



Immigration Litigation Bulletin

Vol. 13, Nos. 9-10

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Supreme Court to hear whether denials of motions to reopen are subject to judicial review in the absence of a constitutional claim or question of law

On November 10, 2009, the Supreme Court will hear oral argument in *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2075 (2009), a case raising the question of whether the federal circuit courts of appeals have jurisdiction to review a BIA's denial of a motion to reopen immigration proceedings. Although the lower courts have been divided on this issue of statutory interpretation, the majority of them have found jurisdiction.

The case is before the Court in an unusual posture, as both the petitioner and the Solicitor General agree that the courts of appeals

have jurisdiction. Accordingly, the Court invited Amanda Leiter, a professor at Catholic University's Columbus School of Law and former clerk to Justice John Paul Stevens, to argue in support of the Seventh Circuit's ruling. The Court's decision may have a significant impact on the administration of our immigration laws and will likely untangle one of the jurisdictional webs created in 1996 by Congress's revision of the INA's judicial review provisions.

Statutory Background

Section 242(a)(2)(B)(ii) of the INA, 8 U.S.C. § 1252(a)(2)(B)(ii), as

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Same Due Process Claim — Different Outcome Ninth Circuit asked to consider issue in criminal prosecution case

If one panel of the Ninth Circuit court of appeals has rejected an alien's due process challenge to a removal proceeding in reviewing a Board of Immigration Appeals decision, how can another panel find a due process violation in considering that alien's collateral challenge in a criminal re-entry prosecution? That is the scenario in *United States v. Lopez-Velasquez*, 568 F.3d 1139 (9th Cir. 2009), where the government has petitioned for en banc re-hearing.

The scenario arises from parallel civil and criminal proceedings following the illegal re-entry, following deportation, of Edmundo Lopez-Velasquez. Lopez-Velasquez was

prosecuted for illegal re-entry, and as a defense, he challenged the validity of his 1994 deportation proceedings, arguing that the immigration judge violated his right to due process then failing to advise him of his potential eligibility for relief from deportation pursuant under INA § 212(c). The criminal trial court found a due process violation and dismissed the case, and the government appealed.

Lopez-Velasquez then filed a motion to reopen his long-completed removal proceeding in which he asserted a due process violation on the same basis. The immigration judge denied the motion as untimely, and found no prejudice in any event be-

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More on state created danger doctrine

As discussed in the August 2009 issue of the Immigration Litigation Bulletin, OIL has responded to several briefs this year in which aliens have argued that they should not be removed asserting a substantive due process right based on “state created danger.” Since that article, the Second Circuit, sitting *in banc*, decided *Arar v. Ashcroft*, ___ F.3d ___, 2009 WL 3522887 (2d Cir. Nov. 2, 2009). *Arar* rejected a *Bivens* constitutional tort claim arising from an “extraordinary rendition” of an alien to a country where he alleges he was tortured. The *in banc* majority declined to extend *Bivens* to a “new context” implicating foreign policy considerations reserved exclusively to the political branches of the federal government, implicitly rejecting the dissent’s assertion that the

context is not new because it “states a substantive due process claim under . . . ‘state-created-danger liability.’” The majority’s reasoning is virtually the same reasoning that OIL proposes that courts employ to reject creation of a right against state created danger in removal cases.

Also since the last *Bulletin*, but before *Arar*, in an unpublished disposition, the Second Circuit affirmed a Board holding that the state created danger exception has no application in immigration cases. *Zhang v. Holder*, 2009 WL 3326481 (2d Cir. Oct. 16, 2009) (unpublished disposition). The Fifth Circuit previously reached a similar result in *Machado v. Gonzales*, 222 Fed.Appx. 395 (5th Cir. 2007) (unpublished disposition).

“State created danger” is, at best, an exception to the rule, and that the Supreme Court has never held that there is a state created danger exception, either in *De-Shaney* or in its three subsequent decisions in which it denied claims asserting a due process right to protection from third-party harm. The Supreme Court has consistently counseled against the creation of a new substantive due process rights, and the application of state created danger theory to removal cases, implicating immigration and foreign policy considerations, would represent creation of a new substantive due process right. For a chronological history of state created danger arguments in immigration cases, see the July 2007 Bulletin.

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Court asked to consider why due process claim raised in a criminal prosecution should be treated differently than in civil proceedings

(Continued from page 1)

cause Lopez-Velasquez was not eligible for any form of discretionary relief at the time of the 1994 deportation proceedings. The Board of Immigration Appeals sustained that decision on the untimeliness ground. And in January 2009, the Ninth Circuit denied a petition for review of that decision, holding that there was neither a due process violation nor a gross miscarriage of justice because Lopez-Velasquez had not been eligible for relief at the time of the 1994 proceedings. *Lopez-Velasquez v. Mukasey*, 308 Fed. Appx. 236 (9th Cir. 2009).

Then, in June 2009, on appeal in the criminal case, another panel of the Ninth Circuit ruled that the immigration judge had violated due process by failing to inform Lopez-Velasquez of relief under INA § 212(c), and affirmed the dismissal of the indictment. The second panel determined that the immigration judge should have recognized a reasonable possibility that Lopez-Velasquez might become eligi-

ble for INA § 212(c) relief during the pendency of an appeal if one had been taken, without finding any arguable claim of error in the immigration judge’s decision that would be the basis for an appeal. 568 F.3d at 1145.

In September, the government petitioned for en banc rehearing to resolve error in this clearest of intra-circuit conflicts – between two panels of the same court on the very same issue involving the very same alien. Prior to the second panel’s published opinion, no circuit precedent required immigration judges to inform aliens of discretionary forms of relief for which the alien might only become eligible at a point in time after the hearing. Such a holding, the government argued, imposes an untenable burden on immigration judges and exceeds the requirements of the Due Process Clause, particularly given the court’s recognition that an alien has no constitutionally protected interest in

receiving discretionary relief.

Moreover, the second panel’s decision actually encourages criminal aliens to file administrative appeals solely for the purpose of delay, creating a perverse incentive contrary to Supreme Court precedent, and frustrating the administration of justice. The court has ordered Lopez-Velasquez to respond to the petition for en banc rehearing, but has not yet withdrawn the published decision. Stay tuned.

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Contributions to the
Immigration
Litigation Bulletin
Are Welcomed

Supreme Court to hear whether denials of motion to reopen are subject to judicial review

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enacted by the 1996 IIRIRA provides that no court has jurisdiction to review “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158 (a) of this title.” In section 242(a)(2)(B)(i) Congress specified that courts of appeals do not have jurisdiction to review particular discretionary decision and in section 242(a)(2)(B)(ii), Congress provided for a residual catch-all provision.

As amended by the REAL ID Act of 2005, the judicial review provision now contains a clause providing that that notwithstanding any judicial review limitations, a court can hear constitutional claims or questions of law raised in a petition for review. See INA § 242(a)(2)(B). A long standing regulation by the Attorney General states, *inter alia*, that the “decision to grant or deny a motion to reopen . . . is within the discretion of the Board.”

Factual Background

The petitioner is an asylum applicant from Albania who entered the United States as a business visitor. He did not depart when his visa expired; instead he applied for asylum. When he failed to appear at his removal hearing in the fall of 1997, he was ordered removed *in absentia*. Soon thereafter, he filed a motion to reopen contending that he missed the hearing because he had overslept. An IJ denied that motion and the BIA affirmed that decision. Petitioner did not seek judicial review nor did he voluntarily leave the United States. Instead in 2006, he filed another motion to reopen, contending that country conditions in Albania had deteriorated and that he would be a victim of persecution if returned

there. The BIA treated petitioner’s motion as a second motion to reopen, and denied it finding that conditions in Albania had improved. Petitioner then sought review of that decision contending, *inter alia*, that the BIA had abused its discretion by not mentioning a particular affidavit in its decision. The government argued that the BIA had properly exercised its discretion.

