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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

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Alien Abroad Whose Advance Parole Document is Revoked Has the Right to Return to the U.S. to Pursue His Application for Adjustment of States

In ***Samirah v. Holder***, __ F.3d __, 2010 WL 4909464 (7th Cir. Dec. 3, 2010) (*Posner*, Manion, Hamilton), the Seventh Circuit held that an alien outside the United States has the regulatory right to return to the United States to pursue his application for adjustment of status where USCIS issues an advance parole document, but later revokes the advance parole when the alien is abroad.

This case involved a citizen of Jordan who first entered the United States in September 1987 as a student. At some point, Samirah dropped out of school and remained in the United States without authorization. In 2002, Samirah planned to visit a sick relative in Jordan, but wanted to return to the United States to pursue an application for adjustment of status. When Samirah filed his adjustment application, he applied for advance parole to preserve his pending application after his departure, *see* 8 C.F.R. § 245.2(a)(4)(ii)(B), and to request re-entry to the United States after his trip abroad, *see* 8 C.F.R. § 212.5(f).

On January 17, 2003, while Samirah was abroad, legacy INS revoked his advance parole document (Form I-512L) because the agency had received information

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Seventh Circuit Takes "the Road Less Traveled" in Holding It Has Jurisdiction to Review Denial of Administrative Closure

Administrative closure may not be the brightest star in the constellation of OIL hot immigration issues, but the decision in *Vahora v. Holder*, 626 F.3d 907 (7th Cir. 2010), is a worthy vehicle to deliver two important points: (1) courts are properly defensive in addressing jurisdictional challenges and may take a "road less traveled" in resolving them.

Illustrative of this point, the Seventh Circuit in *Vahora* rejected the reasoning of the Eighth and Ninth Circuits and sided with the Fifth and Sixth Circuits in finding that administrative closure was within the court's cognizance. The legal reasoning on the jurisdictional issue in this opinion, authored by Senior Judge Ripple, is deserving of some consideration. (2) A post-mortem of the oral argument in light of the court's opinion reaffirms the advocacy maxim: "Win the case not just the argument." Antidotal information about the oral argument will illustrate this point.

Background

Mr. Vahora, a native and citizen of India, sought asylum in the United States based on his Muslim faith. In 2002, Mr. Vahora witnessed sectarian rioting and violence in Ahmedabad, including the burning of homes and businesses and the stabbing of a man. He sought refuge in a tempo-

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Adjustment Available to Alien Granted Advance Parole

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that he was a security risk to the United States. On January 18, 2003, the agency served this revocation on Samirah at its pre-inspection station in Shannon International Airport, Ireland. Legacy INS also concluded that, because Samirah had more than one year of unlawful presence in the United States and lacked a valid travel document, he was inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i). Without a valid Form I-512L, and no other document that would allow his entry into the United States, Samirah returned to Jordan.

Samirah initially filed for injunctive relief challenging the revocation of his Form I-512L, but the court held that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii) to review legacy INS's discretionary decision to revoke an advance parole. *See Samirah v. O'Connell*, 335 F.3d 545, 549 (7th Cir. 2003). The court also held that the district court lacked jurisdiction to review the revocation of Samirah's Form I-512L under a petition for a writ of *habeas corpus*, as Samirah was not in "custody." *Id*. at 552.

Samirah filed a second civil action seeking a writ of *mandamus* to compel DHS to allow him to return to the United States to pursue his adjustment application, notwithstanding his revoked Form I-512L. The district court granted *mandamus* relief and ordered DHS to return Samirah to the United States to provide a removal hearing. The government appealed the decision to the Seventh Circuit.

As a threshold matter, the Seventh Circuit rejected the contention that its prior holding in *O'Connell* precluded Samirah's petition for a writ of *mandamus*. Although the court held that it lacked jurisdiction to review a revocation of advance parole, as that is a discretionary determination, the court ruled that it retained jurisdiction to review the "consequences" of a revoked advance parole. Since Samirah only sought to compel DHS to comply with the parole regulation by returning him to the "status" he had before the grant of advance parole, the court had jurisdiction to review the agency's action.

Aside from the jurisdictional issue, the government argued that the revocation of Samirah's Form I-512L made him inadmissible to the United States, since it left him without an entry document, as required by 8 U.S.C. § 1182(a)(7)(A)(i)(I). The court disagreed with this argument because it construed Form I-512L as a "travel document" and a "substitute for a visa." The text on the face of Form I-512L authorizes "a transportation line to accept the named bearer on board for travel to the United States without liability . . . for bringing an alien who does not have a visa," so the court found that Samirah was in possession of a entry document, as required by the statute.

The court ruled that it retained jurisdiction to review the "consequences" of a revoked advance parole.

Even if the court were correct that a Form I-512L is a travel document, the government argued that Samirah would still need a new Form I-512L, as his current document had been revoked. The court also rejected this argument, because the regulation governing parole provides that "when in the opinion of one of [the designated] officials . . . neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien *and he or she shall be restored to the status that he or she had at the time of parole*." 8 C.F.R. § 212.5(e)(2)(i) (emphasis added). The court held that this regulation requires Samirah's return to the United States to pursue his application for adjustment of status. The court reasoned that the "status" Samirah enjoyed before he received advance parole, and hence the status he reacquired by virtue of the regulation upon the termination of his advance parole, was that of "an alien eligible for an adjustment of status," including physical presence in the United States.

The government pointed out that an applicant for adjustment of status does not by virtue of the application alone have an immigration "status," and therefore has no status to which he or she can be returned when advance parole is revoked. The court gave this argument short shrift, stating that the adjustment of status statute defines who may seek to adjust status, thereby defining the applicant's "status." Accordingly, Samirah's "status" after the revocation of advance parole was an "applicant for adjustment of status," and he should be permitted to return to the United States to assume that status once again.

Finally, the government argued that an advance parole document is not the same as the actual grant of parole into the United States. Advance parole is an authorization that parole *may* be granted when the alien seeks to re-enter the United States after a trip abroad. *See* USCIS ADJUDICATOR'S FIELD MANUAL § 54.1(c). If an advance parole is approved, the alien is not at that point "paroled" into the United States. *See Matter of G-A-C-*, 22 I&N Dec. 83, 88 n.3 (BIA 1998) (*en banc*). Rather, the alien is advised in advance of a departure that, if he meets certain conditions, he will be paroled into the United States when he returns. *Id*. Even where an alien is in possession of a valid Form I-512L, upon re-entry to the United States, a CBP inspecting officer must

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Review of Administrative Closure

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still determine whether the alien *may* be paroled into the United States. *See* CBP INSPECTOR'S FIELD MANUAL § 16.1(b).

In rejecting the government's distinction between advance parole and parole proper, the court relied upon *obiter dictum* in a footnote appearing in a First Circuit decision where the court opined that advance parole is a species of parole. *See Succar v. Ashcroft*, 394 F.3d 8, 15 n.7 (1st Cir. 2005). Nevertheless, the Seventh Circuit found any distinction between the two a "quibble," since advance parole is a "promise of parole," or a "promise to re-enter the United States so that the parolee can press his application for adjustment of status." Moreover, the court generally rejected the government's argument that advance parole creates no right of re-entry to the United States, because this result would nullify the advance parole regulation. DHS may refuse to grant an advance parole, which is a discretionary determination, but the parole regulation cabins the agency's discretion when it revokes an advance parole by requiring that the alien be restored to his "pre-parole status."

