



# ◆ Immigration Litigation Bulletin ◆

Vol. 15, No. 1

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## Second Circuit Holds That, Absent Evidence Of A Signed Waiver, VWP Entrant Has A Due Process Right To A Pre-Removal Hearing

In *Galluzzo v. Holder*, \_\_\_F.3d \_\_\_, 2011 WL 222343 (2d Cir. January 26, 2011) (Feinberg, B.D. Parker, Wesley), the Second Circuit held that "in the absence of evidence of a waiver," an alien who enters the United States under the Visa Waiver Program has a constitutional right to a pre-removal hearing.

The petitioner, Galluzzo, an Italian citizen, entered the United States on April 12, 1995, as a non-immigrant visitor under the VWP. Under the terms of the VWP, an alien can only remain in the United States for a period not exceeding 90 days and, among other requirements,

cannot be provided a waiver of the normal visa requirements "unless the alien has waived any right . . . to contest, other than on the basis of an application for asylum, any action for removal of the alien." INA § 217 (b).

Galluzzo apparently never had any intentions of returning to Italy at the expiration of the 90-day period. Instead, three years after his admission he sought to adjust his immigration status. On January 13, 1998, his employer filed an application for a labor certification and, followings

*(Continued on page 2)*

## Citizenship Laws of the World

"Petitioner is a native and citizen of . . . ." While beginning our briefs with these words or similar ones, few of us give any thought to how the petitioner acquired his foreign citizenship. Fortunately, the foreign citizenship of a petitioner is not often, if ever, an issue in our cases. I say "fortunately" because the citizenship laws of other countries, and their actual application to particular situations, are just as complicated, if not more so, than our citizenship laws, and the resources we have to research foreign laws are very limited.

I found this out while researching foreign citizenship laws for our brief in *Flores-Villar v. United States*.

*Flores-Villar* involved the issue of the citizenship of children born outside the United States, and outside of wedlock, to a U.S. citizen parent and an alien parent.

Our laws provide that, in order for the child to acquire U.S. citizenship, the U.S. citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. See 8 U.S.C. 1401 and 1409 (1970). If it is the mother who is the U.S. citizen, the required period of physical presence is one continuous year at any point in the woman's life. If it is the father of the nonmarital child who is the U.S. citizen, the required physical pres-

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## VWP Alien Has Constitutional right to a hearing

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its approval, submitted an I-140 visa immigrant petition with USCIS. Based on the approval of the visa petition, on January 10, 2002, Galluzzo applied for adjustment of status. On May 24, 2007, USCIS denied found Galluzzo ineligible for adjustment based on his willful misrepresentation in entering the US under the VWP. Galluzzo was informed of the decision on November 25, 2008, when he attended what he thought was a second interview. At that time, Galluzzo was placed in custody and served with an order of removal finding him removable as as a VWP entrant who had overstayed the visa, ineligible for adjustment, and also not entitled to a hearing because as a VWP entrant he had waived his right to contest removal. Following several months in detention, Galluzzo was released on February 26, 2009, under an order of supervision.

The Second Circuit initially determined, that in the absence of a waiver, Galluzzo had a constitutional right to a hearing. The court found support for its proposition in *Landon v. Plasencia*, where the Supreme Court held, in the context of a re-

turning LPR who had taken a brief trip abroad, that once an alien gains admission to the United State “and begins to develop ties that go with permanent residence his constitutional status changes accordingly.”

The court then cited without elaborating, three cases, one unpublished, where the courts “have likewise concluded that aliens similarly situated to Galluzzo have a constitutional right, in the absence of a waiver, to a hearing.” See *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (en banc); *Nose v. U.S. Att’y Gen.*, 993 F.2d 75 (5th Cir. 1993); *Mokarram v. U.S. Att’y Gen.*, 316 F. App’x 949 (11th Cir. 2009) (unpublished).

The court then found that the government had not “submitted explicit evidence of waiver,” and rejected the government’s contention that Galluzzo’s status as a VWP entrant alone was de facto proof that he waived his right to contest removal. The court explained that it

could not adopt this presumption because “we indulge every reasonable presumption against waiver of fundamental constitutional rights.” The court then determined that there was nothing in the record to show “whether the I-94W Departure Record Galluzzo filled out upon his entry actually advised Galluzzo that he would waive his right to a hearing . . . or whether Galluzzo signed or otherwise agreed to waive his rights to contest removal.” “We will not presume away an evidentiary problem of the Government’s own making,” said the court.” Accordingly, the court held that Galluzzo “suffered a violation of his right to due process when he was denied the opportunity for a hearing prior to the issuance of the removal order.”

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The court then remanded the case to permit Galluzzo to show whether he had been prejudice as a result of the failure to receive a hearing.

By Francesco Isgro, OIL  
Contact: Briena Strippoli, OIL  
☎ 202-305-7029

## USCIS Reaches FY 2011 H-1B 65,000 Cap

On January 27, USCIS announced that it had received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year FY 2011 and notified the public that, Jan. 26, 2011, was the final receipt date for new H-1B specialty occupation petitions requesting an employment start date in FY 2011.

The final receipt date is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 65,000. USCIS will reject cap-subject petitions for new H-1B specialty occupation workers seeking an employment start date in FY2011 that arrive after Jan. 26, 2011.

USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on Jan. 26, 2011. USCIS will use this process to select petitions needed to meet the cap. USCIS will reject all remaining cap-subject petitions not randomly selected and will return the accompanying fee.

On Dec. 22, 2010, USCIS had also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the ‘advanced degree’ exemption. USCIS will continue to accept and process petitions that are otherwise ex-

empt from the cap.

Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted towards the congressionally-mandated FY2011 H-1B cap. Accordingly, USCIS will continue to accept and process petitions filed to: extend the amount of time a current H-1B worker may remain in the U.S.; change the terms of employment for current H-1B workers; allow current H-1B workers to change employers; and allow current H-1B workers to work concurrently in a second H-1B position.

## Citizenship laws across the world

(Continued from page 1)

ence was (at the time of Mr. Flores-Villar's birth) ten years, five of which had to be after the man was fourteen years old. The question presented is whether this differential violated the Fifth Amendment's guarantee of equal protection.

One of our arguments in *Flores-Villar* was that the reduced physical presence requirement for women was an attempt by Congress to decrease the possibility that the nonmarital child would be born stateless. Part of the force of this argument depends on the citizenship laws of the country of which the child's other parent is a citizen, as well as the citizenship laws of the country in which the child was born, if he was born in a third country. If those citizenship laws do not confer citizenship on the child born of an unwed U.S. citizen mother, then that child risks being born stateless, unless U.S. citizen laws are sufficiently generous to permit him to acquire U.S. citizenship.

Another factor in the validity of our argument is the paternity laws of the other countries involved – the more difficult it is for a father to establish a legal relationship with a child born out of wedlock for the purposes of the country's citizenship laws, the more that child depends on the citizenship laws of his mother's country to acquire citizenship. Certainly, it is difficult for a child born out of wedlock to acquire his father's citizenship at birth, because in most cases the father's legal relationship is not established until *after* birth.

Accordingly, for the purposes of preparing our brief and for argument before the Court, I researched the citizenship laws of all other countries in the world (according to the State Department, a total of 194 independent states, including Taiwan, and not including the Vatican, see <http://www.state.gov/s/inr/rls/4250.ht>). That research project was eventually pared down to certain specific countries and certain periods of time, and

the primary focus was on the laws governing children born out of wedlock. However, one global research project remained – to determine currently how many countries were *jus soli* countries (where citizenship is largely based on birth in the territory of the country, like the United States) and how many were *jus sanguinis* countries (where citizenship is largely based on the citizenship of one's parents).

I began reading the laws (having found a compilation of the laws as of 1929 and as of 1950), and found myself quickly baffled. For example, many of the French-speaking countries required that the mother of a child born out of wedlock formally acknowledge the child before the child could acquire the mother's citizenship. Mon dieu! What did it mean for a mother to have to "acknowledge" the child that popped out of her body? Or, the laws stated that the child acquired its mother's citizenship if the father was "unknown." Did that apply if the father was literally "known" but had never legally acknowledged the child? I was forced to troll the Internet for current citizenship laws, and even to try to decipher French and Spanish texts. (Some good cites for current law are <http://eudocitizenship.eu> for European countries and <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmai> for others).