Seventh Circuit Decision

In *Kucana v. Mukasey* a fractured panel (Easterbrook, Ripple (*concurring dubitante*), Cudahy (dissenting)), held that that § 242(a)(2)(B)(ii) precludes jurisdiction to review the discretionary decision to deny a motion to reopen proceedings. Accordingly, The court extended *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), where it had found no jurisdiction to review the denial of a motion for a continuance, to also cover the denial of a motion to reopen to apply for asylum

In *Ali*, the Seventh Circuit found that “an immigration judge’s denial of a continuance motion is a discretionary ‘decision or action’ the “authority for which” is committed to the immigration judge by the relevant subchapter of the INA, and the jurisdictional bar in § 1252(a)(2)(B)(ii) generally precludes judicial review.” The court acknowledged that it was adopting the minority position among the circuits that have considered the question, but found that its holding to be a “sound one.”

In extending the *Ali* ruling to the denial of a motion to reopen, the court noted that both the regulations governing reopening and those gov-

erning a request for continuances “are discretionary,” and “draw their force from provisions in the INA allowing immigration officials to govern their own proceedings.” The court found it “surprising,” in light of *Ali*, that the government would argue that § 242(a)(2)(B)(ii) does not cover decisions not to reopen. The court reasoned that in cases such as petitioner’s, the BIA’s decision rests on the factual determination as to whether country conditions have worsened. The court found the exer-

IIRIRA provides that no court has jurisdiction to review “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.”

cise of discretion whether to grant continuance indistinguishable from the exercise of discretion to grant reopening. “Every discretionary decision, unless made by the flip of a coin, rests on the tribunal’s appreciation of the state of the litigation and the state of the world,” said the court. “Section 242(a)(2)(B)(ii) could not mean

that a decision is unreviewable when made randomly or unthinkingly, but that if the agency pays attention to an application and has reasons for acting as it does then those reasons can be reviewed (because the reasons precede, and do not equal, the discretion . . . One cannot review the subsidiary findings that motivate an order, when the order itself is unreviewable; that would be an advisory opinion,” noted the court.

Four judges dissented from the denial of rehearing en banc. In a written opinion, J. Ripple argued that he was bound by *Ali*, but urged the court to revisit *Ali*. “As *Ali* spreads its dominion to substantive fields, it is turning this court into a virtual council of revision with respect to settled federal law,” he wrote. J. Cudahy believed that *Ali* is distinguishable

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Review of motions to reopen

from *Singh* because *Ali* dealt with procedure rooted in an express grant of procedural discretion in the statute, but *Singh* dealt with substance, the outcome of the merits of the case. The four en banc dissenters believed that the scope of the *Ali* decision is an important issue and the extension of *Ali*'s reasoning beyond the realm of a procedural ruling to a motion to reopen is contrary to the statute.

The Parties' Position

Both the petitioner and the Solicitor General argue that the court should reverse the decision of the Seventh Circuit, and hold that the courts of appeals retain jurisdiction to review decisions of the BIA denying motions to reopen.

The Solicitor General argues that that the courts of appeals retain jurisdiction to review decisions of the BIA denying motions to reopen.

The Solicitor General contends that by its plain text, INA § 242(a)(2)(B)(ii) "applies only to decisions that the relevant subchapter specifies are within the discretion of the Attorney General or the Secretary of Homeland Security. Although motions to reopen are mentioned in the statutory subchapter, only a regulation, and not the statute itself, specifies that the Board has wide discretion in adjudicating them." If Congress had intended otherwise, argues the Solicitor General, "Congress easily could have said so. It did not, and denials of

motions to reopen therefore are not reviewable under the unambiguous language of Section 1252(a)(2)(B)(ii)."

The amicus appointed by the Court also contends that the governing statute is unambiguous. She argues, however, that "the phrase

'specified under this subchapter,' encompasses both language in the subchapter itself and language in regulations promulgated under the subchapter."

The amicus argues that even though the Court regularly defers to an agency's interpretation of the statute it is charged with administering, "such deference is not appropriate here, however, for two reasons. First, the agency's assertion is a litigating position — wholly unsupported by regulations, rulings, or administrative practice. Second, with respect to the question before the Court, Congress's decision to use the word — under Section 1252(a)(2)(B)(ii) unambiguously extends the section's reach beyond decisions that are — specified as discretionary — in the Act itself to decisions —specified as discretionary in regulations adopted — under the Act."

Other *amici* also filed briefs with the Court taking one side or the other.

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Immigration Regulations Applied to the Commonwealth of the Northern Mariana Islands

DOJ and DHS are implementing conforming amendments to their respective regulations to comply with the Consolidated Natural Resources Act of 2008 (CNRA). The CNRA extends the immigration laws of the United States to the Commonwealth of the Northern Mariana Islands (CNMI).

On October 28, 2009, interim rules were published amending regulations governing: asylum and credible fear of persecution determinations; references to the geographical "United States" and its territories and possessions; alien classifications authorized for em-

ployment; documentation acceptable for Employment Eligibility Verification; employment of unauthorized aliens; and adjustment of status of immediate relatives admitted under the Guam-CNMI Visa Waiver Program. See 74 *Fed. Reg.* 55726 (October 28, 2009).

A proposed rule to amend the regulations governing E-2 nonimmigrant treaty investors to establish procedures for classifying long-term investors in the CNMI as E-2 nonimmigrants was previously published on September 14, 2009. 74 *Fed. Reg.* 46938 (September 14, 2009).

Noted: A View From the Immigration Bench

"Crushing caseloads and limited judicial resources result in tremendous pressure on an IJ to ensure that the proceedings are fair and rational and that the record is properly developed despite inadequate or no representation. So much is at stake when someone is facing the return to a country where he or she was persecuted or, after having been in the United States nearly all of his or her life and known no other home, is facing separation from spouse and family — who, in turn, face the loss of their breadwinner."

Excerpted from article by IJ Noel Brennan appearing in the current issue of the *Fordham Law Review*.

FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction—Motion to Reopen

On July 13, 2009, the Solicitor General filed in the Supreme Court the government's top-side merits brief in *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), cert. granted, 129 S. Ct. 2075 (2009). The Supreme Court granted the petitioner's request for certiorari on whether INA §§ 242 (a)(2)(B)(ii) & (D), 8 U.S.C. §§ 1252(a)(2)(B)(ii) & (D), bar review of a denial of a motion to reopen. The Seventh Circuit dismissed the case, holding that 8 U.S.C. § 1252(a)(2)(B)(ii), which bars courts' review of discretionary actions or decisions of the Attorney General "the authority for which is specified under" Subchapter II of the INA, precludes its review of motions to reopen. In its response to the petition, the government stated "after re-examining its prior filings on this issue," that the majority position—namely the majority of the courts holding that judicial review is available, "represents the better reading of the statute." The government's brief agrees with petitioner that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar a court's review of the denial of a motion to reopen. The case is set for argument on November 10, 2009.