In a dissenting opinion, Judge Manion would have found that the court had no authority to order DHS to parole Samirah into the United States.

Although the Seventh Circuit rejected the district court's order that the government give Samirah a removal hearing, the Seventh Circuit remanded the matter back to the district court for the issuance of a writ of *mandamus* commanding DHS to enable Samirah to re-enter the United States for the limited purpose of re-acquiring the "status" of an applicant for adjustment of status. The court clarified that it was not ordering DHS to "admit" Samirah to the United States in the sense of upgrading his status from that of a non-lawful resident.

Judge Manion filed a dissenting opinion, in which he stated that the relief sought by Samirah was precluded under 8 U.S.C. § 1252(a)(2)(B)(ii), as interpreted by the court's prior opinion in *O'Connell*. In the court's prior opinion, it rejected Samirah's request to be brought back to the United States, as that would require an order reinstating Samirah's advance parole, which is a discretionary decision committed to DHS, not the court.

In any event, Judge Manion found the court's reliance on the parole regulation misguided. Judge Manion noted that the actual decision to parole an alien into the United States is made by CBP at the port of entry, which did not happen in Samirah's case. As Samirah was never paroled into the United States, it was impossible to terminate his parole and return him to some purported "status" he had prior to leaving the United States.

Judge Manion also pointed out that an applicant for adjustment of status does not have an immigration status -- a necessary conclusion following from case law holding that applicants for adjustment of status are applicants for admission to the United States. In any case, if the court felt the need to treat "status" as something other than a recognized immigration status, then Judge Manion noted that "Samirah's real status was that of an alien abroad with a grant of advance parole." This "status" was not enough to compel his return to the United States.

Judge Manion concluded that it was beyond the court's power to order DHS to enable Samirah to re-enter the United States. The court had no authority to order DHS to parole Samirah into the United States, as that is a discretionary decision for CBP to make. In addition, the court violated statutory law by ordering DHS to admit Samirah without a travel document.

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Nine New Immigration Judges Appointed

Chief Immigration Judge Brian M. O'Leary invested nine immigration judges during a ceremony held at the Executive Office for Immigration Review's (EOIR) headquarters on Dec. 17, 2010.

Attorney General Eric Holder appointed these nine immigration judges: Guadalupe R. Gonzalez, Amiena Khan, Steven A. Morley, David Neumeister, Lee A. O'Connor, Virginia Perez-Guzman, Aviva L. Poczter and Rachel A. Ruane who entered on duty on Dec. 5, 2010, and Andrea H. Sloan whoentered on duty on Oct. 24, 2010.

"We have increased our immigration judge corps by more than 15 percent since we began our robust immigration judge hiring initiative," said O'Leary. "The increase of the number of immigration judges on the bench will help mitigate EOIR's pending caseload."

The new immigration judges will preside in the immigration courts in Chicago, Ill.; El Paso, Texas; Los Angeles, Calif., Philadelphia, Pa., Newark, N.J.; and Portland, Ore.

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Jurisdiction over administrative closure

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rary camp for fleeing Muslims and relocated with his family in India. Mr. Vahora entered the United States at New York City, New York, on September 17, 2003, with his parents, on a B-2 nonimmigrant, temporary visitor visa, but Mr. Vahora overstayed his visa. In the United States, Mr. Vahora's father attempted to obtain a change of status to an employment-based non-immigrant visa, and Mr. Vahora started attending school. In 2005, when he was 16, Mr. Vahora's lack of legal status in the United States was discovered by law enforcement. The Department of Homeland Security thereafter initiated removal proceedings against him.

In removal proceedings, the Immigration Judge noted that Mr. Vahora was a minor with parents present in the United States, but that Mr. Vahora was in removal proceedings alone, and there were no removal proceedings currently pending against Mr. Vahora's parents. Mr. Vahora's attorney indicated that the parents had submitted a request for change of status to an L non-immigrant visa which had been denied, but there was neither an appeal nor a motion to reopen pending. Mr. Vahora's attorney requested that the Immigration Judge terminate proceedings on the basis of the parents' pending L nonimmigrant visa application. Counsel for the government did not agree to termination, stating that it was her understanding that the government was placing Mr. Vahora's father in removal proceedings. Mr. Vahora's attorney then presented a copy of an on-line case status update page showing the still-pending change-of-status application for his father, but the Immigration Judge nevertheless concluded that pendency of the father's application did not provide for the status of Mr. Vahora, and, therefore, there was no basis for termination. As Mr. Vahora had not filed any applications for relief, the Immigration Judge ordered him removed but granted him voluntary departure. However, the Board found that the proceedings before the Immigration Judge were infected by ineffective assistance of counsel because prior counsel had failed to comply with the court-ordered asylum application deadline and remanded for further proceedings.

On remand, Mr. Vahora presented his application for asylum. In these post-remand proceedings, his counsel did not seek, or even mention, the possibility of termination or administrative closure. Indeed, at his final merits hearing, the government noted that Mr. Vahora's parents were now in removal proceedings before another Immigration Judge apparently with an asylum claim arising out of the same set of facts. The government proposed joining Mr. Vahora's case with his father's, but the Immigration Judge declined, noting the independent procedural histories of the cases. Mr. Vahora's counsel noted that he "would have objected to" any joining of the cases and asserted that "[t]he father was not present at the time [Mr. Vahora] experienced his persecution." At the close of the hearing, the Immigration Judge denied relief but granted voluntary departure.

Administrative closure of a case temporarily removes a case from an immigration judge's calendar or from the Board's docket.

On appeal to the BIA, Mr. Vahora argued that his proceedings should have been closed administratively or terminated because he was a minor in parental custody. The Board dismissed Mr. Vahora's appeal, specifically noting that administrative closure could not be granted if opposed by either party. Mr. Vahora petitioned the Seventh Circuit for review contending that his case should have been closed administratively and joined with the case involving his parents. Although the court ultimately found that the agency had properly denied administrative closure, it rejected the government position that it lacked jurisdiction to consider the issue.

Administrative Closure

Administrative closure is not a practice specified in the statute, nor is it mentioned in the current regulations. Administrative closure may not be granted if it is opposed by either party. *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479 (BIA 1996); *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990). The decision to administratively close a case is a matter of prosecutorial discretion. See William Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005), at 6. Administrative closure does not constitute a final order. Administrative closure of a case temporarily removes a case from an immigration judge's calendar or from the Board's docket. *Arca-Pineda v. U.S. Att'y Gen.*, 527 F.3d 101, 104-05 (3d Cir. 2008). Once a case has been closed administratively, "either party can move to have the case recalendered" once circumstances "indicat[e] that the case is ready for a hearing." *Matter of Hashmi*, 24 I. & N. Dec. 785, 792 n.4 (BIA 2009). The Seventh Circuit in *Vahora* concluded that "this temporary removal of the case from the docket is similar to a court's granting of a continuance, albeit an indefinite one."

