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SPECIAL SUPPLEMENT: DISTRICT COURT CASES

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SUPREME COURT SUMMARILY REVERSES NINTH CIRCUIT'S DECISION NOT TO REMAND ASYLUM CASE INVOLVING "CHANGED CIRCUMSTANCES"

Finding that the Ninth Circuit had "seriously disregarded the agency's legally mandated role," the Supreme Court, in a *per curiam* opinion, reversed the judgment below on the basis that the asylum case should have been remanded to the BIA to address in the first instance, the issue of "changed circumstances" in Guatemala. ***INS v. Ventura***, No. 02-29 (U.S. Nov. 4, 2002).

The Ninth Circuit "seriously disregarded the agency's legally mandated role."

The applicant in *Ventura*, a citizen of Guatemala, had entered the United States illegally in 1993. In his asylum application he asserted that he would be killed by members of a Guatemalan guerilla organization if he was returned to Guatemala. Ventura testified that the guerillas had left messages at his house implying that harm would come to himself and his family if he did not join the guerillas' cause. The Immigration Judge denied asylum, finding the case controlled by *Elias-Zacarias* where the Supreme Court held that a Guatemalan, who refused to join a guerilla group, had not shown persecution on account of a protected ground. As an additional basis, the Immigration Judge denied asylum based on changed country conditions. On appeal, the BIA considered the matter *de novo* and agreed with the Immigration Judge that Ventura had not met his burden of establishing eligibility for asylum. The BIA noted that it did not need to address the question of "changed conditions" in Guatemala.

The Ninth Circuit reversed the BIA and granted the Ventura asylum as well as withholding of deportation. The court held that the guerillas' threats and efforts to recruit Ventura constituted past persecution on account of imputed political opinion. The court also found that a State Department report in the record was insufficient to rebut the presumption of a well-founded fear of future persecution, even though the BIA had not reached that issue. Although both parties had asked the Ninth Circuit to remand the case to the BIA, it declined to do so on the ground that "it would be compelled to reverse the BIA's decision if

(Continued on page 9)

THIRD CIRCUIT UPHOLDS CLOSED HEARING FOR SPECIAL INTEREST CASES

In *North Jersey Media Group, Inc. v. Ashcroft*, __F.3d__, 2002 WL 31246589 (3d Cir. October 8, 2002) (*Becker, C.J.*, Greenberg; Scirica (dissenting)), the Third Circuit reversed a district court decision enjoining enforcement of a September 21, 2001, directive issued by Chief Immigration Judge Michael J. Creppy, which closed removal hearings in cases involving aliens of "special interest" to the government's ongoing terrorism investigation ("Creppy directive"). The *North Jersey Media* case was filed by a consortium of media groups who claimed a qualified First Amendment right to attend immigration hearings that were closed pursuant to the Creppy directive. The district court accepted the plaintiffs' claim of a First Amendment right of

(Continued on page 2)

BORDER PATROL STOP OF PICK-UP TRUCK CAUSES DISPUTE AMONG NINTH CIRCUIT JUDGES

Calling the opinion "dangerous and contrary to law," six judges dissented from a Ninth Circuit order denying rehearing *en banc* in ***United States v. Sigmond-Ballesteros***, 285 F.3d 1117 (9th Cir.) *reh'g en banc denied* __F.3d__, 2002 WL 31387527 (9th Cir. Oct. 2002), a case involving the legality of a U.S. Border Patrol stop near the Mexican border.

The case arose on January 27, 2000, at 4:20 a.m., when a Border Patrol Agent stopped a F350 Ford pick-up truck with a camper shell. A subsequent search revealed eighteen individuals, most of them undocumented aliens, lying on a blanket in the rear area of the truck. The driver was arrested and charged with trans-

(Continued on page 5)

Highlights Inside

REINSTATEMENT AND COLLATERAL ATTACKS	3
SUMMARIES OF RECENT COURT DECISIONS	6
HOW TO ANALYZE DISTRICT COURT CASES	10
INSIDE OIL	16

CLOSED HEARINGS

(Continued from page 1)
access, and further found that the directive's blanket closure of "special interest" immigration cases was not narrowly tailored to serve the government's interest in preventing harm to its terrorism investigation, which could result from broad dissemination of information relating to such cases. *See North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp.2d 288 (D.N.J. 2002).

The Third Circuit agreed with the district court that the case was governed by the First Amendment test developed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), a murder case in which the trial judge had ordered the courtroom cleared of all persons except witnesses. Under *Richmond Newspapers* and its progeny, the existence of a constitutional right of access to a trial proceeding is measured under a two-part "experience and logic" test. That test asks first whether a particular proceeding has a history of openness, and then, whether public access to the proceeding plays a positive role in the proceeding. Throughout the *North Jersey Media* litigation, the Government has consistently maintained that the *Richmond Newspapers* test has no application to administrative proceedings, which are subject to FOIA and other statutory and regulatory constraints on public access. In accepting the *Richmond Newspapers* test as the framework for evaluating the plaintiffs' claimed constitutional right of access, the court did not disagree with the Government's reasoning, but found that controlling Third Circuit precedent has already established that the test is broadly applicable to issues of access to government proceedings, including administrative proceedings.

The Third Circuit held, however, that the plaintiffs' claimed right of access to administrative removal hearings failed both prongs of the experience and logic test. With respect to the "experience" requirement, the court initially observed that the right of access to judicial proceedings was implicit in the First Amendment because the framers had drafted the Constitution in face of an unbroken history of public access to criminal trials dating from the earliest days of Anglo-American law. The Third Circuit found no comparable history of access to proceedings of the political branches. Indeed, the court noted that our democracy was itself created behind closed doors, as the delegates of the Constitutional Convention in Philadelphia in 1787 excluded the public from their proceedings. This observation appears to respond directly to Judge Keith's recent pronouncement in *Detroit Free Press v. Ashcroft*, __ F.3d__, 2002 WL 1972919 (6th Cir. August 26, 2002), a decision addressing a nearly identical challenge to the Creppy directive, that "democracies die behind closed doors."

Turning to plaintiffs' specific claim, the Third Circuit acknowledged a current regulatory presumption of access to most deportation proceedings, but found that the presumption had "neither the pedigree nor uniformity necessary to satisfy *Richmond Newspapers's* first prong." In this regard, the court observed that, in practice, deportation hearings frequently have been closed to the general public, or, since the early 1900s, conducted in prisons and other places where there is no general right of access. And, absent any affirmative expression of congressional intent to hold open deportation hearings, the court was unpersuaded that a tradition of public access to such proceedings could be inferred from the statutory closure of exclusion proceedings to the public: the court declined to "craft a Constitutional right from mere Congressional silence, especially when faced with evidence that some deportation proceedings were, and are, explicitly closed to the public or conducted in places unlikely to allow general public access." The court concluded that "a recent and rebuttable regulatory presumption is hardly the stuff of which Constitutional rights are forged."

