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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Supreme Court Upholds BIA's Interpretation Of Cancellation Statute As Precluding Imputation

In ***Holder v. Martinez Gutierrez***, 2012 WL 1810218 (U.S. May 21, 2012), consolidated with ***Holder v. Sawyers***, the Supreme Court, in a unanimous decision, held that the interpretation by the Board of Immigration Appeals of the cancellation of removal statute, 8 U.S.C. § 1229b(a), as not permitting imputation was a permissible construction entitled to *Chevron* deference.

The Ninth Circuit decisions on review had permitted an alien to impute a parent's years of lawful permanent residence or continuous residence to satisfy the durational requirements for cancellation of removal for lawful permanent residents. The Supreme Court held that the Board's contrary interpretation was consistent with the statute's text, that the doctrine of congressional ratification did not apply where Congress had eliminated the prior textual hook for imputation, and that the immigration laws' general overall goals of promoting family unity did not require another interpretation of the statutory silence.

The aliens involved in the two consolidated cases forming the basis for the Court's decision are lawful permanent residents (LPRs) who were found removable for alien smuggling (Martinez Gutierrez) or drug-related convictions (Sawyers) and sought cancellation of removal for lawful permanent residents under 8 U.S.C. § 1229b(a). Martinez Gutierrez

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When is a Change in the Law Not a Change in the Law?

Trick question? Not hardly; this situation arises with greater frequency than you may realize. When a federal court interprets a statute, it provides an authoritative statement of its meaning. When a subsequent higher court decision interprets the law differently, most observers would say that the law changed. After all, from the date of the original decision until date of the higher court's decision, the law followed one interpretation. After the higher court's authoritative statement, the law indisputably follows another interpretation. Yet, the law did not "change" because the higher court merely decided what the law always meant. This rule is rooted in the constitutional separation of powers, where the courts have no authority to depart from the congressional command setting the effective date of a law that Congress has enacted. Allowing the courts to "change" interpretations would thus allow the courts to, in a sense, change the effective date of a statute. *Rivers v. Roadway Exp., Inc*, 511 U.S. 298, 313 fn. 12 (1994). Thus, the higher court's authoritative interpretation of a statute is retroactive, reflecting the congressional command setting the effective date of the law.

Although this principle is well settled, its applicability when the

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Supreme Court Holds No Imputation in Cancellation

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had neither been lawfully admitted for permanent residence for five years, as required by 8 U.S.C. §1229b(a)(1), nor resided in the United States for seven years after lawful admission, as required by 8 U.S.C. § 1229b(a)(2). Sawyers had not resided in the United States for seven years after lawful admission. To meet the statute's durational requirements, each alien sought to "impute" one of their parent's lawful admission, years of residence after that admission, and/or years of residence as an LPR.

The Ninth Circuit granted the aliens' petitions for review and remanded the cases to the Board for application of the imputation rule it had created in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), and extended in *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009). In *Cuevas-Gaspar,* the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the purpose of satisfying § 1229b(a)(2)'s seven-year residency requirement. The court reaffirmed and extended this holding to § 1229b(a)(1)'s five-year LPR status requirement in *Mercado-Zazueta*. In addition, in *Mercado-Zazueta*, the Ninth Circuit specifically overruled the Board's post-*Cuevas-Gaspar* published decisions. 580 F.3d at 1108-09; see *In re Escobar*, 24 I&N Dec. 231 (BIA 2007); *In re Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008). Those decisions had set forth the Board's interpretation of the statute as not permitting imputation and had rejected the Ninth Circuit's existing interpretation pursuant to a *Brand X* approach. *See In re Ramirez-Vargas*, 24 I&N Dec. at 600 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

In the opinion for the unanimous Court, Justice Kagan first wrote that the Board's approach was "consistent with the statute's text," which "does not mention imputation, much less require it." The Court observed that the provision "calls for 'the alien' – not, say, 'the alien or one of his parents' – to meet the three prerequisites for cancellation of removal." This language thus "at least permits the Board to go the other way [from the Ninth Circuit] – to say that 'the alien' must meet the statutory conditions independently, without relying on parent's history." In other words, the Court found that the statutory silence gave broad leeway to the agency to fashion an appropriate approach.

The Court then rejected the aliens' arguments that the history and context of § 1229b(a) indicated that Congress intended to ratify and carry forward the imputation rule that had been applied in interpreting § 1229b(a)'s predecessor, former §212 (c). The latter section generally allowed the Attorney General to prevent the removal of an alien with LPR status who had maintained a "lawful unrelinquished domicile of seven consecutive years" in this country. 8 U.S.C. § 1182(c) (repealed eff. 1997). The Court observed that, in creating the two new, distinct durational requirements in § 1229b(a), Congress had eliminated the very term in § 212(c) -- "domicile" – on which imputation had been founded. The Court concluded that this alteration meant that the doctrine of congressional ratification did not apply, because Congress did not "reenact [the] statute without relevant change."

The Court also declined to adopt the aliens' view that the general policy in favor of "family unity" that lies behind many provisions of the Immigration and Nationality Act (INA) dictates another interpretation here. The Court agreed that, while the goals of family unity "underlie and inform many provisions of immigration law," "they are not the INA's only goals, and Congress did not pursue them to the *n*th degree." The Court therefore explained that it "cannot read a silent statute as requiring (not merely allowing) imputation just because that rule would be family-friendly."

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The Court also did not agree with the aliens that the Board had been inconsistent in its approach to imputation, finding that the Board had given "a reasoned explanation for the divergent results," namely, the "straightforward distinction" that it "imputes matters involving an alien's state of mind, while declining to impute objective conditions or characteristics." Finally, the Court held that the Board had not erroneously concluded that it was prohibited from applying imputation, holding that the Board properly exercised its discretion to interpret the statute. The Court read the Board's published decisions setting forth its interpretation (*Escobar* and *Ramirez-Vargas*) as expressing its view, "based on its experience implementing the INA, that statutory text, administrative practice, and regulatory policy all pointed in one direction: toward disallowing imputation." The Court declined to adopt the aliens' criticisms of the Board's decisions, concluding that the decisions "read[] like a multitude of agency interpretations -- not the best example, but far from the worst -- to which [the Court] and other courts have routinely deferred" and that it "see[s] no reason not to do so here."

The Court reversed the Ninth Circuit's judgments in the two cases and remanded them to that court for further proceedings consistent with its opinion. It subsequently granted four other pending petitions for certiorari raising the same issue, vacated the judgments, and remanded those cases as well to the Ninth Circuit.