Seventh Circuit Decision Takes "the Road Less Traveled"

In his brief, petitioner did not address the jurisdiction of the court to review the administrative closure

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issue. Respondent's brief identified a split in the circuits on this jurisdictional issue and argued two points: (1) the court lacked jurisdiction to review this issue because there was no sufficiently meaningful standard for evaluating the agency's decision not to administratively close a case, and invited the court to follow the holding and analysis of the Ninth Circuit in *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1120 (9th Cir. 2009), and (2) in the alternative, Mr. Vahora's argument had no merit because administrative closure may not be granted if it is opposed by either party and DHS counsel had not agreed to close the proceedings. In its decision, the Seventh Circuit evaluated how several other circuits had addressed this issue.

The court stated that it "routinely ha[d] reviewed procedural rulings in immigration and other administrative adjudications to determine whether an individual has received a full and fair hearing before an agency."

Option #1: The Ninth Circuit Approach

Because it could not discover a sufficiently meaningful standard for evaluating the decision to grant or deny administrative closure, the Ninth Circuit held that it lacked jurisdiction to review a claim that the BIA abused its discretion in declining to administratively close a case. *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1118, 1120 (9th Cir. 2009). The court took guidance from *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (barring judicial review of the Federal Drug Administration's refusal to bring enforcement actions to prevent the use of lethal-injection drugs in executions), and *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir.2002) (barring judicial review of a BIA denial of a motion to reopen proceedings *sua sponte*), in ruling that the absence of a "meaningful standard" precluded review. *Id*. at 1117-19.

Option #2: The Eighth Circuit Approach

In *Hernandez v. Holder*, 606 F.3d 900, 904 (8th Cir. 2010), the Eighth Circuit agreed generally with the *Diaz-Covarrubias* analysis and concluded that the administrative closure issue was unreviewable, but clarified that the rule was not properly classified as jurisdictional relying on *Ochoa v. Holder* 604 F.3d 546, 549 (8th Cir.2010) ("When a plaintiff complains about an action that is committed to agency discretion by law, it does not mean that a court lacks subject matter jurisdiction over the claim. Instead, it means that there is no law to apply because the court has no meaningful standard against which to judge the agency's unfettered exercise of discretion.").

Option #3: Fifth and Sixth Circuits' Approaches

Both the Sixth and the Fifth Circuits reached a contrary conclusion. First, the Sixth Circuit in *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 (6th Cir. 2007) held, that the reviewability of continuances was dispositive for the reviewability of administrative closure decisions. Citing with approval *Garza-Moreno*, the Fifth Circuit, in *Cantu-Delgadillo*, 584 F.3d 682, 686-67 & n.8 (5th Cir. 2009), also held that it had jurisdiction to review administrative closure decisions. But neither of these decisions engaged in an explicit consideration of the potential problems posed by the possible application of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 (a)(2) (2006 Supp. IV) to these issues. Moreover, both of these decisions were decided prior to the Supreme Court's decision in *Kucana v. Holder*, 130 S. Ct. 827, 836-37 (2010).

The Seventh Circuit's approach

In *Vahora*, the Seventh Circuit identified flaws and omissions in the legal reasoning in each of the opinions of other circuits, rejected their analyses, and took a new path in finding that administrative closure was within the court's cognizance. Although it eventually reached the same result as the Fifth and Sixth Circuits, it did so with a different and more detailed analysis.

The *Vahora* opinion considered the effect of § 701(a)(2) of the APA that states the Act has no application where "agency action is committed to agency discretion by law." The court evaluated this statute as applied to administrative closure, in light of Supreme Court precedent from *Heckler*, it disagreed with the Eighth and Ninth Circuits.

The court reasoned that administrative closure was "a procedural device, not unlike the myriad other procedural devices employed by quasi-judicial bodies in administrative agencies and in the Executive Office for Immigration Review in particular." Noting that closure is one tool that assists the person performing quasi-judicial duties in the orderly management of the docket and the courtroom, the court stated that it "routinely ha[d] reviewed procedural rulings in immigration and other administrative adjudications to determine whether an individual has received a full and fair hearing before an agency . . . [as well as in] non-administrative cases arising in the district courts . . . ." The court stated that it "reviewed an Immigration Judge's refusal to grant a continuance, the procedural device most closely akin to the administrative closure sought to be reviewed here."

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The court in *Vahora* stated that "the decision to grant or deny administrative closure is cut of the same cloth as various other decisions that we review with regularity in both administrative and non-administrative arenas." The decision observed that continuing a case without a specific date for its restoration to a trial docket simply was not the sort of decision that involved a complicated balancing of a number of factors which are peculiarly within the agency's expertise. Moreover, the court noted that an agency decision on administrative closure could affect an individual's liberty and "infringe upon areas that courts often are called upon to protect." Therefore, the court concluded that this procedural question was within the competence of the courts to consider and the standard of review was judicially administrable.

The court found nothing in the Supreme Court's decision in *Kucana* that gave it pause. Although the court explained how *Kucana* was not problematic, there was a beacon of light in *Kucana* that could have informed the Seventh Circuit decision. In *Kucana*, the Court stated that "[a]ny lingering doubt about the proper interpretation of [the statutory provision] would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." The Court observed that it "takes clear and convincing evidence to dislodge the presumption." Indeed, it is these fundamental principles that help explain why courts are both properly and necessarily defensive in addressing jurisdictional challenges. The *Vahora* opinion could have bolstered its analysis by stating that there was an absence of the required clear and convincing evidence to dislodge the presumption favoring judicial review of administrative action.

The legal analysis of the Seventh Circuit in *Vahora* illustrates that a court of appeals may take a "road less traveled" – a path of legal reasoning different in both depth and breadth from other circuits in resolving jurisdictional issues. When jurisdictional issues are present, fresh legal analysis as well as consideration of well-established precedent in other circuits may lead to new arguments that could better inform the court's analysis and decision.

Having concluded that the decision to deny administrative closure, like the decision to deny a continuance, was within its cognizance, the court applied ordinary judicial standards to determine whether the Immigration Judge abused his discretion. Doing so, the court found no abuse of discretion in the Immigration Judge's decision to deny administrative closure. The court noted that the record belied any assertion that Mr. Vahora properly made and maintained his request in light of Mr. Vahora's counsel informing the Immigration Judge that he "would have objected" to an attempt to join Mr. Vahora's case with his parents' removal proceedings. Furthermore, the court stated that it could not identify any other circumstances that would place the ruling outside the range of options from which a reasonable immigration judge would choose because: (1) the government had opposed closure, and agreement of the parties was a prerequisite to closure under binding Board precedent; and (2) there was no ground for immigration relief through his family.

Counsel should always keep in mind that our goal is not merely to win the argument but to win the important point of law.

Having prevailed in this case on the more narrow point, but having lost on the threshold jurisdictional issue, there was some cause for concern of what could have been done to bolster the government's jurisdictional argument. A post-mortem of the oral argument reveals an opportunity that is rooted in an important lesson in advocacy.

An Advocacy Lesson: "Win the case not just the argument."

Advocates are often confronted with the tactical decision of whether and how to reply to weak arguments of opposing counsel or questions by the court to opposing counsel. Fine judgment is required in these decisions. Counsel should always keep in mind that our goal is not merely to win the argument but to win the important point of law. Failing to address a concern of the court, even though opposing counsel presents a weak or non-responsive argument, can result in failing to prevail on an important point of law or winning the case.