So, too, the Third Circuit found that plaintiffs' claim failed the *Richmond Newspapers*' logic prong. The court acknowledged that public access performed many "salutory functions" in deportation proceedings, such as promoting an informed discussion of government affairs and serving as a check on any corrupt practices by exposing the hearing process to public scrutiny. However, the court opined that the Supreme Court could not have intended for the positive functions served by public access to the sole consideration on the logic prong: "to gauge accurately whether a role is positive – the calculus must perforce take account of the flip side, the extent to which openness impairs the public good." The court found that the government had "presented substantial evidence that open deportation hearings would threaten national security." The court relied heavily on a declaration submitted by Dale Watson, the FBI's former Executive Assistant Director for Counterterrorism and Counterintelligence, which presents a range of potential dangers of open hearings in immigration cases associated with the government's terrorism investigation. Factoring these concerns into the *Richmond Newspapers*' "logic equation," the court concluded that it is "doubtful that openness promotes the public good in this context." In view of its holding that the public has no First Amendment right of access to administrative removal proceedings, the court did not reach the issue of whether the Creppy directive was narrowly tailored to serve the government's national security and law enforcement interests.

In upholding the constitutionality of the Creppy directive, the Third Circuit established a sharp circuit split on the question of First Amendment rights of access to immigration proceedings. On August 26, 2002, the Sixth Circuit held in *Detroit Free Press v. Ashcroft* that the First Amendment rights of the press and the public were violated by application of the Creppy directive in the case of an individual alien, Rabih Haddad, whose case is of "special interest" to the terrorism investigation.

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DEFENDING AGAINST COLLATERAL ATTACKS ON EXECUTED IMMIGRATION ORDERS AFTER REINSTATEMENT

The issue of whether an alien may collaterally attack a prior immigration order after that order has been executed through the alien's removal, and the alien subsequently reenters the country, has arisen from time to time in immigration jurisprudence. *See*, *e.g*., Lara *v. Trominski*, 216 F.3d 487, 493 (5th Cir. 2000) (applying "gross miscarriage of justice" test to determine if alien could collaterally attack deportation order); *Matter of Roman*, 19 I & N Dec. 855, 856 (1988) (same). This issue, however, has taken on added significance in both civil immigration and criminal reentry proceedings in light of Congress' enactment of a new reinstatement statute in 1996, and the Supreme Court's recent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

The statute reflects Congress' determination that an illegally reentering alien had sufficient opportunity to challenge the prior order in his original immigration proceedings and should not have a "second bite at the apple" after his reentry.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 ("IIRIRA"), Congress enacted a new reinstatement statute at 8 U.S.C. § 1231(a)(5) (2000), which authorizes the Attorney General to reinstate a previously executed removal order of an illegally reentering alien and to remove the alien without additional administrative proceedings. Notably, for purposes of this article, the statute provides that the prior immigration order is not subject to being "reopened or reviewed." The statute reflects Congress' determination that an illegally reentering alien had sufficient opportunity to challenge the prior order in his original immigration proceedings and should not have a "second bite at the apple" after his reentry. *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173-74 (9th Cir. 2001).

Increasingly, aliens have sought to attack their previously-executed orders in federal courts based on legal developments that occurred *subsequent* to the alien's deportation from the United States, such as the ruling by the Supreme Court in *St. Cyr*, 533 U.S. 289. In *St. Cyr*, the Supreme Court held that certain aliens who plead guilty to their disqualifying crimes prior to the enactment of the 1996 immigration reforms, remain eligible for relief under former Section 212(c) of the Immigration and Nationality Act ("INA") despite those criminal convictions. *Id*. at 293. The government has taken the position that *St. Cyr* does not apply to those aliens who had already been deported prior to *St. Cyr*. Some of these aliens, who illegally reentered the country, either prior to the decision in *St. Cyr* or following it, have attempted to revisit the legality of their prior orders by filing suits in federal court arguing that their prior orders are no longer valid and that they should be afforded a Section 212(c) determination under *St. Cyr*. In almost all of these cases, the suits have arisen in the context of the Attorney General's reinstatement of the prior order under 8 U.S.C. § 1231(a)(5), after the alien illegally returned to the United States.

This article surveys the arguments that aliens have made in support of their collateral attacks against prior immigration orders in reinstatement cases, and provides guidance as to what legal defenses are available to the government, both jurisdictionally and on the merits.

First, as to jurisdiction, aliens have argued that the reinstatement statute's bar on "review" does not preclude habeas corpus review in district court. They argue that such review is required pursuant to the habeas corpus statute and under the due process clause of the Constitution. With regard to the claim of statutory habeas review under 28 U.S.C. § 2241, aliens argue that Section 1231(a)(5)'s bar makes no mention of precluding such review and therefore habeas review must be available under the jurisdictional analysis set forth by the Supreme Court in *St. Cyr*.

This argument ignores a fundamental difference between the Petitioner in *St. Cyr* and these aliens. First, an alien whose order has been reinstated has already received an opportunity for administrative and judicial review of the underlying immigration order in the *prior* immigration proceeding. In contrast, the alien in *St. Cyr* was seeking review of his deportation order for the first time and, according to the Supreme Court, had no other avenue of review available. 533 U.S. at 305. In these circumstances, the Court interpreted the statutes to avoid the thorny constitutional question of whether Congress can preclude all judicial review of an immigration order. *Id.* It is unnecessary to invoke such a rule of judicial construction in the reinstatement context where the alien previously had the opportunity for judicial review.

Aliens have also argued that judicial review of the old order is required by the Constitution. In support of this argument, aliens have relied on the Supreme Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987), which held that due process requires an opportunity for collateral review of a deportation order in a subsequent criminal prosecution for unlawful reentry, where the prior deportation is an element of the crime and where substantial defects in the underlying administrative proceedings foreclosed direct judicial review of the original immigration proceedings.

Several responses to this argument are appropriate, the most obvious of which is that *Mendoza-Lopez*, 481 U.S. 828, has no application in civil proceedings. Nothing in the Constitution requires that an alien have repeated opportunities to seek judicial review of the

(Continued on page 4)

DEFENDING REINSTATED ORDERS

(Continued from page 3)
same removal order following his removal from the country and his subsequent illegal reentry. Indeed, the Supreme Court in *Mendoza-Lopez*, 481 U.S. 828, went out of its way to emphasize that these collateral attacks are limited to criminal proceedings. *Id.* at 839 n.17. In a significant decision in the Ninth Circuit, the court applied Section 1231(a)(5)'s preclusion of review to reject the alien's collateral attack. *Alvarenga-Villalobos*, 271 F.3d 1169. In so doing, the Ninth Circuit distinguished the Supreme Court's decision in *Mendoza-Lopez* by stating that "the requirements are less stringent for orders used in non-criminal deportations." *Alvarenga-Villalobos, supra* at 1173.