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Motion to Reopen Ineffective Assistance of Counsel

On October 5, 2009, the Supreme Court granted the petition for certiorari in *Afanwi v. Holder* (Sup.Ct. No. 08-906), vacated the Fourth Circuit's decision in *Afanwi v. Mukasey*, 526 F.3d 788 (4th Cir. 2008), and remanded the case for further consideration in light of the position asserted by the government in its brief in response. The court of appeals had affirmed the Board's holding that it lacked authority to reopen administrative removal pro-

ceedings based on the claim that the alien's counsel failed to timely file a petition for judicial review of the agency's final order of removal. In its response to the petition for certiorari, the government pointed out that the Attorney General had ruled in *Matter of Compean*, 25 I. & N. Dec. 1 (A.G. 2009), that the BIA has discretion to consider motions to reopen based on claims of post-final order IAC. Therefore, the government argued that the court's judgment should be vacated and the case remanded for further consideration in the light of the Attorney General's decision.

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Aggravated Felony— Loss to Victim(s) Exceeding \$10,000

On September 15, 2008, the government filed a petition for rehearing en banc in *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007), challenging the court's holding that to sustain a charge of removability for the aggravated felony of fraud or deceit with a loss exceeding \$10,000 (8 U.S.C. § 1101(a)(43)(M)(i)) based on conviction for signing a false tax return, the government must prove, using only the categorical approach, not the modified categorical approach, that the alien was convicted of an offense with the elements of fraud or deceit and loss over \$10,000. In August 2009 the parties filed supplemental briefs regarding the impact of *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), on this case and *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc).

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VWP — Waiver, Due Process

On January 30, 2009, the Seventh Circuit granted the government's petition for rehearing en

banc in *Bayo v. Chertoff*, 535 F.3d 749 (7th Cir. 2008). The questions presented are whether a waiver of the right to contest removal proceedings under the visa waiver program (VWP) is valid only if entered into knowingly and voluntarily, and is the alien entitled to a hearing on whether the waiver was knowing and voluntary? The case was argued on May 13, and the parties have filed supplemental briefs on four issues identified by the court at argument.

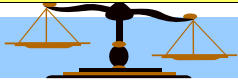
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Particularly Serious Crimes

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 Board 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? Proceedings are currently stayed pending the Supreme Court's decision in *Kucana v. Holder*, because its decision on the scope of the jurisdictional stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) may affect the Ninth Circuit's decision on the rehearing petitions.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Affirms Denial of Withholding Claim Raised by Indonesian Christian**

In *Pakasi v. Holder*, 577 F.3d 44 (1st Cir. 2009) (Boudin, Selya, Howard), the First Circuit affirmed the BIA's denial of the Indonesian applicant's motion to reopen to apply for withholding of removal. The court noted that the episodic incidents of harm that Pakasi alleged were insufficient to constitute past persecution. The court also rejected Pakasi's claim that the IJ and the BIA failed to consider the evidence as a whole, noting, for example, that religious restrictions imposed by the Indonesian government applied to all people. "These policies applied to all religious groups and they did not prevent either petitioner or many Christians in Indonesia from practicing their religion," said the court. The court also determined that the news articles submitted by Pakasi in his motion to reopen were insufficiently related to his situation to support a finding that he faced a substantial likelihood of persecution in Indonesia.

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■ **First Circuit Holds that Alien Failed to Prove Eligibility for Withholding of Removal Because No Nexus Existed Between the Alleged Harm and a Protected Ground**

In *Lopez-Castro v. Holder*, 577 F.3d 49 (1st Cir. 2009) (Lipez, Selya, Howard), the First Circuit ruled that an asylum applicant from Guatemala, who was of indigenous Mayan Quiche ancestry, failed to prove that he was subjected to past persecution or that he would, more likely than not, face future persecution if he returned to that country. The court held that the applicant failed to establish a sufficient nexus between the alleged past and future harm and his Mayan Quiche ethnicity.

The court also held that his claims of discrimination neither amounted to past persecution nor served as a basis for a claimed fear of future persecution. "Disadvantage," said the court, "is not synonymous with persecution. Although Congress has not explicitly defined 'persecution,' the case law is instructive. It tells us, for instance, that persecution requires 'more than mere discomfiture, unpleasantness, harassment, or unfair treatment.' Furthermore, persecution 'implies some connection to government action or inaction.'"

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■ **First Circuit Holds that Ugandan Alien's Speculative Testimony Does Not Compel Conclusion that She Met Her Burden of Proof for Relief**

In *Matovu v. Holder*, 577 F.3d 383 (1st Cir. 2009) (Lynch, Lipez, Howard), the First Circuit affirmed the agency's denial of Matovu's applications for asylum, withholding of removal, and CAT protection. The court held that Matovu presented no evidence, apart from her own speculation, linking her fear of future persecution in Uganda to her family's alleged anti-government views.

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■ **Motion to Reopen Denied Because Movant Failed to Establish Any New and Material Facts, and Did Not Challenge the Agency's Underlying Adverse Credibility Determination**

In *Warui v. Holder*, 577 F.3d 55 (1st Cir. 2009) (Lynch, Boudin, Lipez), the First Circuit affirmed the BIA's denial of petitioner's motion to reopen. The BIA found that petitioner –

who was denied derivative relief based on her alleged fear of female genital mutilation in the underlying proceedings – did not state any "new facts" merely because she divorced and her ex-husband returned to Kenya. The court noted that petitioner's motion simply requested the right to make her own application for withholding of removal and CAT protection – a claim that would have been based on the same facts previously presented to the IJ

The court concluded that the petitioner had failed to establish prima facie eligibility for her claims and made no challenge to the agency's underlying adverse credibility finding.

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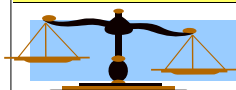
"Persecution requires 'more than mere discomfiture, unpleasantness, harassment, or unfair treatment.'"

■ **Substantial Evidence of Inconsistencies Supports Chinese Adverse Credibility Determination**

In *Chen v. Holder*, 579 F.3d 73 (1st Cir. 2009) (Lynch, Lipez, Howard), the First Circuit affirmed the IJ's decision denying asylum, withholding of removal, and CAT protection to an applicant from China who claimed persecution because he had violated China's population control policy. The IJ did not find Chen's story credible given, *inter alia*, his shifting stories about leaving China, and denied all the claims on that basis. The BIA affirmed. Although the court found that some alleged discrepancies were not supported by the record, it further found that there were still several inconsistencies in the Chen's testimony constituting substantial evidence in support of the adverse credibility determination.

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Summaries Of Recent Federal Court Decisions

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■ Adulterous Women With Out-Of-Wedlock Children in Senegal Do Not Constitute A Particular Social Group

In *Faye v. Holder*, 580 F.3d 37 (1st Cir. 2009) (*Lynch*, Boudin, Howard), the First Circuit upheld the “social visibility” test when it found no statutorily protected social group of “women who had a child out of wedlock/are considered adulterers because they gave birth to a child allegedly not their husband’s/have been abused by their husbands.” The court applied *Chevron* deference to the BIA’s decision and concluded that it could not displace the BIA’s determination that Faye’s proposed group was not sufficiently particular because it was difficult to identify women whom society would consider “adulterers” who “had a child out of wedlock.”

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■ First Circuit Holds that Immigration Judge and Board Committed Prejudicial Legal Error in Assessing Timeliness of Alien’s Asylum Application

In *Lumataw v. Holder*, 582 F.3d 78 (1st Cir. 2009) (*Torruella*, Tashima, Lipez), the First Circuit held that the IJ committed legal error when he faulted petitioner for filing an untimely asylum application ten years after he entered in 1995, when there was no legal one-year time limitation in place until 1997. The court further held that the IJ failed to recognize that petitioner was included in his wife’s 2003 asylum application. The court remanded the case to the BIA to determine whether changed or extraordinary circumstances excused petitioner’s failure to file his asylum appli-

cation within one year of April 1, 1997.