A post-mortem of the *Vahora* oral argument in light of both developments at oral argument is instructive. Antidotal information of the oral argument is helpful. In response to a single question as to petitioner's position on the jurisdictional issue, petitioner's counsel stated he had no argument on the jurisdictional issue. Moreover, Judge Hamilton asked government counsel only a single and simple leading question to the effect that the government relied on the reasoning of the Ninth Circuit case on the jurisdictional issue.

In light of opposing counsel's weak and non-responsive argument and the two brief questions by the court, it initially appeared that it was easy to win the jurisdictional argument. However, winning the point of law on the jurisdictional issue proved more problematic. While the developments in oral argument did

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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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Due Process– Duty to Advise

In ***U.S. v. Lopez-Velasquez***, 568 F.3d 1139 (9th Cir. 2009), the court held that defendant's due process rights were violated when the IJ did not inform him that he was eligible for discretionary relief even though defendant was indeed not eligible under the law as it then existed. On March 8, 2010, the Ninth Circuit granted rehearing en banc and vacated the panel's opinion. The question presented is: Whether an illegal reentry defendant had a due process right to be advised in his underlying deportation proceeding of his potential eligibility for discretionary relief under INA 212(c), where the defendant was not then eligible for that discretionary relief, but there was a plausible argument that the law would change in defendant's favor.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that the BIA Abused Its Discretion in Finding Country Conditions Had Not Changed and Alien Did Not Make Prima Facie Showing He May Face Persecution.

In *Smith v. Holder*, __ F.3d. __, 2010 WL 5116668 (Torruella, *Lipez*, Howard) (1st Cir. December 16, 2010, the First Circuit issued a redacted published version of its September 9, 2010 under-seal decision in which it held that the BIA had committed legal error by denying the alien's untimely motion to reopen based on changed country conditions in Zimbabwe. The court held the BIA erred by not considering an increase in the persecution of opposition activists and the alien's family members as material to the alien simply because he was not present and had been politically active only in the past. The court also held that the BIA erred in finding no prima facie showing of possible persecution as it considered each piece of evidence in isolation rather than as a whole, and did not consider the alien's claim of past persecution. Accordingly, the court remanded to the BIA for further consideration of the alien's motion to reopen.

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SECOND CIRCUIT

Child's Entitlement to Derivative Citizenship Depends on Exact Date and Time of Birth to Determine Whether He Has Lived for 18 Years

In *Duarte-Ceri v. Holder*, __F.3d__, 2010 WL 4968689 (2d Cir. December 6, 2010) (Hall, *Chin*; Livingston, dissenting), the Second Circuit reversed a BIA decision denying petitioner derivative naturalized citizenship based on his mother's naturalization in 1991.

The petitioner was born in the Dominican Republic on the evening of June 14, 1973. He was admitted to the United States as a lawful permanent resident in 1981, when he was eight years old. On July 24, 1989, petitioner's parents divorced in New York. The divorce decree granted petitioner's mother sole custody of petitioner and his younger brother. Petitioner was sixteen years old when his mother applied for citizenship on February 5, 1990. Her application was granted on March 15, 1991, and she took the oath of citizenship on the morning of June 14, 1991-the same day as petitioner's eighteenth birthday.

The court held that § 321(a) provided derivative citizenship for any child who had not lived for 18 years, based on the exact day and time of his birth.

The court held that former INA § 321(a), 8 U.S.C. § 1432(a), then in effect, was vague. That statute provided that one of the conditions for obtaining derivative naturalization was that the naturalization of the parent had to take place "while such child is unmarried and under the age of eighteen years." The court explained that, the phrase "under the age of eighteen years" was susceptible to two meanings. "On one hand, it could refer to an applicant who has not yet reached the eighteenth anniversary of his birth. Under this interpretation, [petitioner]'s claim fails, for he had reached the eighteenth anniversary of his birth when his mother was naturalized. On the other hand, it could refer to an applicant who has not yet lived in the world for eighteen years. Under this interpretation, on the assumed facts, [petitioner]'s claim prevails, for, as a matter of biological fact, on the morning of June 14, 1991, [petitioner] had not yet lived for eighteen years. Rather, he had lived approximately seventeen years, 364 days, and twelve hours." The court, noting that ambiguities should be interpreted in favor of the alien, held that § 321(a) provided derivative citizenship for any child who had not lived for 18 years, based on the exact day and time of his birth.

Because there had been no factual finding as to the actual timing of petitioner's birth, the court transferred the case to the district court for a "new hearing on the nationality claim," pursuant to 8 U.S.C. § 1252(b)(5)(B).

Judge Livingston, noted in her dissenting opinion, that he could not "concur in this novel and utterly implausible reading of the statute."

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Second Circuit Upholds Finding that the Alien's Money Laundering Conviction Constitutes an Aggravated Felony Rendering the Alien Ineligible for Adjustment of Status

In *Varughese v. Holder*, __ F.3d__, 2010 WL 5112819 (2d Cir. November 12, 2010) (Parker, Wesley, Jones) (per curiam), the Second Circuit upheld the BIA's finding that the alien's money laundering conviction, in violation of 18 U.S.C. § 1956(a)(3)(b), constituted an aggravated felony under the INA rendering the alien ineligible for adjustment of status under INA § 245. The court held that, although INA § 101(a)(43)(D) defined an aggravated felony as a money laundering offense in which "the amount of the funds exceeded $10,000," it was irrelevant that the alien was convicted under a subsection of the money laundering statute that did not actually use the word "funds," because the phrase in the INA simply referred to the amount of money laundered.

The court further held that the

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alien's admissions to laundering funds in excess of $10,000 were sufficiently related to the count for which he was convicted. The court determined that the alien's money laundering conviction rendered him ineligible for admission to the United States. Therefore, he was similarly ineligible for adjustment of status pursuant to INA § 212(a)(2)(I)(i).

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■ **Second Circuit Dismisses Challenge to the Agency's Denial of Special Rule Cancellation**

In ***Rosario v. Holder***, __ F.3d __, 2010 WL 4923557 (2d Cir. December 6, 2010) (*Jacobs*, Raggi, Rakoff), the Second Circuit held that the BIA applied the correct law and legal standard in determining whether petitioner's situation rendered her "battered or subjected to extreme cruelty" under INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2)(A).

Preliminarily the court held that whether an alien has been "battered or subjected to extreme cruelty" requires the application of law to fact, rather than statutory interpretation. Therefore the court had jurisdiction to review these determinations " only when the BIA applies an incorrect law or legal standard, bases its decision on a factfinding premised on an error of law, or reaches a conclusion that lacks any rational justification." The court noted that all circuits who have considered this question, with the exception of the Ninth Circuit, have reached the same conclusion. Nonetheless, the court also held that there were no legal errors underlying any of the BIA's factual findings and that, consequently, it lacked jurisdiction over the petition for review.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that BIA Properly Refused to Rescind in Absentia Removal Order**

In ***Sanchez v. Holder***, __ F.3d __, 2010 WL 4923316 (6th Cir. December 6, 2010) (Daughtrey, *Gilman*, McKeague), the Sixth Circuit held that the BIA, applying *Matter Grijalva*, 21 I&N Dec. 27 (BIA 1995), properly exercised its discretion in denying petitioner's motion to reopen based on lack of notice where the record established that the immigration court had sent petitioner a hearing notice via certified mail to the last address that he had provided.

