U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 15, No. 3 *March 2011*

LITIGATION HIGHLIGHTS

Inside

Application of Thirty-Day Deadline To Seek Judicial Review Does Not Violate Suspension Clause

Aliens Can Seek Reopening Under the INA § 240(c)(7)(A)

In ***Luna v. Holder & Thompson v. Holder***, __ F.3d __, 2011 WL 722607 (2d Cir. March 3, 2011) (Calabresi, *Pooler*, Chin), the Second Circuit held that applying the thirty-day filing deadline to petitions for review does not violate the Suspension Clause because the statutory motion to reopen process under INA § 240(c)(7)(A) is an adequate and effective substitute for habeas review of constitutionally ineffective counsel and government interference claims.

The petitioners in this consolidated petition for review were ordered removed because they had been convicted of certain crimes. The first petitioner, a Jamaican national, was found removable because he had been convicted of an aggravated felony. The BIA dismissed his appeal on April 28, 2008. Petitioner, who was pro se, subsequently filed a motion to reopen with the BIA seeking protection under CAT. That motion was denied on September 9, 2008. On October 1, petitioner filed with the Second Circuit a motion for extension of time to appeal the April 28 order, claiming that he had been unable get his legal documents because he was detained. Subsequently, DHS removed petitioner to Jamaica.

The second petitioner, a national of the Dominican Republic, was ordered removed because of a

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Motion to Reopen Alleging Changed Country Conditions

What is the time-frame for when "new" evidence became available?

The ninety-day deadline for filing motions to reopen does not apply where an alien seeks asylum or withholding based on "changed country conditions" and presents material evidence that was not previously available. However, it is unclear *when* the evidence had to be unavailable: (1) at the alien's last evidentiary hearing, (2) while his proceedings were still pending on appeal to the Board of Immigration Appeals, or (3) at the time of an earlier motion to reopen? The statute and the regulations point to different answers, giving rise to an ambiguity that the Board has not yet had occasion to address.

I. The reopening regulations and the reopening statute do not match

Under both the statute and the regulations, an alien may file only one motion to reopen, 8 U.S.C. § 1229a(c)(7)(A) and 8 C.F.R. §§ 1003.2(c)(2) & 1003.23(b)(1), and that motion must be filed within ninety days of the final order of removal, 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. §§ 1003.2(c)(2) & 1003.23(b)(1). However, the statute and regulations differ in setting out when an alien may bring a motion based on changed country conditions.

Both the statute and the regulations provide an exception to the ninety-day time limit for, *inter alia*,

Suspension Clause not violated by 30-day deadline

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controlled substance violation and as an alien who had been convicted of an aggravated felony. The IJ rejected his claim that he had derivative U.S. citizenship though his father. Petitioner, with the assistance of counsel, then filed an appeal to the BIA. On July 20, 2007, the BIA dismissed the appeal. On August 9, 2007, counsel sent a letter to petitioner's mother indicating his belief that he could not make any argument in a petition for review that would warrant reversal of the BIA's decision. Counsel also indicated that the deadline for filing a petition was August 20, 2007. Petitioner claim that he never received a later form his counsel and that he received the letter from his mother on August 25, 2007. On September 5, 2007, petitioner, pro se, filed a petition for review also seeking an enlargement of time because of ineffective assistance of counsel.

The government moved to dismiss both petitions for review as untimely because they had not been filed within thirty days after the date of the final order of removal as required under INA § 242(b)(1). The Second Circuit then ordered the appointment of pro bono counsel as amicus curia and directed the partied to brief "whether there is merit to an as-applied Suspension Clause challenge for a petitioner who lacked any reasonable opportunity to file a petition for review during the 30-day filing period because of circumstances created by the government, or because of attorney error, in light of our opinion in *Ruiz-Martinez v. Mukasey*, 516 F.3d 102 (2008)."

In its brief, the government argued that the 30-day deadline to file a petition for review, as applied to petitioners, did not raise Suspension Clause concerns because the motion to reopen process offers constitutionally adequate review. Amicus counsel argued instead, that the 30-day filing deadline would violate the Suspension Clause if it barred Petitioners from filing a writ of habeas corpus or seeking adequate and effective relief.

On September 3, 2010, the Second Circuit issued an opinion holding that the 30-day deadline did not violate the Suspension Clause as applied to petitioners because the REAL ID Act of 2005 did not withdraw habeas jurisdiction over their claims that they were prevented from filing a timely petition for review by ineffective assistance of counsel or governmental interference. Accordingly, the court transferred the petitions to the district courts.

Shortly after that opinion was issued, the court granted the government's request to recall the mandate, ordered the opinion to be withdrawn and asked the parties to brief whether the statutory motion to reopen process is an adequate and effective substitute for habeas. The court noted that its opinion had only addressed the regulatory mechanism *sua sponte* reopening, and not the statutorily based reopening provision. It also indicated that "permitting aliens to assert these claims through habeas may allow those with frivolous claims to delay their removals and inappropriately clog the judicial system."

Initially, the court rejected the government's contention that the petitions be dismissed on futility grounds because petitioners would be unable to raise a colorable issue over which the court would have jurisdiction. The court found that it could not conclude that "there is no realistic possibility" that petitioners would succeed in a petition for review challenging their removal order.

On the merits, the Second Circuit agreed with the government's contention that by codifying the motion to reopen process, Congress had provided a mechanism by which petitioners could raise their claims that they were prevented by ineffective assistance or governmental interference from filing timely petitions for review, and that this process is an adequate and effective substitute for habeas corpus. The government conceded that "the BIA's denials of statutory motions to reopen are subject to judicial review to the same extent provided by habeas review." The court also agreed with amicus counsel that aliens must be eligible for equitable tolling when ineffective assistance of counsel assistance of counsel or governmental interference prevents them from timely filing a petition for review. "An alien who files a motion to reopen is entitled to equitable tolling when he exercises due diligence in filing the motion and shows that he was prevented by ineffective assistance of counsel or governmental interference from filing the motion on time," said the court.

The court also determined that "for a motion to reopen to be a constitutionally adequate substitute for habeas, it cannot be "subject to manipulation" by the government. In particular, the court held that the BIA could not apply the departure bar regulation under 8 C.F.R. § 1003.2(d) to the statutory motions to reopen. "The BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed or otherwise departs the United States before or after filing the motion," said the court. The court noted that the Sixth Circuit in *Pruidze v. Holder,* 632 F.3d 234 (6th Cir. 2011), reached the same conclusion. However, the court declined to decide the validity of the departure bar in every possible context.

Accordingly, the court dismissed the two petitions for review as untimely, but noted that petitioners can file motions to reopen with the BIA.

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Motion to Reopen Alleging Changed Country Conditions

motions seeking reopening in order to apply for asylum or withholding of removal based on changed country conditions arising in the country of nationality or removal. 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2 (c)(3)(ii); 8 C.F.R. § 1003.23(b)(4)(i). The regulations similarly provide an exception to the numeric limitation for changed country conditions. 8 C.F.R. § 1003.2(c)(3)(ii) & 1003.23 (b)(4)(i). The statute, however, does *not* provide an exception to the numeric limitation. 8 U.S.C. § 1229a(c) (7)(C)(ii) (exception to time limit only).

The statute provides that the time limit will not apply when an alien moves to reopen based on changed country conditions, bringing forth material evidence that was "not available" and that "would not have been discovered or presented at the previous *proceeding*." 8 U.S.C. § 1229a(c) (7)(C)(ii) (emphasis added). The regulation applicable to motions before the Board refers to material evidence of changed country conditions that was "not available" and "could not have been discovered or presented at the previous *hearing*." 8 C.F.R. § 1003.2(c)(3)(ii) (emphasis added). Finally, like the statute, the regulation applicable to motions to reopen in the immigration court (i.e., in cases that have not yet been appealed to the Board or in which appeal was waived), 8 C.F.R. § 1003.23 (b)(1), refers to material evidence of changed country conditions that was "not available" and "could not have been discovered or presented at the previous *proceeding*." 8 C.F.R. § 1003.23(b)(4)(i) (emphasis added).

