another motion to reopen with the BIA, again citing to the approved I-140 visa application and claimed that the expiration of the ten-year bar to adjustment of status relief constituted "new" and previously unavailable "evidence." Consistent with its earlier decision, the BIA ruled in October 2009 that the passing of the 10 year ban did not "overcome" the prior adverse credibility finding, and concluded that petitioner was "undeserving" of discretionary relief.

Before the court, petitioner not only challenged the denial of the motion, but also sought to estop the government from deporting him contending that the immigration laws are broken, as exhibited by the government's failure to "arrest" and "deport" him for overstaying the prescribed departure period. The court held that the BIA acted "well within its discretion" in denying the motion to reopen because the BIA weighed all relevant factors, exercised its judgment, and provided a rational reason for its decision. The court also rejected petitioner's suggestion that the government's "failure" to remove him equitably estops it from removing him now, describing the argument as a "non-starter." The court additionally held petitioner's due process rights were not violated because he did not have an entitlement to reopened proceedings, and thus had no liberty interest.

The court rejected petitioner's suggestion that the government's "failure" to remove him equitably estops it from removing him now, describing the argument as a "non-starter."

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SECOND CIRCUIT

INA § 212(h) Relief Is Unavailable If Alien, An Aggravated Felon, Was Admitted As A Lawful Permanent Resident Prior At Any Time

In *Dobrova v. Holder*, 607 F.3d 297 (2d Cir. 2010) (Walker, Straub, *Livingston*), the Second Circuit held that petitioner was ineligible for relief under INA § 212(h), 8 U.S.C. § 1182 (h), because he had been previously admitted to the United States as a lawful permanent resident, and was thereafter convicted of an aggravated felony.

The petitioner, a native of Yugoslavia and citizen of Macedonia, entered the United in 1983 as a lawful permanent resident. In 1988 he was convicted of sexual abuse of minor and sentenced to four years' imprisonment. On September 15, 1988, the former INS charged petitioner with deportability on the basis that he had been convicted of a crime involving moral turpitude – the sexual abuse of a minor. An IJ and later the BIA held that petitioner was deportable as charged and, on November 16, 1989, he was deported to Yugoslavia.

Sometime in 2000, petitioner's wife applied for, and received, a reentry permit which authorized petitioner to reenter the United States on February 19, 2001, ostensibly as an LPR. On March 30, 2006, petitioner was apprehended and placed in removal proceedings. On April 14, 2006, petitioner's United States citizen son filed a I-130 visa petition on his behalf and later petitioner also filed an application for adjustment and an application for a waiver of inadmissibility under § 212(h). The IJ and subsequently the BIA held that that petitioner was ineligible for the waiver because he had been previously admitted as an LPR and then convicted of an aggravated felony and because he had not resided in the U.S. for the requisite seven years.

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Summaries Of Recent Federal Court Decisions

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Before the Second Circuit, petitioner contended, as he had done below, that the "previously" admitted as an LPR language under § 212(h) was ambiguous and referred only to the alien's most recent admission. The court held that the language was not ambiguous and that the ordinary, common meaning of "previously" refers to "the action that has taken place sometimes in the indefinite past." Additionally, the court noted that Congress's use of the present perfect tense – "has . . . been . . . evinces Congress' intent to include any previous admission in the indefinite past." Accordingly, the court concluded that petitioner was ineligible for the 212(h) waiver and denied the petition for review.

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THIRD CIRCUIT

■ Third Circuit Holds That Asylum Applicant's Business And Social Ties To The Columbian Government Were Sufficient To Imply Imputed Anti-FARC Political Opinion

In *Espinoza-Cortez, Marco Tulio v. Att'y Gen.*, 607 F.3d 101 (9th Cir. June 2, 2010) (Rendell, Ambro, *Fuentes*), the Third Circuit held that petitioner and his family were persecuted by the FARC on the basis of his imputed political opinion, and that the BIA's opinion rejecting their asylum claim was not supported by substantial evidence. Specifically, the court concluded that generalized threats by the FARC to petitioner and his family could be construed as death threats, and that because petitioner ran a catering business at a Columbian military school and had social ties to the Columbian police through his equestrian club membership, the FARC could have imputed an anti-FARC political opinion him and his family.

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■ Sixth Circuit Remands To Board For Further Consideration Of Definition Of "Serious Nonpolitical Crime"

In *Berhane v. Holder*, 606 F.3d 819 (6th Cir. 2010) (Kennedy, Moore, *Sutton*), the Sixth Circuit vacated the BIA's denial of asylum and remanded the case for further consideration and explanation of the BIA's position as to the applicability of its definition of a "serious nonpolitical crime" where rock throwing was the principal criminal act at issue.