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Enhanced vulnerability of certain social, gender, economic, or other groupings to crime and predation did not amount to a protected ground for asylum.

■ First Circuit Holds that the Indigenous Women in Guatemala Do Not Qualify As a Particular Social Group

In *Caal Tiul v. Holder*, 582 F.3d 92 (1st Cir. 2009) (Boudin, Selya, Howard) (*per curiam*), the First Circuit held that the enhanced vulnerability of certain social, gender, economic, or other groupings to crime and predation did not amount to a protected ground for asylum. Therefore, the court held that the alien could not show a nexus to a protected ground by demonstrating an increased risk of harm from gangs based on her status as an indigenous Guatemalan female. The court additionally held that under 8 C.F.R. § 1003.1(d)(3), the BIA properly accorded no deference to the Immigration Judge’s legal conclusion that the alien’s subjectively genuine fear failed to meet the statutory definition of a well-founded fear on account of a protected ground.

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■ First Circuit Holds that Substantial Evidence Did Not Support the Immigration Judge’s Adverse Credibility Finding

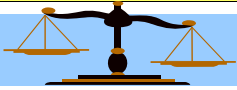
In *Kartasheva v. Holder*, 582 F.3d 96 (1st Cir. 2009) (Boudin, Selya, Stahl), the First Circuit held, in a pre-REAL ID asylum case, that the IJ’s adverse credibility finding was not supported by substantial evidence because many of the inconsistencies relied on by the IJ did not go to the heart of the claim. The petitioner, a native of the Soviet Union and citizen of Uzbekistan, entered the United

States in 2004 as a visitor. She subsequently filed an affirmative asylum application with USCIS. When that claim was not granted, she was placed in removal proceedings where she renewed her claims.

Petitioner testified that her family moved to Uzbekistan from Russia in 1963 when she was nine years old. She suffered a childhood of taunting and teasing. Problems for the petitioner intensified in 1991, when Uzbekistan declared its independence. In 1998, the petitioner was attacked near her home by several Uzbek men who pushed and inappropriately touched her and made lewd sexual comments, calling her, for example, a “Russian whore” and stating, “I’m going to show you some Uzbek love, you Russian bitch.” At the time of the attack, petitioner worked for a government adult education center, teaching a home economics course. She was eventually removed from her position so that, she speculated, an Uzbek woman could take that job. She also claimed that following her participation in a demonstration sponsored by the Human Rights Society of Uzbekistan (“HRSU”) she was beaten by the police and subsequently warned to stop her involvement with the HRSU. She also stated that subsequently she was arrested, imprisoned for several days, interrogated and beaten until she signed a confession. At this point she decided to leave her country.

The USCIS asylum officer who first interviewed petitioner, did not grant her asylum because of inconsistencies in her story. The IJ also held that petitioner’s testimony was not credible because “her account of some of the primary events that form [ed] her claim of persecution varied significantly between her in-Court testimony, her asylum interview testimony, and her initial application for asylum.” The BIA affirmed that decision.

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Summaries Of Recent Federal Court Decisions

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In reversing the credibility finding, the court found that the IJ determination was “both confused and confusingly explained. We find lacking an itemization of the substantial evidence necessary for an adverse credibility determination, and thus, the determination cannot be allowed to stand.” In particular, the court explained that while an IJ may assume an asylum officer’s report is accurate and thus support an adverse credibility finding with statements made at an asylum interview, “the IJ must make an individualized assessment of the petitioner’s credibility. This requirement recognizes the procedural differences between an asylum interview and the hearing before the IJ.” The court also held that the IJ failed to consider all the relevant documents, including the alien’s corroborating evidence and the background evidence for Uzbekistan.

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SECOND CIRCUIT

■ Second Circuit Rules that an Alien’s Lawful Residence Concludes When His Visa Expires

In *Rotimi v. Holder*, 577 F.3d 133 (2d Cir. 2009) (Feinberg, Newman, Katzman) (*per curiam*), the Second Circuit deferred to the BIA’s interpretation of the phrase “lawfully resided continuously” for purposes of eligibility for a waiver of inadmissibility under INA § 212(h). In *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008), the BIA addressed the specific question raised by Rotimi, namely his “13 months as an applicant for adjustment of status and his earlier (and overlapping) time as an applicant for asylum count toward establishing that he has ‘lawfully resided continuously’ for 7 years before his removal proceedings were initiated.” After considering the legislative history, the statutory provision, and case law, among other sources, the BIA concluded that “any lawfulness associated with Rotimi’s residence in the United

States ended when his nonimmigrant visa expired in December 1995.”

In reviewing the BIA’s decision, the court applied *Chevron* analysis. The court found that Congress had not defined the phrase “lawfully resided continuously” anywhere in the INA. “Given the range of possible interpretations that might apply to it,” the court agreed that the phrase was ambiguous. The court then found that the BIA’s definition was reasonable. “Even if we would have interpreted the statute differently if the question had arisen first in a judicial proceeding, we are without authority to substitute that interpretation for an agency’s, if the agency’s view is reasonable,” said the court.

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■ Second Circuit Upholds Denial of Aggravated Felon’s Motion to Terminate § 212(c) Application

In *Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009) (*Jacobs, Kearse, Sack*), the Second Circuit held that Perriello, who was removable for a 1977 arson conviction, was not entitled to terminate removal proceedings under 8 C.F.R. § 1239.2(f). Perriello had entered the United States in 1961, when he was thirteen years old. In 1977, Perriello was convicted in New York of criminal mischief and sentenced to a term of seven to twenty-five years in prison, for which he served seven years before his release on parole in 1984.

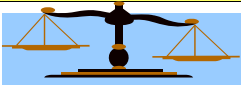
Subsequently Perriello started a business, married a U.S. citizen, and has four U.S. citizen children. On November 28, 200, Perriello was detained at Newark Airport on his return from a brief trip to Italy. In light of his prior conviction, he was paroled pending a

determination of his admissibility. He subsequently was placed in removal proceedings on the basis that his 1977 conviction was for a crime involving moral turpitude. Perriello admitted the allegations but sought to avoid removal by filing an application for naturalization and moving to terminate the proceedings under 8 C.F.R. § 1239.2(f), which permits an IJ to terminate removal proceedings while an application for naturalization is pending. The IJ declined to terminate the proceeding and ordered Perriello removed. The BIA affirmed, finding that the regulation as requiring an affirmative communication from the Department of Homeland Security (DHS) that the alien is prima facie eligible for naturalization, and DHS did not provide one here.

Perriello then challenged the BIA’s decision in a habeas action. That litigation was then entangled by the passage of the REAL ID Act and the case was transferred to the court of appeals.

Despite concerns with the operation of 8 C.F.R. § 1239.2(f), the court held that the IJ lacked authority to terminate proceedings. The court found that following the enactment of the Immigration Act of 1990, and the amendments to INA § 318, aliens can no longer apply for naturalization after removal proceedings have commenced and then move for termination of the removal proceedings. The court disagreed with Perriello’s argument that the IJ and BIA retained the authority to make the prima facie determination for eligibility for naturalization. The court held that the plain language of § 318 prohibits the Attorney General from considering naturalization applications while removal proceedings are pending.

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The court also held that the alien was barred from § 212(c) relief, because he had served more than five years for his aggravated felony conviction and that the plain language of the 1990 amendments to that provision indicated a congressional intent to apply it retroactively.