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AILA InfoNet Doc. No. 12060159. (Posted 6/1/12)

When is a Change in the Law Not a Change in the Law?

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Board construes the meaning of an ambiguous INA provision in a precedential decision is currently before the *en banc* Ninth Circuit in *Garfias-Rodriguez v. Holder*, No. 09-72603. In *Garfias*, the Ninth Circuit reviewed an unpublished Board decision, which held that an alien inadmissible under section 212(a)(9)(C)(i) of the INA was ineligible to adjust status under section 245(i), relying on the Board precedent decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). The panel not only deferred to the Board's permissible interpretation of the interplay of these statutes in *Briones*, but also concluded that the *Garfias* decision should apply retroactively.

Although the panel correctly applied precedent to conclude that *Garfias* would apply retroactively, a better approach would grant retroactive effect to the precedential Board decision to which the *Garfias* panel deferred – *Briones*. This position is rooted in the Board's role as the authoritative interpreter of ambiguous INA provisions as explained in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and *Negusie v. Holder*, 555 U.S. 511 (2009), and our belief that the *Rivers* retroactivity rule applies equally when the Board exercises its interpretative authority under section § 103(a)(1), *Chevron*, and *Brand X*. The government is now advocating that position before the *en banc* court.

Understanding this position requires an understanding of the complex procedural posture in which the case arrived in the Ninth Circuit. The *Garfias* line of cases, which involves section 212(a)(9)(C)(i)(I) (unlawful re-entry following unlawful presence) follows a track parallel to a line of cases addressing section 212(a)(9)(C)(i)(II) (unlawful re-entry following prior removal).

After Congress amended the INA by adding the inadmissibility provisions of section 212(a)(9)(C) for recidivist immigration violators, the former INS issued a memorandum providing that aliens inadmissible under section 212(a)(9)(C) were not eligible to adjust status under section 245(i). Immigration judges routinely followed this guidance, and their decisions were affirmed in unpublished Board decisions.

In 2004, the Ninth Circuit issued *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), where it rejected the INS memorandum's application to section 212(a)(9)(C)(i)(II) and concluded that aliens inadmissible under 212(a)(9)(C)(i)(II) were eligible to adjust status under 245(i). *Perez-Gonzalez* relied on former sections 212.2(e) and (i)(2) of the regulations to reconcile the inadmissibility provision with the special adjustment of status provision.

Two years later, exercising its authority under *Brand X*, the Board issued an authoritative interpretation of the interplay between sections 212(a)(9)(C)(i)(II) and the regulations in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), finding that, because the regulations predated section 212(a)(9)(C)(i)(II), they could not be reasonably construed as implementing the statute.

Shortly thereafter, the Ninth Circuit, relying on *Perez-Gonzalez*, issued a decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), where it rejected the INS memorandum's application to section 212(a)(9)(C)(i)(I) and concluded that aliens inadmissible under 212(a)(9)(C)(i)(I) were eligible to adjust status under 245(i).

When the designated authoritative interpreter of federal law construes a statute, its construction is not regarded as new law, but rather as an "authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."

Later the next year, the Board issued the authoritative interpretation of the interplay between sections 212(a)(9)(C)(i)(I) and 245(i) in *Matter of Briones*, finding that aliens inadmissible under § 212(a)(9)(C)(i)(I) were ineligible to adjust status under 245(i). The Ninth Circuit next issued *Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007), where it acknowledged the authoritative interpretation of section 212(a)(9)(C)(i)(II) in *Torres-Garcia*.

Subsequently, in *Morales–Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076 (9th Cir. 2010), the Court held that *Gonzales* would apply retroactively to all cases open on direct review. Thus, when the Ninth Circuit issued *Garfias*, finding the Board's interpretation reasonable, it was compelled to follow *Morales-Izquierdo* in applying that determination to all cases open on direct review. On rehearing en banc, the Ninth Circuit has requested supplemental briefing on whether the retroactivity rule in *Morales-Izquierdo* should be overruled.

The simple answer is "yes." To determine the appropriate reference point for the retroactivity analysis, the court must first establish the nature of, and the relationship between, the decisions in this case, most notably *Acosta*, *Briones*, and *Garfias*. The nature of that relationship reveals that *Briones* was not a change in the law, but rather an authoritative statement of what the law has always been. When the designated authoritative interpreter of federal law construes a statute, its construction is not regarded as new law, but rather as an "authoritative statement of what the statute meant before as

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USCIS Launches Online Immigration System, USCIS ELIS

USCIS has launched the first phase of its electronic immigration benefits system, known as USCIS ELIS. The system has been created to modernize the process for filing and adjudicating immigration benefits. USCIS Director Alejandro Mayorkas. said that USCIS ELIS will transform how we interact with our customers and how we manage the 6-7 million applications we receive each year."

The initial launch brings the agency closer to realizing the future of immigration services. Individuals can now establish a USCIS ELIS account and apply online to extend or change their nonimmigrant status for certain visa types. Eligible individuals include foreign citizens who travel to the United States temporarily to study, conduct business, receive medical treatment, or visit on vacation. USCIS ELIS will also enable USCIS officers to review and adjudicate online filings from multiple agency locations across the country.

Historically, USCIS customers have had to apply for most benefits by mail and USCIS employees then review paper files and ship documents between offices to complete their adjudication. Today's launch signifies an important step forward and is the first of several releases. Future releases will add form types and functions to the system, gradually expanding to cover filing and adjudication for all USCIS immigration benefits.

This important transition for America's immigration benefits system will take time and continued dedication to fully implement. Following this first release, USCIS anticipates making adjustments and improvements in response to user feedback. This process will enable USCIS to continually enhance the user experience for both customers and USCIS employees. It will also allow the agency to smooth the transition to electronic filing over time, mindful of those individuals without computer access and the agency's commitment to serve our diverse customer base.

U.S. Citizenship and Immigration Services

Benefits of using USCIS ELIS include filing applications and paying fees online, shorter processing times, and the ability to update user profiles, receive notices, and respond to requests electronically. The system also includes tools to combat fraud and identify national security concerns.

Visit www.uscis.gov/uscis-elis to take a tour of the new system.

When is a Change in the Law Not a Change in the Law?