The question in petitioner's case was whether the BIA had permissibly determined that the "criminal nature" of petitioner's actions "outweighed their political component."

The petitioner, a citizen of Ethiopia, illegally entered the United States through Mexico in March 2006. He claimed that, as a member of a government opposition group, he feared persecution if returned to Ethiopia. Petitioner testified that prior to the contested parliamentary elections in May 2005 in Ethiopia, he and his brother joined and became very active in an opposition group, the Coalition for Unity and Democracy. Following the elections Coalition members, including petitioner, took to the streets to protest what they perceived to have been fraudulent election results. The protests sparked violence and many arrests took place. Petitioner admitted that he threw rocks at police and their vehicles and also used rocks to set up barricades on the streets.

The IJ concluded that the rock throwing incidents amounted to a "serious nonpolitical crime" which made petitioner statutorily ineligible for asylum under INA § 208(b)(2)(A)(iii). The BIA affirmed that decision.

Preliminarily, the court *sua sponte* determined that it had jurisdiction to review the determination of the Attorney General that petitioner had committed a "a serious nonpolitical crime." The court explained that the INA's "jurisdiction-stripping provision extends only to those decisions 'specified' by statute 'to be in the [Attorney General's] discretion'" and that the statute has to actually state it explicitly, not just hint about it. The court found support in *Kucana v. Holder*, 530 U.S.__, 130 S. Ct. 827 (2010), where the Supreme Court held that a decision committed to the Attorney General's discretion by a regulation did not satisfy the statutory requirement that the "discretion" had to be specified by the statute.

On the merits, the court noted that the BIA had already permissibly interpreted the statute in *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984), to mean that a crime is "serious" and "nonpolitical" when the criminal nature of the act "outweighs its political nature." Thus, said the court, the question in petitioner's case was whether the BIA had permissibly determined that the "criminal nature" of petitioner's actions "outweighed their political component." The court found that although there were facts to support the BIA's finding that petitioner's acts were criminal in nature, there were also facts establishing a political motive for petitioner's actions. The court determined that the BIA's "brief analysis" was susceptible to at least two interpretation – one, that rock throwing during a political demonstration will amount to a "serious nonpolitical crime;" or two, that throwing rocks at many demonstrations (20) combined with other activities, such as placing boulders on the streets, and the consequences of those activities is a "serious nonpolitical crime." Moreover, the court said that the BIA never addressed one of petitioner's principal arguments that his rock throwing was an act of self-defense and was never directed at civilians.

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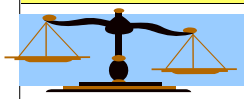

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"It is not lost on us that the BIA deserves considerable deference in deciding what amounts to a 'serious nonpolitical crime,'" said the court. However, the BIA did not provide "a reasoned explanation," and consequently the court remanded for further review.

In a concurring opinion, Judge Moore would have granted the petition on the basis that "pro-democracy activist who throws rocks at political demonstrations in self-defense and to protest election fraud by a regime that had silenced the press, banned free assembly, rounded up the opposition, and killed unarmed civilians did not commit a 'serious nonpolitical crime.'"

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That It Lacks Jurisdiction Over The BIA's Denial Of *Sua Sponte* Reopening But Urges *En Banc* Court To Analyze This Holding**

In ***Gor v. Holder***, 607 F.3d 180 (6th Cir. 2010) (*Lawson*, Batchelder, Cole), the court held that it lacked jurisdiction to review the BIA's denial of *sua sponte* reopening because of existing circuit precedent. However, the lead opinion "urge[d] the *en banc* court to reexamine the validity of [its] prior cases in this area" in light of the Supreme Court's recent decision in *Kucana v. Holder*, __U.S. __, 130 S. Ct. 827 (2010). Judges Batchelder and Cole wrote separate concurrences agreeing that the court lacked jurisdiction in this case, but disagreeing on whether *Kucana* "casts considerable doubt" on the issue of judicial review over the denial of *sua sponte* reopening.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Substantial Evidence Supported The IJ's Adverse Credibility Determination**

In ***Rama v. Holder***, 607 F.3d 461 (7th Cir. 2010) (Kanne, Williams, *Springmann*), the court upheld the BIA's denial of asylum and withholding of removal because the petitioners had not provided credible testimony about the incidents they experienced in Albania. The petitioners, husband, wife, and daughter, sought to enter the United States with fake passports at Chicago O'Hare International Airport. When denied admission they were interviewed by an asylum officer. The AO determined that they had not shown prima facie eligibility for asylum and referred their cases for a hearing before the IJ. At the hearing, petitioners presented additional new information concerned their claim including the fact that the wife had been kidnapped and raped and more details about the husband's activities with the Democratic Party. The IJ did not find petitioners credible and denied their applications for asylum and withholding. The BIA summarily affirmed that decision.