In addition to the arguments cited above, we also have additional arguments that should made in this context. Even under the analysis set forth by the Supreme Court in *Mendoza-Lopez*, an alien may collaterally attack a prior order in criminal proceedings only by meeting several stringent requirements, including establishing that "the alien was deprived of the right to judicial review in the initial proceeding" and demonstrating that the initial proceeding was fundamentally unfair. *Id.*; 8 U.S.C. § 1326(d)(2), (3) (2000). Furthermore, Congress has codified *Mendoza-Lopez* by statute at 8 U.S.C. § 1326(d), which further requires an alien to demonstrate that he had exhausted his administrative remedies in the prior proceedings. 8 U.S.C. § 1326(d)(1). Accordingly, litigators should determine whether such arguments can be made in their cases. *See Alvarenga-Villalobos*, 271 F.3d 1169 (holding that, even if § 1231(a)(5) permitted a collateral challenge to the underlying deportation order, Alvarenga-Villalobos could not succeed where he failed to exhaust his administrative remedies or demonstrate that he was deprived of judicial review in his prior proceedings). *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002) (rejecting alien's collateral attack because he could not establish prejudice in light of the discretionary nature of Section 212(c) relief).

In many cases, aliens will argue that it is unfair and unjust to preclude all review of the prior order, particularly where a claim is made that they did everything correctly in their prior proceedings but that they were prejudiced by circumstances outside their control, such as ineffective assistance of counsel or lack of notice of an immigration hearing. In these instances, it is often helpful to remind the court of the countervailing equities in the government's favor.

First, if the alien is asserting a persecution or torture claim, we should remind the court that reinstated aliens have an opportunity to apply for withholding of removal and protection under the Convention against Torture before an asylum officer and immigration judge. 8 C.F.R. §§ 241.8(e); 208.31 (2001). Second, we should emphasize that the alien chose an illegal option over a legal one to remedy his situation. Instead of violating the criminal and immigration laws of the United States by illegally reentering the country, the alien should have gone to the U.S. Consulate and requested the Attorney General to exercise his discretion favorably by granting permission to the alien to reenter the country. 8 U.S.C. § 1182(a)(9)(A)(iii)(2000) (providing exception to statutory bar to reentry). In this context, the alien can make his legal and equitable arguments as to why he should be allowed to reenter the country. Third, we should emphasize the finality concerns undergirding Congress' preclusion of review over executed orders.

Government litigators should also consider asserting a *res judicata* defense in suits which challenge a previously litigated and executed removal order. In essence, this is closely related to the Supreme Court's requirement in *Mendoza-Lopez*, that the alien demonstrate that he was previously deprived of judicial review. If an alien has previously litigated the merits of his deportation order, res judicata precludes him from doing so again. *See DiGrado v. Ashcroft*, 184 F. Supp.2d 227, 233-34 (N.D.N.Y. 2002) (asserting doctrine of res judicata as precluding a Section 212(c) habeas challenge to the executed immigration order where the order had been previously litigated in immigration proceedings); *see also* 8 U.S.C. § 1252(d)(2)(2000).

The government also has strong arguments on the merits in these types of cases where the alien's suit to the previously-executed order is based on legal precedent that was issued *after* the execution of his order. First, the mere fact that the law changed at a later date does not rise to the level of a due process violation and therefore does not render an alien's prior removal hearing fundamentally unfair such that he may collaterally attack that hearing under the reasoning of *Mendoza-Lopez*, 481 U.S. 828. Fundamental fairness is an issue of *procedural* due process and the simple assertion that, at a later point in time, the Supreme Court or another court disagreed with the Board's interpretation of a federal statute does not create a procedural violation sufficient to mount a collateral attack. *See Mendoza-Lopez*, 481 U.S. 828; *U.S. v. Hernandez*, 170 F. Supp. 700 (N.D. Tex. 2001) (holding that the decision in *St. Cyr* cannot be used to collaterally attack already executed removal order); *but see U.S. v. Diaz-Nin*, 2002 WL 334918 (D. V.I.) (concluding that, in light of the decision in *St. Cyr*, alien's pre-*St. Cyr* deportation order was unlawful).

Finally, even if an alien were able to navigate his way through all of the arguments discussed above, the government has a powerful argument that a new legal precedent, such as *St. Cyr*, simply does not invalidate a previously executed order because the alien's immigration case is closed. The Supreme Court's repeated holding that new judicial decisions are applied "retroactively" solely to matters on *direct review* reflects the well-established principle that judgments are final. New interpretations of civil law do not apply retroactively to cases

(Continued on page 5)

DEFENDING REINSTATEMENT

(Continued from page 4)

that are closed. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

This point is particularly compelling in the immigration context where the finality of immigration orders is integral to maintaining effective control of the country's borders. Clearly, the issuance of a final immigration order and execution of that order by the removal of the alien presents a quintessential example of a civil case that is "closed" and not subject to re-litigation under governing Supreme Court authority.

As the Supreme Court has stated, "'[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.'" *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542 (1991)) (internal citation omitted).

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NOTED

TOUGH VISA SCREENING SLOWS MAIL-ORDER BRIDES

According to the Washington Post, "one of the less-noted after effects of the war on terrorism has been an abrupt halt in the U.S. importation of mail-order brides." "We've got hundreds of women in limbo," says one husband-to-be who has formed a support group. A State Department spokesman "points out that the stricter security checks for all nonimmigrant visas have been in place only a little more than three months -- not a long time in the universe of bureaucratic paper-shuffling." Visa approval times vary depending upon which country the fiancé is from, notes the paper.

BORDER DISPUTE

(Continued from page 1)

porting illegal aliens. The defendant sought to suppress the evidence obtained as a result of the stop but the district denied the motion. The defendant then pled guilty but reserved his right to appeal the denial of the motion.

The Ninth Circuit (Ferguson, *Tashima*, and Fisher) reversed the district court finding that the stop was unlawful under the Fourth Amendment. The court also stated that its analysis of the case was guided by the recent Supreme Court's opinion in *United States v. Arvizu*, 534 U.S. 2666 (2002), where the Court had reaffirmed that the "totality of the circumstances" test for determining the legality of a stop.

"Here we go again. The decision that we have decided not to rehear en banc defies a Supreme Court decision that reversed a previous decision of ours."