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well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-13. Because the Board, and not the court of appeals, is the designated "authoritative interpreter" of ambiguous INA provisions, *Brand X*, 545 U.S. at 983, it is inaccurate to say that *Briones* "announced a new rule of law" or "changed" the *Acosta* ruling that previously prevailed in the Ninth Circuit. *Rivers*, 511 U.S. at n.12 ("Thus, it is not accurate to say that the [Supreme] Court's decision in *Patterson* 'changed' the law that previously prevailed in the Sixth Circuit when this case was filed."). The *Acosta* ruling simply yields to the *Briones* ruling.

Moreover, the government has asked the court to disavow *Morales-Izquierdo's* rationale that *Garfias* adopted *Briones* because it undermines: (1) the statutory designation of the Board as the authoritative interpreter of ambiguous immigration law and; (2) *Brand X's* clarification "that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Brand X*, 545 U.S. at 983.

Morales-Izquierdo's "adoption" rationale incorrectly presupposes that the court must "adopt" the Board's authoritative interpretation for the Board's precedent to become binding law. It also incorrectly presupposes that the court must "correct" its prior non-authoritative construction of the same statute. *Garfias-Rodriguez*, 649 F.3d at 950 (correcting the court's prior reading of the statutes in *Acosta*).

Brand X rejected that notion, holding that "the agency's decision to construe the statute differently from a court does not say that the court's holding was legally wrong." *Brand X*, 545 U.S. at 983. Thus, the Board's decision in *Briones* is in substance and effect no different from an authoritative judicial interpretation of a statute; *Acosta* is no different than a displaced decision of a court of lesser authority; and *Garfias* is simply a later court decision rejecting a challenge to a permissible interpretation of the INA. Accordingly, the government is asking the en banc court to vindicate Congress' power to decide when a statute become effective and hold that *Briones*, like any authoritative statement of a statute's meaning, applies retroactively.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On April 2, 2012, the Supreme Court granted a writ of certiorari over government opposition in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a published decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. The Second and Third Circuits require that the government make these showings because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution. *Moncrieffe's* merits brief is due June 21, 2012; the government response August 29, 2012.

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Conviction — Conjunctive Plea

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

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Asylum — Particular Social Group

During the March 20, 2012, *en banc* argument in ***Henriquez-Rivas v. Holder***, the *en banc* panel requested that the government determine whether the BIA would make a precedent decision on remand in *Valdiviezo –Galdamez v. Attorney General*, 663 F.3d 582 (3d Cir. 2011). The BIA declined to comment on its pending case. The now-withdrawn unpublished *Henriquez-Rivas* decision, 2011 WL 3915529, upheld the agency's ruling that El Salvadorans who testify against gang members does not constitute a particular social group for asylum. Concurring judges on the panel, and the subsequent petition for rehearing, suggested *en banc* rehearing to consider whether the court's social group precedents, especially regarding "visibility" and "particularity," are consistent with each other and with BIA precedent.

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Retroactivity — Judicial Decisions

The Ninth Circuit granted rehearing *en banc*, vacating its prior opinion, ***Garfias-Rodriguez v. Holder***, 649 F.3d 942 (9th Cir. 2011), in which the court had held that an alien inadmissible for reentering after accruing unlawful presence may not adjust his status under 8 U.S.C. § 1245(i). The court permitted supplemental briefing for the parties to address whether the court's decision, deferring to an agency precedent decision rejecting a prior circuit precedent, should be applied retroactively to cases pending at the time of the agency decision. The court also invited the parties to discuss whether the *en banc* court should overrule *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010). Oral argument is scheduled for June 20, 2012.

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Asylum — Corroboration

On May 3, 2012, the Ninth Circuit granted a *sua sponte* call for en banc rehearing, and withdrew its opinion in ***Oshodi v. Holder***, previously published at 671 F.3d 1002, which declined to follow, as dicta, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). No supplemental briefing was ordered for en banc rehearing, calendared for oral argument the week of September 17, 2012.

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Aggravated Felony — Missing Element

On March 21, 2012, a panel of the Ninth Circuit heard argument on rehearing in ***Aguilar-Turcios v. Holder.*** The panel had withdrawn its prior opinion, published at 582 F.3d 1093, and received supplemental briefing on the effect of its *en banc* decision in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (2011), which overruled the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). The government *en banc* petition challenged the missing element rule.

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Asylum – Particular Social Group

On May 31, 2012, the Seventh Circuit granted en banc rehearing and vacated its prior published opinion in ***Cece v. Holder***, 668 F.3d 510, which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that Malicious Destruction of Property Under Massachusetts Law Is a Crime Involving Moral Turpitude

In *Da Silva Neto v. Holder*, __F.3d__2012 WL 1648909 (1st Cir. May 10, 2012) (Boudin, Souter, *Stahl*), the First Circuit held that malicious destruction of property under Massachusetts law is a crime involving moral turpitude.

The petitioner, a citizen of Brazil, entered the United States without inspection in 1994 with his wife, Maria. Together, they had two children, born as United States citizens. Eventually, they separated, but on January 1, 2006, Maria invited petitioner to a New Year's party at her house, despite the fact that Maria had a restraining order against him. Petitioner attended the party, and after initially leaving, quickly returned to Maria's house. When Maria would not open the door, petitioner kicked it open, entered the home and broke some glass and threw some furniture. Police officers were dispatched to Maria's house for a report of a disturbance, and petitioner was arrested at the scene. Petitioner then admitted to sufficient facts to support a finding of malicious destruction of property under Massachusetts law.

Petitioner was subsequently placed in removal proceedings where he applied for cancellation of removal. Initially, the IJ granted cancellation, but upon a remand from the BIA, the IJ determined that malicious destruction of property under Massachusetts law is a CIMT and that petitioner was therefore statutorily barred from establishing eligibility for cancellation of removal. The BIA affirmed.

Although the First Circuit expressed doubt that destroying property, "even with an evil mindset, is not necessarily base, vile, or depraved," it nonetheless determined that the BIA reasonably concluded that intentional destruction of property done with the required malice is "necessarily reprehensible and thus satisfies the CIMT definition." The court noted, however, that it deferred "to the BIA's construction of the 'ambiguous term 'moral turpitude,' . . . not to its interpretation of the underlying criminal statute, since '[t]he BIA has no special expertise in construing state and federal criminal statutes.'"

The court deferred "to the BIA's construction of the "ambiguous term 'moral turpitude,' . . . not to its interpretation of the underlying criminal statute, since '[t]he BIA has no special expertise in construing state and federal criminal statutes.'"