The court determined that , it has no authority to apply a judicial "safety valve" exception to reach aliens' constitutional claims.

The Seventh Circuit found that petitioners had given inconsistent statements between their oral testimony, written asylum application, airport statements, and the documentary evidence in the record. The court held that petitioners' omission and inconsistent statements regarding the female petitioner's rape and kidnapping, the male petitioner's political opinion, and the female petitioner's hospitalization following the kidnapping and rape were specific and cogent reasons supporting an adverse credibility finding. The court also upheld the denial of withholding and CAT protection.

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■ **Seventh Circuit Holds That It Lacks Jurisdiction To Review Constitutional Or Statutory Claims Arising In Expedited Removal Proceedings**

Khan v. Holder, __ F.3d __, 2010 WL 2330383 (Easterbrook, *Wood*, Evans) (7th Cir. June 11, 2010), the court held that, subject to the narrowly circumscribed statutory exceptions to 8 U.S.C. § 1252(a)(2)(A), the court lacks jurisdiction to review an order of expedited removal and any claim related to the implementation, application, or validity of the expedited removal system. The court determined that because of the express jurisdiction-stripping provision, it has no authority to apply a judicial "safety valve" exception to reach aliens' constitutional claims.

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EIGHTH CIRCUIT

■ **Eighth Circuit Affirms Immigration Judge's Denial Of Asylum Where Petitioners Presented Only Generalized And Speculative Claims Of Fear Upon Return To Belarus**

In ***Litvinov v. Holder***, 605 F.3d 548 (8th Cir. 2010) (Riley, Smith, *Shepherd*), the Eighth Circuit upheld the denial of asylum to a couple from Belarus. The husband had been admitted to the United States on April 24, 2000, on a nonimmigrant work visa. The wife entered late that year on a tourist visa. On May 25, 2004,

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prior to the expiration of the work visa, petitioner applied for asylum with USCIS and listed his spouse as a derivative beneficiary. The USCIS did not approve the application but instead referred petitioners' case to the immigration court. The petitioners testified that they did not support the government of Alexandaer Lukashnko, who was elected president of Belarus in 1994. In particular, petitioners' daughter became involved with a youth organization that promoted the traditions of Belarus but which was viewed by the government as an opposition organization. Subsequent to their arrival in the United States, petitioners claimed that their daughter and son were subject to discriminatory treatment. The IJ and the BIA denied the asylum request, concluding that even if credible, petitioners had not shown a well-founded fear of future persecution.

In upholding the denial of asylum, the court rejected petitioner's contention that the IJ had applied an incorrect legal standard. The court also agreed with the IJ's decision that petitioners presented only generalized and speculative statements of fear regarding what may occur upon their return to Belarus, and that while they referenced a new law in Belarus that criminalized political opposition to the government, they did not present any evidence that anyone had been punished under it.

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■ **Eighth Circuit Withdraws Its Previous Holding That It Lacked Jurisdiction Under INA § 242(a)(2)(B)(ii) To Review The Denial Of A Continuance**

In ***Hernandez v. Holder***, 606 F.3d 900 (8th Cir. 2010)(Murphy, Melloy, *Shepard*), the court held that in light of the Supreme Court's decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010), it would withdraw a portion of its prior decision holding that the court lacked jurisdiction under INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), to review the denial of a continuance, and affirmed the BIA's denial of a continuance on the merits.

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■ **Eighth Circuit Upholds Denial Of Asylum In Light Of Adverse Credibility Determination, Despite Objective Evidence Of FGM**

In ***Fesehaye v. Holder***, 607 F.3d 523 (8th Cir. 2010) (*Murphy*, Riley, Loken), the court upheld the BIA's denial of asylum to an applicant who presented objective evidence of female genital mutilation ("FGM"), but failed to present credible evidence of her identity and nationality. The applicant, allegedly an Ethiopian native of Eritrean nationality, entered the United States in 2005 from the Netherlands after her application for asylum there had been denied. She entered the United States using a Dutch passport in the name of Ruth Balay. Petitioner testified about her mistreatment in Ethiopia, but the IJ found that she lacked objective documents to prove her identity, nationality, and ethnicity, and that she was otherwise not credible. The BIA affirmed the decision below, noting the striking inconsistencies between her Dutch and current asylum claims.

Because petitioner had failed to credibly establish her identity and nationality, the court concluded that she failed to satisfy her burden of proof.

The court held that the BIA did not err by rejecting petitioner's explanations for the multiple inconsistencies in her asylum applications, or by requiring corroborating evidence in light of the inconsistencies. Because petitioner had failed to credibly establish her identity and nationality, the court concluded that she failed to satisfy her burden of proof to show that the FGM occurred on account of a protected ground.