It was time to enlist the aid of our dauntless Civil Division librarians. They (and, in particular, Katie Ziegler and intern Bret Mooney) were invaluable in tracking down resources for me, including secondary sources that helped explain some of the laws. They also (upon my pleading) were able to obtain the services

of the Law Library of Congress, which has foreign law specialists and which produced a very helpful and polished report for me on a number of countries. And, as I read and studied, the laws started to make more sense to me (except for those darn French countries. . .). While I felt most of the information was ultimately irrelevant to this case or to any potential future case, nevertheless it was quite interesting and afforded me perspective on some of the debates about our current citizenship laws.

For example, it turns out that many otherwise *jus sanguinis* countries (including some of the Francophone ones) have laws providing that children born in the country of lawful permanent resident parents (but not of ones illegally present in the country) can obtain citizenship, either at birth or upon reaching the age of majority. As another example, one formerly *jus soli* country, the Dominican Republic, amended its constitution this year to provide that only those individuals born in the country of legal residents obtain citizenship.

More specifically, as to treatment of nonmarital children, many countries now have laws that do not, at least on their face, differentiate between children born in wedlock and those born out of wedlock. And many now grant citizenship to any child born of one citizen parent, whether that parent is the mother or the father. Indeed, Yemen and Sudan have recently amended their laws to remove any distinction between mothers or fathers in transmitting citizenship. (Women's rights groups are lobbying for similar changes in other countries that retain restrictions on a mother's trans-

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**Many countries now have laws that do not, at least on their face, differentiate between children born in wedlock and those born out of wedlock.**

## Citizenship Laws

(Continued from page 3)  
mittal of citizenship.)

But, back to the global categorization of all countries as either jus soli or jus sanguinis. This itself was not straightforward, as many countries apply a combination of the two types of laws; for example, the United States itself relies on parentage, *i.e.*, jus sanguinis, to determine the citizenship of children born outside the country. Another example are those countries referred to in the preceding paragraph that are predominantly jus sanguinis countries but do provide that children born in the country of lawfully resident, non-citizen parents can obtain citizenship in certain circumstances. (I categorized those as jus sanguinis countries as that was the predominant basis for their laws and as the child's parentage was still a relevant consideration.)

Therefore, my final results (see the table) required judgment calls as to which box to put a particular country in and therefore may not be the same results that anyone else would come up with. Nevertheless, they do serve the purpose of indicating the general extent of each type of regime. And, as statelessness was a focus of the case, I also included as a subcategory of jus sanguinis countries those that had what I called a "statelessness exception," providing for citizenship for a child born in the country if he would otherwise be stateless or if the child did not receive the nationality of the parents.

Overall, 20% of countries worldwide can be considered jus soli countries (including the United States, Canada, Mexico, many other Latin American countries, and Bangladesh and Pakistan). The other 80% are primarily jus sanguinis. However, of these, roughly 30% grant citizenship to children born in their country that would otherwise be stateless.

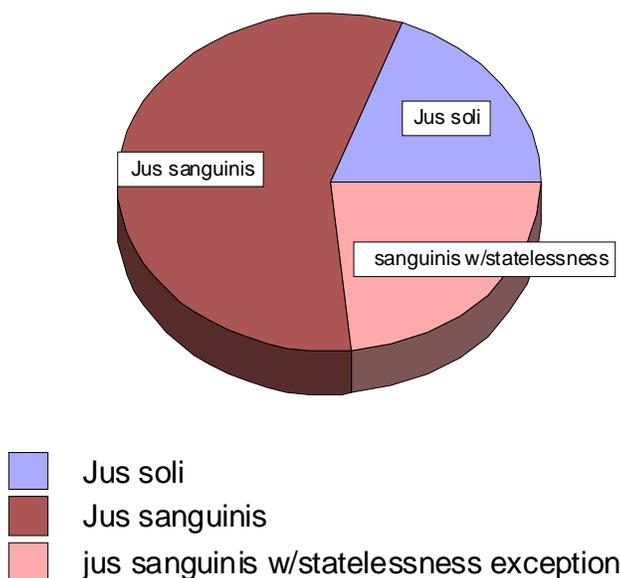
I hope that you will never have to research foreign citizenship law for one of your cases. But if a foreign citizenship issue should come

up in one of your cases, please contact me.

By Carol Federighi, OIL  
☎ 202-514-1903

### JUS SOLI V. JUS SANGUINIS BREAKDOWN FOR 2010

Current Jus Soli v. Jus Sanguinis Division



#### Summary

**194 countries total**

**38 jus soli countries (19.6%)**

**156 jus sanguinis countries (80.4%)**

- 45 jus sanguinis countries with a "statelessness exception"
  - these latter comprise 23.2% of total;
  - 28.8% of jus sanguinis countries
  - these countries plus jus soli countries is 42.8% of total

## FURTHER REVIEW PENDING: Update on Cases & Issues

### Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court heard arguments in **Flores-Villar v. United States**, 130 S. Ct. 1878. The Court is considering the following question: Does defendant's inability to claim derivative citizenship through his US citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers violate equal protection, and give defendant a defense to criminal prosecution for illegal reentry under 8 U.S.C. § 1326. The decision being reviewed is *U.S. v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008).

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

### Particularly Serious Crimes

On December 16, 2010, the Ninth Circuit en banc heard oral arguments in **Delgado v. Holder**, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the BIA determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

Contact: Erica Miles, OIL  
☎ 202-353-4433

### Convictions - State Expungements

On December 16, 2010, the Ninth Circuit en banc heard arguments in **Nunez-Reyes v. Holder**,

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

Contact: Holly M. Smith, OIL  
☎ 202-305-1241

### Asylum - Corroboration

On December 15, 2010, the Ninth Circuit en banc heard oral argument in **Nirmal Singh v. Holder** (08-70434) to address whether 8 U.S.C. § 1158(b)(1)(B)(ii) requires an immigration judge to take the following steps sequentially: (1) determine whether an asylum applicant has met his burden of proof; (2) notify the applicant that specific elements of his case require corroboration; and (3) provide the applicant an opportunity to explain why any evidence is unavailable. Although the issue was neither raised to the agency below, nor argued in the opening brief to the panel, in her dissent to the unpublished decision, Judge Berzon argued forcefully for such a process. The panel majority held that the plain language of the statute did not require a sequential process, and even if the statute had been ambiguous, the majority would defer to the agency's reasonable interpretation of the INA.

Contact: John Blakeley  
☎ 202-514-1679

### Aggravated Felony – Missing Element

The government has filed a petition for rehearing en banc in **Aguilar-Turcios v. Holder**, 582 F.3d 1093 (9th Cir. 2009). The government petition challenges the court's use of the "missing element" rule for analyzing statutes of conviction.

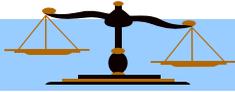
The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892) – incorporating the Department of Defense Directive prohibiting use of government computers to access pornography – was not an aggravated felony under 8 U.S.C. § 1101 (a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

Contact: Holly M. Smith, OIL  
☎ 202-305-1241

### Conviction - UCMJA

On December 6, 2010, the government has filed a petition for rehearing en banc in **Vukmirovic v. Holder**, 621 F.3d 1043 (9th Cir. 2010). The government argues that the panel majority opinion erred holding that the alien was entitled to rescission of the in absentia order where the alien did not miss the hearing due to extraordinary circumstances beyond his control, the facts are not compelling or unusual, relief is not virtually certain, and the alien has not shown diligence.

Contact: Allison Drucker, OIL  
☎ 202-616-4867



## Summaries Of Recent Federal Court Decisions

### FIRST CIRCUIT

#### ■ First Circuit Upholds Adverse Credibility Finding and Denial of Motion to Remand

In *Mariko v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 198602 (1st Cir. January 24, 2011) (Lipez, Selya, Howard), held that substantial evidence supported the IJ's adverse credibility finding where it was based upon the lead petitioner's demeanor, inconsistencies between his testimony and the record evidence, and his serial use of fraudulent documents unrelated to his escape from Guinea.

