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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Sixth Circuit Appears To Recognize as a Particular Social Group, Women in China Who Have Been Subjected to Forced Marriage and Involuntary Servitude

In ***Qu v. Holder***, __F.3d __, 2010 WL 3362345 (6th Cir. August 27, 2010), the Sixth Circuit held that "it appeared that [petitioner] has shown that she was a member of a particular social group of women in China who have been subjected to forced marriage and involuntary servitude." However, the court remanded the case to the BIA to consider whether petitioner "classifies as a member of a particular social group for purposes of asylum."

The petitioner, who was born in 1984, entered the United States on December 4, 2005, at Chicago's O'Hare Int'l Airport. Because petitioner was without valid entry documents, DHS instituted removal proceedings against her on December 15, 2005. Petitioner then filed an application for asylum, withholding, and CAT protection.

In her asylum application petitioner claimed that she was a victim of human trafficking and involuntary servitude. She stated that her father, who owned a farm that raised seafood, took out a 300,000 yuan loan from an individual identified as Zhang. Zhang apparently is a "big thug" in the underground world, and has powerful government connections. When petitioner's father was unable to repay the loan, Zhang visited their home on the morning October 31, 2005. Zhang demanded either the repayment of the loan or to allow petitioner, who was then 20 years old, to become his wife. Zhang threatened to have petitioner's fam-

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Terrorist Exemptions Under The INA

The Immigration and Nationality Act (INA) employs broad definitions of "terrorist activity" in the operative provisions that render aliens inadmissible, removable, or ineligible for most immigration benefits and relief from removal – Torture Convention deferral of removal being one notable exception. The breadth of these terrorism bars is counter balanced with unreviewable discretionary waiver authority delegated to the Secretary of Homeland Security or Secretary of State, in consultation with one another and the Attorney General, to exempt an alien or a terrorist group from the terrorism bars. That waiver, or "Exemption Provision," set forth in INA § 212(d)(3)(B)(i), is the subject of developing governmental policy regarding its scope and application, as well as jurisprudence arising from aliens awaiting consideration for exemptions, or faced with removal for lack thereof.

In this article, we detail the contours of the Exemption Provision, discuss a published Board decision affected by it, and discuss how it has been implemented with regard to a particular category of terrorist organizations, known as Tier III terrorist or-

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ganizations, as well as a significant category of exemptible conduct: material support provided under duress to a terrorist organization.

***Mechanics of the Exemption Provision*.**

The Exemption Provision, § 212 (d)(3)(B)(i), empowers the Secretaries of DHS or State to waive the terrorism bars in INA § 212(a)(3)(B). However, it restricts the grant of exemptions in various categories, depending upon the type of terrorist organization or terrorist activity involved. The INA defines three types of terrorist organizations: (1) a terrorist organization designated pursuant to 8 U.S.C. § 1189 as a foreign terrorist organization, see 8 U.S.C. § 1182(a)(3)(B)(vi)(I) ("Tier I" organization); (2) a group otherwise designated in the Federal Register, pursuant to 8 U.S.C. § 1182(a)(3)(B)(vi)(II) ("Tier II" organization); and (3) an undesignated group of two or more individuals engaged in terrorist activities, see 8 U.S.C. § 1182(a)(3)(B)(vi)(III) ("Tier III" organization).

Relevant to these categories, the Exemption Provision provides that "no waiver may be extended to an alien" who: (1) is a member or representative of a Tier I or Tier II terrorist group; (2) has voluntarily or knowingly engaged in terrorist activity on behalf of a Tier I or Tier II terrorist group; (3) endorsed, espoused, or persuaded others to endorse or espouse terrorist activity on behalf of a Tier I or Tier II group; or (4) has knowingly and voluntarily received military training from a Tier I or Tier II terrorist group. Thus, the exceptions do not restrict the Secretaries from exempting terrorist conduct that is involuntary or unknowing, as defined in the discretion of the Secretary, including actions taken under coercion or duress. Nor do they bar exemptions for either voluntary *or* involuntary terrorist activities conducted on behalf of Tier III terrorist organizations. Finally, no exemption is permitted, regardless of the type of terrorist organization involved, if there are reasonable grounds to believe the alien is engaged, or is likely to engage, in terrorist activities. *See* INA § 212(d)(3)(B)(i).