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NINTH CIRCUIT

■ **Ninth Circuit Holds Conviction For Aggravated Assault Under Canadian Law Does Not Categorically Qualify As Crime Involving Moral Turpitude**

In ***Uppal v. Holder***, 605 F.3d 712 (9th Cir. 2010) (Thompson, *Berzon*, Smith), the Ninth Circuit vacated its prior decision (576 F.3d 1014) on rehearing and held that a conviction for aggravated assault under Canadian law, which applies to conduct that "wounds, maims, disfigures, or endangers the life of another," does not categorically qualify as a crime involving moral turpitude because it does not require specific intent to injure or actual injury, and does not involve a special trust relationship.

The petitioner, a citizen of India entered the United States illegally in 1997. In 1998 he was granted asylum and, in 2004, became a lawful permanent resident. On April 11, 2006, DHS instituted removal proceedings against the petitioner alleging that he was inadmissible at the time of his entry because in 1995 he had been convicted of aggravated assault in Canada, and because he had attempted to obtain immigration benefits through fraud, namely he had not revealed his conviction when he applied for asylum. The IJ found petitioner removable as charged and specifically held that his conviction under § 268 of the Criminal Code of Canada was categorically a CIMT. The BIA, reviewing the CIMT issue *de novo*, interpreted the Canadian crime as requiring "willfulness of the action which inflicts significant injury." The BIA did not reach the fraud issue.

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The Ninth Circuit, applying the two-steps analysis in *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc), determined that it was unclear whether the BIA had correctly identified the elements of § 268 necessary to secure a conviction. However, even if the BIA had correctly identified the elements, the court said that it would not give *Skidmore* deference because the BIA's unpublished decision was "neither thoroughly reasoned nor consistent with prior BIA and Ninth Circuit case law." The court found that "§ 268 does not require that the perpetrator specifically intend to inflict serious physical injury, or any injury at all . . . Instead, § 268 requires only that a reasonable person would know that the assault carries a risk of bodily injury or endangerment which is a negligence standard." The court further explained that Canadian case law supported its interpretation. Accordingly, because under established law a simple assault and battery conviction is not a CIMT, the court concluded that petitioner's conviction was not categorically a CIMT. The court also determined that petitioner's case did not fall within any of the exception including the special trust relationship between the victim and the perpetrator.

The court remanded the case to the BIA for the application of the modified categorical approach and noted that, on remand, the BIA could also consider the immigration fraud issue.

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■ **Ninth Circuit Defers To *Brand X* Decision By BIA But Reverses Asylum Denial**

In ***Jiang v. Holder***, 606 F.3d 1099 (9th Cir. 2010) (Pregerson, Reinhardt, *Wardlaw*), the Ninth Circuit, after applying *Brand X* , deferred to the BIA's interpretation in *Matter of J-S-*, 24 I&N Dec. 520 (BIA 2008), that under INA § 101(a)(42) a spouse of an individual who has undergone forcible abortion or sterilization is not per se entitled to refugee status.

The petitioner, a citizen of the PRC, entered the United States on May 5, 1999, and was immediately detained for violating INA § 212(a)(6)(C)(i) (misrepresentation). Petitioner then sought asylum on the basis that his girlfriend had been forcibly subjected to an abortion and that he also had resisted the local authorities who had tried to prevent their wedding because he and his girlfriend were under the legal age imposed by the population control policy. The IJ and the BIA initially denied asylum based on failure to meet the burden of proof under *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). Subsequently, following a remand from the Ninth Circuit, the BIA reaffirmed the denial of asylum under *Matter of S-L-L*, 24 I&N Dec. 1 (BIA 2006). The case was remanded again by the Ninth Circuit, however, in light of its decisions holding that people living together as "husband and wife" should be treated as spouses for purposes of asylum claims based on population control policies. On June 24, 2008, the BIA denied, for the third time petitioner's claim for asylum based on *Matter of J-S-*, concluding that petitioner could not rest his asylum claim on his girlfriend or wife's forced abortion, and that he had failed to demonstrate any resistance to family planning policies or that he been subject to persecution.

The court determined that petitioner had been subject to past persecution on account of his resistance because the local authorities had detained him and he had to pay a heavy fine in order to be released from detention.

The Ninth Circuit, after deferring to the BIA's interpretation in *Matter of J-S*, determined that the BIA had erred in its conclusion that petitioner did not qualify for asylum under the "other resistance" clause. The court found that petitioner's credible testimony had "amply" demonstrated "other resistance to a coercive population control program." The court noted petitioner's "persistent defiance of coercive population control policy," including his attempt to get married in contravention of the policy. The court also determined that petitioner had been subject to past persecution on account of his resistance because the local authorities had detained him and he had to pay a heavy fine in order to be released from detention. The court also faulted the BIA for denying asylum on the basis that petitioner was not legally married to a victim of forced abortion. The court said that under its precedents whether a persecuting country would recognize a marriage is not the dispositive question in determining whether the petitioner is a spouse. Accordingly, the case was remanded again to the BIA to exercise its discretion regarding whether to grant asylum.