The difference between "hearing" and "proceeding" is important. If "hearing" in the Board regulation is interpreted literally to mean taking of live testimony or argument, and if the use of that term is viewed as narrowing the broader language used in the statute, then the Board regulation could be read to allow an alien to bring an untimely or successive motion to reopen based on evidence that became available after the immigration court hearing, but while an alien's case was on appeal to the Board. Under this reading, the alien could bring a motion after the Board decided his first appeal, even though the alien could have saved time by moving to remand the case while his appeal was pending, in order to present the new evidence. *See* 8 C.F.R. § 1003.1(d)(3)(iv). More remarkably, under this reading, an alien could even bring a motion to reopen based on evidence that was available when he made an earlier motion to reopen before the immigration court or Board, so long as the earlier motion did not result in a hearing. This reading would allow an alien to bring multiple motions to reopen to bring up matters the Board could have handled in one decision, which would undermine Congress's purpose of limiting aliens to one motion to reopen. Such a reading does not appear to be compelled by the reopening statute or by any definitive administrative interpretation of the statute.

The statute provides that the time limit will not apply when an alien moves to reopen based on changed country conditions, bringing forth material evidence that was "not available" and that "would not have been discovered or presented at the previous *proceeding*."

II. The reopening regulations were promulgated before the reopening statute, not as an interpretation of the statute

The Board and immigration court regulations adopting the time and numeric limitations and providing the changed country conditions exception to those limits came midway in the process of reforming the procedures for motions to reopen. They were promulgated before the current statute, rather than as an interpretation of that statute.

The Board's earliest regulation on the subject of reopening was very simple and said nothing about the need for new evidence. 8 C.F.R. § 90.10 (1940). In 1947, this proto-regulation was amended to require that a motion to reopen should state "new facts to be proved at the reopened hearing." 12 Fed. Reg. 5073 (July 31, 1947). The Attorney General adopted a more reticulated regulation in 1962, which contained three provisions promoting administrative efficiency. 27 Fed. Reg. 96, 97 (Jan. 5, 1962) (codified at 8 C.F.R. § 3.2). First, the regulation dictated that no motion to reopen could be granted unless based on evidence that was "not available and could not have been discovered or presented at the former hearing." *Id.* Second, it barred reopening for applications for discretionary relief if the alien had been advised of his right to apply for the relief earlier, unless the basis for the relief had arisen "subsequent to the hearing." Third, the regulation barred rehearing motions after the alien's departure, *id.* (this last measure had appeared earlier, in the 1958 version of the regulation, 23 Fed. Reg. 9115, 9118 (Nov. 26, 1958)). The 1962 regulation still contained no time or numeric limitations. 27 Fed. Reg. at 96-97. An analogous regulation for hearing officers was promulgated later the same year, stating that hearing officers could not reopen proceedings unless the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." 27 Fed. Reg. 9647 (Sept. 29, 1962).

In the Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 4978, 5066, convinced that the existing regulation was vulnerable to abuse, Congress instructed

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the Attorney General to issue regulations limitating the number of motions to reopen and setting a maximum time period within which such motions could be filed. "[A] principal purpose of the 1990 amendments to the INA was to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions." *Stone v. INS*, 514 U.S. 386, 400 (1995). In the Conference Report, Congress specified a presumptive limit of one motion to reopen per alien and a presumptive time limit of twenty days from the final order of removal. H.R. Conf. Rep. No. 101-955 at 116, 1990 WL 201613, at *6798 (Oct. 26, 1990). At the same time, Congress instructed the Attorney General to consider an exception to the limits "for asylum claims which arise due to a change in circumstances in the country of the alien's nationality and after the initiation of the deportation proceedings." *Id.* In April 1996, the Attorney General adopted the one-motion limit suggested by Congress, but extended the time limit to ninety days from Congress's suggested twenty. Executive Office for Immigration Review, "Motions and Appeals in Immigration Proceedings," 61 F.R. 18900, 18901, 18905 (April 29, 1996).

It was in this regulation of April 1996 -- six months before the reopening statute was adopted in September 1996 -- that the Board created the exception to the time and numeric limitations for asylum or withholding claims based on changed country conditions. *Id.* at 18905. In the rule as first proposed two years earlier, in 1994, the exception to the limits for new asylum or withholding claims followed the 1990 congressional suggestion and did not refer to when the evidence had become available, but only to when the change in conditions had taken place: "subsequent to the commencement of proceedings," both for motions before the Board and motions in the immigration court. Dep't of Justice, "Executive Office for Immigration Review, "Motions and Appeals in Immigration Proceedings," 59 Fed. Reg. 29386, 29388, 29390 (June 7, 1994). But a later version of the proposed rule modified the exception, for motions before the Board, to hinge not on when the country conditions changed, but on whether the motion was based on evidence that was not available at the "former hearing." Dep't of Justice, Motions and Appeals in Immigration Proceedings, 60 Fed. Reg. 24573, 24574, 24575 (May 9, 1995). The notes to the regulation said this revision was meant to "mirror" the regulatory requirement for new evidence in timely motions to reopen (which does not require a change in country conditions). However, the regulation for motions before the immigration court was not similarly amended. *Id.* at 24578-79. The final version of the regulation, published on April 29, 1996, carried over the "former hearing" language for motions before the Board, 61 Fed. Reg. at 18905, but, without discussion, changed the relevant time for the change in country conditions in motions before the immigration court from "subsequent to the *commencement* of proceedings," to "subsequent to the *conclusion* of proceedings." 61 Fed. Reg. at 18905, 18908 (emphasis added). It appears that the drafters of the regulation decided that setting the time frame for new developments too early in the proceedings would defeat the reformers' intent to limit abusive motions.

In April 1996, Congress enacted IIRIRA which wrote into the INA for the first time the numeric and temporal limits for motions to reopen.

Several months after the final rule was promulgated in April 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, Title III, § 304, 110 Stat. 3009-587 (Sept. 30, 1996), which wrote into the INA for the first time the numeric and temporal limits for motions to reopen, 8 U.S.C. § 1229a(c)(7). According to the Board, "This sent a clear message that Congress wanted an end to successive and frivolous motions to achieve finality in removal cases." *Matter of H-A-*, 22 I. & N. Dec. 728, 733 (BIA 1999) (citing *Removal of Criminal and Illegal Aliens: Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 2 (Mar. 23, 1995) (expressing concern that aliens file dilatory motions to extend their stay)); *see Matter of G-D-*, 22 I. & N. Dec. 1132, 1133 (BIA 1999) (inferring from Congress's decision to incorporate the regulatory time and numeric limits into the INA that Congress was earnest about expediting judicial review and bringing finality to immigration proceedings). Like the regulations, section 304 of IIRIRA also provided an exception to the time limit (but not the numeric limit) for motions based on changed country conditions; however, IIRIRA made the exception applicable to motions based on evidence that was not available and would not have been presented at the "previous *proceeding*," rather than at the "former hearing," as stated in the Board regulation. IIRIRA section 304, 8 U.S.C. § 1229a(c)(7)(C)(ii) (emphasis added). Whereas in the regulation the language setting the time-frame for availability of the evidence in the changed country conditions exception was made to "mirror" the general requirement of newly available evidence that applies even to timely motions to reopen, in contrast, IIRIRA's reopening provision did not specify when the evidence must be new for a timely motion. Therefore, there was no general provision in

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IIRIRA to "mirror" in setting the timeframe for new availability in the changed country conditions exception. IIRIRA § 304. *Cf. Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (relying on mistaken premise that the statutory provision requiring new evidence on all motions to reopen, 8 U.S.C. § 1229a(c)(7)(B) (formerly codified at 8 U.S.C. § 1229a(c)(6)(B) (2004)), referred to the "former hearing," whereas it does not).

It seems significant that in IIRIRA Congress chose to require that evidence be newly available since the previous "proceeding," which is a broader term than the word "hearing" used in the Board regulation. On the other hand, the Conference Report employs the words "initial hearing," similar to the Board regulation, rather than "previous proceeding," which appears in the statute itself. H.R. Conf. Rep. No. 104-828, 104th Cong., 2d Sess. 212 (Sept. 24, 1996) ("The deadline for a motion to reopen may be extended in the case of an application for asylum or withholding of removal that is based on new evidence of changed country conditions, evidence that was not available at the time of the *initial hearing*.") (emphasis added).

IIRIRA was implemented by a 1997 regulation. *See* Executive Office for Immigration Review, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10331 (March 6, 1997). The 1997 regulation made only a minor change to the changed country conditions exception for time and numeric limitations on motions to reopen before the Board, changing "former hearing" to "previous hearing." The provision for motions to reopen in the immigration court was more extensively revised by the 1997 regulation, but only to make it more like the April 1996 regulation governing reopening before the Board. In relevant part, the immigration court regulation was changed from specifying when the changed conditions had to arise ("subsequent to the conclusion of proceedings") to specifying, like the Board regulations, when the evidence had to have become available ("if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding."). *Id.* at 10333.