The petitioners, husband and wife, entered the United States illegally in 2001 and 2000 respectively. In 2004, when DHS initiated removal proceedings, they applied for withholding of removal and protection under the CAT. The lead petitioner claimed that he feared persecution in his homeland on account of his membership in the Guinea People's Rally (RPG), a political party that opposed the party in power. He testified that due to his political activities he had been arrested by the military and beaten and tortured. He escaped from the military camp and later purchased a phony passport and traveled to France. Once there, he purchased a second passport, used it fraudulently to fly to Chicago, and then journeyed to Rhode Island to join his wife. Neither the IJ nor the BIA found him credible and they denied the applications for withholding and CAT. The court held that the adverse credibility findings were based on a series of specific findings and constituted substantial evidence. Accordingly, the court upheld the BIA's denial of withholding of removal and protection under the CAT.

The court also determined that the BIA was warranted in declining to remand petitioners' new claim - that their newly-born U.S. citizen daughter would be forced to undergo female genital mutilation if she returned to

Guinea with them - because it was a derivative claim and there was no authority for the proposition that a parent may be a derivative beneficiary of his or her child's asylum claim.

Contact: Yedidya Cohen, OIL  
☎ 202-532-4480

### SECOND CIRCUIT

#### ■ Second Circuit Holds that the BIA Did Not Err in Determining that Asylum Applicant Failed to Show Eligibility on Account of Alleged Resistance to Family Planning Policy

In *Liu v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL No. 09-5258 (2d Cir. January 24, 2011) (Feinberg, Cabranes, Raggi) (*per curiam*), the Second Circuit found no error in the BIA's conclusion that an asylum applicant from China failed to establish persecution because substantial evidence supported the BIA's holding that, prior to his arrest and detention by local police, he suffered only minor bruising from an altercation with family planning officials, which required no formal medical attention and had no lasting physical effect.

Contact: James Hunolt, OIL  
☎ 202-616-4876

#### ■ Second Circuit Holds That Use Of A Child In A Sexual Performance Is An Aggravated Felony

In *Oouch v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 257336 (2d Cir. January 28, 2011) (Jacobs, Raggi, Rakoff (sitting by designation)), the Second Circuit held that a conviction under New York Penal Law ("NYPL") § 263.05 for the use of a child in a sexual performance was an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). The court gave *Chevron* deference to the BIA's

interpretation in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 994-96 (BIA 1999), where the BIA adopted a broad and flexible a definition of "sexual abuse of a minor" in view of the congressional intent to "expand the definition of an aggravated felony and to provide a comprehensive statutory scheme to cover crimes against children" through the grounds of deportability added by IIRIRA.

**In *Matter of Rodriguez-Rodriguez* the BIA adopted a broad and flexible a definition of "sexual abuse of a minor in view of the congressional intent to "expand the definition of an aggravated felony."**

Agreeing with the BIA, the court ruled that a conviction under NYPL § 263.05, pursuant to either the general or parental clauses, categorically constituted the sexual abuse of a minor. The court concluded that both clauses required a *mens rea* as stringent as the equivalent federal statute.

Contact: Kelly J. Walls, OIL  
☎ 202-305-9678

#### ■ Second Circuit Holds Stop Time Rule Applies At The Time Offense Is Committed

In *Baraket v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 135760 (2d Cir. January 14, 2011) (Kearse, Winter, Hall.) (*per curiam*), the Second Circuit held that the BIA properly pretermitted the petitioner's application for cancellation of removal. For purposes of cancellation, INA § 240A(d)(1) provides that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed" any of certain crimes. At issue in this case was whether the "stop-time rule" is triggered when an alien commits the predicate offense, or on some other date, such as the date on which he is convicted of the offense or admits to having committed the offense.

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## Summaries Of Recent Federal Court Decisions

(Continued from page 6)

The petitioner, a native of Tunisia and citizen of Germany, was admitted to the United States as an lawful permanent resident. On October 25, 2003, after a trip overseas, he arrived at the Newark, New Jersey, airport and applied for admission to the United States as a returning LPR. He was denied admission, and in May 2004 DHS served him with a NTA alleging that he was removable because on November 2003 he had been convicted of a crime involving moral turpitude. At the removal hearing, petitioner admitted that he had pleaded guilty to third-degree grand larceny and that the acts underlying his offense had been committed between October 2001 and December 2001. The IJ pretermitted petitioner's application for cancellation of removal, finding that his crime, committed between October 2001 and December 2001, stopped the clock of continuous residence short of the seven-year mark. On appeal, the BIA affirmed citing to *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999)(*en banc*).

In the Second Circuit, petitioner argued that whatever the court had said in its prior decision regarding the stop-time rule was dicta. The court acknowledged that "certain passages from several of [its] past decisions required clarification, but concluded that it was "bound to rule that 'it is the date of the commission of the offense . . . that matters for purposes of computing an alien's period of continuous residence.'" It further explained that "the reading that we are bound to is also the reading that best comports with a natural reading of the statute."

Contact: Beau Grimes, OIL  
☎ 202-305-1537

### FOURTH CIRCUIT

#### ■ Fourth Circuit Dismisses Claim of Asylum Applicant and Denies His Application for Withholding of Removal and Protection Under the CAT

In *Lizama v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 149874 (4th Cir. January 19, 2011) (Agee, Davis, *Duncan*), the Fourth Circuit determined that it

**"It is the date of the commission of the offense . . . that matters for purposes of computing an alien's period of continuous residence."**

lacked jurisdiction to review the petitioner's challenge to the denial of his asylum application as untimely. The court further held that substantial evidence supported the agency's determination that young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs did not qualify as a particular social group for purposes of withholding of removal. The court deferred to the BIA's interpretation of "particular social group," noting that neither the relevant statute nor its associated regulations specifically define the term "particular social group."

The court explained that the BIA defines a particular social group as meeting three criteria: (1) its members share common, immutable characteristics, (2) the common characteristics give its members social visibility, and (3) the group is defined with sufficient particularity to delimit its membership. In petitioner's case, the court agreed with the BIA that "Americanization is not an immutable characteristic," and that "Americanization, and opposition to gangs are all amorphous characteristics and that neither 'provides an adequate benchmark for determining group membership.'"

Finally, the court concluded that substantial evidence supported the agency's determination that the violence in El Salvador did not entitle the

alien to protection under the CAT. "Although record evidence indicates crime and gang violence is pervasive in El Salvador, according to the State Department's 2007 Issue Paper, said the court, report also indicates that the Salvadoran government does not have a policy or practice of refusing assistance to persons who receive threats or are otherwise victims of gang violence."

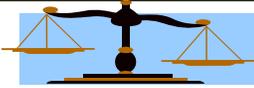
Contact: Jesse M. Bless, OIL  
☎ 202-305-2028

#### ■ Fourth Circuit Holds That A Virginia Deferred Adjudication Does Not Constitute A Conviction For Immigration Purposes

In *Crespo v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 73616 (4th Cir. January 11, 2011) (*Shedd*, *Duncan*, *Hamilton*), the Fourth Circuit held that the plain language of INA § 101(a)(48)(A), which defines the term "conviction" for immigration purposes, does not encompass a deferred adjudication under Virginia Code § 18.2-251. Under the Virginia statute, after a defendant pleads not guilty a judge finds facts that "would justify a finding of guilt" but does not enter a judgment of guilt.

The petitioner, a citizen of Peru, entered the United States with a B-2 tourist visa in 1997. He overstayed this visa and eventually married a United States citizen. His spouse then filed an I-130 but, at some point, the marriage dissolved. The former INS denied the petition and served him with an NTA on October 24, 2000. Petitioner was detained in 2006 after he pled guilty to assault and battery in Fairfax, Virginia. In 2001, prior to his detention, petitioner fathered a child with another United States citizen. Following his release from detention in September 2006, he married the mother of his child. In January 2007, petitioner's second wife filed an I-130, accompanied by his application to adjust status. After the I-130 petition was

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## Summaries Of Recent Federal Court Decisions

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approved, petitioner sought a § 212(h) waiver. The BIA agreed with the IJ that the 1997 Virginia conviction was a “conviction” under the INA. The BIA did not decide whether petitioner satisfied the extreme hardship standard in § 212(h) or otherwise merited discretionary relief.