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First Circuit Holds That Accrual of Continuous Presence Stops When Notice to Appear Is Issued, Even If the Original Charge Is Withdrawn and Substituted

In *Cheung v. Holder*, 678 F.3d 66, (1st Cir. 2012) (Boudin, Souter, *Thompson*), the First Circuit held that the issuance of a notice to appear stopped time for purposes of accrual of continuous presence for cancellation of removal, even where the sole original charge of removability included in the notice to appear was subsequently withdrawn and a new charge lodged.

Petitioner was admitted to the United States on an H–1B visa. In October of 2004, on the same month that the visa expired, petitioner applied for an adjustment of status based on his marriage to a United States citizen. The adjustment of status was approved on June 13, 2005. A few years later, on February 24, 2008, petitioner and his wife had their first child, a son. For reasons unknown, on August 13, 2009, petitioner's wife requested that the petition she filed on behalf of her husband be withdrawn. Two months later, on October 14, 2009, it was. The very same day, the DHS charged petitioner as an alien who sought to procure a visa, other documentation, or admission into the United States by fraud or by willfully misrepresenting a material fact.

On April 23, 2010, DHS withdrew the original fraud charge but added an entirely new charge alleging that petitioner was removable because he had overstayed his visa. Petitioner sought cancellation, but an IJ denied his application because he failed to accrue ten years' continuous presence prior to the issuance of the NTA.

Petitioner argued that it was error to apply the "stop-time" rule to the October 14, 2009 NTA because the charge alleged, fraud, was subsequently withdrawn and a new charge, overstaying, was added with the filing of Form I–261 approximately six months.

The court agreed with the IJ that the I–261 form, filed six months after the NTA, was not a "new NTA" but an "amended" NTA, and that although the original charge of removability was withdrawn, the NTA itself was not. Because petitioner was placed into removal proceedings on October 14, 2009 — the date the original NTA was served — and because the original NTA was never withdrawn, the court found that petitioner "was ineligible for cancellation of removal because he failed to meet the ten years' continuous physical presence statutory requirement."

The court also ruled that DHS acted within its prosecutorial discretion in withdrawing one charge and substituting another.

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SECOND CIRCUIT

Second Circuit Holds that Bank Employee Embezzlement Conviction Is Not Categorically an Offense Involving Fraud or Deceit

In ***Akinsade v. Holder***, 678 F.3d 138 (2nd Cir. May 1, 2012) (Chin, Carney, *Katzmann*), the Second Circuit held that a conviction for embezzlement by a bank employee under 18 U.S.C. § 656 is not categorically an offense involving fraud or deceit under INA § 101(a)(43)(M)(i). The petitioner, a citizen of Nigeria, was first admitted to the United States on July 30, 1988, at the age of seven, as a B –2 nonimmigrant and adjusted his status on May 4, 2000. That same year, he pled guilty to a single count of embezzlement.

On January 8, 2009, petitioner was arrested and charged with removability for, among other offenses, having been convicted of an aggravated felony. An IJ sustained the aggravated felony charge and the BIA affirmed.

Employing the modified categorical approach, the court concluded that petitioner's conviction record failed to establish that he "actually and necessarily" pleaded that he acted with an intent to defraud or deceive. The court remanded, holding that the BIA erred by deeming petitioner removable.

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FIFTH CIRCUIT

Fifth Circuit Affirms Revocation of Naturalization Based on Doctrine of Offensive Collateral Estoppel

In ***United States v. Akamo***, __F.3d__, 2012 (5th Cir. May 15, 2012) (King, Barksdale, Prado)(*per curiam)*, the Fifth Circuit affirmed the district court's decision to revoke defendant's naturalization. Before taking the oath of citizenship, the defendant concealed his involvement in a conspiracy to commit mail fraud. The court affirmed the district court's application of offensive collateral estoppel to dismiss defendant's argument that he did not enter into the conspiracy until after he was a citizen, even though his plea agreement in the criminal case specifically confessed his involvement in the months leading up to the oath ceremony.

"Although we may evaluate certain questions of law wrapped up in the eligibility determination . . . we do not have jurisdiction to review the Board's assessment of the weight or credibility of the evidence."

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SIXTH CIRCUIT

Sixth Circuit Affirms District Court Decision Finding Abandonment of Plaintiffs' Adjustment Application By Operation of Law and Denying Spousal Claim to Right to Consortium

In ***Zundel v. Holder***, __F.3d__, 2012 WL 1570863 (6th Cir. May 7, 2012) (Siler, Clay, *Rogers*), the Sixth Circuit affirmed the district court's dismissal of a lawsuit in which plaintiffs challenged the 20-year inadmissibility bar, holding the claim was not ripe because until plaintiff attempts reentry. The plaintiff, a Visa Waiver Pilot Program entrant who was removed in 2003, sought the reconsideration of his denied adjustment of status application. His wife joined him in his *Bivens* claims stemming from the removal.

The court found plaintiffs' *Bivens* claims barred by the state statute of limitations, and found, pursuant to 8 U.S.C. § 1252(g), that the court lacked jurisdiction to review USCIS's decision against reconsideration of plaintiff's denied adjustment of status application due to abandonment by operation of law upon plaintiff's removal. The court also dismissed the plaintiff's wife's right to consortium claim, holding that it was trumped by her husband's lawful bar to entry.

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Sixth Circuit Holds It Lacks Jurisdiction To Review Determination That Alien Was Not Eligible for Hardship Waiver Due to Lack of Credible Testimony

In ***Johns v. Holder***, __F.3d__, 2012 WL 1521975 (6th Cir. May 2, 2012) (Martin, Kethledge, *Sutton*), the Sixth Circuit held that it lacked jurisdiction to review the BIA's determination that petitioner was ineligible for a "hardship waiver" due to lack of credible testimony. The waiver would have allowed petitioner to remain in the country even though her marriage to an American citizen had ended in divorce. 8 U.S.C. § 1186a(c)(4).

Petitioner challenged the BIA's assessment of her credibility and the way in which it weighed the evidence, rather than the legal standard BIA applied. "Although we may evaluate certain questions of law wrapped up in the eligibility determination—whether the Board applied the correct legal test for a good-faith marriage, for example—we do not have jurisdiction to review the Board's assessment of the weight or credibility of the evidence," explained the court.

The court held, however, that it had jurisdiction to review for substantial evidence the BIA's determination that the petitioner's marriage was not bona fide. The court noted that it would be "very difficult, if not impossible, to overrule a hardship-waiver decision premised on lack of credibility. But that is not the case when the Board denies a hardship waiver even

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after accepting the credibility of the witnesses." In this instance, said the court, "we have no trouble concluding that substantial evidence supports the Board's decision." In particular, the court noted that petitioner had "serious credibility problems, bending the truth on several occasions by misstating the couple's age difference by almost a decade and trying to pass off a letter from a department store informing her of a bounced check as evidence of a joint account."