In sum, Congress moved in two steps toward imposing time and numeric limits on motions to reopen. In its first step, in 1990, Congress only directed the Attorney General to design his own limits for reopening, considering an exception for asylum claims based on changed country conditions. In April 1996, the Attorney General responded by adopting the regulatory limits with two variants of the exceptions for changed country conditions claims. During the rulemaking process, the regulation for motions before the Board was affected by the gravitational pull of the existing regulation governing all motions to reopen, not just untimely or numerically barred ones. The changed country conditions exception for motions before the Board was revised to mirror the general reopening provision by requiring that the evidence to be offered was unavailable at the "previous hearing." In contrast, the version of the reopening regulation for motions in the immigration court stuck to Congress's suggestion of limiting the motion by reference to when the change in conditions happened, not when the evidence became available, and the immigration court regulation required that the change occur after the end of the "proceedings." The asymmetry of the Board and immigration court regulations suggests that the drafters of the regulation did not focus on the ramifications of the different language in the respective provisions. In 1996, Congress then took the second step of directly legislating the time and numeric limits and provided an exception -- to the temporal limit only -- for changed country conditions motions supported by evidence that became available after the "proceeding." In view of Congress's avowed intent in enacting IIRIRA to curb successive motions, *Matter of C-W-L-*, 24 I. & N. Dec. 346, 349 (BIA 2007), one might think that by requiring evidence to be new since the previous "proceeding," a broader term than the word "hearing" that was used in the existing Board regulation, and by omitting an exception to the numeric bar, which the existing regulation had provided, Congress was intentionally tightening the limits on motions to reopen. At the very least, chronology suggests that the regulation for motions before the Board cannot be an interpretation of the reopening statute because the statute did not exist when the reopening regulation was promulgated.

Chronology suggests that the regulation for motions before the Board cannot be an interpretation of the reopening statute because the statute did not exist when the reopening regulation was promulgated.

III. The Board has not yet taken a position regarding the differences in the regulation and statute.

The Board has not discussed Congress's omission in IIRIRA of a changed country conditions exception to the numeric limitation on motions to reopen. However, the Board has continued to apply the regulation's exception to the numeric limitation in cases decided after IIRIRA's enactment. In *Matter of S-Y-G-*, 24 I. & N. Dec. 247, 252 (BIA 2007), *aff'd*, 546 F.3d 138 (2d Cir. 2008), the Board entertained a successive motion to reopen, referring to changed country conditions

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as an exception to both the time and numeric limitations without commenting on the lack of such an exception to the numeric limitation in the statute. (While the dates show that proceedings in *S-Y-G-* began before IIRIRA became effective, *see* IIRIRA § 309(a), nevertheless *S-Y-G-* cited IIRIRA in its discussion of the changed country conditions exception, *see* 24 I. & N. Dec. at 252.) *See also Matter of J-J-*, 21 I. & N. Dec. 976, 978 (BIA 1997) (stating that changed country conditions provide an exception to the time and numeric limitations in the *regulation*); *cf. Wei v. Mukasey*, 545 F.3d 1248, 1254 n.2 (10th Cir. 2008) (Board assumed that numeric limit was subject to changed country conditions exception and Tenth Circuit reserved the question of whether the regulation provides valid exception to numeric limitation, despite the statute's omission of exception).

Assuming, therefore, that the numeric limit, as well as the time limit, will be excused upon showing of changed country conditions by previously unavailable evidence, what is the time-frame for when the evidence first became available? The Board's unpublished decisions vary in their treatment of this question.

In cases predating the 1996 IIRIRA time and numeric limitations, the Board routinely described the general requirement of new evidence for all motions to reopen as hinging on availability of the evidence during the "hearing" before the Immigration Judge. *E.g.*, *Matter of Gutierrez-Lopez*, 21 I. & N. Dec. 479, 482 (BIA 1996) (finding that alien satisfied general criteria for motions to reopen because she presented evidence that "was not available during her deportation hearing"). Because the April 1996 changed country conditions regulation for motions before the Board was made to "mirror" the general requirement of newly available evidence, the Board seems to have interpreted the changed country conditions exception, like the general requirement of new evidence for all motions to reopen, to hinge on availability of the evidence at the time of the evidentiary hearing. *See Matter of J-J-*, 21 I. & N. Dec. 976, 978 (BIA 1997). Since IIRIRA, the Board has not addressed the import of Congress's use of the different word "proceeding" in the statute to describe the relevant time for evidence to have become available. In a 2007 decision on a motion to reopen deportation proceedings, the Board cited both the statutory and regulatory reopening provisions, and stated that the changed country conditions exception applies where a motion to reopen is based on evidence not available at the previous "hearing." *Matter of S-Y-G-*, 24 I. & N. Dec. at 252-53 (referring to evidence available at merits hearing where court remanded consolidated petitions for review of two motions to reopen); *see Matter of Man Tat Lin*, 2010 WL 4509788 (BIA Oct. 28, 2010) (where alien had hearing and was ordered removed in 2000, and moved to reopen in 2007 and 2008, Board considering second motion asked whether evidence was newly available since hearing in 2000). In *S-Y-G-*, at least one of the documents proffered on the second motion to reopen dated from 1999, the year in which the alien filed her first motion to reopen; the Board nevertheless did not hold that the evidence was not newly available within the meaning of the changed country conditions exception. 24 I. & N. Dec. at 253. In *S-Y-G-*, the Board did not discuss the use of the term "proceeding" in the statute or whether allowing successive motions to reopen based on evidence available at the time of the first motion would be consistent with the purpose of the time and, especially, the numeric limitation on reopening motions. However, since the Board found that the document did not show a change in country conditions, the outcome of the case did not turn on the Board's determination that the evidence was unavailable at the critical time, whatever that time might be.

Many courts have touched on the time-frame for availability of the new evidence without addressing the difference in language between the statute and regulations.

On the other hand, unpublished Board decisions sometimes take different approaches, as in the decisions reviewed in *Filja v. Gonazales*, 447 F.3d 241, 252 (3d Cir. 2006), and *Haile v. Gonzales*, 421 F.3d 493, 495 (7th Cir. 2005), where the Board used as the benchmark the date of the Board decision, not the immigration court hearing. *See Kurukulasooriyage v. Holder*, 332 Fed. Appx. 671 (2d Cir. 2009) (Board used benchmark date of its own decision for new availability of evidence); *Vushaj v. Holder*, 389 Fed. Appx. 512, 514 (6th Cir. 2010); *see also Ullah v. Holder*, 383 Fed. Appx. 63, 64 (2d Cir. 2010) (referring to both time of previous motion to reopen and time of hearing); *Xing Lin v. U.S. Att'y Gen.*, 307 Fed. Appx. 298, 303 (11th Cir. 2009) ("The BIA determined that several of the documents that Lin submitted were available when he filed his first motion to reopen and so declined to consider them.").

IV. The Courts weigh in

Many courts have touched on the time-frame for availability of the new evidence without addressing the difference in language between the statute and regulations. *E.g.*, *Smith v. Holder*, 627 F.3d 427, 434 n. 6 (1st Cir. 2010) (reserving question of whether relevant date is date of hearing before Immigration Judge or date of Board decision); *Lemus v.*

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Gonzales, 489 F.3d 399, 401 (1st Cir. 2007) (evidence on fifth motion to reopen is compared to what was available at time "BIA ordered [alien's] removal."); *Norani v. Gonzales*, 451 F.3d 292, 294 & n.3 (2d Cir. 2006) (selecting immigration court hearing as relevant date without mentioning statute); *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (using as benchmark date of Board decision, not immigration court hearing); *Zhong Qin Zheng v. Mukasey*, 523 F.3d 893, 896 (8th Cir. 2008); *He v. Gonzales*, 501 F.3d 1128, 1133 (9th Cir. 2007) (affirming Board's denial of second motion to reopen because the "new" evidence was dated six months prior to the Board's decision on the first appeal).

In *Filja v. Gonzales*, 447 F.3d 241, 252-53 (3d Cir. 2006), the Third Circuit was faced with an untimely first motion to reopen to reopen deportation proceedings, which the Board had denied because the allegedly "new" evidence of changed country conditions was available during the pendency of the alien's initial appeal to the Board. Without considering whether IIRIRA applied in deportation proceedings, the Third Circuit considered the differing use of "hearing" in the Board regulation and "proceeding" in the immigration court regulation and IIRIRA. The court held IIRIRA to be ambiguous with regard to the point in administrative proceedings at which the evidence had to have been unavailable. *Id.* at 252. Therefore, the court held that the issue was appropriate for deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, the Third Circuit held that it was unreasonable for the Board to interpret "proceeding" to include the pendency of an appeal to the Board, and the court held that "proceeding" necessarily meant "hearing before the IJ." *Id.* at 253.