Among the factors that the panel considered were the driving behavior of the defendant: the defendant's hand gestures when he attempted to obscure the view of his face; the notoriety of the route, Highway 86, for smuggling; the type of vehicle driven by the defendant; the character of the particular traffic pattern for that time of the day; the proximity to the border; and, the missing rear seat of defendant's truck. The panel found that each of these factors were of little of no probative value in determining whether the Border Patrol Agent had reasonable suspicion to stop the truck. The panel said that since these factors were of no value, it was left with the following picture: "A man driving a large pick up truck northbound on Highway 86 at 4:20 in the morning." That "profile" said the court, depicts a large category of presumably innocent travelers and consequently did not justify the stop.

The government then petitioned the court for rehearing en banc. A vote for rehearing was taken but the vote failed to secure a majority of the nonrecused, active judges of the Ninth Circuit. Accordingly the petition was denied. Six judges (*Kleinfeld*, Kozinski, O'Scannlain, T. Nelson, Gould, and Tallman) however, issued a strongly-worded dissent reflecting the court's sharp division on this issue. The dissenters' view is expressed in the opening sentences: "Here we go again. The decision that we have decided not to rehear en banc defies a Supreme Court decision that reversed a previous decision of ours, making the identical error, arguably creates a mistaken rule on 'profiling,' and reduces America's ability to patrol its borders." The dissenters note that after the court in *Arvizu* "dismembered the Border Patrol Agent's list of reasons for suspicion, the Supreme Court dismembered our opinion . . .Yet the panel opinion in *Sigmond-Ballesteros* does exactly what the *Arvizu* panel did, and does it in the same way, citing and quoting the right rule but not following it." The dissent notes that after *Arvizu*, the panel's approach "splits the circuits into five that take the factors together, and one that separates then and discounts those that might be part of a 'profile' or are lawful or consistent with innocent conduct."

"We have very open borders, which is a fine thing," concluded the dissent. "And we have Border Patrol Agents to reconcile our openness with a bare minimum of national security and immigration control. *Sigmond-Ballesteros* takes away the opportunity to chat with drivers who, though law abiding so far as the agents can see, arouse suspicion through a number of indicia. That's dangerous and contrary to established law."

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Summaries Of Recent Federal Court Decisions

ASYLUM

■Eighth Circuit Denies Asylum To Mexican Citizen

In ***Regalado-Garcia v. INS***, __F.3d__, 2002 WL 31162996 (8th Cir. October 1, 2002) (*Wollman*, Riley, Melloy), the Eighth Circuit upheld the BIA's denial of asylum and withholding of deportation to a Mexican citizen. The petitioner left Mexico because he was once detained and pursued by people he thought were Mexican police, on account of his union activities with alleged anti-government organizations. The court held that the petitioner's brief detention and flight from unidentified persons did not establish threats or specific incidents of violence amounting to persecution. The court further found that petitioner did not submit evidence that his fear of future persecution was objectively reasonable, as his family continued to reside in Mexico without incident, and conditions in Mexico had markedly changed since his departure over 10 years ago.

The court held the aliens were firmly resettled in Italy, but that they demonstrated a well-founded fear of future persecution in Italy by credibly testifying that unidentified individuals shot at the father on two occasions while he was driving.

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■Ninth Circuit Holds Vietnamese Family Has A Well-Founded Fear Of Persecution In Italy

In ***Truong v. INS***, No. 01-71501 (9th Cir. October 16, 2002) (Schroeder, W. Fletcher, Weiner), the Ninth Circuit in an unpublished decision reversed the BIA's denial of asylum to a Vietnamese couple who had firmly resettled in Italy for 11 years and whose children were born in Italy. The aliens had renewable permanent resident status in Italy, were free to work, travel, and attend school. The court held the aliens were firmly resettled in Italy, but that they demonstrated a well-founded fear of future persecution in Italy by credibly testifying that unidentified individuals shot at the father on two occasions while he was driving, that unidentified individuals speaking Italian and Vietnamese threatened the mother by telephone, and that a daughter's classmates discriminated against her because she is Asian.

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■Ninth Circuit Holds Iranian Has A Well-Founded Fear Of Future Persecution In Germany

In ***Behnam v. INS,*** 01-70274 (9th Cir. October 15, 2002) (Schroeder, W. Fletcher, Weiner), the Ninth Circuit in an unpublished decision reversed the BIA's denial of asylum to an Iranian who had obtained asylum in Germany and lived there for 10 years. The court held that while the petitioner was firmly resettled in Germany, she had a well-founded fear of future persecution there because her family had received death threats and experienced physical abuse on account of their active participation in an Iranian political movement, and because a city councilman advised the petitioner's father to leave Germany on account of the threats.

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CRIMES

■Ninth Circuit Holds That BIA Erred In Relying On Presentence Report, Rather Than Plain Language Of Plea Agreement, To Determine Loss To The Victim In Aggravated Felony Conviction.

In ***Chang v. INS***, __F.3d__, 2002 WL 31268882 (9th Cir. October 11, 2002), the Ninth Circuit reversed a district court's finding holding that that Chang had not been convicted of an aggravated felony because he had not been convicted of an offense that resulted in a loss to the victim of more than $10,000. Chang is a native and citizen of South Korea, but has been a permanent resident of the United States since 1975. In 1998, Chang plead guilty to Count Seven of a bank fraud indictment involving a loss to the victim of $605.30. Chang also agreed to make restitution in excess of the specific loss caused by the fraudulent check in Count Seven, an amount which would fall within the $20,000 to $40,000 range. Chang was sentenced, pursuant to the plea agreement, to eight months in prison and was ordered to pay restitution in the amount of $32,628.67. The INS initiated removal proceedings in December of 1999. Based on his aggravated felony conviction, the IJ ordered Chang removed to South Korea. On appeal, the BIA affirmed. Chang then sought habeas review in federal district court, which held that resort to the plea agreement and presentence report (PSR) was proper and that both documents provided support for the BIA's conclusion that the total loss was above $10,000.

Reviewing the removable offense question *de novo*, the Ninth Circuit reversed the judgment of the district court. The court found that the plea agreement involved a loss to the victim of exactly $605.30 and held that the BIA erred when it relied on Chang's PSR to establish a different loss than what was plainly stated in the plea agreement. The court noted that "no case of ours has held that reliance on a PSR [to determine the loss to the victim], in the circumstances that the BIA has countenanced here, is permissible." The court concluded that the INS may rely on the PSR to determine the loss to the victim only when other evidence does not provide the loss figure. Here, the loss figure was plainly provided in the plea agreement. The judgment of the district

Summaries Of Recent Federal Court Decisions

(Continued from page 6)
court was then reversed and remanded.

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■Sixth Circuit Finds Sufficient Evidence Of Willful Transportation Of Illegal Aliens With The Specific Intent Of Furthering Their Illegal Presence In The United States.