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■ **Sixth Circuit Applies Rational Basis Test to Age-Based Citizenship Requirement and Finds Immigration Statute Constitutional**

In ***Guzman v. DHS***, __F3d__, 2012 WL 1623196 (6th Cir. May 10, 2012) (Sutton, Kethledge, *Martin*), the Sixth Circuit affirmed the district court's decision dismissing plaintiff's complaint for failure to state a claim. The court held that the district court did not err in applying the rational basis test to the plaintiff's claim that the age-based residence requirement of section 201(g) of the 1940 Nationality Act is unconstitutional.

The court explained that section 201(g) is rationally related to Congress's interest in ensuring that the citizen parent has developed sufficient ties to the United States. The court also ruled that the district court's interpretation of section 201 (g) is not absurd, unreasonable, or unjust and that 8 U.S.C. §§ 1431 and 1433 do not apply retroactively to plaintiff.

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The court held that the district court did not err in applying the rational basis test to the plaintiff's claim that the age-based residence requirement of § 201(g) of the 1940 Nationality Act is unconstitutional.

SEVENTH CIRCUIT

■ **Timely Filing of a Motion to Reconsider Does Not Toll the Filing Period for a Motion to Reopen**

In ***Sarmiento v. Holder***, __F.3d__, 2012 WL 1813687 (7th Cir. May 21, 2012) (Posner, Sykes, *Tinder*), the Seventh Circuit held that the timely filing of a motion to reconsider does not toll the 90-day period for filing a motion to reopen.

An IJ ordered petitioners removed and declined to adjust their status to permanent residents. The BIA affirmed. Petitioners moved the BIA for reconsideration, but the BIA denied the motion. Within 90 days of that denial, but nine months after the BIA's initial dismissal of their appeal, petitioners moved to reopen. The BIA denied the motion as untimely, concluding that a motion to reopen must be filed within 90 days of the dismissal of the BIA appeal regardless of the pendency of a motion to reconsider.

The court, finding the statute ambiguous, deferred to the decision of the BIA, explaining that "to conclude otherwise would allow aliens to receive extra time to move to reopen their cases by the simple expedient of filing frivolous motions to reconsider." Additionally, said the court, rejecting the BIA's interpretation would create a circuit split with the Fifth and Ninth Circuits.

Finally, the court rejected petitioner's equitable tolling argument because it had not been raised to the BIA in the first instance.

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EIGHTH CIRCUIT

■ **Eighth Circuit Defers to BIA's Interpretation of the Inadmissibility Waiver at INA § 212(h), for a Single Offense of Simple Possession, as Not Including Possession in a Vehicle**

In ***Popescu-Mateffy v. Holder***, 678 F.3d 612 (8th Cir. 2012) (Wollman, Arnold, Smith) (*per curiam*), the Eighth Circuit concluded that the BIA reasonably interpreted the inadmissibility waiver at INA § 212(h), for simple possession of thirty grams or less of marijuana, to exclude a conviction for possession of drug paraphernalia in a motor vehicle.

The petitioner, citizen of Romania, was admitted to the United States on August 22, 2005, as a nonimmigrant, temporary skilled worker. He remained in the United States longer than permitted and was employed as a commercial truck driver without the authorization of the DHS. In February 2007 he married a United States citizen.

On April 16, 2007, petitioner, while driving a tractor-trailer for his employer, was pulled over by a South Dakota Highway Patrol officer. After observing petitioner, the officer arrested him for driving under the influence. The officer found a pipe and approximately .25 ounces — approximately seven grams — of marijuana in the tractor-trailer's cab. On May 22, 2007, petitioner pleaded guilty to, *inter alia*, possession of drug paraphernalia in a motor vehicle.

Subsequently, DHS place petitioner in removal proceedings for failure to maintain his nonimmigrant status and for remaining longer than permitted. Petitioner conceded removability but sought adjustment of status and § 212(h) waiver. The IJ determined that petitioner's convic-

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tion did not bar him from § 212(h) relief because it related to 30 grams or less of marijuana, and granted the waiver and the adjustment of status. Following a DHS appeal, the BIA determined, applying *Matter of Espinoza*, 25 I&N Dec. 118 (BIA 2009), that the additional penalty, which required revocation of driving privileges for ninety days, demonstrated that the offense was "substantially more serious than 'simple possession."'

The BIA's exclusion of a conviction for possession of drug paraphernalia within a motor vehicle from the waiver statute was "a reasonable and permissible interpretation of the statute."

The Eighth Circuit determined that the BIA's exclusion of a conviction for possession of drug paraphernalia within a motor vehicle from the waiver statute was "a reasonable and permissible interpretation of the statute." The court deferred to BIA's interpretation that the "penalty enhancement" for possessing drug paraphernalia in a vehicle sufficiently demonstrates conduct that is substantially more serious than "simple possession."

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TENTH CIRCUIT

■ **Tenth Circuit Holds that Administrative Collateral Estoppel Does Not Apply to the Court's Analysis of a Citizenship Claim**

In ***Shepherd v. Holder***, __F.3d__, 2012 WL 1592973 (10th Cir. May 8, 2012) (Hartz, O'Brien, *Matheson*), the Tenth Circuit held that administrative collateral estoppel did not preclude its review of a citizenship claim.

The petitioner was an orphaned baby in India when she was brought to this country for adoption in 1982 by a U.S. citizen. Her adoptive mother died when she was eight years of age, and she was thereafter cared for by guardians. There is no record of any effort by petitioner or her guardians to petition for her citizenship.

In March and May 2004, petitioner was convicted in Utah of attempted forgery and third-degree forgery. After she served her time, DHS sought her removal under 8 U.S.C. § 1227 (a)(2)(A)(iii) as an alien convicted of an aggravated felony. At the initial hearing, DHS did not contest petitioner's claim to automatic citizenship under the Child Citizenship Act of 2000 (CCA), 8 U.S.C. § 1431, and the IJ dismissed the case for lack of jurisdiction. On the next day, however, DHS initiated a second removal proceeding based on the same grounds as the first, explaining to the same IJ that it had determined that the automatic citizenship provision of the CCA did not apply to petitioner because she was no longer a child "under the age of eighteen years" on February 27, 2001.