Filja is problematic for several reasons. First, *Filja* assumed without discussion that IIRIRA applied in deportation proceedings. Second, the court seemed unaware of the fact that the reopening regulation was adopted before the reopening statute was enacted, since the court stated that the regulation "implements" the statute. *Id.* at 252, 253 (finding significance in the fact that the regulation for motions in the Board substituted the words "at the previous hearing" for the statute's words "at the previous proceeding"). This is the same mistake for which the Supreme Court chided the Seventh Circuit in *Kucana v. Holder*, 130 S. Ct. 827, 834 n.9 (2010): "It is hard to see how the [reopening] regulation could draw force from § 1229a(c)(7), for the regulation was already in force when that statutory provision was enacted."

Board precedent has long allowed motions to remand to introduce new evidence while an appeal is pending before the Board.

Third, *Filja*'s reasoning is based on an incomplete understanding of the Board's procedural rules. The Third Circuit reasoned that because the Board cannot consider new evidence on appeal, it would be unreasonable to bar an alien seeking to reopen from relying on evidence that became available after his immigration court hearing but before the Board decided his appeal. *Id.* at 253. The court said, "There is no 'hearing' in the usual sense of the word in proceedings before the BIA, and the substitution of the word 'hearing' for 'proceeding' recognizes that the only place the alien could have presented evidence of changed country conditions was before the IJ." *Id.* at 254. To the contrary, when the regulatory time and numeric limitations were adopted in April 1996, the reopening regulation was also amended to provide that a party to an appeal to the Board may move the Board to remand so that the party can introduce new evidence, and indeed the regulation provided that such remand motions would not count against the time and numeric limits, *see* 61 Fed. Reg. at 18902, 18905 (codified at 8 C.F.R. §1003.2(c)(4)); *see also* 8 C.F.R. § 1003.1(d)(3)(iv)). Board precedent has long allowed motions to remand to introduce new evidence while an appeal is pending before the Board. *See Matter of Coelho*, 20 I. & N. Dec. 464, 471 (BIA 1992); BIA Practice Manual § 5.8(a) & (c) (motions to remand available to introduce newly available evidence and such motions are not subject to time or numeric limits), *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf. Therefore, *Filja* is wrong in supposing that the alien cannot supplement the administrative record during the pendency of an appeal to the Board.

But more importantly, because *Filja* did not involve an alien who had already filed one motion to reopen, the court did not take into account the ramifications of its holding in cases where an alien is seeking to bring a second motion to reopen. By holding that "proceeding" has to mean "hearing" and that only evidentiary hearings before the immigration court count, *Filja* would seemingly reach beyond its own facts to require the Board to allow an alien to bring a second motion based on evidence that was available when he brought his first motion to reopen.

In *Malty v. Ashcroft*, 381 F.3d 942, 946 (9th Cir. 2004), the Ninth Circuit did just that. *Malty* involved a second motion to reopen deportation proceedings, in which the alien relied on evidence that was available at the time when he brought an

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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).

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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?

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Convictions - State Expungements

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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.

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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.

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Aggravated Felony — Missing Element

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

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

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Cancellation - Burden of Proof

On March 31, 2011, the government filed a petition for rehearing en banc in ***Rosas-Castaneda,*** 630 F.3d 881 (9th Cir. 2011). The issue raised in the petition is whether an alien can satisfy his burden of proving eligibility for cancellation by showing that his conviction was based on a divisible state offense, but refusing to provide the plea colloquy transcript so that the IJ could determine whether the conviction was an aggravated felony under the modified categorical approach.

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AILA InfoNet Doc. No. 11042536. (Posted 4/25/11)

Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

Second Circuit Holds That Where Alien Had Actual Notice Under 8 CFR § 103.5a(c), Failure To Make Proper Service Under Did Not Implicate The Alien's Fundamental Rights Or Result In Prejudice

In *Nolasco v. Holder*, __ F.3d __, 2011 WL 668035 (2d Cir. February 25, 2011) (Jacobs, Hall, Scheindlin (by designation)) (*per curiam*) the Second Circuit held that in this case, where the DHS failed to comply with 8 C.F.R. § 103.5a(c)(2)(ii), requiring that service shall be made upon the person with whom the minor resides, there was no violation of a fundamental right because the petitioner had received notice.

The petitioner, a citizen of El Salvador, was served with an NTA while in DHS custody. The NTA alleged that she entered the United States two days earlier, in Arizona, and was present in the United States without having been admitted or paroled. Petitioner was nine years old at the time of service. Petitioner was released from custody the following day, and on April 20, 2006, her father successfully moved on her behalf to change venue to Hartford, Connecticut. In November 2006, petitioner appeared before the IJ accompanied by counsel and her parents. Through counsel, she admitted the allegations in the NTA, conceded removability as charged, and filed an application for asylum and withholding of removal. Neither the IJ nor the parties' lawyers raised the issue of whether service of the NTA was proper and whether the court had jurisdiction to hear the case. In March 2008, following a merits hearing, the IJ denied petitioner's asylum application and ordered her removed to El Salvador. The BIA summarily affirmed that decision.

In December 2009, petitioner filed a motion for reconsideration before the BIA, arguing for the first time that both the BIA and the IJ lacked jurisdiction over her removal proceedings because her NTA was served improperly. She asserted that under 8 C.F.R. § 103.5a(c)(2)(ii), DHS was obligated to effect service simultaneously on her parents or a legal guardian, and that the agency's failure to comply with this regulation warranted termination of her removal proceedings. The BIA denied her motion concluding that, because petitioner was represented by counsel and accompanied by her parents at her removal proceedings, none of her fundamental rights were violated by any technical defect in service.

"Where it is clear that the minor alien received [the NTA] notice, she has no due process claim, regardless of any technical defect in the manner in which the NTA has been served."

Preliminarily, the Second Circuit explained that where the agency fails to follow its own regulations, it will remand to invalidate the challenged proceeding "only where the alien demonstrates prejudice to the rights sought to be protected by the subject regulation, or where the regulation [at issue] is promulgated to protect a fundamental right derived from the Constitution or a federal statute." The court first determined that, based on the facts, petitioner was afforded due process because: "[S]he was aware of the nature of the immigration proceedings and the time and place when those proceedings would be held; she was informed of the government's allegations against her and the statutory violations which she was alleged to have committed; she was advised that she could be represented by counsel and, indeed, counsel appeared on her behalf; and she appeared before the immigration judge and was granted a full opportunity to pursue relief from removal."

The court rejected petitioner's contention that she was denied a fundamental right because DHS did not effect service of the NTA in a manner consistent with 8 C.F.R. § 103.5a(c)(2)(ii). The court said that "the regulation is designed to increase the probability that a minor, like any adult alien, has notice of the charges filed against her and thus may appear before the immigration court and participate in the proceedings." It added that, "however, to the extent 8 C.F.R. § 103.5a(c)(2)(ii) implicates a due process right, that right is to receive notice provided for in the NTA. And where it is clear that the minor alien received such notice, she has no due process claim, regardless of any technical defect in the manner in which the NTA has been served."

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Second Circuit Upholds Reinstatement Of Prior Removal Order Where Alien Reentered The United States With The Use Of Another's Passport

In *Beekhan v. Holder* , __ F.3d __, 2011 WL 677346 (2d Cir. February 25, 2011) (Pooler, Hall, Bianco (by designation)) (*per curiam*), the Second Circuit held that immigration officials properly reinstated the petitioner's prior order of removal because she illegally reentered the United States. The petitioner, a native and citizen of Guyana, was removed from the United States in January 1997. In February 1997, she reentered the United States without inspection. About ten years later, petitioner applied for adjustment stating that she had entered the United States without inspection along the Canadian border. After interviewing petitioner, USCIS found that she was "a previously deported alien who entered the United States without authorization from the Attorney General" and transferred her into ICE custody.

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On June 22, 2009, ICE reinstated petitioner's prior removal order

The court rejected the petitioner's argument that ICE should have considered an affidavit she submitted to the agency alleging she re-entered the United States with another person's passport and that, consequently her re-entry was not illegal. However, the record reflected that she had signed a form indicating that she did not contest ICE's determination that she was subject to reinstatement.