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■ IJ's Adverse Credibility Determination Reversed Because Based on Minor Inconsistencies and an Impermissible Demeanor Finding

In *Hu v. Holder*, 579 F.3d 155 (2d Cir. 2009) (Parker, Wesley, Cedarbaum) (*per curiam*), the Second Circuit held that substantial evidence did not support the IJ's adverse credibility determination because it was based (1) on minor inconsistencies which could have arisen from the IJ's own flawed reasoning or misstatement of the record, and (2) a demeanor finding based on a hearing held four years earlier. The court declined to grant deference to the IJ's recollection of the alien's demeanor in light of the passage of time and the IJ's caseload as indicated in the Syracuse University's Transactional Records Access Clearinghouse Reports (TRAC).

In particular, the court noted that, according to TRAC, the IJ had decided 1377 asylum claims on the merits between 2004 and 2009, and that fifty-two percent of those asylum seekers were from China. Accordingly the court speculated that "the IJ's memory of Hu's testimony may have been affected by the many similarly-situated-asylum-seekers who testified before him. A reasonable adjudicator would not rely on his four year old memory of Hu's facial expression when evaluating her credibility four years later."

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■ Second Circuit Holds that the Agency Adequately Considered Alien's Pattern or Practice Claim and Its Finding Is Supported by Substantial Evidence

In *Santoso v. Holder*, 580 F.3d 110 (2d Cir. 2009) (Calabresi, Cabranes, Hall) (*per curiam*), the Second Circuit affirmed the denial of petitioner's applications for asylum, withholding, and protection under CAT. Petitioner who entered the U.S. in 1999 for six months did not depart when her visa expired. Six years later she applied for protection claiming fear of persecution on account of her Catholic religion if returned to Indonesia. The IJ and later the BIA denied her request for relief. On appeal she argued that that the BIA and the IJ had failed adequately to address her claim that there exists a pattern or practice of persecution of ethnic Chinese and Catholics in Indonesia and therefore under *Mufied v. Mukasey*, 508 F.3d 88 (2d Cir. 2007), her case had to be remanded.

The court declined to remand, finding that, unlike in *Mufied v. Mukasey*, the BIA had addressed petitioner's pattern or practice claim. The BIA explicitly noted, said the court, that "[t]he discrimination and sporadic violence in various parts of Indonesia, as discussed by the Immigration Judge, do not establish that there is a pattern or practice of persecution against individuals similarly situated to the respondent."

Furthermore, the court held that the agency finding of no pattern or practice of persecution of ethnic Chinese Catholics in Indonesia was supported by substantial evidence by virtue of the background materials in the record. Nevertheless, the court expressed a hope that in time the

agency will refine or describe more fully its standards for pattern or practice claims.

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THIRD CIRCUIT

■ Third Circuit Holds that Ivorian Alien's Witnessing of Her Father's Abduction Constituted Past Persecution

"A person who has directly witnessed a brutal assault on a family member has experienced so devastating a blow as to rise to the level of persecution."

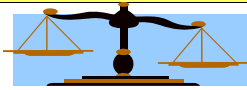
In *Camara v. Att'y Gen.*, 580 F.3d 196 (3d Cir. 2009) (Sloviter, Hardimann, Pollak), the Third Circuit held that substantial evidence did not support the BIA's determination that Camara, a Muslim and member of the

Dioulla ethnicity, had not been persecuted in the Ivory Coast when she witnessed a pro-government militia abduct her father, an opposition party member, from the family's home, and the militia directly threatened her with harm as well. The court reasoned that "a person who has directly witnessed a brutal assault on a family member has experienced so devastating a blow as to rise to the level of persecution."

In contrasting this case with other asylum cases involving "unfulfilled threats," the court further explained that Camara was "directly and unambiguously" threatened with harm herself, and that it was reasonable to conclude that the father's abduction caused her actual suffering and harm. Accordingly, the court remanded the case to the BIA for further considerations.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds that an Alien May Not Seek “Derivative” Withholding of Removal Based on the Risk of Female Genital Mutilation to His Daughter**

In *Kane v. Holder*, 581 F.3d 231 (5th Cir. 2009) (Jones, Wiener, Benavides), the Fifth Circuit affirmed *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007), and ruled that Kane, whose daughter may face FGM in Senegal, is neither entitled to “derivative” withholding of removal because no such protection exists under the statute, nor entitled to withholding of removal in his own right absent evidence that the FGM will be carried out in order to harm Kane on account of his own protected characteristic. The court reasoned that, if taken to their logical conclusions, “Kane’s contentions essentially suggest that any time an illegal immigrant from a country where FGM is practiced has a female child while present in the United States, he should prevail on a claim for asylum or withholding of removal.” The court said that “if Congress had intended such a broad expansion to our nation’s immigration laws, however, it would have expressly provided for this result; it did not.” The court also noted that when presented with similar facts, the Seventh Circuit held in *Oforji v. Ashcroft* that an otherwise-removable alien was not entitled to withholding based solely on the possibility that her U.S. citizen-daughter might be subjected to FGM following the alien’s removal.

Finally, the court declined Kane’s request for remand based on UNHCR guidance, which is non-binding and may constitute extra-record evidence. “The UNHCR guidance note” said the court, “neither constitutes binding

precedent nor renders the BIA’s order unsustainable. Further, it is doubtful whether this particular guidance note offers persuasive authority, as it appears to contradict the express terms of the INA.”

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that Rescission of Lawful Permanent Resident Status Is Not a Prerequisite to Removal Proceedings**

The court held that petitioners’ former status as asylees did not bar their placement in removal proceedings.

In *Stolaj v. Holder*, 577 F.3d 651 (6th Cir. 2009) (Moore, Rogers, Thapar), the Sixth Circuit rejected the Third Circuit’s reasoning in *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996), and held that the “five-year statute of limitations on rescission proceedings found in INA § 246(a) does not apply to the removal proceedings.” The A.G. held in *Matter of Belenzo*, 17 I&N Dec. 374 (A.G. 1981), that the five-year statute of limitations on rescission proceedings in § 246(a) does not apply to removal proceedings. The majority of the courts have followed that ruling. See *Asika v. Ashcroft*, 362 F.3d 264 (4th Cir. 2004); *Kim v. Holder*, 560 F.3d 833 (8th Cir. 2009); *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986); *Oloteo v. INS*, 643 F.2d 679 (9th Cir. 1981).

Here, the petitioners, citizens of Albania, were found removable due to fraud in their asylum applications and because they had no valid entry documents at the time of their adjustment of status. The court held that petitioners’ former status as asylees did not bar their placement in removal proceedings, and concluded that the record supported the agency’s determi-

nation that the aliens were removable for having procured asylum through fraud.

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■ **Sixth Circuit Affirms Agency’s Finding that Alien is Removable for Wilfully Misrepresenting Material Fact and is Ineligible for Relief Because He Assisted in Persecution**

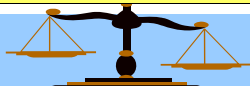
In *Parlak v. Holder*, 578 F.3d 457 (6th Cir. 2009) (*Gibbons*, Sutton, Martin), the Sixth Circuit upheld the agency’s finding of wilful misrepresentation by the alien to support removability. The court held that the government did not need to show intent to deceive by the alien to be inadmissible under INA § 212(a)(6)(C)(I), but that “knowledge of the falsity of the representation” was sufficient. The court also affirmed the BIA’s application of the persecutor bar, which rendered the alien from Turkey ineligible for withholding of removal. Judge Martin dissented.