The court further held that petitioner failed to rebut the presumption that he had received notice, even though the notice was returned undeliverable. Because petitioner "has not shown that his lack of notice was due to some reason other than his failure to provide a current address, he cannot reopen his proceedings," said the court.

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SEVENTH CIRCUIT

■ **Seventh Circuit Upholds BIA's Ruling that the Birth of Children in the U.S. Is Not a Basis for Asylum**

In ***Liang v. Holder,*** 626 F.3d 983 (7th Cir. 2010) (Bauer, Sykes, *Griesbach*), the Seventh Circuit held that the birth of the alien's first child and her second pregnancy did not constitute grounds to reopen removal proceedings to pursue an asylum claim, because under INA § 240(c)(7)(C) (ii) these events established changes in her personal circumstances, not changed country conditions.

The petitioner, a citizen of the People's Republic of China, arrived in the United States without a valid entry document on July 30, 2003. She applied for asylum, withholding of removal, and CAT protection alleging that she was mistreated by the Chinese government due to her membership in the Democratic Party.

An IJ denied her applications and the BIA affirmed on March 1, 2004. However, DHS did not remove the petitioner, nor did she leave the country voluntarily. Rather, on August 24, 2009, petitioner filed a motion to reopen on the ground that because she had given birth to one child and was pregnant with another, she feared persecution in the form of forced abortion and sterilization under China's "one-child rule." The BIA denied the motion to reopen.

The court rejected petitioner's claim that China's "one-child" policy was being enforced more stringently in her home province than when she first applied for asylum.

The court upheld the BIA's denial of reopening. The court explained that "these events represent changes in her personal conditions" not changes in country conditions.. Further, the court rejected petitioner's claim that China's "one-child" policy was being enforced more stringently in her home province than when she first applied for asylum. The court agreed with the BIA's conclusion that the materials she submitted failed to show that either China's family planning policy or the enforcement of it had materially changed. In particular, the court noted that some of the materials submitted by petitioner in support of her motion predated the 2003 hearing before the IJ.

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■ **Seventh Circuit Upholds Adverse Credibility Finding and Rejects Unexhausted Ineffectiveness of Counsel and Competency Claims**

In ***Lin v. Holder***, __F.3d __, 2010 WL 5186059 (7th Cir. December 23, 2010) (Easterbrook, Sykes, *Tinder*), the Seventh Circuit upheld the BIA's adverse credibility finding regarding a Chinese asylum applicant who claimed persecution based on his wife's alleged forced abortion. The court agreed with the government's arguments that petitioner had failed to exhaust or waived many of his challenges to the adverse credibility finding, and also failed to exhaust his ineffective assistance of counsel claim and his assertion that the IJ should have determined his competency to testify. The court also rejected all of petitioner's claims on the merits.

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The court cited physical brutality, an unreasonable show or use of force during an arrest, and an arrest based on race or appearance as some examples of "egregious" conduct that may warrant application of the exclusionary rule.

■ **Seventh Circuit Faults Agency for Using Inappropriate Methodology to Determine Whether Failure to Register as a Sex Offender Is a Crime Involving Moral Turpitude**

In ***Mata-Guerrero v. Holder,*** __ F.3d __, 2010 WL 4746189 (7th Cir. November 24, 2010) (*Hamilton*, Manion, Tinder), the Seventh Circuit held the BIA did not properly analyze whether the alien's conviction for failing to register as a sex offender was a crime involving moral turpitude. The court refused to give *Chevron* deference to the BIA's decision because it used the categorical method, a method which had been abandoned by the BIA and Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). Thus, noting that crimes of moral turpitude normally require some form of *scienter*, and that the Wisconsin statute the alien was convicted under had no element of intent, the court remanded for an individual inquiry of the alien's crime in accord with the Attorney General's decision in *Matter of Silva-Trevino*.

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EIGHTH CIRCUIT

■ **Arrest Without Probable Cause Was Not Sufficiently Egregious to Require Suppression of Evidence in Civil Immigration Proceedings**

In ***Puc-Ruiz v. Holder,*** __ F.3d. __, 2010 WL 5185803 (8th Cir. December 23, 2010) (Riley, Murphy, *Melloy*), the Eighth Circuit affirmed the BIA's denial of the alien's motion to suppress evidence of his alienage that was obtained during a criminal arrest that was later determined to lack probable cause.

Deciding a matter of first impression, the court cited physical brutality, an unreasonable show or use of force during an arrest, and an arrest based on race or appearance as some examples of "egregious" conduct that may warrant application of the exclusionary rule in immigration proceedings, and held that the police officers in this case did not perpetrate an egregious violation of the alien's Fourth Amendment rights. The court further held that although the BIA may have erred in shifting the burden to the alien to demonstrate that the government did not comply with agency regulations, and in refusing to strike the immigration judge's written decision that was issued after the administrative notice of appeal had been filed, the errors were harmless because the alien failed to demonstrate prejudice.

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NINTH CIRCUIT

■ **Ninth Circuit Reverses BIA's Decision Upholding Asylum Denial Based on Failure to Consider Cumulative Harm**

In ***Javhlan, v. Holder***, 626 F.3d 1119 (9th Cir. 2010) (*Pregerson*, Nelson; Ikuta dissenting), the Ninth Circuit held the IJ failed to consider cumulative harm to an asylum applicant from a single incident of detention, along with a number of Secret Police harassment and threats, from which the alien suffered mental anguish and a nervous breakdown.

The petitioner, a native of Mongolia, grew up hearing her grandparents talk about their fears of communist rule in Mongolia. She also heard the story of how her deceased paternal grandfather, a Buddhist Monk, was tortured and killed by agents of the communist government in 1937. As an adult, petitioner refused to join the Communist Party. She also refused to serve as a spy for the communist Secret Police by acting as their "eyes and ears" at the Mongolian British and Indian embassies where the Mongolian Ministry of Foreign Affairs had placed her. At another time, petitioner worked at the United Nations Development Programme (UNDP) in Mongolia where again she was pressured and refused to spy for the Secret Police. Consequently, Secret Police agents approached petitioner frequently on her way to and from work and threatened her with assault, imprisonment, rape, and death. In June 1995, a Secret Police Captain arrested petitioner and took her to a prison where she was interrogated for four to five hours. When the Mongolian Communist Party regained power in 2000, following a brief ruling by the People's Democratic Party, the threats intensified leading petitioner and her husband to leave the country in 2002. The agency de-

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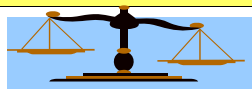

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nied asylum, finding insufficient evidence of persecution.

The court reversed, holding that "a reasonable factfinder would have to conclude that [petitioner] suffered past persecution on account of her political opinion. The evidence demonstrates that [petitioner] suffered multiple in-person confrontations with communist Secret Police agents, and that she was frequently threatened over a period of years with assault, imprisonment, rape, and death because she refused to act as a spy for them. The threats by the Secret Police, and the mental anguish and physical paralysis that [petitioner] suffered as a result, constitute persecution. We find that the cumulative effect of these events qualifies as an offensive suffering or harm that rises to the level of persecution." Thus, the court remanded for a discretionary decision on asylum, an order for withholding of removal and consideration of petitioner's CAT claim.