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THIRD CIRCUIT

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■ **Third Circuit Reverses BIA's Ruling Requiring Corroboration, Finding Alien Provided Sufficient Corroboration**

In ***Dong v. Attorney General*** __ F.3d __, 2011 WL 1086610 (*Rendell*, Ambro, Fisher) (3d Cir. March 25, 2011), the Third Circuit reversed a BIA affirmance of the denial of asylum, withholding and CAT, based on failure to provide a statement from the petitioner's husband. The petitioner claimed persecution on account of the threat of sterilization under China's family planning policies. Her husband who had filed a separate application, had given an inconsistent date for her abortion. The husband, however, did not testify or offer a statement in his wife's case. The IJ ruled that this corroboration was necessary and denied relief. The BIA affirmed. The court held that petitioner had provided other sufficient corroboration, applying the 3-part test for corroboration in *Abdulai v. Ashcroft*, 239 F.3d 542, 544 (3d Cir. 2001). The court affirmed the denial of CAT protection, but remanded for consideration of petitioner's claim for asylum and withholding of removal based on past persecution.

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FIFTH CIRCUIT

■ **Fifth Circuit Upholds Agency's Determination That Statutory Provision Barring Motion To Reopen Overrides IJ's General Authority To Reopen *Sua Sponte***

In ***Gregoire v. Holder***, __ F.3d __, 2011 WL 754873 (5th Cir. March 4, 2011) (Reavley, *Jolly*, Stewart), the Fifth Circuit held that given the "fundamental rule of statutory interpretation [that] specific provisions trump general provisions," the BIA reasonably determined that the specific statutory requirements for rescinding an *in absentia* order of removal trump the IJ's general authority to reopen *sua sponte*.

Where petitioner waived his right to appeal, the IJ need not verify petitioner's understanding of the finality of the order.

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■ **Fifth Circuit Holds It Retains Jurisdiction When BIA Reconsiders And Revises Order Under Appeal If Original Order Not Materially Changed**

In ***Espinal v. Holder***, __ F.3d __, 2011 WL 1049508 (5th Cir. March 24, 2011) (*Jones*, Benavides, Aycock), the Fifth Circuit held that it retains appellate jurisdiction over a final order of the BIA even if it is reconsidered *sua sponte*, "so long as the BIA's grant of reconsideration does not materially change, or effectively vacate, the order under review." The court joined the Third and Ninth Circuits in adopting a case by case approach.

The court also reversed the BIA's determination that petitioner's 2007 drug conviction was an "aggravated felony," making him ineligible for cancellation of removal. The court held the offense was not based on a prior conviction and was therefore not punishable as a felony under federal law, citing the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2589 (2010). The court remanded the case to the BIA for consideration of the alien's request for cancellation of removal.

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■ **Fifth Circuit Holds That Petitioner Knowingly And Intentionally Waived Right To Appeal When Accepting Pre-Conclusion Voluntary Departure**

In ***Kohwarien v. Holder***, __ F.3d __, 2011 WL 754259 (5th Cir. March 4, 2011) (*Garza*, Stewart, Haynes), the Fifth Circuit held that the BIA properly dismissed the *pro se* petitioner's appeal for lack of jurisdiction because he had knowingly and intelligently waived his right to appeal when he accepted pre-conclusion voluntary departure pursuant to 8 C.F.R. § 1240.26(b)(1)(i). The Fifth Circuit ruled that the IJ need not verify petitioner's understanding of the finality of the order and that petitioner had not shown that his unreserved waiver of his appellate rights was invalid. The court rejected petitioner's contention that *Dada v. Mukasey*, 554 U.S. 1 (2008) (holding that an alien must be permitted an opportunity to withdraw from a voluntary departure agreement prior to expiration of the voluntary departure period directed by statute) applied to his case, explaining that petitioner's proceeding before the BIA was an appeal of the IJ's decision and not a motion to reopen.

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SIXTH CIRCUIT

Attempted Possession Of A Controlled Substance With Intent To Deliver Is Aggravated Felony Even If Amount Of Controlled Substance Is Undetermined

In ***Garcia v. Holder,*** __ F.3d __, 2011 WL 1105591 (*Gilman*, Gibbons, Cook) (6th Cir. March 28, 2011), the Sixth Circuit held that petitioner's state conviction for possession of marijuana with intent to deliver was an aggravated felony, even though the amount of marijuana was not established. The petitioner is a Mexican citizen and an LPR since 1995. In 1998, he pled guilty to the attempted possession of marihuana with the intent to deliver the drug, and was sentenced to a fine and costs totalling $1,150. DHS began removal proceedings against him in 2005, alleging that he was removable because, among other things, he was an alien believed to be an illicit trafficker in a controlled substance and an alien who had been convicted of a controlled-substance offense. At his removal hearing, petitioner sought a § 212(h) waiver of inadmissibility for his state drug conviction and cancellation of removal. Because of his convictions, he was found ineligible for these reliefs by an IJ and later by the BIA.

The court held that because the elements petitioner's Michigan state offense include the elements of a felony punishable under the CSA petitioner's state conviction is an aggravated felony under the INA.

The court held that because the elements of petitioner's Michigan state offense include the elements of a felony punishable under the Controlled Substances Act, and because the amount of marijuana is not an element of the relevant federal felony, petitioner's state conviction was an aggravated felony under the INA.

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SEVENTH CIRCUIT

Seventh Circuit Remands Case For Further Consideration Of Petitioner's Withholding Of Removal Claim As To The West Bank

In ***Zahren v. Holder***, __ F.3d __, 2011 WL 798511 (7th Cir. January 27, 2011) (Manion, Wood, Evans) (*per curiam*), the Seventh Circuit granted petitioner's rehearing petition and remanded the case to the BIA for further consideration of his withholding of removal claim as to the West Bank. The court concluded that further agency action was appropriate in light of: (1) its finding the BIA did not accord appropriate weight to the evidence the alien presented in support of his withholding claim as to the West Bank; (2) Jordan's refusal to accept the alien; and (3) the passage of five years with significant country conditions in the West Bank since the BIA's decision. The government joined in the petition for rehearing, taking the position that the court could decide the withholding claim as to the West Bank.

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Seventh Circuit Holds That The Alien Could Not Establish Eligibility For Asylum Based On Harm To His Parents And Generalized Harassment

In ***Ni v. Holder***, __ F.3d __, 2011 WL 1086002 (7th Cir. March 25, 2011) (*Flaum*, Evans, McCuskey), the Seventh Circuit held that a Chinese asylum applicant failed to demonstrate past persecution where his claims were based on harm experienced by his parents, and where he only faced generalized discrimination and harassment. Petitioner based his claim on the fact that the Chinese authorities had jailed and mistreated his parents in 1982. The court held that petitioner did not have a well-founded fear of future persecution where the incidents of past harm occurred a long time ago and the background evidence did not establish that he faced an individualized risk of future harm.

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Seventh Circuit Holds Invocation Of INA's Jurisdiction-Stripping Provision Limits Its Ability To Critique An Agency Decision

In ***Kiorkis v. Holder*** ,__ F.3d __, 2011 WL 678388 (7th Cir. February 28, 2011) (*Cudahy*, Rovner, Adelman (by designation)), the Seventh Circuit held that the agency did not legally err in denying the petitioner's asylum application. The petitioner, a Lebanese citizen, who had been an LPR for over a decade, was placed into removal proceedings due to his prior conviction for possession of a controlled substance. He conceded that he was removable, but filed an application seeking asylum. An IJ denied petitioner's request, finding that he had failed to establish that he had a well-founded fear of future persecution on the basis of a statutorily-protected ground. The BIA affirmed.

Before the Seventh Circuit, petitioner argued that the agency had overlooked his Hezbollah-related and non-religious-based fears, and had applied the wrong evidentiary standard. The court held that the IJ considered the petitioner's claims and applied the appropriate evidentiary standard. "The BIA and the immigration courts are entitled to a presumption of regularity concerning their resolution of claims and applicants appealing from their decisions bear the burden of establishing that an error occurred," said the court. It further stated that, INA § 242(a)(2)(C) limited its ability to critique the agency's opinions, it did not endorse the manner in which the agency denied the petitioner's claim.

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The court explained that its "holding should not be interpreted as an unqualified endorsement of the immigration court's decision. . . [the IJ] might have discussed each of [petitioner's] claims in greater depth and elaborated on the reasons why she was rejecting each claim."