The Fourth Circuit, in reversing the BIA’s interpretation, held that under the plain reading of the statute there was not a sufficient finding of guilt because neither a judge nor a jury found petitioner guilty after a trial and he did not plead guilty or no contest or admit to any facts, let alone facts sufficient to warrant a finding of guilt. Accordingly, it remanded the case for further proceedings.

Contact: Beau Grimes, OIL

☎ 202-305-1537

### FIFTH CIRCUIT

#### ■ Fifth Circuit Holds That Family May Constitute A Particular Social Group But That Petitioner Failed To Establish Nexus

In *Demiraj v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 72551 (5th Cir. January 11, 2011) (Barksdale, Dennis, Haynes), the Fifth Circuit held that while a family may constitute a particular social group, the alien failed to establish that she would be persecuted on account of her membership in the Demiraj family. Rather, explained the court, the record showed that the aliens, the wife and son of Demiraj, would be targeted as people who are important to Demiraj, i.e., on account of a personal motivation.

The court further explained that, there was no suggestion that family members had been systematically targeted, or that the fact of marriage and formal inclusion in the Demiraj family mattered to the persecutor. Judge Dennis dissented, and would have held that the evidence established a sufficient nexus between the feared

persecution and the alien’s membership in the particular social group.

Contact: Jennifer Khouri, OIL

☎ 202-532-4091

### SEVENTH CIRCUIT

#### ■ Seventh Circuit Affirms Removability Based on 1984 Armed Robbery Conviction and Rejects Alien’s Unexhausted Retroactivity Challenge to Removal

In *Alvarado-Fonseca v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 31859 (7th Cir. January 6, 2011) (Flaum, Rovner, Evans), the Seventh Circuit held that the petitioner failed to administratively exhaust his claim that his 1984 conviction for armed robbery preceded the codification of “crimes of violence” and “theft” as removable offenses.

The petitioner, a Mexican citizen, was ordered removed on the ground that his 1984 state court conviction for armed robbery constituted an aggravated felony. On appeal to the BIA, petitioner argued that he was not removable because the definition of aggravated felony in IIRIRA could not be applied retroactively. The BIA dismissed the appeal.

In his petition for review, petitioner argued that a provision in the Anti-Drug Abuse Act of 1988 (“ADAA”) precluded his deportation and urged the court to follow the Ninth Circuit decision in *Ledezma-Galicia v. Holder*, 599 F.3d 1055 (9th Cir. 2010). The court determined that in *Flores-Leon v. INS*, 272 F.3d 433 (7th Cir. 2001), it had squarely rejected the argument that the IIRIRA’s definition of aggravated felony cannot be applied retroactively. The court then held that the ADAA argument had not been exhausted before the BIA. “By requiring that the BIA be given the first opportunity

to consider questions of law under the INA, the exhaustion requirement acknowledges and respects the BIA’s role as the primary interpreter of immigration law, as well as its expertise in interpreting the INA,” explained the court.

The court also rejected petitioner’s argument that his removal would violate the ex post facto clause of the Constitution. Petitioner argued that, in light of the Supreme Court statements in *Padilla* that “deportation is a particularly severe ‘penalty,’ “ and that removal proceedings, while “civil in nature,” are

**“We cannot agree that *Padilla* provides sufficient guidance to deviate from the long line cases establishing that statutes retroactively setting criteria for deportation do not violate the ex post facto clause.”**

“intimately related to the criminal process,” the court should consider applying the ex post facto law to immigration proceedings. “We cannot agree that *Padilla* provides sufficient guidance to deviate from the long line cases establishing that statutes retroactively setting criteria for deportation do not violate the ex post facto clause,” said the court.

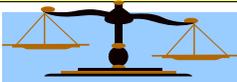
Contact: Greg D. Mack, OIL

☎ 202-616-4858

#### ■ Seventh Circuit Holds that the BIA Has “Significant Discretion” to Determine How It Hears Appeals of IJs’ Decisions

In *Ward v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 181485 (7th Cir. January 21, 2011) (Bauer, Manion, Hamilton), the Seventh Circuit held that a BIA member may affirm the decision of an IJ by writing a lengthy explanatory order without violating the streamlining regulations. The lead petitioner applied for special-rule cancellation of removal as an alleged abused spouse. To avoid the jurisdictional bar to review before a court of appeals, petitioners argued that three BIA members should have heard their case and that the

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single BIA member demonstrated this necessity by writing too much. The court disagreed, noting that the regulation vests a BIA member with discretion in deciding how the BIA will decide an appeal, and in a showing of comity, the court would not direct the BIA as to how it should hear an appeal in a particular case.

Contact: Tim Hayes, OIL  
☎ 202-532-4027

### NINTH CIRCUIT

#### ■ Ninth Circuit Upholds Denial of Asylum Based on Adverse Credibility Finding

In *Rizk v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 6182 (9th Cir. January 3, 2011) (O'Scannlain, Gould, *Ikuta*), the Ninth Circuit held that the IJ's adverse credibility determination was supported by substantial evidence and that no reasonable adjudicator would be compelled to conclude that petitioner was credible.

The lead petitioner, a citizen of Egypt, entered the United States on December 6, 1998, as a nonimmigrant visitor for pleasure, with authority to remain in the United States until June 5, 1999. His wife, Attia, and two children later entered the U.S. also as visitors. In early 2000, all were placed in removal proceedings for having remained in the United States beyond the dates permitted by their visas.

Petitioner and his wife filed separate applications for asylum, withholding of removal, and CAT protection. The children claimed derivative relief through each parent. At the hearing petitioners testified out of the hearing of the other and based their fear of persecution on three incidents: the harassment and beating of their son for refusing to join in Islamic prayers, the break-in at the family's apartment, which led to petitioner's persecution by the police and prosecution for incit-

ing sectarian chaos, and Attia's harassment by a Muslim, culminating in her abduction and rape.

They IJ did not find petitioners' story credible. He detailed dozens of inconsistencies, including discrepancies as to times, dates, the sequence of events, and the identity of the individuals who participated in those events. Consequently, the IJ denied all of the petitioners' requested relief. On appeal the BIA "adopt[ed] and affirm[ed]" the IJ's opinion solely as to "the lead male respondent." The BIA's opinion expressly did not address the appeals of Attia or the couple's children.

In upholding the adverse credibility finding against the principal petitioner, the court noted that he "had ample opportunity to explain the reasons for inconsistencies in the record, but failed to offer . . . reasonable and plausible explanation for the discrepancies, which went to the heart of his claim, either individually or in the aggregate." The court determined though, that the BIA had failed to consider Attia's and her children's claims. Therefore it remanded their cases to the BIA to consider their administrative appeals in the first instance.

Contact: Linda Wernery, OIL  
☎ 202-616-4865

#### ■ Ninth Circuit Holds that Fraudulent Deceit by Immigration Consultant Is an "Extraordinary Circumstance" and an Exception to the One-Year Filing Deadline

In *Viridiana v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 149339 (9th Cir. January 19, 2011) (Fletcher, *Paez*, Walter (sitting by designation)), the Ninth Circuit held that fraudulent deceit by an immigration consultant was an "extraordinary circumstance" directly related to petitioner's failure to file her

asylum application within the one-year deadline. The court rejected the government's contention that, because relevant facts were in dispute, the court lacked jurisdiction to review the BIA's determination that petitioner's asylum application is time barred. The court found that "the relevant historical facts" regarding the fraud were undisputed and consequently it had jurisdiction under *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007). The court remanded for consideration of the merits of petitioner's application for asylum and withholding of removal.