The IJ eventually decided that his initial ruling precluded DHS from relitigating petitioner's citizenship or alienage status, and terminated the proceeding. Following an appeal by DHS, the BIA held that collateral estoppel did not apply and remanded to the IJ, who subsequently ordered petitioner's removal. Petitioner then filed a petition for review directly from the IJ's removal order, challenging the BIA's prior rejection of collateral estoppel on the issue of her citizenship.

The court ruled it had jurisdiction to consider the petitioner's citizenship claim *de novo* under 8 U.S.C. § 1252(b)(5) through the principle of "jurisdictional self-determination," which required it "decide whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute." The court rejected petitioner's argument that the BIA should have applied collateral estoppel, explaining that general preclusion principles "requires us to decide the citizenship issue without the constraint of administrative collateral estoppel. The congressional directive in § 1252(b)(5) for independent judicial determination must be given precedence over the operation of administrative preclusion."

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds It Lacks Jurisdiction to Review a Discretionary Determination of Whether an Alien Has Been "Battered or Subjected to Extreme Cruelty."**

In ***Bedoya-Melendez v. U.S. Attorney General***, __F.3d__, 2012 WL 1722290 (11th Cir. May 17, 2012) (Marcus, Siler, *Cox*), the Eleventh Circuit held that whether an applicant for special rule cancellation of removal pursuant to INA § 240A(b)(2) has been "battered or subjected to extreme cruelty" is a discretionary determination over which the court has no jurisdiction.

The petitioner, a Peruvian citizen, entered the United States in 2003 as a nonimmigrant visitor and in 2004, married an U.S. citizen. A week later, the U.S. citizen filed a visa petition and application to adjust petitioner's status. The marriage quickly soured, however, and petitioner alleged that the U.S. wife be-

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gan slapping him when she became upset and falsely led him to believe he had HIV. Thus, less than six months after they married, they separated, and eventually divorced.

Meanwhile, USCIS declined to adjust petitioner's immigration status, and he was placed in removal proceedings. At a hearing in late 2004, petitioner admitted that he was removable, but sought asylum. He later withdrew his asylum application and, in 2007, filed an application for special rule cancellation of removal, claiming that he was a battered spouse under 8 U.S.C. § 1229b(b)(2). Following a hearing, the IJ determined that petitioner's former spouse's actions did not make petitioner a "battered spouse."

In concluding that the battered-spouse determination was a discretionary determination, the court explained that there was no objective legal standard on which a court can base its review because the word "battered" and the clause "subjected to extreme cruelty" are not self-explanatory.

In concluding that the battered-spouse determination was a discretionary determination, the court explained that there was no objective legal standard on which a court can base its review because the word "battered" and the clause "subjected to extreme cruelty" are not self-explanatory and reasonable minds could differ as to their meaning.

The court also noted that of the six other circuits that have considered this issue, five have concluded that the battered-spouse determination is a discretionary decision. *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Johnson v. U.S. Att'y Gen.*, 602 F.3d 508 (3d Cir. 2010); Stepanovic v. Filip, 554 F.3d 673 (7th Cir. 2009); *Wilmore v. Gonzales*, 455 F.3d 524 (5th Cir. 2006); *Perales–Cumpean v. Gonzales*, 429 F.3d 977 (10th Cir. 2005), with only the Ninth Circuit reaching a contrary conclusion in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003) (holding that phrase "has been battered or subjected to extreme cruelty" establishes an objective legal standard to guide the battered-spouse determination under § 1229b(b)(2)).

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DISTRICT COURTS

■ **Central District of California Determines Alien Beneficiaries Lack Standing to Challenge a Notice of Intent to Revoke an I-140 Petition for Alien Worker**

In ***Kaspi v. DHS***., No. 11-cv-2617 (C.D. Cal. May 7, 2012) (King, J.), the District Court for the Central District of California held that alien beneficiaries lack standing to challenge a USCIS Notice of Intent to Revoke an I-140 Petition for Alien Worker ("I-140 petition"). The alien beneficiary and his derivative spouse beneficiary filed suit, alleging that USCIS should have notified them of the proposed revocation and provided them with an opportunity to respond. Noting that the employer's business had already dissolved before the proposed revocation issued, rendering the employer ineligible to maintain an I-140 petition, the court determined that there was no causal connection between the lack of notice of the proposed revocation and the denial of the aliens' adjustment of status applications.

The court further held that the aliens' claims were incapable of being redressed by a favorable decision. The court also dismissed the aliens' equal protection claims.

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■ **Eastern District of Pennsylvania Holds that USCIS Did Not Violate SAW Program's Confidentiality Statute in Its Denial of Adjustment**

In ***Uddin v. Mayorkas***, No. 06-cv -275 (E.D. May 16, 2012) (Brody, J.), the District Court for the Eastern District of Pennsylvania granted the Government's motion for summary judgment, finding that USCIS did not violate the confidentiality provisions of the Special Agricultural Worker ("SAW") program when adjudicating the aliens' adjustment applications. The court held that the SAW confidentiality statute applies exclusively to information in a SAW application itself, and not to SAW information provided by an alien in support of his later adjustment application. The court also affirmed the denial of the alien's adjustment application and the derivative application of his spouse, based on a finding that the alien committed immigration fraud in his earlier SAW application.

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■ **Central District of California Dismisses Mandamus Complaint Seeking to Compel AAO to Expedite Appeal of Denied I-601 and I-212**

In ***Ceja v. Napolitano***, No. LACV 12-466 (C.D. Cal. May 31, 2012) (Phillips, J.), the District Court for the Central District of California *sua sponte* dismissed an alien's mandamus complaint seeking to compel the United States Citizenship and Immigration Services Administrative Appeals Office to expedite the appeal of her denied I-601 and I-212 waivers. The court held that it lacked subject matter jurisdiction over the complaint because the AAO's refusal to expedite adjudication of the appeal is not a final agency action.