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■ **Ninth Circuit Holds That Alien Continues To Be The Son Of A United States Citizen After His Mother's Death**

In ***Federiso v. Holder***, 605 F.3d 695 (9th Cir. 2010) (*D.W. Nelson*, Reinhardt, Friedman), the court reversed *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), which held that an alien must have a living relative to qualify for a waiver under INA § 237(a)(1)(H)(i), 8 U.S.C. § 1227(a)(1)(H)(i).

The petitioner, a Filipino national, had entered the United States by falsely claiming that he was the unmarried son a lawful permanent resident alien. Years later, when the government discovered the misrepresentation, petitioner was placed in removal proceedings. Petitioner conceded deportability but sought a

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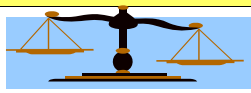

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waiver under § 237(a)(1)(h)(i). This section provides for a waiver of inadmissibility to an alien who is, *inter alia*, the son of a citizen of the United States. During the pendency of the hearing, petitioner's mother died. Nonetheless, the IJ interpreted the statute to authorize the waiver under the circumstances and granted it. Following the government's appeal, the BIA reversed and held that the waiver was only available where there was a qualifying relationship to a living relative.

The Ninth Circuit court concluded that § 237(a)(1)(h)(i) was unambiguous and makes a waiver available to any alien who "is" the son or daughter of a United States citizen. The court also distinguished the Ninth Circuit cases upon which the BIA relied, noting that they were decided before *Chevron*. Finally, the court observed that the question of whether to grant a waiver to a particular alien, consistent with the purpose of the statute to unite families, is within the discretion of the Attorney General.

The Ninth Circuit court concluded that § 237(a)(1)(h)(i) was unambiguous and makes a waiver available to any alien who "is" the son or daughter of a United States citizen.

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■ **Ninth Circuit Grants Petition For Review Under *Estrada-Espinoza***

In ***Rivera-Cuartas v. Holder***, 605 F.3d 699 (9th Cir. 2010) (*McKeown*, Rymer, Fawsett), the Ninth Circuit held that Arizona revised Statute 13-1405 , which criminalizes sexual conduct with a minor under eighteen years of age, does not constitute an aggravated felony under the INA because it does not meet the federal generic offense of "sexual abuse of a minor." Accordingly, the court reversed the BIA's removal order against petitioner who had been convicted for performing oral sex on a sixteen-year old boy and had been sentenced to three years probation. The court noted that its decision was controlled by two recent decisions that had addressed the generic definition of "sexual abuse of a minor": *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*), and *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009).

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■ **Ninth Circuit Holds Alien Ineligible For 212(c) Relief Because He Was Inadmissible At The Time He Was Erroneously Admitted For Permanent Residence**

In ***Segura v. Holder***, 605 F.3d 1063 (9th Cir. 2010) (O'Scannlain, *Tallman*, Block), the court found petitioner ineligible for relief under former INA § 212(c). The petitioner, a Mexican citizen who had entered the United States illegally in 1980 and received temporary resident status in 1988, pled guilty in 1989 of possession or purchase of a controlled substance. In 1992 he applied for and obtained LPR status. In 2003, after vacationing in Mexico, petitioner was denied admission upon his return to the United States based on the 1989 conviction and placed in removal proceedings. The IJ determined that petitioner was ineligible for § 212 (c) relief because at the time of his conviction he was not an LPR. Subsequently, the IJ also denied petitioner's request for cancellation. On appeal to the BIA petitioner only contested the waiver denial. The BIA affirmed the IJ concluding that petitioner had never been admitted as an LPR.

The Ninth Circuit held that petitioner's 1989 conviction of a drug crime rendered him inadmissible at the time he was admitted as an LPR in 1992. The court determined that the petitioner's inadmissibility thus precluded him from meeting the prerequisites to obtaining lawful permanent resident status. The court followed its decision in *Monet v. INS*, 791 F.3d 752 (9th Cir. 1986), where it had held that relief under § 212(c) "requires lawful admission." Petitioner sought to distinguish *Monet* by arguing that the was not evidence in his case that he had fraudulently obtained LPR status. However, the court said that *Monet* should not be read so narrowly, explaining that the holding in that case emphasized the necessity of actually complying with the substantive admission requirements.