Contact: John D. Williams, OIL  
☎ 202-616-4854

**The court found that "the relevant historical facts" regarding the fraud were undisputed and consequently it had jurisdiction under *Ramadan*.**

#### ■ Ninth Circuit Applies Modified Categorical Analysis To Hold That Alien's Drug Conviction Was Not An Aggravated Felony

In *Young v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 257898 (*Fletcher*, Kleinfeld, Rawlinson) (9th Cir. January 28, 2011), the Ninth Circuit reversed the BIA's finding that the alien was not eligible for cancellation of removal due to an aggravated felony. The court held California Health and Safety Code § 11352(a) was overly broad, and the charging document and guilty plea recited no specific facts, but merely indicated the alien had committed one of several acts violating the statute. The court found the alien was eligible for consideration for cancellation of removal, as the record was inconclusive as to how the alien violated the state statute. The court remanded the case to the BIA for consideration of the alien's application for cancellation of removal.

Contact: Siu Wong, OIL  
☎ 202-616-3270

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### ■ Ninth Circuit Holds That Sua Sponte Reopening Determinations Remain Unreviewable, But Remands On Equitable Tolling Issue

In *Mejia-Hernandez v. Holder*, \_\_\_ F.3d \_\_\_, 2011WL 240357 (9th Cir. January 27, 2011) (Goodwin, Rawlinson, Zouhary, (by designation)), the Ninth Circuit reaffirmed its 2002 holding in *Ekimian v. INS*, 303 F.3d 1153, that the BIA's sua sponte reopening determination are unreviewable. The majority held that *Ekimian* was not overruled by the Supreme Court's 2010 decision in *Kucana v. Holder*, 130 S. Ct. 827, and that there were no sufficiently meaningful standards to allow review of such determinations. The

court also held that the agency, having given effective hearing notice via certified mail, properly denied petitioner's motion to reopen to rescind his in absentia deportation order. However, the court concluded that the agency erred in finding that the deadline for petitioner's motion to reopen under NACARA was not subject to equitable tolling.

In a dissenting opinion, District Court Judge Zouhary would have found that *Kucana* had implicitly overruled *Ekimian* and that a denial of sua sponte reopening should be subject to judicial review.

Contact: Glen T. Jaeger, OIL  
☎ 202-307-6852

### ■ Ninth Circuit Reaffirms that Inconclusive Evidence Is Sufficient to Carry an Alien's Burden of Proof

In *Rosas-Castaneda v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 9504 (9th Cir. January 4, 2011) (Cowan, Tashima, Silverman), the Ninth Circuit held that the burden of proof provisions of 8

U.S.C. §§ 1229a(c)(4)(A) and (B), added by the REAL ID Act of 2005, "did not work any change in that law that affects" the "logic, holding, or applicability" of the court's prior decision in *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007).

The petitioner, a citizen of Mexico and an LPR, was convicted of attempted transportation for sale of

an amount of marijuana weighing more than two pounds in violation of Arizona law. An IJ found Rosas-Castaneda removable based on his conviction for a controlled substance violation, but found the record of conviction unclear as to whether his offense constituted an aggravated felony. The IJ requested that petitioner

submit the criminal transcript to corroborate the inconclusive record; however, he declined to provide any further evidence of his conviction. Instead, petitioner argued, citing *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), that he met his burden for relief from removal because the record of conviction did not conclusively prove that his offense constituted an aggravated felony. The IJ denied his application for cancellation of removal. On appeal, the BIA affirmed, ruling that the REAL ID Act changed the result of *Sandoval-Lua*.

The court found that the REAL ID Act simply codified the existing regulatory scheme that was at issue in *Sandoval-Lua*, and held that the new statutory language did not grant an IJ the authority to require aliens to supplement the record of convictions. The court explained that, the "plain language of 8 U.S.C. § 1229a(c)(4)(B) unambiguously authorizes IJs to request corroboration of only testimonial evidence, and conspicu-

ously excludes the authority to require an alien to corroborate 'other evidence in the record.'" Accordingly, the court reaffirmed *Sandoval-Lua's* holding that an applicant for cancellation can meet his burden of proof by submitting "inconclusive" evidence regarding whether he has been convicted of a disqualifying aggravated felony.

Contact: Beau Grimes, OIL  
☎ 202-305-1537

### ■ Ninth Circuit Determines that Pending Removal Proceedings Bar District Court Jurisdiction Over Adjustment Denials

In *Cabaccang v. USCIS*, 627 F.3d 1313 (9th Cir. 2010) (Schroeder, M. Tallman, R. Smith, M.), the Ninth Circuit clarified "mixed jurisprudence" by holding that the denial of an adjustment of status application by USCIS is not considered final for APA review purposes in cases where removal proceedings are pending.

The plaintiffs, husband and wife, entered the United States with B-2 nonimmigrant tourist visas. A month before the expiration of their visas, they each filed an application for adjustment of status. The husband based his application on a I-140 petition filed by his employer, and the wife sought derivative adjustment. USCIS denied their applications because the husband had not provided certain required documentation. The USCIS later denied their motions to reconsider finding that their lawful nonimmigrant status had expired on January 16, 2005, when their tourist visas ran out. Thus, they did not qualify for adjustment because they did not have lawful status at the time of their second applications, and they had failed to continuously maintain lawful status for a period exceeding 180 days, beginning January 16, 2005.

Plaintiffs then filed an action in district court. The court granted a TRO and directed USCIS to reopen and reconsider their applications for

**The court held that that the new statutory language in the REAL ID Act, did not grant an IJ the authority to require aliens to supplement the record of convictions.**

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adjustment of status. USCIS complied and the district court dismissed the original complaint as no longer ripe. USCIS then denied the reopened applications and four days later, on May 22, 2008, placed the couple in removal proceedings. Plaintiffs then returned to the district court. The court held that it had jurisdiction, noting "mixed jurisprudence" on the issue, but ultimately granted the government's motion for summary judgment, concluding USCIS's interpretation of INA § 1255(k) was not arbitrary or capricious under the APA. Plaintiffs then appealed to the Ninth Circuit.

As a threshold matter, the Ninth Circuit held that the district court lacked jurisdiction under the APA because there had been "no finality in the administrative process." The court noted that plaintiffs had the right to renew their applications to adjust status and an opportunity to fully develop their arguments before and IJ who will have "unfettered authority to modify or reverse USCIS's denial" of their applications. The court also held that the pendency of removal proceedings means the plaintiffs had not exhausted their administrative remedies. The court distinguished its prior decisions on the basis that there was no pending removal proceeding, explaining that a denial of status adjustment is final because there is no appeal to a superior administrative authority. "On the other hand, when removal proceedings are pending, further administrative relief is available."

Finally, the court acknowledged that the timing of the initiation of removal proceedings does not control, for "[t]o hold otherwise would allow plaintiffs to confer jurisdiction on the federal courts simply by racing to the courthouse before the Government initiates removal proceedings."

Contact: Gisela Westwater, OIL DCS  
☎ 202-532-4174

### ■ Ninth Circuit Holds that IJ Erred in Denying Asylum Application Based on Adverse Credibility Determination

In *Li v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 149344 (9th Cir. January 19, 2010) (*Goodwin*, Rawlinson, Zouhary (sitting by designation)), the Ninth Circuit concluded that the immigration judge applied the wrong standard in denying the alien's pre-REAL ID Act asylum claim based on an adverse credibility finding. In so doing, the majority reiterated that an immigration judge's "perception of a petitioner's ignorance of religious doctrine is not a proper basis for an adverse credibility finding." The majority further held that "a general declaration of evasiveness or inconsistency is insufficient as a basis for adverse credibility." Judge Zouhary's dissent suggests that remand is appropriate for a supplemental hearing so that the immigration judge may "clarify any credibility determination."

Contact: Kevin J. Kijewski, CRT  
☎ 202-305-2913

## TENTH CIRCUIT

### ■ Tenth Circuit Upholds Its Prior Precedent Finding that the Departure Bar Is a Complete Jurisdictional Bar Against Motions to Reopen

In *Contreras-Bocanegra v. Holder*, \_\_\_ F.3d \_\_\_, 2010 WL 5209228 (10th Cir. December 23, 2010) (*Briscoe*, *McKay*, *Hartz*), the Tenth Circuit held that pursuant to prior precedent, "the post-departure bar [8 C.F.R. § 1003.2(d)], prohibits the BIA and IJ from hearing motions to reopen or reconsider made by

aliens who have since been removed from the country."