In ***United States v. Perez-Gonzalez***, __F.3d__, 2002 WL 31306660 (6th Cir. October 16, 2002), the Sixth Circuit affirmed a district court decision that found Raul Perez-Gonzalez guilty of knowingly transporting illegal aliens within the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). Perez-Gonzalez appealed the verdict, arguing that the district court erred in denying his motion for acquittal under Federal Rule of Criminal Procedure 29, based on the insufficiency of the evidence. The court cited *United States v. 1982 Ford Pick-Up*, 873 F.2d 947 (6th Cir. 1989), where the Sixth Circuit adopted an intent-based approach that requires the government to prove "that the defendant willfully transported an illegal alien with the specific intent of supporting the aliens' illegal presence." In reviewing the defendant's appeal, the court found that, because Perez-Gonzalez clearly attempted to conceal illegal alien passengers and because he was compensated for the transport, there was sufficient evidence for a reasonable jury to conclude that Perez-Gonzalez willfully transported illegal aliens with the specific intent of furthering their illegal presence in the United States.

JURISDICTION

■Third Circuit Lacks Jurisdiction Over Appeal Of District Court Order Transferring Habeas Case

In ***Marcelus v. Jordan,*** No. 01-1780 (3d Cir. September 25, 2002) (Scirica, Greenberg, Fullam (by designation)), the Third Circuit in an unpublished decision dismissed an appeal of a district court order transferring a habeas petition that challenged a final order of removal. The district court held that it lacked jurisdiction over the proper custodian and that the appropriate venue was the federal courts exercising jurisdiction over the location where the alien was being detained. By the time the transfer order was appealed, the transferee court had already exercised jurisdiction. The Third Circuit dismissed the appeal for lack of jurisdiction, holding that transfer orders are generally not final appealable orders.

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MOTION TO REOPEN

■Tenth Circuit Holds BIA Should Apply Lozada Criteria To Ineffective Assistance Claims First Raised In Motion To Reopen

In ***Osei v. INS,*** __F.3d__, 2002 WL 31113805 (10th Cir. September 24, 2002) (Henry, McWilliams, *Murphy*), the Tenth Circuit reversed the BIA's order denying petitioner's motion to reopen on a claim of ineffective assistance of counsel.

The court held that the BIA abused its discretion because its denial was supported only by a citation to the regulation at 8 C.F.R. § 3.2(c)(1), and that it had not previously based denial of a motion under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), on the cited regulation. The court held that while the BIA may change rules it creates in common law fashion, "it is not permitted to do so without a reasoned explanation for its change of mind." The court remanded the case to the BIA to explain its change of course in addressing such claims, or to evaluate petitioner's motion under *Lozada*.

While the BIA may change rules it creates in common law fashion, "it is not permitted to do so without a reasoned explanation for its change of mind."

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NATURALIZATION

■Alien Asks Ninth Circuit To Rehear Citizenship Case.

In ***Taniguchi v. Schultz,*** __F.3d __, 2002 WL 31115538 (9th Cir. September 2002) (Roney, *Hug*, Thomas), the Ninth Circuit affirmed the district court's denial of Taniguchi's habeas petition based on a lack of jurisdiction because petitioner failed to exhaust her administrative remedies by not appealing the decision of the IJ to the BIA. The court also held that the habeas claim had to be brought in the court of appeals (rather than in the district court), and that the court of appeals could not transfer the habeas petition to itself because it could not have exercised jurisdiction on the date the habeas petition was filed with the district court.

The petitioner, a native and citizen of the Philippines, was admitted to the United States as an immigrant in July 1973. After receiving numerous federal and state convictions for crimes including theft, bank fraud, criminal forfeiture, and impersonating a citizen of the United States, the petitioner was found removable by an immigration judge. The immigration judge also determined that she was statutorily ineligible for cancellation of removal based on her status as an aggravated felon. Petitioner then filed an untimely motion to reopen, which the immigration judge denied. The BIA denied her appeal from the immigration judge's decision. Petitioner then petitioned for writ of habeas corpus alleging that INA § 212 (h) impermissibly distinguished between LPRs, like her, and non-lawful

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
resident aliens, thus denying her equal protection. The district court denied her petition, based on a finding that she lacked standing. The Ninth Circuit affirmed the district court.

On September 5, the alien petitioned for *rehearing en banc* and argued that the panel erred in holding that there was no jurisdiction to decide her citizenship claim. The government filed its opposition on October 7, 2002.

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VISAS

■District Court Orders INS To Process 1999 Diversity Visa Application

In ***Savvinov v. U.S. I.N.S.,*** No. 00-2445 (D.P.R August 20, 2002) (Cassellas), the district court in unpublished decision ordered INS to adjudicate Savvinov's application for an immigrant visa under the 1999 Diversity Visa Lottery Program (DVLP) as if the 1999 diversity visas were still available. The district court held that INS failed to expedite the processing of Savvinov's visa application filed under the DVLP before the fiscal year ended and the diversity visas expired. The district court noted that there is a split of authority regarding the granting of relief in DVLP cases, but found that equity required the granting of relief.

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■Seventh Circuit Finds Errors Made By IJ And BIA, But Dismisses Claim Based On Failure To Exhaust

In ***Bosede v. Ashcroft***, __F.3d__, 2002 WL 31420753 (7th Cir. October 29, 2002), the Seventh Circuit found that the errors made by the IJ and the BIA in the removal proceedings of a Nigerian citizen were not harmless, but rejected the claim for relief because petitioner did not exhaust his administrative remedies. The petitioner, a native and citizen of Nigeria, has been a permanent resident of the United States since 1982. After accumulating three felony convictions, the IJ found that he was removable. The BIA affirmed the IJ's decision. Petitioner appealed the decision of the BIA, arguing *inter alia*, that he was eligible for withholding of removal.

In reviewing the course of proceedings, the Seventh Circuit found a fundamental mistake of fact, brought about through sloppy legal representation. In 1993, petitioner was convicted of a controlled substance offense, which the INS thought was for possession with intent to distribute. After evaluating the Cook County records, the Seventh Circuit discovered that petitioner was telling the truth when he testified before the IJ that he had been convicted only of simple possession, not possession with intent to distribute. The finding that this conviction was a "particularly serious crime" prevented petitioner from being eligible for withholding of removal. "This record gives us no confidence that the agency's decision on the withholding aspect was correct or based upon a proper basis," said the court. However, because petitioner never gave the BIA the opportunity to take into consideration the full Cook County records, the court dismissed his claim for lack of jurisdiction based on petitioner's failure to exhaust his administrative remedies.

"This record gives us no confidence that the agency's decision on the withholding aspect was correct or based upon a proper basis."

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■Ninth Circuit Holds That Alien Married Before Marriage Fraud Amendments Entitled To Reopening.