In addition to the foregoing rules pertaining to individual conduct, the Exemption Provision empowers the Secretaries to exempt Tier III terrorist organizations as groups. Group exemptions are precluded, however, if the group engaged in terrorist activity against the United States or "another democratic country," or purposefully engaged in a pattern or practice of terrorist activity "directed at civilians." *Id.*

No exemption is permitted, regardless of the type of terrorist organization involved, if there are reasonable grounds to believe the alien is engaged, or is likely to engage, in terrorist activities.

***Matter of S-K- and Material Support Exemptions*.**

The INA bars the admission of (or renders removable, or ineligible for removal relief) an alien who provided "material support" for the commission of a terrorist activity, to a terrorist organization, or to an individual who has committed, or plans to commit, a terrorist activity. "Material support" is broadly defined, and includes activities such as providing funding, transportation, communications, false documentation, weapons, and training. An alien who provided material support to a Tier III organization may disprove his inadmissibility if he can demonstrate by clear and convincing evidence that he "did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(iv)(VI)(dd). Thus, the material support bar itself includes an exception in the Tier III context (even apart from any waiver that may be available under the Exemption Provision) if the alien establishes that he or she was unaware or justifiably unaware that the organization was a terrorist organization.

In *Matter of S-K-*, 23 I. & N. Dec. 936 (BIA 2006), the BIA considered the application of the material support bar to an asylum applicant. The BIA affirmed an Immigration Judge's decision that a Burmese Christian ethnic Chin who had contributed money to the Chin National Front (CNF), a Tier III terrorist organization, was statutorily ineligible for asylum and withholding of removal because she provided material support to a terrorist organization. The BIA determined that S-K- was eligible, however, for deferral of removal under the Conventional Against Torture and granted her that protection.

In determining that S-K's contribution of approximately $685 during an eleven-month period sufficed to find that she provided material support, the Board relied in part upon the earlier Third Circuit ruling in *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004), where the Court found that providing food and setting up tents for persons known to be involved in terrorist activity constituted "material support" within the meaning of INA § 212(a)(3)(B)(iv)(VI). The Board determined: "it is clear that our government leaders have taken a strict approach to dealing with suspected terrorists and have attempted to make it more difficult for those involved in terrorist to gain relief of any kind." *Matter of S-K-*, 23 I. & N. Dec. at 942 n. 7. The Board also noted, referencing the Exemption Provision, that Congress has "expressly provided a waiver that may be exercised in cases where the result reached under the terrorist bars to relief would not be consistent with our international treaty obligations or where, as a matter of discretion, the Secretary of State or the Secretary of Homeland Security determines that

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the facts of a specific case warrant such relief." *Id.*

Following the issuance of *Matter of S-K-*, on March 6, 2007, then-DHS Secretary Chertoff exercised his authority under the Exemption Provision, determining that the material support bar would not apply with respect to material support provided by aliens to the Chin National Front. The Secretary delegated his discretionary authority to U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), to make the relevant exemption eligibility determinations in individual cases. *See* 72 Fed. Reg. 9957.