The petitioner, a citizen of Mexico, who became an LPR in 1989, was removed from the United States on April 9, 2009, because he had been convicted of a controlled substance violation. In June 2009, he filed a timely motion to reopen in which he alleged ineffective assistance of counsel in the removal proceeding. The BIA dismissed the motion for lack of jurisdiction, under 8 C.F.R. § 1003.2(d).

Petitioner argued that under IIRIRA he had the statutory right to file one motion to reopen within the ninety-day period, upon which the federal regulation in 8 C.F.R. § 1003.2(d) could not infringe. The court determined that petitioner's case fell squarely within its prior holdings that the post-departure bar was a valid exercise of the Attorney General's discretion, and accordingly held that it was bound by those decisions absent an en banc consideration or superseding Supreme Court decision.

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

### ■ Tenth Circuit Rules That One Incident Of Physical Harm Did Not Rise To The Level Of Persecution

In *Ritonga v. Holder*, \_\_\_ F.3d \_\_\_, 2011 WL 258380 (10th Cir. January 28, 2011) (*Tymkovich*, *Seymour*, *Baldock*), the Tenth Circuit upheld the agency's determination that an Indonesian Christian woman who was pushed into a wall by a group of Muslims did not suffer past persecution where the incident caused only minor bleeding and the police thereafter arrested the perpetrators. "Even considering all of these incidents cumulatively, however, we cannot conclude that a reasonable

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adjudicator would be compelled to find Ms. Ritonga suffered past persecution, given our prior decisions in analogous circumstances,” said the court.

The court also upheld the BIA's determination that Ms. Ritonga's "repeated returns to Indonesia, as well as the continued presence of her family in Indonesia without further violent incidents, undercuts her asserted fear of persecution." Furthermore, said the court, Ms. Ritonga "failed to demonstrate the BIA erred in finding that she could reasonably relocate within the country."

Finally, the court held that sporadic incidents of violence did not necessarily compel the conclusion that there is a pattern or practice of persecution against Christians in Indonesia. "The record as a whole reflects there are problems of violence in Indonesia, as well as discrimination against Christians, but the government overall does not seem unable or unwilling to combat such crimes. "Sporadic incidents of violence do not necessarily compel the conclusion that there is a 'pattern or practice' of persecution against Christians in Indonesia," explained the court.

Contact: Annette Wietecha, OIL  
☎ 202-353-3961

### ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That a Guilty Plea, a "Finding of Guilt," and a Sentence of Time Served Result in a Conviction Under the INA**

In *Mejia Rodriguez v. USCIS*, \_\_\_ F.3d \_\_\_, 2011 WL 9573 (11th Cir.

January 4, 2011) (Carnes, Kravitch, and Siler) (*per curiam*), the Eleventh Circuit affirmed the district court's dismissal of Mejia Rodriguez's challenge to the denial of his application for renewal of Temporary Protected Status.

Rodriguez entered the United States in November 1980 on a B-2 visa. He overstayed his visa and was ultimately ordered to be deported. He then applied for and received TPS after Hurricane Mitch struck Honduras. He was permitted to renew his status from 1999 through 2004. In 2005, however, USCIS rejected Rodriguez's request

for renewal, citing several prior convictions as the basis for his ineligibility. All of the prior convictions, except two, were later vacated. The remaining convictions on which the CIS relied were a 1985 turnstile-jumping conviction, and a conviction in 1986 when he was charged in state court with marijuana possession and driving with a suspended license. According to the state-court records, Rodriguez's drug offense was disposed of by a "guilty plea, finding of guilty, and credit for time served."

The court determined that the state court accepted Rodriguez's plea, made a "finding of guilt," and imposed a sentence of time served. Consequently, it held that this satisfied the INA § 101(a)(48) definition of a formal judgment of guilt. Accordingly, it concluded that the 1986 case resulted in a conviction for immigration purposes.

Contact: Jeffrey S. Robins, OIL DCS  
☎ 202-616-1246

## DISTRICT COURTS

■ **District Court Denies Government's Motion to Dismiss Terrorism-Related Inadmissibility Delay Case**

In *Beshir v. Holder*, \_\_\_ F. Supp.2d \_\_\_, 2011 WL 204798 (D.D.C. January 24, 2011) (*Urbina, J.*), the district court denied the government's motion to dismiss for lack of jurisdiction. USCIS had denied the alien's adjustment of status application on terrorism-related inadmissibility grounds, later reopening and placing it on hold pursuant to USCIS's policy. The alien petitioned the court to compel an agency adjudication of her application. The court held that the INA did not deprive it of jurisdiction because the Secretary of Homeland Security did not have discretion to hold the application in abeyance indefinitely. It noted the regulation permitting withholding of adjudication pending investigations and denied the government's motion for summary judgment without prejudice to renew such motion to address the applicability of the regulation.

Contact: Kimberly Wiggans, OIL-DCS  
☎ 202-532-4667

■ **Court Remands Delayed Naturalization Case to USCIS**

In *Iqbal v. Holder*, No. 10-cv-633 (W.D. Okl. January 5, 2011) (*Friot, J.*), the court remanded plaintiff's naturalization application to USCIS and denied the government's motion to dismiss for mootness. The court held that in a delayed naturalization case, the district court has exclusive jurisdiction, and USCIS therefore lacked jurisdiction to deny the application. The court remanded the case, instructing USCIS that it may reconsider its September decision or reinstate it.

Contact: Kate Goettel of OIL-DCS  
☎ 202-532-4115

## This Month's Topical Parentheticals

### ARREST/SEARCH/SEIZURE

■ **U.S. v. Gonzalez-Diaz**, \_\_ F.3d \_\_, 2011 WL 198438 (9th Cir. Jan. 24, 2011) (holding that petitioner was not under official restraint when he was arrested by U.S. immigration agents because, having been denied legal entry into Canada, he was not entering the U.S. from a foreign country)

### ASYLUM

■ **Ritonga v. Holder**, \_\_ F.3d \_\_, 2011 WL 258380 (10th Cir. Jan. 28, 2011) (affirming BIA's finding that petitioner failed to establish persecution in Indonesia where she suffered only minor injuries at the hands of Muslims; upholding well-founded fear finding where petitioner repeatedly returned to Indonesia, her family continued to reside there without further violent incidents, and State Department reports did not support a finding of a pattern or practice of persecution against Christians)

■ **Li v. Holder**, \_\_ F.3d \_\_, 2011 WL 149344 (9th Cir. Jan. 19, 2011) (reversing IJ's adverse credibility finding in pre-REAL ID Act case and reasoning that "[a]n IJ's perception of a petitioner's ignorance of religious doctrine is not a proper basis for an adverse credibility finding;" further rejecting IJ's finding that petitioner's testimony was inconsistent and evasive) (Judge Zouhary dissented)

■ **Liu v. Holder**, \_\_ F.3d \_\_, 2011 WL 199123 (2d Cir. Jan. 24, 2011) (holding that substantial evidence supports BIA's finding that petitioner failed to establish persecution where, prior to his arrest and detention by Chinese police, petitioner suffered only minor bruising from an altercation with family planning officials)

■ **Viridiana v. Holder**, \_\_ F.3d \_\_, 2011 WL 149339 (9th Cir. Jan. 19, 2011) (holding that a claim of fraudulent deceit by an immigration consultant is distinct from a claim of ineffective assistance of counsel and constitutes an "extraordinary circumstance"

justifying an untimely asylum application; remanding withholding claim for further consideration in light of *Wakary v. Holder*)

■ **Lizama v. Holder**, \_\_ F.3d \_\_, 2011 WL 149874 (4th Cir. Jan. 19, 2011) (holding that IJ's misstatement was simply a "labeling error" and did not raise a question of law that would allow court to review timeliness of asylum application; affirming BIA's holding that a group of young, Americanized, well-off, Salvadoran male deportees with criminal histories who oppose gangs is not a legally cognizable social group)