In ***Castillo Ison v. INS,*** __F.3d.__, 2002 WL 31356204 (9th Cir. October 21, 2002) (Hall, Kozinski, McKeown), the Ninth Circuit remanded the case to the BIA with directions to grant the alien's motion to reopen. The petitioner, a citizen of the Philippines, was ordered deported after being charged with overstaying a nonimmigrant visa. In 1986, while his appeal to the BIA was pending, he married a United States citizen. The BIA dismissed his appeal in 1990. In 1994, petitioner moved to reopen proceedings to apply for suspension of deportation so that he could remain in the United States to care for his ailing wife. The BIA denied the motion but suggested that he might qualify for an adjustment of status. Petitioner's wife died later that year. In 1996, petitioner moved again to reopen his immigration proceedings, this time to apply for adjustment of status and an immigrant visa. The BIA denied the motion, concluding that the Immigration Marriage Fraud Amendments of 1986 barred him from simultaneously filing both a petition for an immigrant visa and an application for adjustment of status.

The Ninth Circuit found that the petitioner, who married six months prior to the effective date of the Marriage Fraud Amendments of 1986, should be permitted under the BIA's rule in *Matter of Garcia*, 16 I. & N. Dec. 653 (BIA 1978), to simultaneously file a visa petition and an application for adjustment of status. The court held under *Garcia* that the BIA should generally grant such motions to reopen unless the applicant appears "clearly ineligible" for relief.

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VOLUNTARY DEPARTURE

■First Circuit Lacks Jurisdiction To Reinstate Voluntary Departure

In ***Velasquez v. Ashcroft***, __ F.3d__, 2002 WL 31119926 (1st Cir. September 30, 2002) (Torruella, Lipez, McAuliffe

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)
(D.J. N.H.)), the First Circuit held that it lacked authority to reinstate voluntary departure in light of INA § 242(a)(2)(B)(i), which bars judicial review of the grant or denial of discretionary relief, including voluntary departure.

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WAIVERS

■Fourth Circuit Holds Alien Convicted By Trial Before IIRIRA Enacted Not Eligible For 212(c) Relief.

In ***Chambers v. Reno***, __F.3d__, 2002 WL 31301183 (4th Cir. October 15, 2002) (Widener, *Traxler*, Goodwin), the Fourth Circuit found that petitioner was ineligible for relief under former INA § 212(c), based on the repeal of such relief in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 304(b).

The petitioner, a native and citizen of Jamaica, entered the United States in 1978, when he was two years old. In 1994, at the age of 17, the petitioner was convicted in Maryland of robbery with a deadly weapon. He was sentenced to four years in prison, two and a half years of which were suspended.

The INS began removal proceedings on April 22, 1997 (after IIRIRA took effect). The immigration judge concluded that petitioner's conviction constituted an aggravated felony because it was a crime of violence under 8 U.S.C. § 1101(a)(43)(F). In addition, the immigration judge determined that the petitioner could not apply for a discretionary waiver of deportation under INA § 212(c) because this form of relief was repealed by IIRIRA § 304(b). The BIA affirmed the decision of the immigration judge. Petitioner then filed an application for habeas relief. The district court affirmed the BIA's decision. Petitioner then appealed the district court decision. The Fourth Circuit affirmed.

Under the pre-IIRIRA version of the INA, a crime of violence did not constitute an aggravated felony unless it resulted in a conviction of at least five years. Under the current version of the INA, a crime of violence qualifies as an aggravated felony if the term of imprisonment is at least one year. Discretionary relief under INA § 212(c) was available at the time of Chambers' trial, conviction, and sentencing, but not at the time that his removal procedures began.

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that discretionary relief under INA § 212(c) "remains available for aliens . . . whose convictions were obtained through plea agreements and who . . . would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326. The Court in *St. Cyr* reasoned that "because [petitioner], and other aliens like him, almost certainly relied upon [the] likelihood [of receiving discretionary relief] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Chambers' argued that he possessed a similar reliance interest that would cause the application of IIRIRA § 304(b) in his case to operate retroactively. The court concluded, however, that "[t]he key event in terms of *St. Cyr's* analysis of whether the new statute would produce a retroactive effect was the aliens' decision to abandon his conceptional right to a trial and plead guilty to a deportable offense in reliance on prior law." The court distinguished this case from *St. Cyr*, holding that application of IIRIRA's repeal did not create an impermissible retroactive effect because Chambers did not have reliance interests comparable to that of the alien in *St. Cyr*, and Chambers, who was convicted following a trial, made no decision that adversely affected his immigration status, in contrast to aliens who plead guilty.

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SUPREME COURT

(Continued from page 1)
the BIA decided the matter against the applicant." Accordingly, the court granted asylum and withholding of deportation. Subsequently, the Solicitor General filed a petition for certiorari bringing to the Court's attention what the government perceived to be a recurring error by the Ninth Circuit, namely deciding factual issues instead of remanding to the BIA to make those findings in the first instance.

In reversing the Ninth Circuit, the Court noted that "well-established principles of administrative law" required the court of appeals to remand the "changed circumstances" question to the BIA. The Court reaffirmed the principle that "within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question." A court of appeals is not generally empowered to conduct de novo inquiry into the matter being reviewed and to reach its own conclusions based on such inquiry, said the Court.

Here, the Supreme Court was troubled by the court of appeals' failure to remand the case to the BIA. The Court said that by "disregarding the agency's legally-mandated role," the Ninth Circuit "independently created potentially far-reaching legal precedent about the significance of political change in Guatemala, a highly complex and sensitive matter." Moreover, "it did so without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise," said the Court.

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Editor's Note: Pending before the Court is another asylum case (*INS v. Chen*) raising the "remand" issue decided in *Ventura* and the issue of review of credibility findings.

SPECIAL SUPPLEMENT

HOW TO ANALYZE A DISTRICT COURT IMMIGRATION CASE

District court defenses to immigration cases depend upon (1) the type of action, (2) the nature of the decision or action challenged, (3) the aspect of the decision challenged, (4) whether a jurisdictional bar or limit applies, and (5) the type of error or issue asserted by the alien.

OIL has model briefs for all district court defenses. Please visit our website at https://oil.aspensys.com or contact the assigned OIL attorney or the OIL counselor for your court or INS district.

I. WHAT TYPE OF ACTION IS BROUGHT ?

_____ Is it habeas corpus ?

We contend that habeas corpus is a specific and limited means of contesting detention, and cannot be used where there is another avenue of judicial review.

_____ Is it a challenge to exclusion, deportation, or removal ?

Challenges to orders of removal or the denial of relief from removal generally may be raised only in accordance with the provisions of 8 U.S.C. 1252.

_____ Is it a claim under the Administrative Procedure Act or other federal statute ?

While some actions and decisions are so reviewable, if judicial review can be obtained under the INA, it must be obtained under the immigration statute.