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■ **Sixth Circuit Holds that Parent’s Abandonment of Lawful Permanent Resident Status May be Imputed to Unemancipated Child In Parent’s Physical Custody**

In *Karimijanaki v. Holder*, 579 F.3d 710 (6th Cir. 2009) (Siler, Moore, Griffin), the Sixth Circuit affirmed the BIA’s determination that the lead petitioner abandoned her lawful permanent residency (“LPR”) when she spent only one month in this country before returning to Iran with her minor son in 1997 and remaining there for seven and a half years. The court further held that the BIA properly imputed petitioner’s abandonment of her LPR status to her minor son even though the father had remained in the U.S. and had since become a naturalized U.S. citizen, because the son was in the mother’s

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care and physical custody during the relevant period. Because the son was in his mother's custody, the court also held that he did not automatically acquire U.S. citizenship when his father naturalized.

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■ Sixth Circuit Holds that Service of an Order to Show Cause that Is Never Filed Constitutes "Action Taken" Under Section 321(c) of IIRIRA

In *Sagr v. Holder*, 580 F.3d 414 (6th Cir. 2009) (Clay, Gibbons, Stamp), the Sixth Circuit held that the service of an OSC on an alien in 1994 constituted an "action taken" under IIRIRA § 321(c), such that the amended aggravated felony definition did not apply to the alien. The court reasoned that, although the OSC was never filed with the immigration court, and a NTA was issued and filed in 1998, service of the charging document nevertheless initiated proceedings under the INA, and was the point at which proceedings began for purposes of determining which version of the aggravated felony definition to apply.

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SEVENTH CIRCUIT

■ Seventh Circuit Rules that an Alien Must be Given an Opportunity to Present Evidence of "Other Resistance" to China's Coercive Population Control Policy

In *Chen v. Holder*, 578 F.3d 515 (7th Cir. Aug. 19, 2009) (Posner, Kanne, Wood), the Seventh Circuit held that petitioner who applied for asylum based on his wife's forced abortion prior to the BIA's issuance of *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008) (holding no per se eligibility for asylum by spouse of individual subjected to a forced abortion or sterilization), and whose application was then

denied based on that case, must be given an opportunity to present evidence that he is eligible for asylum on account of his "other resistance" to China's coercive family planning policy. The court reasoned that because of "the way the proceedings unfolded in Chen's case, he has been deprived of that statutory opportunity."

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■ Seventh Circuit Holds that it Lacks Jurisdiction Over Discretionary Exception to the One-Year Asylum Filing Deadline

In *Ishitiq v. Holder*, 578 F.3d 712 (7th Cir. 2009) (Kanne, Wood, Williams), the Seventh Circuit

dismissed the petition for review of petitioner's asylum claim, holding that it did not have jurisdiction to review the BIA's discretionary determination that petitioner had failed to establish an exception to excuse his untimely filed asylum application.

The petitioner, a Sunni Muslim, from Pakistan claimed fear of persecution by the Jamat-E-Islami, a benevolent organization which turned into a terrorist group. He claimed that in 1986 and 1988, when he refused to join the group he was beaten. After those incidents he left Pakistan but returned there again in 2000. He said that Jamat-E-Islami members found him and beat him again at which point he decided to go to the U.S. Embassy and get a visitor's visa. Petitioner entered the U.S. later that year and in March 2003 he was placed in removal proceedings. He claimed, *inter alia*, that the assassination of Prime Minister Benazir Bhutto on December 27, 2007, was a changed circumstance excusing his untimely filed asylum application.

Petitioner "cannot overcome the jurisdictional bar against reviewing discretionary decisions by cloaking rationale he does not agree with as a legal error."

The court rejected the petitioner's claim that the BIA had misapprehended the regulations relating to exceptions of the one-year filing deadline, holding that petitioner "cannot overcome the jurisdictional bar against reviewing discretionary decisions by cloaking rationale he does not agree with as a legal error." Finally, the court upheld the agency's denial of the petitioner's applications for withholding of removal and CAT protection.

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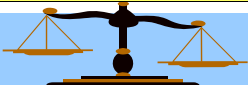
■ Seventh Circuit Holds that The BIA Erred in Adopting an Overly Narrow Interpretation of 8 C.F.R. § 1003.2(c)(3)(ii)

In *Joseph v. Holder*, 579 F.3d 827 (7th Cir. 2009) (Rovner, Wood,

Aykes), the Seventh Circuit, in a case which had been previously remanded, held that the BIA erred in interpreting 8 C.F.R. § 1003.2(c)(3)(ii) to require a "dramatic change" in country conditions to justify the untimeliness of an asylum applicant's motion to reopen removal proceedings. Petitioner, a Pakistan citizen, claimed that she faced either a forced marriage or the prospect of living as a single Christian woman without familial support" if returned to her country. She argued that these were changed circumstance that could warrant reopening her removal proceedings. The court in its initial decision, remanded the case to the BIA to consider that aspect of her claim. On remand, the BIA, after considering the claim, again denied the motion to reopen.

The court ruled that the BIA committed legal error because "the plain language of the regulation also does not restrict the concept of 'changed circumstances' to some kind of broad social or political

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change in the country, such as a new governing party, as opposed to a more personal or local change.”

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■ Seventh Circuit Holds that Relevant Evidence Supporting Petitioner's Claim of Non-Receipt of Notice Was Not Considered

In *Dakaj v. Holder*, 580 F.3d 479 (7th Cir. 2009) (Bauer, Ripple, Tinder) (*per curiam*), the Seventh Circuit held that the BIA failed to consider all relevant evidence when it rejected the petitioners' claim that they had not received the notice of briefing schedule and denied their motion to file their brief out-of-time. Petitioners, citizens of Albania, were seeking asylum claiming fear of persecution on account of their anticommunist views and their support for the Democratic Party.

The court inferred that in light of petitioner's "demonstrated commitment to the asylum process" which they had demonstrated by not missing any other court deadlines, and "the strong interest in setting forth their position in their briefs to the Board," that had they received the notice, petitioners would have complied. Accordingly, the court remanded the case to the BIA to consider the relevant factors supporting the petitioners' claim of non-receipt and to redetermine, in light of those factors, whether it would accept their motion to file their brief out-of-time.

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EIGHTH CIRCUIT

■ Eighth Circuit Concludes that Investigative Costs Constitute Loss to the Victim Under INA § 101(a)(43)(M)(I)

In *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009) (Murphy, Arnold, *Grunden*), the Eighth Circuit ruled that the \$29,800 that the alien's former em-

ployer spent to investigate a breach of its computer network, which resulted in the alien's conviction for unauthorized access to a protected computer under 18 U.S.C. § 1030, constituted a loss to the victim under § 101(a)(43)(M)(I), which defines as an aggravated felony "an offense that involves fraud or deceit in which the loss to the victim . . . exceeds \$10,000." The court also ruled that it had jurisdiction to review whether the BIA applied the correct legal standard in determining that the alien was convicted of a particularly serious crime, which made him statutorily ineligible for withholding of removal.

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■ Eighth Circuit Affirms Judgment of District Court, Holding that USCIS' Revocation of a Visa Petition Approval Is a Discretionary Action Not Subject to Judicial Review

In *Abdelwahab v. Frazier*, 578 F.3d 817 (8th Cir. 2009) (*Loken*, Ebel, Clevenger), the Eighth Circuit affirmed the district court's decision granting the government's motion to dismiss. The court found that USCIS's revocation of a approved immigrant worker visa petition is a discretionary action within the meaning of the INA and thus not subject to judicial review.