■ **Teclezghi v. Holder**, \_\_ F.3d \_\_, 2010 WL 5483375 (9th Cir. Jan. 4, 2011) (denying alien's *en banc* rehearing petition) (Judge Pregerson dissented reasoning that an attorney's failure to inquire as to whether his female client (an asylum applicant) suffered FGM constitutes ineffective assistance of counsel)

■ **Demiraj v. Holder**, \_\_ F.3d \_\_, 2011 WL 72551 (5th Cir. Jan. 11, 2011) (affirming denial of asylum for lack of nexus between proposed social group of "the Demiraj family" and the persecution feared where the record contained no evidence that family members were targeted in Albania on account of their membership in the family as *such*, but because they are people who are important to Mr. Demiraj – that is, because hurting them would hurt Mr. Demiraj) (Judge Dennis dissented)

■ **Mariko v. Holder**, \_\_ F.3d \_\_, 2011 WL 198602 (1st Cir. Jan. 24, 2011) (affirming IJ's adverse credibility finding based on petitioner's use of fraudulent identification documents, inconsistencies between his testimony and medical records/affidavit, and his vague testimony regarding the political party with which he was allegedly involved; affirming denial of motion to remand and rejecting new asylum claim based on assertion that newborn daughter would be subject to FGM)

### CANCELLATION

■ **Baraket v. Holder**, \_\_ F.3d \_\_, 2011 WL \_\_ (2d Cir. Jan. 18, 2011) (pretermitted application for cancellation of removal and rejecting petitioner's argument that court should interpret the stop-time rule at 8 U.S.C. § 1229b(d)(1) as terminating period of continuous residence on the date alien is convicted of (or admits) the offense rather than the date he commits the offense)

### CRIMES

■ **Gudiel-Soto v. U.S.**, \_\_ F. Supp.2d \_\_, 2011 WL 256297 (D.N.J. Jan. 25, 2011) (declining to issue writ of *coram nobis* because defendant failed to establish prejudice from his prior counsel's alleged failure to advise him of the immigration consequences of his guilty plea where there was overwhelming evidence of his guilt and he received a favorable plea offer from the government)

■ **Young v. Holder**, \_\_ F.3d \_\_, 2011 WL 257898 (9th Cir. Jan. 28, 2011) (holding that petitioner's drug conviction is not an aggravated felony for purposes of eligibility for cancellation, and reasoning that under the modified categorical analysis, a court may not rely on a guilty plea and charging document "that merely recites the multiple theories under which a defendant can be convicted under an overly-inclusive statute")

■ **Crespo v. Holder**, \_\_ F.3d \_\_, 2011 WL 73616 (4th Cir. Jan. 11, 2011) (holding the BIA erred in finding that a deferred adjudication under a Virginia first offender statute for possession of marijuana constituted a "conviction" where petitioner pled not guilty, the judge found facts justifying a finding of guilt but did not make a specific finding of guilt, and the judge sentenced petitioner to one year probation)

■ **Oouch v. DHS**, \_\_ F.3d \_\_, 2011 WL 257336 (2d Cir. Jan. 28, 2011)

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## This Month's Topical Parentheticals

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(holding that a conviction for the use of a child for sexual performance in violation of New York Pen. Law § 263.05 categorically constitutes an aggravated felony as a "sexual abuse of minor" crime)

■ **Rosas-Castaneda v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 9504 (9th Cir. Jan. 4, 2011) (holding that its prior decision in *Sandoval-Luna* – which held that an alien may show that he has not been convicted of an aggravated felony for purposes of cancellation eligibility by submitting an inconclusive record of conviction – applies to post-REAL ID cases because the REAL ID Act simply codified the existing regulatory scheme)

■ **Mejia-Rodriguez v. DHS**, \_\_\_ F.3d \_\_\_, 2011 WL 9573 (11th Cir. Jan. 4, 2011) (holding that under 8 U.S.C. § 1101(a)(48)(A), a guilty plea and a finding of guilt, with a sentence of time served, establishes a formal judgment of guilt and thus qualifies as a "conviction" under the INA)

■ **U.S. v. Sanchez-Ledezma**, \_\_\_ F.3d \_\_\_, 2011 WL 48948 (5th Cir. Jan. 7, 2011) (holding that the crime of evading arrest with a motor vehicle, by its nature, involves a substantial risk of physical force against a person or property, and therefore is a crime of violence/aggravated felony for purposes of the sentencing guidelines).

■ **U.S. v. Doss**, \_\_\_ F.3d \_\_\_, 2011 WL 117628 (9th Cir. Jan. 14, 2011) (applying *Nijhawan* to conclude that it should look beyond the elements of the criminal statute to determine if the defendant had a "prior sex conviction in which a minor was the victim")

■ **U.S. v. Ashraf**, \_\_\_ F.3d \_\_\_, 2011 WL 93048 (6th Cir. Jan. 12, 2011) (rejecting government's argument that the defendant's removal mooted his challenge to his convictions for willful failure to sign travel documents where collateral consequences re-

mained; affirming district court's convictions and rejecting petitioner's argument that the government had to establish that he was not acting in good-faith when he refused to sign the travel documents).

### DETENTION

■ **Leslie v. Holder**, \_\_\_ F. Supp.2d \_\_\_, 2011 WL 242350 (W.D.N.Y. Jan. 27, 2011) (rejecting challenge to immigration detention because petitioner's failure to cooperate in obtaining travel documents is principal reason for the delay in his removal)

### DUE PROCESS - FAIR HEARING

■ **Rangel-Zuazo v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 285214 (9th Cir. Jan. 31, 2011) (holding that a rational basis exists to treat differently offenders who have reached eighteen years of age before conviction or adjudication from those who have not reached eighteen years of age before conviction or adjudication)

■ **Galluzzo v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 222343 (2d Cir. Jan. 26, 2011) (holding that in the absence of evidence of a waiver of rights to contest removal for violation of the VWP, petitioner's right to due process was violated by his failure to receive a "pre-removal hearing")

■ **Ward v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 181485 (7th Cir. Jan. 21, 2011) (rejecting petitioner's argument that the BIA violated the review procedures set forth in 8 C.F.R. § 1003.1(e) where a single BIA member, in his discretion, issued a three-page decision without referring it to a full panel)

### EAJA

■ **Cody v. Caterisano**, \_\_\_ F.3d \_\_\_, 2011 WL 108690 (4th Cir. Jan. 13, 2011) (affirming district court's denial of EAJA fees and reasoning that this is a case of first impression where the government has made reasonable arguments based on statutory inter-

pretation and analogous cases, and therefore petitioner failed to establish that the government's position was not substantially justified)

### JURISDICTION

■ **Beshir v. Holder**, \_\_\_ F. Supp.2d \_\_\_, 2011 WL 204798 (D.D.C. Jan. 24, 2011) (finding that 242(a)(2)(B)(ii) does not preclude the court's review of petitioner's claim that CIS unreasonably withheld adjudication of her adjustment application because the INA does not provide the DHS Secretary with discretionary authority to withhold a decision indefinitely)

■ **Alvarado-Fonseca v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 31859 (7th Cir. Jan. 6, 2011) (denying PFR for failure to exhaust administrative remedies where petitioner failed to challenge his removability before the BIA on the ground that his aggravated felony conviction pre-dated the Anti-Drug Abuse Act of 1988)

■ **Telyatitskiy v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 117257 (1st Cir. Jan. 14, 2011) (finding no jurisdiction to review withholding claim where petitioner failed to file PFR of underlying order and, in any event, failed to raise specific argument before the BIA; further finding it lacked jurisdiction to review CAT denial pursuant to criminal alien review bar where petitioner merely raised "weight-of-the-evidence" arguments rather than asserting an error of law)

### MOTION TO REOPEN

■ **Mejia-Hernandez v. Holder**, \_\_\_ F.3d \_\_\_, 2011 WL 240357 (9th Cir. Jan. 27, 2011) (holding: (a) petitioner was properly served with a hearing notice sent by certified mail to last known address; (b) *Kucana* does not warrant revisiting question of whether the court may review BIA's refusal to reopen sua sponte; and (c) the BIA abused its discretion in failing to equitably toll the deadline for NACARA relief)

## Justice Announces Launch of Human Trafficking Initiative

The Departments of Justice, Homeland Security and Labor announced on February 1, the launch of a nationwide Human Trafficking Enhanced Enforcement Initiative designed to streamline federal criminal investigations and prosecutions of human trafficking offenses.