II. WHAT IS THE IMMIGRATION DECISION OR ACTION CHALLENGED ?

_____ **A. Is it a decision by the Board of Immigration Appeals (BIA) ?**

_____ Is the decision final ?

Only final administrative orders may be challenged (and denials of post-decision motions to reopen or reconsider are deemed final, reviewable orders).

_____ What was the nature of the immigration proceedings (*i.e.*, exclusion, deportation, removal, or other), and in which immigration court were the proceedings brought?

The choice of court (district or circuit), venue, and scope and standard of review depend upon the nature and place of the immigration proceedings.

_____ Did the Board order the alien's "exclusion" or "deportation" ?

Before 1996, INA section 106 provided for district court habeas corpus review of exclusion orders and circuit court petition review of deportation orders.

_____ Did the Board order the alien's "removal" ?

INA section 242 provides for circuit court petition review of removal orders. Venue is the place of the alien's immigration proceedings.

_____ Were the proceedings against the alien commenced before April 1, 1996, or after April 1, 1997?

Cases started in immigration court before April 1996 generally are governed by old INA § 106 and cases started after April 1, 1997, by current INA § 242; cases in between may be governed by the "transition rules".

_____ **B. Is it a decision by an Immigration Judge ?**

If so, the alien must exhaust his administrative remedies by appealing to the BIA, and no court has jurisdiction until that remedy has been exhausted.

_____ **C. Is it a decision by the INS ?**

_____ Did the INS order the alien's removal ?

INS (as opposed to Board) removal orders under INA sections 217 (visa waiver), 235 (expedited removal, or national security), and 238 (criminal expedition) are subject to limited, specialized review.

_____ Does the alien challenge an INS denial of immigration benefits (*e.g.*, a visa petition or adjustment application) ?

Such a denial can and must be exhausted by administrative appeal. Also, in many cases, an alien can and should re-assert his claim in immigration court (with appeal to the BIA and review by the courts of appeals).

_____ Does the alien challenge the initiation of immigration proceedings?

The prosecutorial decision whether, when, and on what charge to commence immigration proceedings is non-reviewable (and if review may be had, it is limited to removal order review in the circuit courts). 8 U.S.C. 1252(g).

_____ Does the alien challenge the reinstatement of a prior deportation or removal order?

Prior orders may be re-executed, subject only to limited review (the prior order may not be challenged). 8 U.S.C. 1231(a)(5).

_____ Does the alien challenge the denial of a stay of deportation or removal ?

We contend that deportation or removal may only be stayed if the alien satisfies the heightened injunctive standard of 8 U.S.C. 1252(f)(2).

_____ Does the alien challenge INS's steps to execute an exclusion, deportation, or removal order, to expel him from the United States?

We contend that the execution of such an order is non-reviewable. 8 U.S.C. 1252(g). See also "detention", below.

_____ Does the alien challenge other INS action or decision (*e.g.,* failure to act) ?

Matters not within INA section 242 may be subject to ordinary APA review, but we contend that the INS and EOIR have no enforceable duty to decide. Naturalization is governed by the special provisions of 8 U.S.C. 1421 et seq .

_____ **D. Is it a challenge to INS detention ?**

_____ Is the alien in INS custody?

Habeas corpus requires custody (the INS District Director is the proper respondent); an alien held by the U.S. Marshals or by the Bureau of Prisons ordinarily is not in INS custody. Immigration "detainers" do not provide custody for habeas purposes.

_____ Is it a challenge by an arriving or excludable alien (*i.e.*, has the alien been denied admission and/or been paroled into the United States) ?

Aliens inadmissible under INA section 212 have no right to enter the United States. We contend that parole decisions are not reviewable.

_____ Is the alien a Mariel Cuban ?

Most Mariel Cubans were paroled into the United States. Their detention is governed by 8 C.F.R. § 212.12.

_____ Is the challenge to detention without bond ?

Immigration detention is civil, and for some, mandatory. The availability of bond depends upon the type of alien and stage of his immigration proceedings.

_____ Is it a challenge to "pre-order" INS detention (*i.e.*, detention pending immigration proceedings) ?

Detention during proceedings is governed by INA § 236. Bond is available to non-criminals, barred to most criminals. (Some courts have held 236(c) detention unconstitutional; the issue is before the Supreme Court.)

_____ Is it a challenge to "post-order" INS detention (*i.e.*, detention pending removal) ?

Detention after final order (awaiting removal) is governed by INA § 241. After a "removal period" (generally of six months), such detention may be reviewed per Zadvydas and 8 C.F.R. § 241.

_____ Is the challenge to the bond or conditions set for release ?

District Director and Immigration Judge bond decisions are reviewable by the Board. We contend bond decisions are unreviewable (and that threshold jurisdictional scrutiny is available in habeas).

III. IF A BIA ORDER, WHAT PART OF THE ORDER IS CHALLENGED?

All aliens may upon timely suit obtain review of the administrative determination of their alienage and deportability/ removability (distinguished from relief from deportation or removal), as well as constitutional claims. Whether the review lies in the circuit or the district courts depends upon the alien's circumstances and the circuit.

_____ **A. Is it a challenge to the finding of alienage ?**

Claims of United States citizenship or nationality (which are separate from naturalization decisions) are subject to special judicial review. 8 U.S.C. 1252(b)(5).

_____ **B. Is it a challenge to a ground or finding of exclusion, deportation, or removal ?**

_____ Is the ground or finding non-criminal ?

We contend that non-criminal aliens may only obtain judicial review of Board decisions by petition to the circuit courts. There is contrary authority in the Second and Third Circuits.

_____ Is the ground or finding criminal ?

We contend that criminal aliens should obtain (and be limited to) judicial review of Board decisions by petition to the circuit courts. Following St. Cyr, the circuits have taken a variety of jurisdictional positions. All courts have jurisdiction to determine their jurisdiction (thus, alienage and crime), and to hear constitutional claims (on this the Eleventh Circuit disagrees).

_____ Is it an aggravated felony, a controlled substance offense, a firearms offense, or two qualifying crimes of moral turpitude ?

If so, we contend that circuit court review petition jurisdiction is limited; some circuits permit district court habeas review of purely legal claims (as an alternative or an additional forum).

_____ Or is it some other type of crime ?

We contend that for non-serious criminals review of Board decisions is only by petition to the circuit courts, not by habeas corpus. The Second and Third Circuits disagree.

_____ **C. Is it a challenge to the denial of relief ?**

Under the IIRIRA-amended INA, issues of statutory eligibility for relief are reviewable (by circuit court petition), but issues of discretion generally are not reviewable by any court.