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■ **Ninth Circuit Holds That Crime Existing At Time Of Prior Immigration Proceeding Can Subsequently Be Charged As One Of Two Crimes Involving Moral Turpitude.**

In ***Poblete Mendoza v. Holder***, 606 F.3d 1137 (9th Cir. 2010) (*Hug*, Bybee, Gwin), the court rejected a claim that *res judicata* defeated a charge of removability. Petitioner, a lawful permanent resident, had previously been put in proceedings on the basis of a drug charge, but his removal had been cancelled despite also having a shoplifting conviction. The alien subsequently committed a new offense, and the Ninth Circuit held that a charge of two crimes involving moral turpitude based on the new offense and the prior shoplifting conviction was a "new claim" that could not have been adjudicated in the first proceeding. The court also held that, by submitting the alien's state court moving papers seeking vacatur of a conviction under Arizona Revised Statutes § 13-907, the Department of Homeland Security met its burden of demonstrating that the vacatur was done for rehabilitative purposes.

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■ **Ninth Circuit Holds That 212(k) Applies To Non-Citizens Who Are Deemed Inadmissible Solely For Lacking A Valid Visa**

In *Shin v. Holder*, __ F.3d __, 2010 WL 2331466 (9th Cir. June 11, 2010) (Wallace, Graber, *McKeown*), the Ninth Circuit held that the BIA improperly found two sibling aliens ineligible for a waiver of inadmissibility under Section 212(k) of the INA. The court agreed with the BIA that the aliens, who had obtained lawful permanent residence derivatively through their mother, were removable because their mother had obtained lawful status through the fraudulent actions of a former INS officer. The court, however, remanded to the BIA on the ground that § 212(k) expressly makes relief available to non-citizens deemed inadmissible for lacking a valid immigrant visa when they were unaware of the underlying fraud and otherwise admissible.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That Following-To-Join Status Of Overseas Alien Is Terminated Upon Death Of Primary Parent**

In *Ward v. Attorney General*, __ F.3d. __, 2010 U.S. App. LEXIS 11157 (11th Cir. June 2, 2010), (Birch, Barkett, Kravitch, JJ.) (*per curiam*), the court rejected appellant's claim that the Child Status Protection Act ("CSPA") allows an alien living abroad to "follow to join" a lawful permanent resident parent after the parent's death. The court noted that the CSPA "never addressed the issue of children losing their following-to-join status when a primary-beneficiary parent dies." The court also found the "widow" cases inapposite because those cases did not involve following-to-join status and "spouses and former spouses of U.S. citizens have long been treated more favorably than derivative beneficiaries of lawful permanent residents." The court also determined that the alien was not entitled to reinstatement of lawful permanent resident status on humanitarian grounds because an immigration petition had never been approved on his behalf.

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■ **A Conviction Under Arizona Aggravated Assault Statute Does Not Categorically Qualify As A Crime Of Violence**

In *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010) (Dubina, *Martin*, Hill), the Eleventh Circuit held in a criminal prosecution case and applying the Supreme Court's analysis in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that a conviction under an Arizona aggravated assault statute does not categorically qualify as a crime of violence because it permits a conviction where the physical injury is caused by defendant's recklessness.

The district court held that the plain language and statutory construction did not eliminate the requirement that alien be "inspected and admitted" to be eligible for adjustment of status.

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DISTRICT COURTS

■ **Northern District Of Georgia Holds That Temporary Protected Status Did Not Absolve Plaintiff's Prior Entry Without Inspection That Precluded His Adjustment Of Status**

In *Serrano v. Holder*, No. 09-cv-3253 (N.D. Ga. April 28, 2010) (*Duffey, J.*), the district court granted the government's motion to dismiss plaintiff's challenge to USCIS' denial of his application for adjustment of status. Although 8 U.S.C. § 1254a(f)(4) describes a beneficiary of temporary protected status as "being in, and maintaining, lawful status as a nonimmigrant," the district court held that the plain language and statutory construction did not eliminate the requirement that alien be "inspected and admitted" to be eligible for adjustment of status. The district court also held that the government's interpretation of the § 1254a(f)(4) – in the form of two legal opinions from the General Counsel of the former INS and an unpublished opinion of the BIA – was entitled to *Skidmore* deference.

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■ **District Court Dismisses Class Action Seeking Approval of I-140 Petitions**

In *Karpeev v. DHS*, No. 09-cv-21278 (S.D. Fla. May 28, 2010) (Jordan, J.), the Southern District of Florida granted a motion to dismiss a purported class action by seven athletes seeking to compel USCIS to approve their Immigration Petitions for Aliens of Extraordinary Ability. The complaint also asserted *Bivens* claims against individual USCIS officers. The government moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which the court could grant relief for the *Bivens* claims. The court concluded that plaintiffs failed to set forth any viable bases for federal subject matter jurisdiction and that the *Bivens* claims failed under Federal Rule of Civil Procedure 12(b)(6).