As part of the Enhanced Enforcement Initiative, specialized Anti-Trafficking Coordination Teams, known as ACTeams, will be convened in select pilot districts around the country. The ACTeams, comprised of prosecutors and agents from multiple federal enforcement agencies, will implement a strategic action plan to combat identified human trafficking threats. The ACTeams will focus on developing federal criminal human trafficking investigations and prosecutions to vindicate the rights of human trafficking victims, bring traffickers to justice, and dismantle human trafficking networks.

The ACTeam structure not only enhances coordination among federal prosecutors and federal agents on the front lines of federal human trafficking investigations and prosecutions, but also enhances coordination between front-line enforcement efforts and the specialized units at the Department of Justice and federal agency headquarters. The ACTeam Initiative was developed through inter-agency collaboration among the Departments of Justice, Homeland Security, and Labor to streamline rapidly expanding human trafficking enforcement efforts.

“This modern-day slavery is an affront to human dignity, and each and every case we prosecute should send a powerful signal that human trafficking will not be tolerated in the United States,” said Attorney General Eric Holder. “The Human Trafficking Enhanced Enforcement Initiative takes our anti-trafficking enforcement efforts to the next level by building on the most effective tool in our anti-trafficking arsenal: partnerships.”

“Working together, the entire U.S. government continues to make progress in convicting traffickers, dismantling their criminal networks and protecting their victims,” said Secretary of Homeland Security Janet Napolitano. “Combating human trafficking is a shared responsibility, and the ACTeam Initiative is a critical step in successfully leveraging all our federal, state and local resources to crack down on these criminals.”

“This pilot is a necessary tool in the federal government’s crackdown on human trafficking,” added Secretary of Labor Hilda L. Solis. “Victims of these contemptuous acts have been left in an unfamiliar land with no family, no support systems, and no way to make a life for themselves. We must do whatever we can to ensure that victims of trafficking receive full restitution, including denied wages.”

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## Noted.....

In *Harrington v. Richter*, 131 S. Ct. 770, 20-11 WL 148587 (Jan. 19, 2011), the Supreme Court held that the Ninth Circuit erred in finding that a state court’s application of *Strickland*’s ineffective assistance standard was unreasonable, where the state court concluded that prior counsel was not ineffective for failing to consult blood evidence experts or anticipate that the prosecution might offer such experts. The Court also held that the Ninth Circuit erred in its prejudice analysis, and reiterating that the proper standard under *Strickland* is whether it is “reasonably likely” that the result would have been different.

**USCIS** is undertaking an agency-wide effort to move immigration services from a paper-based model to an electronic environment. This effort is known as **USCIS Transformation**. According to the agency, Transformation will deliver a simplified, Web-based system for benefit

seekers to submit and track their applications. The new, account-based system will provide customers with improved service. It will also enhance USCIS’s ability to process cases with greater precision, security, and timeliness.

On January 26, EOIR celebrated the 10th anniversary of the **BIA Pro Bono Project**. EOIR implemented the Project in January 2001, to improve access to legal information and increase pro bono representation for individuals whom DHS is detaining while their immigration cases are under appeal. The Project is a joint effort between EOIR and a non-governmental organization.

USCIS has announced that it is “beta-testing the web-based **Validation Instrument for Business Enterprises** (VIBE), and petitioners may begin seeing VIBE-related Requests for Evidence (RFEs).”

## Litigation Statistics

According to statistics released by the Administrative Office of the U.S. Courts, there has been a decrease (768 cases) in the number of appeals filed in the federal courts from a year ago. Fewer appeals were filed in the Second Circuit (down 365), the Ninth Circuit (down 182), and in the Eleventh Circuit (down 109).

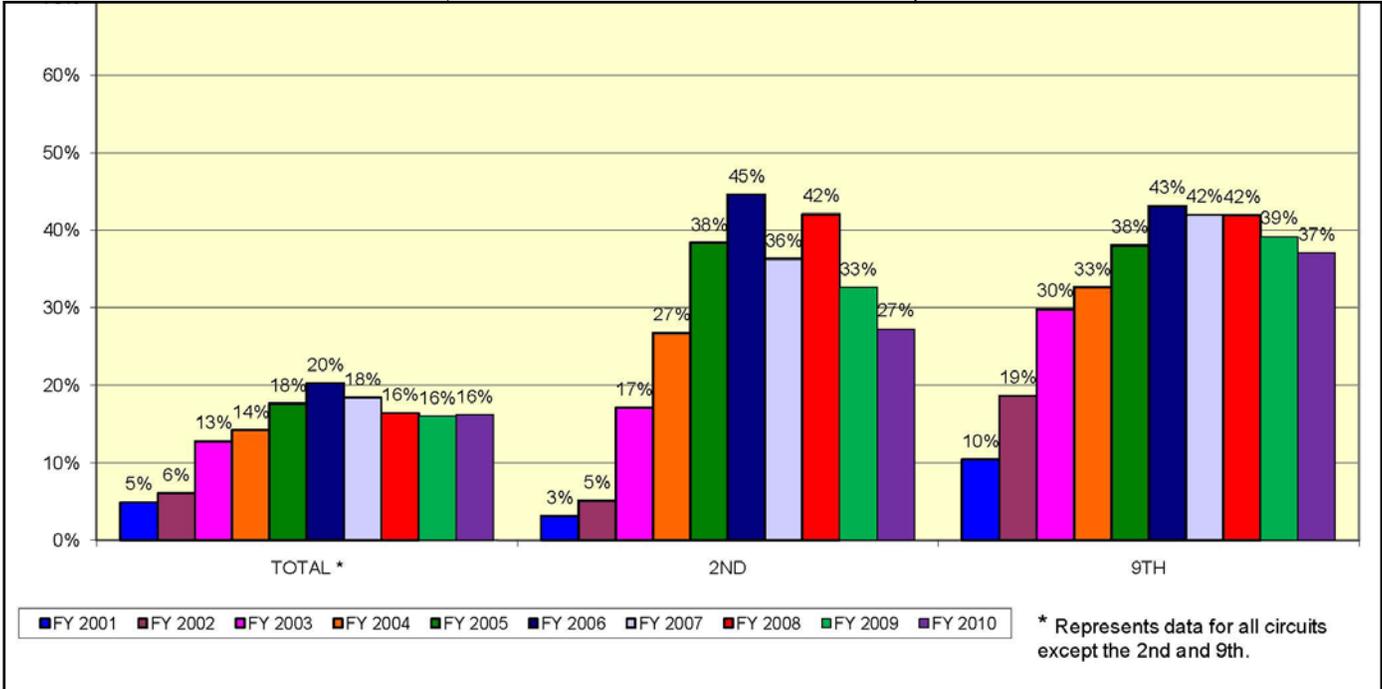
The number of appeals completed by the BIA was 27,428, a level comparable to 2001. However, the number of appeals of these cases to the federal courts are still four times what they were in 2001.

The chart below indicates the BIA rate of appeals in FY 2001-2010.

## INSIDE OIL

Congratulations to new Senior Litigation Counsel **Erica Miles** and **Holly Smith**.

Best wishes to **Mike Truman** who has taken a position as Assistant Chief Counsel with the ICE office in Denver.



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.



*“To defend and preserve the Executive’s authority to administer the Immigration and Nationality laws of the United States”*

If you would like to receive the *Immigration Litigation Bulletin* electronically send your email address to:  
karen.drummond@usdoj.gov

**Tony West**  
Assistant Attorney General

**William H. Orrick, III**  
Deputy Assistant Attorney General  
Civil Division

**Thomas W. Hussey**, Director  
**David M. McConnell**, Deputy Director  
**Donald E. Keener**, Deputy Director  
Office of Immigration Litigation

**Francesco Isgrò**, Senior Litigation Counsel  
Editor

**Tim Ramnitz**, Attorney  
Assistant Editor

**Linda Purvin**  
Circulation