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NINTH CIRCUIT

■ Ninth Circuit Orders Bond Hearings For Aliens Detained For Six-Months Or Longer Under Post-Order Detention Statute

In ***Diouf v. Napolitan*** __ F.3d __, 2011 WL 768077 (9th Cir. March 7, 2011) (*Fisher*, Bybee, Hall), the Ninth Circuit held that an alien facing detention for more than six months under INA § 241(a)(6) is entitled to a bond hearing before an IJ, and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community. The court determined that the 180-day post-order custody review regulation, 8 C.F.R. § 241.4, did not offer constitutionally adequate safeguards against erroneous detention because "they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter."

Accordingly, the court determined that detention for longer than 180-days without a bond hearing poses serious constitutional concerns, and concluded that detained aliens were entitled to a hearing before an IJ when they have been detained for 180-days, unless their removal is imminent. The court also placed the burden for proving flight risk and danger at a bond hearing on the government.

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■ Ninth Circuit Holds That The Requirements For Finding An Alien Filed A Frivolous Asylum Application Were Not Met

In ***Yan Liu v. Holder***, 632 F.3d 1150 (9th Cir. 2011) (*Fisher*, Berzon, Snow), the Ninth Circuit held that the BIA's adverse credibility determination was supported by substantial evidence, and affirmed the denial of petitioner's request for asylum and withholding of removal. The court further held, however, that the BIA's finding the petitioner's asylum application was frivolous was not supported because the evidence did not establish that the petitioner deliberately fabricated a material element of the claim. "Although the grounds cited for the adverse credibility determination overlap to some extent with the grounds cited for the frivolousness finding, the heightened requirements for the latter finding were not met. [Petitioner] was not given an adequate opportunity to address all the grounds for the frivolousness finding, and those she was able to address are insufficient, standing alone, to support the frivolousness determination," said the court.

"'An alien who is illegally present in the United States . . . [commits] only a civil violation,' and an alien's 'admission of illegal presence . . . does not, without more, provide probable cause of the criminal violation of illegal entry.'"

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■ Ninth Circuit Denies En Banc Rehearing Of Decision Holding That An Arrest Based On An Admission Of Unlawful Presence Is Not An Egregious Fourth Amendment Violation

In ***Martinez-Medina v. Holder*** __ F.3d __, 2011 WL 855791 amending 616 F.3d 1011 (9th Cir. March 11, 2011) (Kleinfeld, *Bea*, Ikuta), the Ninth Circuit denied the aliens' petition for rehearing en banc and amended its prior published opinion in the case. In its prior decision the court had held that a state police officer's arrest of two aliens who admitted being unlawfully present in the United States did not constitute an "egregious" Fourth Amendment violation warranting the exclusion of subsequently collected evidence, since a reasonable state police officer would not have known that unlawful presence itself is not a criminal offense. The court's amended opinion emphasized that, although a reasonable officer could have been confused by a conflicting statement in a Supreme Court decision, unlawful presence alone is definitely not a crime. "Therefore, *Gonzales*'s [*Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983)] observation that 'an alien who is illegally present in the United States . . . [commits] only a civil violation,' and its holding that an alien's 'admission of illegal presence . . . does not, without more, provide probable cause of the criminal violation of illegal entry,' always were, and remain, the law of the circuit, binding on law enforcement officers," said the court.

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■ Ninth Circuit Affirms That Celine Dion's Security Consultant Failed To Satisfy At Least Three Criteria, As Required, For An "Extraordinary Ability" Immigrant Visa

In ***Skokos v. USCIS,*** 2011 WL 834062 (9th Cir. March 10, 2011) (Canby, Clifton, Hawkins) (unpublished), the Ninth Circuit held that the district court properly granted the government's summary judgment motion. The court agreed that the evidence submitted by the alien failed to satisfy the required three out of ten criteria set forth in the regulations, and consequently failed to establish that the alien's professional contributions were original or of major significance, or that his salary was signifi-

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cantly higher than other security consultants in his field. The court additionally determined that any error with respect to the agency's determination that the alien had not demonstrated that he played a lead or critical role in the success of his employer was harmless, because the alien was unable to satisfy at least two other regulatory requirements.

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The court explained that it was "yet to pass upon the constitutional implications of the VWP waiver or decide whether it must be knowing and voluntary."

■ **Ninth Circuit Holds A VWP Entrant's Signed Waiver Is Valid And Entrant Suffered No Prejudice Through The Enforcement Of The Waiver**

In ***Bingham v. Holder***, __ F.3d __, 2011 WL 1025582 (*Gould*, Callahan, Korman) (9th Cir. March 23, 2011), the Ninth Circuit concluded that the form I-94 waiver of rights to contest removal that was signed by the English VWP entrant was enforceable. The petitioner, a citizen of the United Kingdom, was admitted to the United States under the VWP on March 11, 2007. Petitioner overstayed the 90-day term of his admission by more than a year. On December 5, 2008, petitioner was stopped by a police officer and arrested for presenting false citizenship or resident alien documents under California law. Although he was not charged with an offense, he was released to the custody of immigration authorities. On December 12, 2008, DHS ordered petitioner removed as an alien admitted under the VWP who had remained in the United States beyond the authorized period.

The court determined that an alien who signs an I-94 VWP entry form gives up any right to challenge removal, except on asylum grounds, if he or she overstays the grant of time permitted by the VWP. The court noted that at the time of entry, petitioner was free to decline to sign the waiver and alternatively seek entry to the United States by way of a tourist visa. The court noted that the "procedure required by the VWP is neither complex nor unfair" and held that petitioner failed to demonstrate that he has prejudiced by the enforcement of the waiver.

In finding that petitioner had suffered no prejudice, the court explained that it was "yet to pass upon the constitutional implications of the VWP waiver or decide whether it must be knowing and voluntary."

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■ **Former § 212(c) Applies In Deportation Proceedings Commenced Before IIRIRA'S Effective Date Even If Charges Are Based On Post-IIRIRA Offenses**

In ***Pascua v. Holder***, __ F.3d__, 2011 WL 1024434 (9th Cir. March 23, 2011) (*Tashima*, Fisher, Wolf), the Ninth Circuit held that former INA § 212(c) applies in deportation proceedings commenced before the April 1, 1997, effective date of IIRIRA, even if proceedings included charges based on post-IIRIRA offenses.

The petitioner, an LPR since 1983, was twice convicted of drug and weapons offenses in California. In 1995, she pleaded guilty to charges stemming from her simultaneous possession in a vehicle of a firearm and methamphetamine. In 2005, a jury convicted her of similar charges for possessing methamphetamine and ammunition in her home. The former INS commenced deportation proceedings in 1996, alleging, based on the 1995 convictions, that she was deportable for a firearms offense and a controlled substance offense. But, by the time she was convicted of the 2005 crimes, her case was still before an IJ, so DHS supplemented the deportation charges with additional charges based on the new firearms and drug convictions.

The court remanded the case for the BIA to address petitioner's request for relief under *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993), which allows for adjustment of status in conjunction with a waiver of inadmissibility under former § 212(c).

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TENTH CIRCUIT

■ **Tenth Circuit Accords *Chevron* Deference To The BIA' Rejection Of The Court's Precedent Holding**

In ***Padilla-Caldera v. Holder*** , __ F.3d __, 2011 WL 856272 (10th Cir. March 14, 2011) (*Kelly*, Baldock, Brorby), the Tenth Circuit held that the BIA's determination that an alien inadmissible under 8 U.S.C. § 1182 (a)(9)(C)(i)(I) is ineligible for adjustment of status under 8 U.S.C. § 1255(i), as articulated in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), is a reasonable interpretation of ambiguous statutory provisions that warranted *Chevron* deference.

The court held that, because *Briones* was authoritative and issued after the court's prior decision in this case, the BIA was justified in departing from the law of the case and the court's mandate on remand.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds Criminal Extortionate Extension Of Credit Is Not Categorically An Aggravated Felony Which Would Make An Alien Removable

In *Accardo v. US Att'y Gen.*, __ F.3d __, 2011 WL 814840 (11th Cir. March 10, 2011) (*Carnes*, Pryor, Cox), the Eleventh Circuit reversed the BIA's holding that a criminal violation of 18 U.S.C. § 892(a), which prohibits an extortionate extension of credit, is categorically a crime of violence under 18 U.S.C. § 16, and held the alien is therefore not necessarily removable for committing an aggravated felony under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The court held 18 U.S.C. § 892(a) speaks to a debtor's reputation as well as violence, and the modified categorical approach requires review of the criminal record documents to determine if the violation constitutes a crime of violence. The court remanded the case to the BIA for use of the modified categorical approach to determine whether the alien's conviction constitutes a crime of violence and therefore an aggravated felony.