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This Month's Topical Parentheticals

ASYLUM

■ *Gilca v. Holder,* __ F.3d __, 2012 WL 1867125 (1st Cir. May 23, 2012) (holding that substantial evidence supports agency conclusion that vague telephonic threats by unknown persons do not amount to past persecution and do not support a well-founded fear of persecution based on Roma ethnicity or pro-democratic political party membership in Moldova)

CANCELLATION

■ *Cheung v. Holder*, 678 F.3d 66 (1st Cir. 2012) (holding that accrual of physical presence time stops for purpose of cancellation eligibility when DHS issues NTA, even though DHS later amends NTA and substitutes new charges)

■ *Holder v. Martinez Gutierrez,* __ U.S __, 2012 WL 1810218 (May 21, 2012) (holding that the BIA's decision not to impute a parent's years of continuous resident or LPR status to his or her child for purposes of 8 U.S.C. § 1229b(a) is reasonable and therefore entitled to deference; finding that the BIA's practice of imputing matters involving an alien's state of mind to a child while declining to impute objective conditions or characteristics was rational)

■ *Bedoya-Melendez v. United States Att'y Gen.,* __ F.3d __, 2012 WL 1722290 (11th Cir. May 17, 2012) (holding that the BIA's determination that petitioner failed to show he was "battered or subjected to extreme cruelty" for purposes of special-rule cancellation of removal was an unreviewable discretionary decision because there was no "objective legal standard" on which a court can base its review)

CHILD STATUS PROTECTION ACT

■ *Matter of A-Y-M-*, 25 I&N Dec. 791 (BIA May 8, 2012) (holding that after the enactment of the Child Status Protection Act, an unmarried alien seeking derivative asylum status based on the approval of his or her parent's application for asylum who turned 21 while the application was pending continues to be classified as a "child" for purposes of qualifying for derivative status under INA § 208(b)(3)(B))

CITIZENSHIP

■ *Guzman v. DHS*, __ F.3d __, 2012 WL 1623196 (6th Cir. May 10, 2012) (applying rational basis test and rejecting petitioner's equal protection challenge to section 201(g) of the Nationality Act of 1940 based on petitioner's claim that age-based requirement for conferring derivative citizenship -- *i.e.*, requirement that citizen parent have been physically present in US for five years after the age of 16 and prior to petitioner's birth -- is discriminatory toward children of younger parents)

■ *Shepherd v. Holder,* __ F. 3d __, 2012 WL 1592973 (10th Cir. May 8, 2012) (finding jurisdiction to consider citizenship claim pursuant to the principle of "jurisdictional self-determination," despite application of criminal bar; rejecting citizenship claim and holding that principles of administrative collateral estoppel did not apply given the court's plenary review over the nationality issue pursuant to 8 U.S.C. § 1252(b)(5))

■ *Schnitzler v. United States*, __ F. Supp.2d __, 2012 WL 1893582 (D.D.C. May 25, 2012) (finding that because the incarcerated plaintiff's application to renounce his citizenship has been acted upon by USCIS's decision to hold the application in abeyance until plaintiff can personally appear at a field office, his claim is moot)

CRIME

■ *Popescu-Mateffy v. Holder,* __ F. 3d __, 2012 WL 1521072 (8th Cir. May 2, 2012) (holding the BIA reasonably interpreted the inadmissibility waiver at § 212(h) for simple possession of thirty grams or less of marijuana to exclude a conviction for possession in a motor vehicle; noting the BIA had determined that the additional penalty, which required revocation of driving privileges for ninety days, demonstrated that the offense was "substantially more serious than 'simple possession'")

■ *Akinsade v. Holder,* 678 F.3d 138 (2d Cir. 2012) (holding under the modified categorical approach that a conviction for embezzlement by a bank employee in violation of federal law is not an offense involving fraud or deceit under section 101(a)(43)(M)(i) because the record failed to establish that petitioner actually and necessarily pleaded that he acted with an intent to defraud or deceive)

■ *Figuereo-Sanchez v. United States,* __ F. 3d __, 2012 WL 1499871 (11th Cir. May 1, 2012) (concluding that the Supreme Court's holding in *Padilla v. Kentucky* did not announce a "watershed rule of criminal procedure" because that holding did not alter any bedrock elements of criminal proceedings)

■ *Da Silva Neto v. Holder,* __ F.3d __, 2012 WL 1648909 (1st Cir. May 10, 2012) (deferring to BIA's holding that a conviction for malicious destruction of property under Massachusetts law qualifies as a CIMT because it involves intentional acts that were done "out of cruelty, hostility, or revenge" towards the owner of the property)

■ *United States v. Amer,* __ F.3d __, 2012 WL 1621005 (5th Cir. May 9, 2012) (concluding that the Supreme Court's holding in *Padilla v. Kentucky* was a "new rule" within the meaning of *Teague v. Lane,* and thus did not apply retroactively to defendant's conviction that had already become final when *Padilla* was decided)

■ *United States v. Leal-Vega*, __ F.3d __, 2012 WL 19402167 (9th

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Cir. May 30, 2012) (holding that court could consider the minute order and abstract of judgment under modified categorical analysis to conclude that defendant was convicted of possession of tar heroin, and thus was convicted of a "drug trafficking offense" warranting a sentencing enhancement under the sentencing guidelines)

■ *Bobadilla v. Holder*, __ F.3d __, 2012 WL 1914068 (8th Cir. May 29, 2012) (approving the AG's three-part test in *Matter of Silva-Trevino* for determining whether a crime involves moral turpitude, but reversing the BIA's finding that a conviction for giving a false name to a peace officer is categorically a CIMT, and reasoning that there was a "realistic probability" that the statute of conviction would apply to conduct that does not involve moral turpitude, and thus, the agency should have applied the second [or third] step of the *Silva-Trevino* test)

DEPARTURE BAR

■ *Lin v. United States Att'y Gen.*, __ F.3d __, 2012 WL 1860686 (11th Cir. May 23, 2012) (holding that the "departure bar," which bars an alien who has departed from the country from filing a motion to reopen, "impermissibly conflicts with the [INA's] provision permitting an alien to file one motion to reopen")

DETENTION

■ *Hosh v. Lucero,* __ F.3d __, 2012 WL 1890390 (4th Cir. May 25, 2012 (deferring to BIA's interpretation, reversing district court, and holding that a deportable criminal alien who was not immediately taken into federal custody upon his release from other custody is not exempt from section 236(c)'s mandatory detention provision, and is therefore not entitled to a bond hearing; refusing to apply the rule of lenity because it is a rule of "last resort" not "a primary tool of construction")

JURISDICTION

■ *Ma v. Holder*, __ F.3d __, 2012 WL 1755840 (N.D. Cal. May 16, 2012) (finding that court lacked habeas jurisdiction to review petitioner's request for a stay of removal during the pendency of his motion to reopen before the BIA)

■ *Matter of Diaz-Garcia*-, 25 I&N Dec. 794 (BIA May 14, 2012) (holding that the unlawful removal of an alien during the pendency of a direct appeal from a removal order in violation of 8 C.F.R. § 1003.6(a) does not deprive the BIA of jurisdiction to review the appeal)