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Can the filing of a lawsuit constitute political opinion?

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his leg broken.

The BIA determined that petitioner's lawsuit did not advance a political opinion and therefore the government's reaction, though excessive, was not on account of "political opinion."

Preliminarily, the court observed that the Ninth Circuit had made an "independent decision" that litigation is a form of political expression that can make a person eligible for asylum, citing *Baghdasaryan v. Holder*, 592 F.3d 1018, 1020-21, 1024 (9th Cir. 2010); *Yan Xia Zhu v. Mukasey*, 537 F.3d 1034, 1044-45 (9th Cir. 2008). The court then noted that given the ambiguities of the terms in the asylum statute, the BIA should be given *Chevron* deference and "considerable leeway" in its interpretation. The court explained that it was "necessary to distinguish having a political opinion from the means of its expression." For example, the court noted that the United States "does not allow punishment for anyone's political views-but rules for the time, place, and manner of expression are independent of the speaker's politics. Thus it may be permissible to punish a person for waking up the neighbors with a bullhorn, even though the viewpoint of the amplified statements cannot be penalized." The court said that the "Ninth Circuit assumed that the time, place, and manner rules used in the United States apply equally to foreign nations, and that any departure from them penalizes political opinion. That is far from clear to us. The foundation for the time, place, and manner rules is that they do not concern the viewpoint or content of the speech." In California, noted the court, shopping malls are open to political demonstrations, but "if a foreign nation bans political speech at shopping malls and arrests picketers as trespassers, that is not necessarily punishment for 'political opinion." Thus, said the court, "if a foreign state decides that litigation is not an appropriate forum for political opinion, it would be hard to characterize that as persecution." Additionally, the court pointed out that the United States has itself limited the expression of political opinion in the courts. "A court is the forum in which legal rights are vindicated, and people who use litigation solely as a pulpit for political protest may be penalized if the suit is objectively baseless."

"If a foreign state decides that litigation is not an appropriate forum for political opinion, it would be hard to characterize that as persecution."

The record in petitioner's case, said the court, " strongly implies" her suit was "objectively baseless." It's not just that she lost. She did not own the land. Her parents did, and the government's promise to supply replacement land and pay for a new house was made to her father, not to her," explained the court. However, the court continued, the BIA "assumed that litigation differs from expression of political opinion but did not analyze whether that is so in general, or particularly in China. Perhaps despite appearances China does allow political litigation. How China understands the proper use of its courts is a matter for the agency to decide. Yet, as far as we can determine, the BIA has never addressed, in a precedential opinion, the question whether (and, if so, in which nations) it is appropriate to treat suing a unit of government as a legitimate means of expressing one's political opinion."

The court also concluded that the BIA erred by failing to consider whether the Chinese government's response to the filing of the lawsuit – an attempted arrest of the petitioner and beating of her father – was evidence that petitioner's political opinion was "one central reason" for the government's actions. The court remanded for the Board to address whether and under what circumstances litigation against the government can constitute an expression of a political opinion.

Finally, the court suggested to the BIA that "before conducting a more comprehensive analysis of litigation as political opinion in China," it might want to decide whether petitioner is telling the truth. The immigration judge disbelieved her, remarking that Chen had not supplied material documents, "the absence of which raised suspicions."

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Contributions to the Immigration Litigation Bulletin Are Welcomed

Eleventh Circuit Statistics

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in one of four categories – persecution (past persecution, future persecution, and nexus), credibility, changed country conditions, or other. Where the Eleventh Circuit decided issues in multiple categories, I ignored the other category. There was one case where the Eleventh Circuit decided issues involving persecution and credibility. *See Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247 (11th Cir. 2006). I categorized *Ruiz* as a credibility case, rather than as a persecution case, because the persecution finding made by the agency was an alternative finding.

Supreme Court Defines "Aggravated Felony

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was like the "circumstance-specific" factor at issue in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), where the Court did not require that the alien have been "convicted" of causing a loss in excess of $10,000 before concluding that the alien was barred from cancellation of removal based on a conviction for the aggravated felony defined at 8 U.S.C. § 1101(a)(43)(M)(i). *See Carachuri-Rosendo*, 2010 WL 2346552, at *8 n.11. At bottom, although the Court acknowledged that recidivism was not a true element of the possession offense, *see id.* at *3 n.3, the Court considered recidivism (being a factor that would increase the statutory maximum for the federal drug possession offense if found by a judge) to be too much like an element of a crime to be treated as a "circumstance-specific" consideration for which a "conviction" in some form was unnecessary.