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DISTRICT COURTS

■ Southern District Of Texas Grants Government's Motion To Dismiss Plaintiff's Constitutional Claims In Passport Case

In *Benavides v. Clinton,* (S.D. Tex. March 3, 2011) (Hughes, J.), the Southern District of Texas District Court adopted the magistrate judge's report and recommendation, dismissing a suit challenging the denial of an alien's passport application and granting partial summary judgment for the government. The court ruled that the Department of State gave Benavides due process by twice allowing her to submit more evidence and by providing her with a letter explaining its reasons for denying her application. The court further determined that Benavides could not prevail on her equal protection claim because she failed to allege improper motive or discriminatory purpose. Additionally, on Benavides's substantive due process claim, the court granted summary judgment for the government, holding that there is no fundamental constitutional right to international travel. The court then held that the Department of State's reason for denying the passport – that Benavides failed to supply sufficient evidence of citizenship – was rational.

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■ Northern District Of Illinois Dismisses APA And Due Process Challenges To Visa Petition Denials

In *Villena v. Napolitano*, 10-6351 (N.D. Ill. March 4, 2011) (Coleman, J.), the district court granted the Government's motion to dismiss a married couple's challenge to the denial by USCIS of their visa petitions for their adopted children. The court held that the Villenas had failed to state a claim upon which it could grant relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, the court concluded, in light of the documents the Villenas had submitted to USCIS and the BIA in support of their visa petitions (which they attached to their complaint), the couple could not show that they had satisfied the requirement that they resided with (and had parental control over) the beneficiaries of the petitions. Moreover, the court determined that the Villenas had failed to sufficiently allege any due process violation in light of the documents they submitted to the agency and the responses they received from the agency. The dismissal is without prejudice, and the court allowed the Villenas 30 days to amend their complaint.

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■ Northern District Of Georgia Grants Government's Motion For Summary Judgment In Cultural Exchange Visa Petition Case

In *Beyond Management, Inc. v. Holder,* No. 1:10-CIV-2482 (N.D. Ga. March 25, 2011) (Shoob, J.), in a challenge to the denial of a cultural exchange visa petition, the district court denied the government's motion to dismiss for lack of subject matter jurisdiction, holding that neither the relevant statute nor the regulation specified that the petition decision is purely discretionary and that the INA thus does not bar judicial review.

Beyond Management, a hotel management company, had filed an 1-129, petition for nonimmigrant worker, seeking to be approved as an international cultural program and to obtain a Q-1 visas for four named beneficiaries. USCIS denied the petition noting that all four beneficiaries had been in the U.S. in J-1 visa training in the hospitality industry, and that essentially they were "temporary workers that your organization is attempting to fit into the Q1 visa category." On appeal, the AAO affirmed, finding that Beyond Management had failed to show that its program qualified as an international cultural exchange program.

On the merits, the district court granted summary judgment for the government and held that the record supported USCIS' findings that plaintiff did not establish that (i) its program qualified as an international cultural exchange program; and (ii) it would offer the beneficiaries wages and working conditions comparable to those accorded local domestic workers similarly employed.

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AILA InfoNet Doc. No. 11042536. (Posted 4/25/11)

This Month's Topical Parentheticals

ADJUSTMENT

■ ***Padilla-Caldera v. Holder,*** __ F.3d __, 2011 WL 856272 (10th Cir. Mar. 14, 2011) (holding that the BIA's determination in *Matter of Briones* -- that an alien who is inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I) is ineligible for § 1255(i) adjustment of status -- is a reasonable interpretation of ambiguous statutory provisions to which the court owes *Chevron* deference regardless of its prior interpretation)

■ ***Matter of Sesay***, 25 I.&N. 431 (BIA Mar. 17, 2011) (holding that a fiancé(e) visa holder may be granted adjustment of status under INA §§ 245(a) and (d), even if the marriage to the fiancé(e) visa petitioner does not exist at the time that the adjustment application is adjudicated, if the applicant can demonstrate that he or she entered into a bona fide marriage to the fiancé(e) visa petitioner within the 90-day period of admission, provided that the requirements of section 216 (conditional resident status) do not apply)

ASYLUM

■ ***Zahren v. Holder,*** __ F. 3d __, 2011 WL 798511 (7th Cir. Jan. 27, 2011) (granting rehearing petition and remanding to BIA in light of Jordan's refusal to accept petitioner (a native of Israel and citizen of Jordan), the need to update the record for changed country conditions, and the Court's concern regarding the weight the BIA gave to petitioner's evidence of persecution if removed to the West Bank)

■ ***Ali v. Holder,*** __ F.3d __, 2011 WL 923412 (9th Cir. Mar. 18, 2011) (holding that substantial evidence did not support BIA's decision that past-persecution presumption was rebutted by 2004 country report where BIA did not provide an "individualized analysis" of "how the changed country conditions affect the alien's specific situation")

■ ***Chen v. Att'y Gen. of United States,*** __ F.3d __, 2011 WL 923353 (3d Cir. Mar. 18, 2011) (affirming denial of asylum for failure to show well-founded fear of sterilization or economic persecution in Fujian Province due to birth of two US children)

■ ***Singh v. Holder,*** __ F.3d __, 2011 WL __ (9th Cir. Mar. 25, 2011) (pre-REAL ID case holding that substantial evidence supports adverse credibility finding and denial of asylum to Indian woman who admitted to lying twice to asylum officer about whereabouts of husband and whether he applied for asylum)

■ ***Castaneda-Castillo v. Holder,*** __ F. 3d __, 2011 WL 1049777 (1st Cir. Mar. 24, 2011) (denying government's motion to remand to hold in abeyance pending extradition proceeding, in asylum case of Peruvian military officer claiming persecution by Shining Path for involvement in a civilian massacre during civil strife; vacating BIA's denial of asylum and remanding to decide if "Peruvian military officers whose names became associated with [a massacre]" are a PSG, and if so, whether Shining-Path revenge would be persecution on that account)

■ ***Ni v. Holder,*** __ F. 3d __, 2011 WL 1086002 (7th Cir. Mar. 25, 2011) (affirming IJ's and BIA's denial of asylum to 38-year-old Chinese Christian man claiming past and future religious persecution, where applicant cannot claim "derivative persecution" based on parents' arrest and beating when he was a child)

■ ***Dong v. Att'y Gen. of United States,*** __ F.3d __, 2011 WL 1086610 (3d Cir. Mar. 25, 2011) (pre-REAL ID Act corroboration case vacating IJ's and BIA's denial of asylum to Chinese woman for failure to reasonably corroborate claim of past forced abortion in 1997 that is inconsistent as to date with husband's asylum application and remanding for IJ to comply with Third Circuit's 3-part *Abdulai* corroboration rule)

CANCELLATION

■ ***Saucedo-Arevalo v. Holder***, __ F. 3d __, 2011 WL 1126039 (9th Cir. Mar. 29, 2011) (holding that the period of physical presence of a parent (as opposed to period in status) is not imputed to a child to satisfy the requirement for cancellation of removal because the physical presence requirement for cancellation is indistinguishable from the requirement under NACARA which the court previously held could not be imputed)

CRIMES

■ ***Accardo v. United States Att'y Gen,*** __ F.3d __, 2011 WL 814840 (11th Cir. Mar. 10, 2011) (holding that petitioner's conviction for the "extortionate extension of credit," under 18 U.S.C. § 892(a) is not categorically a crime of violence because it encompasses some criminal behavior that does not involve the substantial use of physical force)

■ ***Gallegos-Vasquez v. Holder,*** __ F. 3d __, 2011 WL 692086 (9th Cir. Mar. 1, 2011) (holding that petitioner had a "settled expectation" of 212(c) relief when he pled guilty to a second misdemeanor conviction prior to gaining LPR status through automatic adjustment provisions under the SAW program, despite being ineligible for 212(c) relief at the time of the plea)

■ ***Garcia v. Holder,*** __ F. 3d __, 2011 WL 1105591 (6th Cir. Mar. 28, 2011) (affirming BIA's holding that petitioner's state conviction for possession of marijuana with intent to deliver is an aggravated felony because it corresponds to the federal felony offense of marijuana distribution; rejecting *Padilla* claim because it is not proper to raise in immigration proceedings)

■ ***Matter of Vo,*** 25 I&N Dec. 426 (BIA Mar. 4, 2011) (holding that where the substantive offense underlying an alien's conviction for an at-

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This Month's Topical Parentheticals