The court found that neither the Immigration Act of 1990 nor the IIRIRA implicitly repealed the non-retroactive ADAA amendments.

In a dissenting opinion, Judge Ikuta criticized the majority for "confidently tak[ing] over the IJ's fact-finding role, combing the record to support its determination that [petitioner] suffered past persecution" and that "Congress and the Supreme Court have rejected the majority's approach," she wrote.

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■ **Ninth Circuit Denies Gov't Petition for En Banc Rehearing and Issues Amended Decision Reversing BIA Ruling that Prior Aggravated Felony Was Grounds for Removal**

In ***Ledezma-Galicia v. Holder***, __ F.3d __, 2010 WL 517497905-77092 (9th Cir. December 22, 2010) (Reinhardt, *Berzon*, Bybee), the Ninth Circuit denied the government's petition for rehearing en banc. In an amended decision, the court held that, while the alien's October 1988 sodomy conviction in Oregon was an aggravated felony, the alien was not removable under 8 U.S.C. § 1227(a)(2)(A)(iii) because it does not apply to convictions occurring before November 18, 1988. The court explained that the amendments to this removal ground made by the Anti-Drug Abuse Act ("ADAA") of 1988 specified that they did not apply prior to the passage of the amendments. The court found that neither the Immigration Act of 1990 nor the IIRIRA implicitly repealed the non-retroactive ADAA amendments.

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■ **Ninth Circuit Remands Denial of Pre-REAL ID Application for Withholding and CAT Protection, Finding that Corroborating Evidence Should Not Have Been Required**

In ***Tijani v. Holder***, __ F.3d __, 2010 WL 4925449 (9th Cir. December 6, 2010) (*Noonan*; Tashima, concurring and dissenting in part; Callahan, concurring and dissenting in part), the Ninth Circuit held that, while the alien's conviction for credit card fraud under Section 532a(1) of the California Penal Code constituted a crime involving moral turpitude, as the alien's intent to repay the funds was not a defense, the BIA's denial of the alien's request for asylum, withholding of removal, and CAT protection was reversible error.

The court held that since the alien, who filed a pre-REAL ID Act request for relief, did not lack credibility, it was improper to require corroborating evidence. The court remanded the case to the BIA to consider the claims for withholding of relief and CAT protection, noting that the alien had waived his asylum claim by failing to argue the discretionary denial of his claim for asylum was in error.

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TENTH CIRCUIT

■ **Tenth Circuit Affirms Dismissal of District Court Challenge to USCIS's Discretionary Decision to Revoke a Form I-130 Petition for Alien Relative**

In ***Green v. Napolitano,*** __ F.3d __, 2010 WL 5157366 (10th Cir. December 21, 2010) (Tymkovich, Porfilio, Gorsuch), the Tenth Circuit affirmed the district court's decision to grant the government's motion to dismiss the plaintiff's mandamus complaint for lack of subject matter jurisdiction. The panel determined that USCIS's decision, pursuant to 8 U.S.C. § 1155, to revoke plaintiff's erroneously approved I-130 petition once it discovered the beneficiary previously entered into a sham marriage, was discretionary and unreviewable pursuant to INA § 242(a)(2)(B)(ii).

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DISTRICT COURTS

■ **Southern District of Florida Holds that Alien Stowaways Are Ineligible for Adjustment of Status**

In ***Ali v. USCIS***, No. 9:10-cv-80338 (S.D. Fla. December 9, 2010) (Cohn, J.), the district court granted the government's motion to dismiss, holding that USCIS properly found that an alien was ineligible for adjustment of status pursuant due to his status as a stowaway and could not invoke the "entry doctrine" to absolve himself of his stowaway status. The court concluded that, following IIRIRA, stowaways could no longer invoke the "entry doctrine" to argue that, because they are physically present in the

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United States, they are eligible for adjustment. Rather, the court held, because only aliens who present themselves for inspection prior to entry or aliens who are paroled are eligible for adjustment of status, stowaway aliens are categorically ineligible for adjustment.

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■ **Northern District of California Upholds USCIS's Termination of Asylum**

In *Chamlikyan, v. Bardini,* No.10-cv-268 (N.D. Cal. December 13, 2010) (Breyer, J.), the district court held that substantial evidence supported the USCIS's decision to terminate asylum status on the basis of fraud, because the misrepresentations in the asylee's application were material to his persecution claim. The court held further that the termination complied with regulations and due process, rejecting the claim that USCIS gave plaintiffs insufficient notice of the basis for termination. The court declined to bar the termination on the grounds of laches, notwithstanding the agency's eight-year delay.

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■ **Southern District of California Denies Alien's Challenge to Twelve-Month Mandatory Pre-Final Order Detention**

In *Gonzalez-Galindo v. Napolitano*, et al. No. 10-cv-1875 (S.D. Cal. December 1, 2010) (Hayes, J.) the district court denied the alien's petition for a writ of habeas corpus. The court concluded that, under the REAL ID Act, the district court lacked jurisdiction over the alien's removal order challenge and the court's jurisdiction was limited to his detention. The court held that the alien's twelve-month, pre-final order mandatory detention was for no other purpose but to facilitate his removal, and that his removal proceedings had not been unreasonably delayed because the alien effectively prolonged his own detention by requesting a change of venue and pursuing various applications for relief from removal.

The court held, because only aliens who present themselves for inspection prior to entry or aliens who are paroled are eligible for adjustment of status, stowaway aliens are categorically ineligible for adjustment.

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■ **District Court for D.C. Declines to Issue Writ of Mandamus to Supermax Inmate Seeking Renunciation**

In *Clinton v. Clinton*, No. 10-1009, (D.D.C. November 29, 2010) (Kennedy, J.), the district court dismissed a complaint seeking an order to compel the Secretary of State to issue plaintiff a Certificate of Loss of Nationality. The court held that the Secretary has the discretion to determine whether an individual has adequately renounced affiliation with the United States.

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■ **Southern District of Texas Dismisses Habeas Challenge To Passport Denial and Finds that the Alien Failed to State a Due Process and Equal Protection Claim**

In ***Villegas v. Clinton***, No. 10-00029 (S.D. Tex. December 20, 2010) (*Atlas, J*), the court dismissed the alien's habeas corpus challenge over the denial of her passport application. The court held that a denied passport application did not satisfy the habeas custody requirement because the alien was not treated differently than other passport applicants, noting that all persons must demonstrate eligibility for a passport and comply with the regulations. The court further denied her due process and equal protection challenges because she failed to show that she had a fundamental right to international travel, and failed to show that the State Department treated passport applicants born of a midwife differently from other applicants. Finally, the court dismissed her claims under the Mandamus and Administrative Procedure Acts because the alien had an adequate remedy under 8 U.S.C. § 1503 for a declaratory judgment regarding her citizenship.

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Review of Denial of Administrative Closure

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not appear to invite elaboration on our jurisdictional argument, in retrospect, a more plenary response and additional argument may have invited more questions by the court or been more helpful to the court. Indeed, more focus on winning the jurisdictional issue before the court rather than prevailing over the opponent perhaps could have resulted in a more persuasive and even winning argument.