One question left open in the decision is whether, when a subsequent possession conviction is based on or enhanced by a prior drug conviction, the determination that a prior conviction exists must be made by any of the procedures set forth in, or analogous to, 21 U.S.C. § 851. *See* 2010 WL 2346552, at *8. Thus, even if a subsequent possession conviction actually is based on or enhanced by a prior drug conviction, the subsequent conviction still might not be an aggravated felony if the "finding" of a prior conviction is not procedurally adequate. A further question that may also remain concerns the meaning of a subsequent possession conviction being "based on" or "enhanced" by a prior conviction. While it is fairly clear that, if a subsequent possession conviction has as an element of the crime a prior drug conviction, or if a prior drug conviction actually raises the statutory maximum for a subsequent possession conviction, then the subsequent conviction could be an aggravated felony. Whether any other situation might qualify as an aggravated felony remains to be seen. For example, it is uncertain (at least with respect to a state court conviction) whether the use of a prior conviction in determining a sentence on a subsequent conviction would suffice if the prior conviction did *not* raise the applicable statutory maximum sentence.

Whether or not the Board is entitled to deference on these issues, it is important to note that these issues will arise not only in immigration cases but in criminal cases as well.

These remaining questions may be primarily for the Board to determine because they may be viewed as a matter of interpreting the word "convicted" in 8 U.S.C. § 1229b(a)(3) – a word the Supreme Court emphasized in its decision. Arguably, an interpretation of this term by the Board in future cases would be entitled to deference by the courts because § 1229b(a)(3) is an immigration statute that is not bound up with a criminal statute. On the other hand, § 1229b(a)(3) uses a criminal term ("convicted"), and arguably the word should refer to the same circumstances as the word "conviction" appearing in 8 U.S.C. § 1326(b)(2) – which concerns criminal re-entry by aggravated felons and which the Board cannot interpret authoritatively. Also, the Supreme Court did not mention deference to the Board in its *Carachuri* decision (although this was likely because the Board had not expressly interpreted the term "convicted" in its own decision in the case). In any event, whether or not the Board is entitled to deference on these issues, it is important to note that these issues will arise not only in immigration cases but in criminal cases as well. Thus, the need for coordination between OIL and the Criminal Division remains regarding when recidivist possession will constitute an aggravated felony.

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OIL TRAINING CALENDAR

■ OIL's 14th Annual Immigration Litigation Conference will be held at the National Advocacy Center in Columbia, South Carolina on September 27—October 1, 2010. This is an advanced immigration law conference intended for experienced attorneys who are litigating in the federal courts or advising their client agencies on immigration matters that may lead to litigation.

■ OIL's 16th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC on November 15-19, 2010. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

For additional information about these training programs contact Francesco Isgro at Francesco.Isgro@usdoj.gov.

INSIDE OIL

OIL bids farewell to the following Trial Attorneys: ***Ana Zalah-Monroe*** who is moving to Dallas where she intends to practice immigration law; ***Scott Rempell,*** who has accepted a position as Law Professor in Houston, and ***Melody Eaton*** has moved to Florida.

During the World Cup, the OIL ***Bernal Team*** hosted a 21-teams Waka Waka World Cup Foosball Tournament. Congratulations to the winners, ***Peachey Team*** (Goldman/ Robbins) and the runner-up ***Ginsburg Team***.

The Ginsburg Team

The Office Of Immigration Litigation To Issue Reference Guide To Immigration Consequences Of Crimes In Response To Supreme Court Decision In *Padilla v. Kentucky*

In view of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Office of Immigration Litigation is preparing a comprehensive overview of provisions of the Immigration and Nationality Act that are relevant to criminal aliens. The overview is intended to assist interested parties in understanding the potential immigration consequences of a plea to criminal charges. The overview is expected to be released this summer.

Padilla holds that the Sixth Amendment requires defense counsel to advise a noncitizen client of the risk of deportation arising from a guilty plea. Specifically, the Court ruled that when the risk of removal resulting from a guilty plea is "clear," counsel must advise his or her client of that risk; and that, when the risk of removal is less clear, counsel need only advise the defendant "that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S. Ct. at 1483. The Court concluded that defense counsel's failure to so advise, or defense counsel's misadvice regarding the immigration consequences of the plea, may constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), which may be a basis for withdrawing a guilty plea and vacating a conviction.

The Court's holding in *Padilla* requires defense counsel to have a basic understanding of immigration law – an area in which they "may not be well versed" – in order to effectively advise their clients. *Padilla*, 130 S. Ct. at 1483. The decision is also of obvious importance, however, to federal and state prosecutors and judges, among other interested parties. The guide – to which many OIL attorneys have contributed – will present a brief, cogent, and clear introduction that identifies and summarizes the relevant statutes, and will not include in-depth analysis of issues that arise in litigation involving those statutes, or a discussion of *Padilla* itself.

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: karen.drummond@usdoj.gov