The court also rejected petitioner's contention that USCIS acted *ultra vires*, finding that the issue of whether properly delegated authority was exercised by the proper agency official was not a "predicate legal question" that conferred jurisdiction.

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■ Eighth Circuit Remands for The BIA to Address Alien's Humanitarian Asylum Claim

In *Hernandez v. Holder*, 579 F.3d 864 (8th Cir. 2009) (Murphy, Melloy, and *Shepard*), the Eighth Circuit remanded the asylum case of a

Guatemalan applicant to the BIA for a determination of whether he merits humanitarian asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(B) based on his claim of facing "other serious harm" should he return to his homeland. Specifically, upon rejecting arguments relating to due process, *nunc pro tunc* asylum, administrative closure, and the continuance of proceedings, the court determined that remand was warranted as the BIA failed to adequately address the exhausted humanitarian asylum claim.

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NINTH CIRCUIT

■ Ninth Circuit Holds that Alien From Indonesia Is Entitled to Remand for Consideration of Female Genital Mutilation Claim

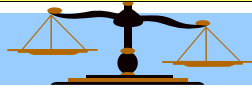
In *Benjamin v. Holder*, 579 F.3d 970 (9th Cir. 2009) (B. Fletcher, McKeown, N.R. Smith), the Ninth Circuit affirmed the agency's denial of asylum based on the asylum applicant's alleged membership in a particular social group consisting of Muslim men married to Catholic women in Indonesia. However, the court remanded for the agency to consider whether the alien may qualify for derivative asylum to avoid constructive deportation based on his daughter's past female genital mutilation and other daughter's possible future female genital mutilation in Indonesia.

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■ Ninth Circuit Holds that Alien's Admissions Do Not Support a Finding of Removability Based on a California Drug Conviction

In *S-Yong v. Holder*, 578 F.3d 1169 (9th Cir. Aug. 25, 2009) (*Cudahy*, Pregerson, Hawkins), the Ninth Circuit reversed the BIA's determination that an alien removable

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based on a conviction relating to a controlled substance was ineligible for relief based on an aggravated felony conviction. The alien admitted the facts of the conviction and that the conviction was for a controlled substance. The court held that because the statute was divisible, the alien's admissions could not be used to determine removability in the absence of a conviction record. The court additionally noted that for the same reasons, the alien's admissions could not be used to support the conclusion that the alien was barred from seeking relief.

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■ Ninth Circuit Holds that Two California Solicitation Crimes to Commit Rape and Assault Qualify as a Crime of Violence Under 18 U.S.C. § 16(b)

In *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009) (*Clifton*, Silverman, Smith), the Ninth Circuit held that convictions for solicitation to commit rape by force, in violation of California Penal Code § 653f(c), and solicitation to commit assault by means of force likely to produce great bodily injury, in violation of California Penal Code § 653f(a), constitute crimes of violence under 18 U.S.C. § 16(b), and thus constitute aggravated felonies under INA § 101(a)(43)(F). Accordingly, the court found that it lacked jurisdiction of Prakash's petition under INA § 242(a)(2)(C).

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■ Ninth Circuit Holds that an Alien Does Not Gain "Grandfathered" Status under INA § 245(i) Through Post-Adjustment Marriage to a Grandfathered Permanent Resident

In *Landin-Molina v. Holder*, 580 F.3d 913 (9th Cir. 2009) (Trott, McKeown, Ikuta), the Ninth Circuit affirmed the denial of adjustment of status to an alien who, after entering the United

States unlawfully, married a lawful permanent resident who had previously adjusted her status as a "grandfathered" alien under INA § 2455(i)(1)(B). The court held that the wife's grandfathered status was not imputed to her husband because the qualifying spousal relationship did not exist at the time of the wife's adjustment. The court also held that an alien's registration under the Replenishment Agricultural Worker program does not grandfather eligibility for adjustment of status under INA § 245(i)(1)(B)(ii).

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■ Ninth Circuit Holds that USCIS's Denial of an "Extraordinary Ability" Visa was Not Arbitrary, Capricious, or Contrary to Law

In *Kazarian v. U.S. Citizenship and Immigration Services*, 580 F.3d 1030 (9th Cir. 2009) (*Nelson*, Thompson; Pregerson, dissenting), the Ninth Circuit affirmed the district court's grant of summary judgment to the Administrative Appeals Office's (AAO) finding that the denial of an "extraordinary ability" visa was not arbitrary, capricious, or contrary to law. Plaintiff filed an application for an employment-based immigrant visa for "aliens of extraordinary ability," contending that he was an alien with extraordinary ability as a theoretical physicist. The court held that substantial evidence supported all of the AAO's findings that plaintiff did not meet any of the regulatory criteria to qualify for an "extraordinary ability" visa.

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■ Parent's Lawful Permanent Resident Status May be Imputed to Her Child to Satisfy the Five-Year Requirement in 8 U.S.C. § 1229b(a)

In *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009) (Farris, Graber, Wardlaw), the Ninth Circuit

overturned *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), and held that the rationale of *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), extends to allow a parent's lawful permanent resident status to be imputed to an unemancipated minor child residing with that parent for purposes of satisfying the five-year permanent residence requirement for cancellation of removal under INA § 240A(a)(1). The court concluded that the BIA's decision in *Escobar* was not entitled to deference because it was based on the same interpretation of § 240A(a) rejected in *Cuevas-Gaspar*.

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■ Ninth Circuit Upholds Immigration Relief Bar for Terrorist Activities

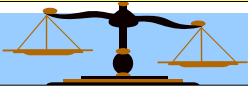
In *Khan v. Holder*, 580 F.3d 1102 (9th Cir. 2009) (*Nelson*, Fletcher, Tallman), the Ninth Circuit affirmed the BIA's ruling that Khan was statutorily ineligible for asylum and withholding of removal because he engaged in terrorist activity by raising funds for a terrorist organization, the Jammu Kashmir Liberation Front. The court held that the definition of "terrorist activity" under the INA was not overbroad or vague, and rejected Khan's argument that the terrorist bar conflicts with the U.N. Protocol Relating to the Status of Refugees and other international agreements.

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■ Attempted Kidnapping Under Cal. Penal Code § 207(a) Is an Aggravated Felony Because It Is a Crime of Violence

In *Delgado-Hernandez v. Holder*, 582 F.3d 930 (9th Cir. 2009) (Hawkins, McKeown, Bybee) (*per curiam*), the Ninth Circuit held that attempted kidnapping under Cal.

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Penal Code § 207(a) qualifies as a crime of violence under 18 U.S.C. § 16(b), because although it is possible to commit kidnapping without physical force, in the ordinary case force will be present and, in any event, all kidnapping cases carry a substantial risk that force will be used.

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■ Ninth Circuit Holds a Conviction for Receipt of Stolen Property Under California Penal Code § 496(a) Is Categorically a Theft Offense

In *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. Sept. 14, 2009) (Silverman, Smith, *Clifton*), the Ninth Circuit held that a felony conviction for receipt of stolen property under Cal. Penal Code § 496(a) categorically qualifies as an aggravated felony theft offense, rendering the alien ineligible for cancellation of removal. The court rejected the alien's argument that section 496(a)'s use of the term "aids" extends the statute to cover someone who was only an accessory after the fact, and that accessory liability does not rise to the level of an aggravated felony.