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tempt offense is a CIMT, the alien is considered to have been convicted of a CIMT for purposes of section 237(a)(2)(A) of the INA, even though that section makes no reference to attempt offenses)

CRIMINAL PROSECUTION

■ *United States v. Villanueva-Diaz,* __ F.3d __, 2011 WL 693001 (5th Cir. Mar. 1, 2011) (rejecting collateral challenge to deportation order in criminal prosecution for illegal reentry and noting that defendant's suggestion of deficient performance by privately-retained counsel in immigration proceedings fails absent a constitutional right to appointed counsel)

■ *United States of America v. Bonilla,* __ F.3d __, 2011 WL 833293 (9th Cir. March 11, 2011) (reversing district court and holding that a defendant who may have been aware of the "possibility" that pleading guilty would lead to deportation had nevertheless established the necessary prejudice in support of his *Padilla* claim where counsel failed to inform him that his deportation would be "virtually certain")

DUE PROCESS – FAIR HEARING

■ *Martinez-Medina v. Holder,* __ F. 3d __, 2011 WL 855791 (9th Cir. Mar. 11, 2011) (amending prior decision holding that there was no egregious violation of the Fourth Amendment where a reasonable officer could have been confused as to whether he had probable cause to detain petitioners based solely on their illegal presence in the country)

DETENTION

■ *Diouf v. Napolitano,* __ F. 3d __, 2011 WL 768077 (9th Cir. Mar. 7, 2011) (applying the cannon of constitutional avoidance to hold that an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an IJ and to release from detention unless the government establishes that the alien poses a risk of flight or a danger to the community)

JURISDICTION

■ *Kohwarien v. Holder,* __ F.3d __, 2011 WL 754259 (5th Cir. Mar. 4, 2011) (holding that substantial evidence supports the BIA's finding that it lacked jurisdiction over petitioner's appeal because he knowingly and intelligently waived his appellate rights)

■ *Singh, Vijendra v. Holder*, __ F. 3d __, 2011 WL 1226379 (9th Cir. Mar. 31, 2011) (holding that district court retained habeas jurisdiction to consider questions of law and constitutional claims that arise from the denial of bond; further holding that given the substantial liberty interests at stake for aliens facing prolonged detention while their PFRs are pending: (1) the government has the burden of proving by clear and convincing evidence at a bond hearing before an IJ that the alien's continued detention is justified; and (2) the immigration court is required to make a contemporaneous record of the hearing, and that an audio recording would suffice)

■ *Luna v. Holder,* __ F.3d __, 2011 WL 722607 (2d Cir. Mar. 3, 2011) (holding that the 30-day PFR filing deadline does not violate the Suspension Clause, as applied to petitioners, because a statutory motion to reopen is an adequate substitute for habeas in the context of a non-citizen's claim that he was prevented from filing a timely PFR by ineffective assistance of counsel and governmental interference; the court's holding was premised on, *inter alia*, its determination that the BIA may not dismiss a MTR for lack of jurisdiction on the basis of the departure bar)

■ *Espinal v. Holder,* __ F.3d __, 2011 WL 1049508 (5th Cir. Mar. 24, 2011) (holding that the BIA's *sua sponte* reconsideration and modification of its prior order did not moot a pending PFR where the new BIA decision abandoned its reliance on one of petitioner's drug convictions but did not materially change or effectively vacate the order under review)

MOTION TO REOPEN

■ *Gregoire v. Holder,* __ F.3d __, 2011 WL 754873 (5th Cir. Mar. 4, 2011) (affirming BIA's reversal of IJ's decision to *sua sponte* reopen an *in absentia* order, and agreeing with the BIA that the specific statutory provision barring a motion to reopen for exceptional circumstances after expiration of the 180-day deadline overrides the IJ's general authority to reopen *sua sponte*)

Jiang v. Holder, __ F. 3d __, 2011 WL 923279 (7th Cir. Mar. 18, 2011) (holding that BIA did not abuse its discretion in denying reopening based on IAC where alien did not comply with *Lozada*)

VWP

■ *Bingham v. Holder,* __ F.3d __, 2011 WL 1025582 (9th Cir. Mar. 23, 2011) (rejecting argument that the VWP waiver was invalid; refusing to reach question of whether waiver must be knowing and voluntary, and finding that petitioner failed to show that the allegedly unknowing waiver resulted in any prejudice)

WAIVERS

■ *Pascua v. Holder,* __ F. 3d __, 2011 WL 1024434 (9th Cir. Mar. 23, 2011) (holding that former § 212(c) applies in deportation proceedings that commenced before the April 1, 1997 effective date of IIRIRA, even if the proceedings include deportation charges based on post-IIRIRA offenses; remanding case to BIA to determine if petitioner is eligible for *Gabryelsky* relief)

AILA InfoNet Doc. No. 11042536. (Posted 4/25/11)

Motions to reopen

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earlier motion to reopen that did not present an asylum claim. The Board denied the second motion on the ground that the evidence was available before the alien's first motion to reopen. The Ninth Circuit reversed, holding that the second motion was exempted from the time and numeric bars. The court stated that under the regulation, availability of evidence during a first motion to reopen was irrelevant where the first motion to reopen did not seek asylum. Said the court, "[C]hanged country conditions are specifically excepted from the numerical limitations on motions. 8 C.F.R. § 1003.2 (c)(1)." *Id.* at 946. The court did not discuss when the "new" evidence had to have become available, nor did it mention whether IIRIRA applied, although it cited IIRIRA's reopening provision elsewhere in the decision, 381 F.3d at 947. *See also Jiang v. U.S. Atty. Gen.*, 568 F.3d 1252, 1255 (11th Cir. 2009) (third motion to reopen fell within changed country conditions exception even though it raised evidence in existence at time of second motion); *Li v. U.S. Atty. Gen.*, 488 F.3d 1371, 1372 (11th Cir. 2007) (holding that alien's second motion to reopen in 2006 brought up newly available evidence of changed country conditions, including evidence from 2003, when alien's first motion had been denied in 2006); *Shardar v. U.S. Att'y Gen.*, 503 F.3d 308, 311 (3d Cir. 2007) (remanding, where Board denied second motion to reopen, for the Board to consider evidence that became available while first motion to reopen was pending before Board).

At the opposite end of the spectrum, the Seventh Circuit has held that "the relevant question for the BIA when it considers a motion to reopen based on new evidence is not whether that material was available at the time of the hearing before the immigration judge, but whether it was available before the BIA itself rendered a final decision in the case." *Haile v. Gonzales*, 421 F.3d 493, 497 (7th Cir. 2005) (the facts of the case show that the alien had moved to reopen under the changed country conditions provision, not the provision for timely motions to reopen).

V. Conclusion

The confusion among the courts suggests that there is room for further agency analysis of when evidence should be considered "new" for purposes of permitting an untimely or successive motion to reopen.

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Readers are reminded that the views expressed in this article are those of the author only and do not represent the views of the Office of Immigration Litigation or of the Department of Justice.

St. Patrick's Day at OIL

OIL Acting Director David McConnell finds happiness in St. Patrick's Day, the Redskins, and Jell-O.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

■ **April 18, 2011.** Analyzing and briefing past persecution cases. LSB LL100, 10:00-11:30 am.

■ **April 19, 2011.** Finality of BIA orders" and other recent issues regarding the finality of removal orders for purpose of judicial review. LSB LL100 , 2:30-4:00 pm

■ **April 25, 2011.** Introduction to criminal immigration prosecutions. LSB LL100, 2:00-3:30 pm

■ **October 3-7, 2011.** OIL's 17th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

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

AILA InfoNet Doc. No. 11042536. (Posted 4/25/11)

INSIDE OIL

New OIL Attorneys Attend Civil Division Orientation Program

New attorneys for the Civil Division, including OIL attorneys, recently attended a training program where they learned about the structure and priorities of the Department, and the administrative nuts and bolts of working in the Civil Division. The attorneys also had an opportunity to meet with the senior management of the Civil Division, including Assistant Attorney General **Tony West** and OIL's DAAG, **Bill Orrick.**

Front: Dara Smith, Lindsay Corliss, Sarah Bergene, Bill Orrick (DAAG), Tony West (AAG), Robert Stalzer, Kohsei Ugumori, Melissa Loft, Christina Martin, Lindsay Murphy; Back: Christopher Buchanan, Sabatino Leo, Carlton (Fred) Sheffield, Colin Tucker, Frank Johnson, Ashley Martin, Walter Bocchini

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

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

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

Office of Immigration Litigation

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