Shortly thereafter, the Attorney General referred *Matter of S-K-* to himself, and later remanded the case to the Board to consider any appropriate further proceedings in light of the DHS Secretary's March 6th determination, while at the same time stipulating that such remand did not "affect the precedential nature of the Board's conclusions in *Matter of S-K-*, *supra*, regarding the applicability and interpretation of the material support provisions." *See In re S-K-*, 24 I. & N. Dec. 289, 291 (A.G. 2007). Pending remand, on December 26, 2007, Congress enacted the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 ("CAA"). The legislation broadly amended the exemption authority of the Secretary of Homeland Security and the Secretary of State, bringing about the scheme of exemption availabilities and exceptions already fully described above. However, it also provided that for purposes of INA § 212 (a)(3)(B) (setting out the terrorism grounds of inadmissibility), ten Tier III groups, including the CNF, "shall not be considered to be a terrorist organization on the basis of any act or event occurring before the [December 26, 2007] date of enactment of this section." CAA § 691(b), 121 Stat. at 2365. Pursuant to this group-related automatic relief provision, the DHS filed a statement with the Board acknowledging that S-K- was no longer ineligible for asylum and withholding of removal as a result of her support for the CNF. On March 11, 2008, the Board granted S-K- asylum, and vacated the order of CAT deferral. *Matter of S-K-*, 24 I. & N. Dec. 475 (BIA 2008).

The CAA's automatic relief provision benefitted an alien such as S-K-, because she had been found ineligible regarding her material support for a terrorist organization. Because the provision only pertained to inadmissibility grounds in which "terrorist organization" was an element, however, it would not entirely exempt other CNF members or supporters from the material support bar, which not only encompassed the provision of material support to terrorist organizations, but also for the commission of terrorist activity itself, or to individuals the alien knows or reasonably should know have committed or plan to commit a terrorist activity. *See* INA § 212(a)(3)(B)(iv)(VI)(aa), (bb). Addressing this residual liability, the DHS Secretary, and Secretary of State, jointly issued another determination, on June 18, 2008, providing that INA § 212(a)(3)(B) shall not apply "with respect to an alien not otherwise covered by the automatic relief provisions of section 691(b) of the CAA, for any activity or association relating to the Chin National Front/Chin National Army (CNF/CNA)." *See* 73 FR 34772-02.

Secretary Chertoff determined that INA § 212(a)(3)(B)(iv)(VI) does not apply with respect to material support provided under duress to terrorist organizations described in INA § 212(a)(3)(B)(vi)(III)

The foregoing *S-K-* decisions illustrate the breadth of the material support and other terrorism-related immigration bars, as well as the complexity of the legislative and discretionary actions necessary to afford immigration relief to deserving aliens who would otherwise be precluded from admission to the United States. Moreover, where these cases pertained to the subject matter areas of material support and Tier III terrorist organizations, both such categories have seen other major developments of exemption policy, and will be briefly discussed in turn.

Duress-related Exemptions

On February 20, 2007, Secretary Chertoff determined that INA § 212(a)(3)(B)(iv)(VI) does not apply with respect to material support provided under duress to terrorist organizations described in INA § 212(a)(3)(B)(vi)(III) ("Tier III" organizations), if warranted by the totality of the circumstances. He delegated his exemption authority to USCIS, in consultation with ICE, to make determinations in individual cases.

On April 27, 2007, Secretary Chertoff extended the same conditional exemption benefit aliens who provided material support to Tier I and Tier II organizations (i) if they did so under duress, and (ii) if an exemption is warranted by the totality of the circumstances. Once again, Secretary Chertoff delegated this exemption authority to USCIS, in consultation with ICE. Relevant to this determination, however, DHS policy initially restricted the exemption authority to specific Tier I and Tier II organizations that had been vetted within DHS after an intelligence community assessment, such as the Colombian terrorist organizations FARC, ELN, and AUC. In December 2008, Secretary Chertoff released the restriction, authorizing USCIS to process exemptions with respect to material support provided

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Regulatory Update

Employment Authorization for Dependents of Foreign Officials

DHS published a final rule amending its regulations governing the employment authorization for dependents of foreign officials classified as A-1, A-2, G-1, G-3, and G-4 nonimmigrants. 75 *Fed. Reg.* 47699 (August 9, 2010).

This rule, effective August 9, 2010, expands the list of dependents eligible for employment authorization to include any individual who falls within a category of aliens designated by the Department of State (DOS) as qualifying.