Although the government ultimately prevailed on the theory that there was no abuse of discretion in the denial of administrative closure, we missed an opportunity at oral argument to bolster our argument of no jurisdiction. So this is the advocacy tip to wise counsel who has to make those fine, split-second, decisions about how to use precious time in oral argument: "Win the case, not just the argument."

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This Month's Topical Parentheticals

ASYLUM

■ *Javhlan v. Holder,* __ F.3d __, 2010 WL 4910228 (9th Cir. Dec. 3, 2010) (holding that a reasonable fact-finder would conclude that petitioner was persecuted on account of her political opinion where she suffered, in addition to a brief detention and interrogation, multiple in-person confrontations with communist secret police agents in Mongolia, and was frequently threatened over a period of years with harm because she refused to act as a spy for them)

■ *Lin v. Holder*, __F.3d __, 2010 WL 5186059 (7th Cir. Dec. 23, 2010) (upholding adverse credibility finding of asylum applicant who claimed persecution on account of his wife's forced abortion in China)

■ *She v. Holder*, __ F.3d __, 2010 WL 5141271 (9th Cir. Dec. 14, 2010) (holding that the BIA's denial of asylum based on firm resettlement was not supported by substantial evidence)

ADJUSTMENT OF STATUS

■ *Samirah v. Holder,* __ F.3d __, 2010 WL 4909464 (7th Cir. Dec. 3, 2010) (remanding to district court for the issuance of a mandamus commanding the AG to take "whatever steps are necessary" to enable petitioner to reenter US for the limited purpose of reacquiring the status, with respect to his application for adjustment of status, that he enjoyed when he left the United States pursuant to a grant of advance parole which was later revoked) (Judge Manion dissented)

CITIZENSHIP

■ *Duarte-Ceri v. Holder,* __ F.3d __, 2010 WL 4923559 (2d Cir. Dec. 6, 2010) (holding that petitioner was still "under the age of eighteen years" when his mother naturalized (and therefore he acquired derivative citizenship), if, at the moment his mother took the naturalization oath, he had not yet lived for 18 years; transferring case to district court to determine the precise hour that petitioner was born) (Judge Livingston dissented)

■ *United States v. Forney- Quintero,* __ F. 3d __, 2010 WL 4830004 (11th Cir. Nov. 30, 2010) (holding, in a criminal reentry prosecution, that defendant did not qualify as a derivative citizen when, at the time of his mother's naturalization, and thereafter, while under the age of eighteen years, he was not a lawful permanent resident; construing statutory phrase -- "begins to reside permanently in the United States while under the age of eighteen years" -- as requiring the status of a lawful permanent resident).

CRIMES

■ *Varughese v. Holder*, __F.3d__, 2010 WL 5112819 (2d Cir. Nov. 12, 2010)(holding that alien who admitted to laundering well in excess of $10,000 on multiple occasions during his plea colloquy, sufficiently established that the circumstances of his money laundering conviction involved funds in excess of $10,000, constituting therefore an aggravated felony)

■ *United States of America v. Echeverria-Gomez,* __ F.3d __, 2010 WL 4968710 (5th Cir. Dec. 8, 2010) (holding that sentence for illegal reentry was properly enhanced because defendant's prior conviction for first-degree burglary under Cal. Pen. Code §§ 459 & 460(a) was a crime of violence aggravated felony within the meaning of 18 U.S.C. § 16(b))

■ *United States of America v. Farmer,* __ F.3d __, 2010 WL 4925441 (9th Cir. Dec. 6, 2010) (reaffirming that Cal. Pen. Code § 288 (a) categorically relates to sexual abuse under 18 U.S.C. 2252A(b)(2), with a concurrence by two of the panel judges noting "our recent attempts to distinguish the array of contradictory cases in this area of law has yielded the awkward result that we now apply two competing, but equally recognized, definitions of 'sexual abuse of a minor'")

■ *United States v. Williams,* __ F.3d __, 2010 WL __ (8th Cir. Dec. 14, 2010) (holding that district court improperly relied on portion of pre-sentence report that recited the contents of a police report to conclude that defendant's conviction for attempted felony escape constituted a crime of violence under the modified categorical approach)

■ *Hakim v. Holder,* __ F.3d __, 2010 WL 5064379 (5th Cir. Dec. 13, 2010) (holding that petitioner laundered more than $10,000, and this constituted a particularly serious crime; finding, however, that the BIA applied an incorrect legal standard in adjudicating the acquiescence requirement for CAT protection, and remanding for application of an "actual knowledge" or "willful blindness" standard)

■ *Ledezma-Galicia v. Holder*, __ F.3d __, 2010 WL 5174979 (9th Cir. Dec. 22, 2010) (holding that alien convicted of sodomy in 1988, was not convicted of an aggravated felony because the ADAA of 1988 that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988, and that neither the 1990 Act or IIRIRA erased that temporal limitation)

■ *United States v. Anaya-Acosta,* __ F.3d __, 2011 WL __ (9th Cir. Jan. 3, 2011) (holding that the issuance of a departure control order, which temporarily prohibited petitioner from leaving the United States, did not change his illegal status for purposes of his criminal conviction under 18 U.S.C. § 922(g)(5)(A))

DUE PROCESS – FAIR HEARING

■ *United States v. Lopez-Velasquez,* __ F.3d __, 2010 WL 4948516 (9th Cir. Dec. 7, 2010) (en banc) (holding that an IJ's duty is limited to informing an alien of a "reasonable possibility"

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that the alien is eligible for relief at the time of the hearing, and that this duty did not require the IJ to inform petitioner of relief that he would become eligible for *only* with a change of law and the passage of eight months)

■ ***Puc-Ruiz v. Holder,*** __ F.3d __, 2010 WL 5185803 (8th Cir. Dec. 23, 2010)(holding that alien's arrest by police officers without probable cause, was not sufficiently egregious to require suppression of evidence obtained as a result of that arrest)

■ ***Franco-Gonzalez v. Holder,*** No. 10 -2211 (C.D. Cal. Dec. 27, 2010) (finding that the individual circumstances of two mentally ill immigration detainees warranted the reasonable accommodation of a "qualified representative" to represent them in their immigration proceedings)

JURISDICTION

■ ***Ibarra v. Swacina,*** __ F.3d __, 2010 WL 5299877 (11th Cir. Dec. 28, 2010) (affirming that the district court lacked jurisdiction under the APA to review an adjustment denial for failure to exhaust administrative remedies where petitioner was in removal proceedings and could renew her application in those proceedings)

■ ***Cabaccang v. USCIS,*** __ F.3d __, 2010 WL 5366596 (9th Cir. Dec. 29, 2010) (vacating district court decision and holding that district court lacked jurisdiction to review plaintiffs' adjustment denials for failure to exhaust administrative remedies where plaintiffs may renew their applications in ongoing removal proceedings)

■ ***Freire v. Terry,*** __ F. Supp.2d __, 2010 WL 5297183 (S.D.N.Y. Dec. 20, 2010) (dismissing petitioner's custody challenge because the court lacked jurisdiction over the warden of the facility at which petitioner was detained)