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ELEVENTH CIRCUIT

■ An Alien Found Deportable for Sexual Abuse of a Minor Is Ineligible for a Waiver of Inadmissibility Under Former § 212(c)

In *De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009) (Dubina, Birch, Wilson) (*per curiam*), the Eleventh Circuit held that an alien found deportable as an aggravated felon for a sexual abuse of a minor conviction was statutorily ineligible for a waiver of inadmissibility under former INA § 212(c), because the basis for deportability had no specific statutory counterpart to any of the grounds of inadmissibility. The court affirmed

the comparable grounds test articulated in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), which assesses comparability solely on the basis of the statutory text of the deportability and inadmissibility grounds, rather than on whether the criminal conduct itself could potentially trigger an inadmissibility charge.

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DISTRICT COURTS

■ District Court for the District of Columbia Dismisses Adjustment-of-Status Review Claim by Diplomat for Lack of Jurisdiction

In *Maalouf v. Wiemann*, ___ F. Supp. 3d ___, No. 1:08-cv-2177 (D.D.C. Sept. 16, 2009) (*Leon, J.*), the district court held in a published decision that it lacked jurisdiction to consider plaintiff's claim under the Administrative Procedure Act because removal proceedings currently are pending against her, and she can renew her claim before the immigration judge. Accordingly, plaintiff failed to exhaust as required by the exclusive review scheme under the INA. Plaintiff is a citizen and native of Lebanon who entered the United States as an accredited government employee for the embassy of the United Arab Emirates. She brought a challenge to the agency's denial of her application to adjust status.

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■ Central District of California Holds DHS Post-Order Custody Review Process Is Constitutional

In *Diouf v. Holder*, No. 06-cv-07452 (C.D. Cal. Sept. 9, 2009) (*Hatter, J.*), the district court held that an alien detained after entry of his removal order received adequate procedural due process when he received custody reviews conducted by removal officers in connection with his detention, and is therefore not enti-

tled to the additional due process of a bond hearing. The court distinguished the facts of this case from *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), wherein the alien was detained under a different Immigration and Nationality Act (INA) provision because he was seeking judicial review of a final order of removal and, accordingly, was deemed to be entitled to a bond hearing. In contrast, the alien in this lawsuit was detained under the post-order custody section of the INA and sought review of a denial of a motion to reopen after he exhausted all other judicial review of his order of removal. Thus, the court held that an alien detained under the post-order custody section receives sufficient procedural due process through the post-order custody review process, and the court denied the alien's request for a preliminary injunction.

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■ District of Montana Denies Due Process Habeas Challenge to Expedited Removal Proceedings

In *Menendez v. Holder*, No. 09-cv-48 (D. Mont. Sept. 17, 2009) (*J. Lovell*), the district court denied the alien's habeas challenge to her being subject to expedited removal proceedings, rather than routine removal proceedings. The court concluded that its jurisdiction over the habeas petition was limited to three inquiries by the INA. The court then concluded the permissible inquiries supported the removal order and the court lacked jurisdiction to proceed further because: (1) the alien admitted she was not a United States citizen, (2) the alien made no claim that she was a lawful permanent resident or had been granted asylum or refugee status, and (3) the record revealed that the alien had been ordered removed on August 13, 2009.

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INSIDE OIL

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 majoring in English, Political Science and Philosophy, and her J.D. and M.A. in International Affairs from American University. In 2005, Laura was a summer legal intern with OIL. Following law school, she practiced at Jones Day. Prior to joining OIL, Laura clerked for Chief Judge Eric Washington on the D.C. Court of Appeals.

Karen L. Melnik received her B.A. from the University of Michigan and her J.D. from the Washington College of Law, American University. Following law school, Karen clerked for the Judge Linda Turner, Superior Court for the District of Columbia, and later for the Judge William M. Jackson, also of the Superior Court for D.C. Prior to joining OIL, Karen was an AUSA for the District of Columbia, and an Associate Counsel for USCIS.

Allison Frayer (née Hoffmann) received her B.A. from Bucknell University in International Relations and French and her J.D. from American University Washington College of Law. Prior to coming to OIL, she was Judicial Law Clerk for the Arlington Immigration Court.

Katherine Smith received her B.A. in 2002 from Whitworth University, majoring in International Studies and French, and her J.D. in 2007 from Tulane University Law School. Katherine has spent the past two years clerking for the Executive Office for Immigration Review at the San Francisco Immigration Court.

Nicole Thomas-Dorris is a graduate of the California Western School of Law in San Diego, California, and Point Loma Nazarene University, also in San Diego. Prior to joining OIL she was a Judicial Law Clerk at the San Diego Immigration Court from 2008 to 2009.

Lisa Morinelli received a B.A. from Saint Louis University in 2005 and a

J.D. from the University of Nebraska College of Law in 2008. Prior to joining OIL, Lisa served as a Judicial Law Clerk with the Executive Office for Immigration Review at the Immigration Court in New York, NY.

Angela M. Olsen received her A.B. from Hamilton College, majoring in English literature; her M.S. in cellular and molecular biology from Catholic University; and her J.D. from American University, Washington College of Law. Prior to joining OIL, Angela practiced at Latham & Watkins. Prior to that time, she practiced for six years at Jones Day, focusing on complex litigation matters.

Eddie Cohen received his B.A. from the University of California, San Diego, majoring in Political Science, and his J.D. from the University of California, Davis. Following law school, Eddie served as a Judicial Law Clerk for the Executive Office of Immigration Review at the Los Angeles Immigration Court.

Catherine B. Bye received her B.A. from Mount Holyoke College, where she double-majored in English and Classics. She received her J.D. from Suffolk University Law School. After law school, Catherine was a Judicial Law Clerk with the York Immigration Court through the Honors Program.

Rachel Browning joined OIL through the Attorney General Honors Program. She is a graduate of the Eastman School of Music in Rochester, NY) and the University of Houston Law Center. During law she participated in legal internships with the U.N. International Tribunal for the Former Yugoslavia and Special Court for Sierra Leone in The Hague, The Netherlands. Ms. Browning was a professional musician for ten years, and served honorably in the United States Coast Guard as a member of the U.S. Coast Guard Band from 1999 until 2003.

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OIL cheers Trial Attorney **Beth Young** who ran the New York marathon in the amazing time of 3:09:31. To those of you who are not in the know about the nuances of distance running, Beth's performance is nothing short of phenomenal.

INSIDE OIL

OIL welcomes the following new Trial Attorneys:

Kirsten (Keri) Daeubler received her B.A. from Brown University in 2003, with a concentration in Political Science, and her J.D. from The George Washington University Law School in 2006. Following law school, Keri joined the Corporate & Securities group of Reed Smith LLP in Philadelphia, PA, where she worked as an associate prior to joining the DOJ.

Matthew B. George ("Matt") received his B.A. from the University of Virginia, majoring in Physics and Chemistry, and his J.D. from the William & Mary School of Law. Following law school, Matt was a Staff Attorney for the Eleventh Circuit Court of Appeals, where he worked on a number of immigration ap-

peals. He then clerked for Judge Frank Hull on the Eleventh Circuit and later for District Judge Jack Camp in the Northern District of Georgia. Prior to joining OIL, Matt was a Trial Attorney with the Tax Divi-

sion where he litigated civil tax cases primarily in Ohio and Michigan.

Laura Halliday Hickein received her B.A. from the University at Buffalo, *(Continued on page 15)*



Standing: Katherine Smith, Matthew George, Lisa Morinelli, Allison Frayer, Nicole Thomas-Dorris, Yedidya "Eddie" Cohen. **Sitting:** Angela Olsen, Laura Hickein, Karen Melnik, Catherine Bye, Kristofer McDonald, Rachel Browning.

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.



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authority to administer the
Immigration and Nationality
laws of the United States"*

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