_____ Is it denial of suspension or cancellation of deportation ?

IIRIRA narrowed and replaced "suspension" with "cancellation". We contend that judgments regarding "hardship" are non-reviewable.

_____ Is it denial of a waiver of crime under INA § 212(c)?

IIRIRA repealed section 212(c) criminal waivers. Under the St. Cyr and Calcano decisions, some waiver denials will be re-adjudicated.

_____ Is it denial of asylum or withholding of removal ?

Such decisions are reviewable, under the deferential standards of Elias-Zacarias and Aguirre-Aguirre.

_____ Is it denial of protection under the Convention Against Torture ?

Implemented by special statute, CAT claims may only be reviewed by circuit court petition; we contend that habeas review is not available.

_____ Is it denial of adjustment of status ?

Denials of adjustment of status under the various INA section 245 programs are reviewable (as to non-discretionary matters) by circuit court petition.

_____ Is it denial of voluntary departure ?

INA section 240B(f) bars review of voluntary departure denials.

_____ Is it denial of some other form of relief ?

While some immigration benefit denials are APA-reviewable, removal relief must be sought in removal proceedings and reviewed in accordance with INA § 242.

_____ **D. Did the BIA deny relief because it found the alien statutorily ineligible (*i.e.*, that he failed to establish the statutory elements for relief) ?**

Issues of law such as statutory eligibility are reviewable,subject to appropriate deference to the Attorney General. "Persecution" and "hardship" are mixed questions, subject to limited review.

_____ **E. Or, did the BIA deny relief as a matter of discretion, because it determined that regardless of eligibility, the alien does not deserve relief ?**

Certain discretionary determinations are non-reviewable. 8 U.S.C. 1252(a)(2)(B) (and habeas review does not reach discretion). The Attorney General may make discretionary disposition of a matter without deciding eligibility.

_____ **F. Is it some other challenge to the BIA's decision or the manner in which it reached or stated its decision (*e.g.*, a challenge to summary dismissal or to a failure to consider all the evidence) ?**

The manner in which immigration cases and claims are adjudicated generally is left to the Attorney General's unreviewable discretion. Reviewing courts may not re-weigh the evidence.

IV. IS THE ALIEN OR ACTION SUBJECT TO A JURISDICTIONAL BAR ?

The INA bars or limits jurisdiction over various immigration actions or claims. While we contend that such provisions apply to all courts and causes, habeas corpus often is used as a collateral avenue of judicial review.

_____ **A. Is the suit or action timely ?**

Judicial review of Board decisions must be sought within 30 days. 8 U.S.C. 1252(b)(1). We contend that habeas corpus may not circumvent this limitation.

_____ **B. Is the suit or action properly venued ?**

Judicial review of Board decisions must be brought only in the circuit in which the immigration proceedings were completed. 8 U.S.C. 1252(b)(2).

_____ **C. Is the subject matter appropriate to judicial review ?**

Certain matters such as consular actions and INS prosecutorial decisions (see 8 U.S.C. 1252(g)) are immune from judicial review. Other matters cannot be reviewed in district court (e.g., Convention Against Torture claims). See II and III C, supra.

_____ **D. Is the alien a criminal ?**

While we contend that criminals should be limited to such review as is available by circuit court petition under INA section 242, some habeas review has been permitted. See III B, supra.

_____ **E. Is the matter expressly *reserved* for the district court ?**

The INA provides limited district court review for citizenship (INA 242(b)(5)), expedited removal (INA 242 (e)), and national security detention (INA 236a).

V. WHAT TYPE OF ERROR OR ISSUE DOES THE ALIEN RAISE ?

For matters bearing upon removal and removal relief, we contend that judicial review is governed (and limited) by INA § 242, which for most aliens is circuit court review on the INS/EOIR administrative record. Section 242(b)(9) consolidates "all questions of law and fact", including constitutional claims, in circuit court review of final Board decisions.

_____ **A. Is it a claim of pure legal error (*i.e.*, violation of the INA or the Constitution) ?**

A court's jurisdiction to determine jurisdiction reaches many threshold legal issues and, we contend, all courts may hear constitutional claims (and that the first if not only reviewing court should be the circuit courts of appeals).

_____ Is it an error in the construction or interpretation of an INA provision ?

INA section 103(a) and Supreme Court jurisprudence accord particular deference to the Attorney General on immigration law issues.

_____ Is it a constitutional claim ?

In immigration enforcement matters, aliens enjoy substantially reduced constitutional protections. We contend that all courts have jurisdiction over constitutional claims.

_____ Is it a claim of due process violation ?

Aliens are "persons" but have no constitutional right to admission or to remain in the United States, and we contend that due process does not require a particular form of immigration adjudication.

_____ Is it a claim of equal protection violation ?

Equal protection does not require nationality neutrality in immigration law or enforcement.

_____ **B. Is it a factual claim (*e.g.*, that the evidence does not support the factfinding or credibility assessment by the BIA or IJ) ?**

Immigration decisions are reviewed on the administrative record, and facts are deferentially reviewed under the substantial/compelling evidence standards. Neither habeas courts nor circuit courts on petition may find facts (and remands are limited).

_____ **C. Is it a claim of abuse of discretion ?**

INA section 242(a)(2)(B)(ii) bars review of some discretionary determinations (and habeas review does not reach discretion). The Attorney General may decide immigration cases on discretionary issues without adjudicating eligibility.

CASES SUMMARIZED IN THIS ISSUE

Behnam v. INS..... 06
Bosede v. Ashcroft..... 08
Chambers v. Reno..... 09
Chang v. INS..... 06
INS v. Ventura..... 01
Marcelus v. Jordan..... 07
North Jersey Media 01
Osei v. INS..... 07
Regalado-Garcia v. INS..... 06
Savvinov v. U.S. I.N.S..... 08
Taniguchi v. Schultz..... 07
Truong v. INS..... 06
U.S. v. Perez-Gonzalez..... 07
U.S. v. Sigmond-Ballesteros... 01
Velasquez v. Ashcroft..... 08

MARK YOUR CALENDAR

SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE TO BE HELD IN ST. LOUIS ON APRIL 21-25, 2003

INSIDE OIL

Sixty-five students including attorneys from EOIR, INS, and the Department of State attended OIL's Eighth Annual Immigration Law Seminar. Shown in the picture above is OIL Attorney **Patricia Buchanan,** who participated in a mock court of appeals argument on judicial review.

In anticipation of increased staffing, OIL is accepting applications from experienced attorneys interested in immigration litigation.

Congratulations to OIL Deputy Director **David M. McConnell** who received the Interagency Cooperation Award from the Executive Office For Immigration Review.

Congratulations to OIL Attorney **Jennifer Parker** who ran the Marine Corps Marathon finishing in 4:43.

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. The deadline for submission of materials is the 20th of each month. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

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

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