■ ***Green v. Napolitano***, __ F.3d __, 2010 WL 5157366 (10th Cir. Dec. 21, 2010) (holding that court lacks jurisdiction to review a decision to revoke the grant of an immigrant visa petition)

■ ***Rizk v. Holder,*** __ F.3d __, 2011 WL __ (9th Cir. Jan. 3, 2011) (affirming IJ's adverse credibility finding with respect to male petitioner where he had ample opportunities to reconcile the numerous contradictions in his testimony, but failed to offer a reasonable and plausible explanation for them)

■ ***Contreras-Bocanegra v. Holder***, __ F.3d __, 2010 WL 5209228 (10th Cir. Dec. 23, 2010) (holding that court lacks jurisdiction under 8 C.F.R. § 1003.2(d), the departure bar regulation, to review the denial of a motion to reopen filed within the statutory time limit by an alien who has been removed from the United States)

■ ***Rosario v. Holder,*** __ F.3d __, 2010 WL 4923557 (2d Cir. Dec. 6, 2010) (holding that court lacked jurisdiction under 242(a)(2)(B)(ii) to review the IJ's determination that petitioner was not "battered or subjected to extreme cruelty" for purposes of eligibility for cancellation of removal)

■ ***Tijani v. Holder,*** __ F.3d __, 2010 WL 4925449 (9th Cir. Dec. 6, 2010) (issuing slightly revised opinion upon denying government's rehearing petition) (clarifying that the court lacks jurisdiction to review the IJ's discretionary denial of asylum because that issue was not raised with the BIA or in the opening brief to the court)

■ ***Sanchez v. Holder,*** __ F.3d __, 2010 WL 4923316 (6th Cir. Dec. 6, 2010) (holding that the BIA properly exercised its discretion in denying petitioner's MTR on the basis of lack of notice where the record established that the immigration court sent petitioner a hearing notice by certified mail to the last address he provided)

■ ***LanceSoft, Inc. v. USCIS***, __ F.Supp.2d __, 2010 WL 5153618 (D.D.C. Dec. 20, 2010)(holding that court lacked jurisdiction under the APA to review USCIS's director decision under 8 C.F.R. §103.3(a)(2), to forward appeal to AAO rather than reopen case)

MOTION TO REOPEN

■ ***Ocampo v. Holder***, __ F.3d __, 2010 WL 5140832 (9th Cir. Dec. 14, 2010)(holding that for purposes of motion to reopen, a removal order becomes final upon the BIA's affirmance of order, rather than upon alien's overstay of voluntary departure period)

■ ***Smith v. Holder,*** __ F.3d __, 2010 WL 5116668 (1st Cir. Sept. 9, 2010) (holding that the BIA abused its discretion in denying petitioner's MTR on the basis that petitioner had not shown changed country conditions or made a prima facie case for asylum) (publishing decision and redacting identifying information)

MISCELLANEOUS

■ ***Al-Aulaqi v. Obama,*** __ F.3d __, 2010 WL 4941958 (D.D.C. Dec. 7, 2010) (dismissing suit by alien on behalf of his son, a Yemeni cleric and US citizen who the government allegedly placed on a kill-or-capture list of terrorists linked to al-Qaeda; court dismissed for: (1) lack of standing; (2) failure to make out a cognizable claim under the Alien Tort Statute; and (3) political question).

Contributions to the Immigration Litigation Bulletin Are Welcomed

AILA InfoNet Doc. No. 11022368. (Posted 02/23/11)

A new Beginning: John Cunningham Retires

John C. Cunningham, who joined OIL in January 1997, retired this month. Prior to his departure, we asked him several questions which he kindly answered.

Do you have any words of advice to new attorneys who are starting their career at OIL?

Be flexible. Try different things. I spent the first 2/3 of my career at an independent regulatory agency. Those agencies –SEC, FTC, CFTC, and so on – offer the chance to do policy, which DOJ does not offer to us litigators. At the same time, they have independent litigation authority in the courts of appeals, so you would still have the opportunity to get into court. I never worked for a pure Executive branch agency, but I know well people who do, and they enjoy it. You don't get into court working at such an agency – DOJ does that – but you do help to implement broad-based policies and, by doing so, experience the satisfaction of making things better.

What will you be doing next?

I am going to walk through doors and see what happens. Example: a friend of mine retired from a solo practice in Virginia Beach and, on the spur of the moment, volunteered for relief work in Haiti immediately after the earthquake. He is now on the board of directors of the relief agency that sent him there. See? -- he walked through a door and found himself in a new place where he has decided to stay for a while.

Anything else you'd like to add?

Have great lives. Be happy.

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Contributions to the Immigration Litigation Bulletin Are Welcomed

Attorney General Appoints Juan Osuna as Acting Director for The Executive Office for Immigration Review

On December 23, 2010, Attorney General Eric Holder announced the appointment of Juan Osuna as Acting Director for the Executive Office for Immigration Review (EOIR).

"Juan has been with the department for more than a decade and has developed an extensive knowledge of immigration litigation, and earned a reputation as a diligent and thoughtful advocate and manager," said Attorney General Holder. "I am confident he will lead the office with the highest standards of professionalism, integrity and dedication."

Osuna has served as an Associate Deputy Attorney General working on immigration policy, Indian country matters, and other issues. Prior to that, he worked in the Civil Division, where, in addition to handling immigration policy, he also oversaw civil immigration-related litigation in the federal courts.

Osuna is a graduate of the George Washington University, and the American University's Washington College of Law.

AILA InfoNet Doc. No. 11022368. (Posted 02/23/11)

INSIDE OIL

OIL Celebrated Holiday Season with the Annual White Elephant Affairs and Holiday Party

Congratulations to the following OIL attorneys and support staff support staff who received awards at the Civil Division Awards Ceremony held on December 9, 2010, in the Great Hall:

Margaret Perry, received the Dedicated Service Award. This award is given in recognition of employees with more than 15 years of service in the Civil Division who have demonstrated - by a record of outstanding actions and accomplishments - the highest standards of excellence and dedication throughout their career.

Jackquelyn Foster, Award for Excellence in Paralegal Support. This award is given "In recognition of outstanding achievements in the paralegal field over a sustained period of time or extraordinary achievements that overcame unusual difficulties or unique situations of high importance to the mission of the employee's organization."

Melissa Lewis, Award for Excellence in Administrative Support. This award is given in recognition of "outstanding achievements in the field of legal and general administrative support over a sustained period of time or extraordinary achievements that overcame unusual difficulties or unique situations of high importance to the mission of the employee's organization."

Rachel Browning, Rookie of the Year Award. This award is given in recognition of "exceptional performance and notable contributions towards the Division's mission by any employee with fewer than three years of service with the Division and fewer than five years overall Federal service."

Stacy Paddack, Special Commendation Award (mediation); **Bryan Beier, Matthew George, Patrick Glen, Michael Green, Leijla Huric, Derek Julius, Jennifer Keeney, Jennifer Levings, Gregory Mack, Jessica Malloy, Erica Miles, Melissa Neiman-Kelting, Luis Perez, Margaret Perry, Aviva Poczter, Papu Sandhu, Margaret Taylor, Thankful Vanderstar, Lindsay Williams, M. Jocelyn Lopez Wright** (Special Commendation Award, *Padilla* monograph).

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

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

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