MARRIAGE

■ *Johns v. Holder,* __ F.3d __, 2012 WL 1521975 (6th Cir. May 2, 2012) (holding that section 242(a)(2)(B)(ii) precludes review of the BIA's assessment of the weight and credibility of the evidence in finding petitioner had not married in good faith for purposes of 8 U.S.C. § 1186a(c)(4))

MOTION TO REOPEN

■ *Sarmiento v. Holder*, __ F.3d __, 2012 WL __ (7th Cir. May 21, 2012) (deferring to BIA and holding that the timely filing of a motion to reconsider does not toll the 90-day period for filing a motion to reopen; reasoning that a contrary view would allow an alien to extend the time for reopening simply by filing a frivolous motion to reconsider)

TERRORISM

■ *In re People's Mojahedin Organization of Iran*, __ F.3d __, 2012 WL 1958869 (D.C. Cir. June 1, 2012) (ordering the Secretary of State to either deny or grant the petition to remove the State Department's designation of petitioner as a Foreign Terrorist Organization no later than four months from the date of the opinion)

VISAS

■ *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO May 15, 2012) (holding that: (1) the term "culturally unique," as defined at 8 C.F.R. § 214.2(p)(3), is not limited to traditional art forms, but may include artistic expression that is deemed to be a hybrid or fusion of more than one culture or region; (2) as the regulatory definition provides for the cultural expression of a particular "group of persons," the definition may apply to beneficiaries whose unique artistic expression crosses regional, ethnic, or other boundaries; (3) definition of "culturally unique" calls for a case-by-case factual determination; and (4) the petitioner bears the burden of establishing by a preponderance of the evidence that the beneficiaries' artistic expression, while drawing from diverse influences, is unique to an identifiable group of persons with a distinct culture").

VISA WAIVER PROGRAM

■ *Zundel v. Holder,* __ F. 3d __, 2012 WL 1570863 (6th Cir. May 7, 2012) (holding that petitioner's VWP challenge is barred by res judicata; that his challenge to the inadmissibility bar for unlawful presence was not ripe for consideration; that his request that the court compel DHS to adjudicate his motion to reconsider his adjustment denial was precluded by section 242(g))

WAIVERS

■ *Makir-Marwil v. United States Att'y Gen.,* __ F.3d __, 2012 WL 1841321 (11th Cir. May 22, 2012) (holding that in assessing whether petitioner should be granted a waiver of inadmissibility under 8 U.S.C. § 1159(c), the BIA properly applied the criteria in *In re Jean*, 23 I. & N. Dec. 373 (A.G. 2002), to find that his convictions rendered him a violent or dangerous individual, but erred by refusing to consider the hardship his removal would cause based on "the horrific country conditions in Sudan")

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Remembering Mike Hertz

On May 5, 2012, Michael F. Hertz, Deputy Assistant Attorney General for the Civil Division, passed away. In an email to the Civil Division employees, Stuart Delery, Acting Assistant Attorney General, remarked as follows on Mike and his career at the Department:

For more than 36 years, Mike has been a respected voice of wisdom and reason throughout the Department: consistently providing institutional knowledge, sage counsel, and unyielding dedication to ethical principles. He was a relentless advocate of the government's interests while exhibiting sound judgment. He dedicated himself tirelessly to the success of the Civil Division's efforts to meet the demands of justice by treating claimants and their counsel fairly and without rancor, by teaching new attorneys, and by instilling a spirit of pride in those who choose government service.

Mike joined the Civil Division's Appellate Staff through the Honors Program. He led the Fraud Section from 1984 through 2007, when he was promoted to Deputy Assistant Attorney General with oversight of the Commercial Litigation Branch. He directed all areas of commercial litigation, including federal contract, grant, and loan disputes; bankruptcy and reorganization proceedings; international trade; patent and copyright infringement; and other litigation in both foreign and domestic courts.

Mike's career will forever be associated with the Department's record-setting success under the False Claims Act. In 1986, he convinced a reluctant Congress to modernize the Act, increasing the damage and penalty provisions to keep pace with inflation, removing barriers to proving false claims, and reinvigorating the *qui tam* or "whistle- blower" provisions by encouraging individuals to come forward with evidence and receive up to 30 percent of recoveries. Since those 1986 amendments, recoveries have topped $30.3 billion, including more than $21 billion attributable to *qui tam* claims. Mike was instrumental in setting the paradigm used so successfully today to investigate and handle cases of fraud against the government. As Director of the Fraud Section, he understood that civil recoveries in fraud cases could be maximized only if the government was prepared to provide a proposed defendant with an opportunity to deal comprehensively with its legal liabilities to the government. He convinced criminal prosecutors and agency attorneys to work together with Fraud Section lawyers to focus more broadly on the government's overall interests.

Mike received the Attorney General's Edward H. Levi Award for Outstanding Professionalism and Exemplary Integrity, as well as the Attorney General's Award for Distinguished Service. He also received the Stanley D. Rose Award, the Civil Division's highest honor. He is a three-time recipient of Presidential Rank awards, earning the Distinguished Rank in 1989 and 2006, and the Meritorious Rank in 1997, and has received numerous performance awards and special commendations.

I worked intensively with Mike on a matter right after coming to the Department in 2009. I could not have had a better introduction to the Department's traditions of excellence and integrity. I appreciated Mike's extraordinary legal skill, professionalism, sound judgment, and sense of humor then, and during many other matters over the past three years. His career exemplified the ideals of public service, and his leadership to the Civil Division and the Department will be sorely missed.

Our thoughts are with Mike's wife, Ronnie, and their children. We will plan an appropriate recognition of Mike's life and service to the country here at the Department.

A celebration of life for Michael Hertz will be held at 2:00 p.m., on Monday, July 30, 2012, in the Great Hall of the RFK Main Justice Building.

(Pictured above at right, Mike Hertz with then AAG Tony West, during a visit to OIL)

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL SUMMER ASSOCIATES

Front : Elliott Daniels, Yifan Wang, Graciela Cardona, Kathleen Imbriglia, David McConnell (OIL Director), Rosa Melia-Acevedo, Beah Mejla, Acacia Bellamy Back : Mike Lueptow (DCS), Grant Rafter, Erica Tokar, Sean Quinn, Amanda Selvy, Erin Griffith, Sarone Solomon, Shuchi Parikh, Daniel Collier, Kevin Gregg

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

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

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

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