USCIS will only issue employment authorization documents to those dependents of foreign officials who are recognized by DOS as qualifying. Qualifying dependents must fall within a bilateral work agreement or de facto arrangement, listed on DOS's website at http://www.state.gov/m/dghr/flo/c24338.htm.

To apply for employment authorization documents, eligible dependents first must obtain an endorsement from DOS on an Interagency Record of Request, Form I-566. The individual must then file Form I-566 along with an Application for Employment Authorization, Form I-765, with USCIS.

Electronic System for Travel Authorization Fee

Nonimmigrant aliens who wish to enter the United States under the Visa Waiver Program at air or sea ports of entry must obtain a travel authorization electronically through the Electronic System for Travel Authorization (ESTA) from U.S. Customs and Border Protection prior to departing for the United States. 75 *Fed Reg.* 47701 (Aug. 9, 2010). This rule requires ESTA applicants to pay a congressionally mandated fee of $14.00, which is the sum of two amounts: a $10 travel promotion fee for an approved ESTA statutorily set by the Travel Promotion Act and a $4.00 operational fee for the use of ESTA as set by the DHS Secretary to ensure recovery of the full costs of providing and administering the ESTA system.

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under duress to "any Tier I or Tier II organization, regardless of whether an IC assessment has been completed for that group." *See* USCIS Field Memorandum, February 13, 2009, (published at http://www.uscis.gov/files/nativedocuments/terror-related_inadmissibility_13feb09.pdf).

In those cases where USCIS determines that insufficient open source (non-classified) information exists to determine the national security implications of exempting aliens associated with a particular organization, it has noted that it will "coordinate with ICE and DHS to obtain additional information on the group to assist in adjudication." *Id.*

Tier III Terrorist Organizations

As noted above, certain Tier III terrorist groups, such as the CNF and nine other groups, have been the subject of DHS exercises of exemption authority and the CAA's automatic relief provisions. On September 21, 2009, moreover, DHS Secretary Napolitano and Secretary of State Clinton exercised their statutory authority to exempt qualified individuals from certain terrorist inadmissibility grounds with respect to activities and associations related to three additional Tier III terrorist groups, the Iraqi National Congress (INC), the Kurdistan Democratic Party (KDP), and the Patriotic Union of Kurdistan (PUK).

Nevertheless, as reflected in the USCIS Field Memorandum, USCIS continued to withhold the adjudication of exemptions related to Tier III groups in the following categories: (1) aliens inadmissible for any activity or association that was not under duress, relating to any Tier III organization; (2) aliens inadmissible under the terrorist-related provisions of the INA, other than material support, based on any activity or association related Tier III (as well Tier I and II) terrorist organizations, where the activity was committed under duress; (3) aliens who voluntarily provided medical care to any terrorist organization (Tier I, II, and III) to members of such organizations, or to individuals who engaged in terrorist activity; and (4) aliens inadmissible as the spouses or children of the aliens described above.

Conclusion

As detailed above, the exemption authority concerns an extraordinary, unprecedented population: aliens who concede having engaged in or materially supported terrorism. The stakes are high in administering these cases, because once admitted, aliens who are mistakenly admitted and pose a threat are prosecuted and removed with substantial difficulty and expenditure of Government resources. The foregoing brief overview is not intended to be exhaustive, but merely illustrative of the kinds of issues at play and matters that remain the subject of ongoing policy development.

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Particular social group of women forced to marry

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ily jailed if the incident was reported to the police. That evening, when petitioner returned to her family home, Zhang kidnapped her and brought her to a guarded home where she remained for two weeks.

On the third day after her kidnapping, Zhang attempted to rape petitioner, but she managed to fight him off. After this incident, Zhang threatened daily to send her to prison if she did not have sex with him or repay the debt. He also threatened to cut her hands and feet if she tried to escape. After "half a month" petitioner escaped the home and fled to her aunt's house. The aunt then paid a "snakehead" to smuggle her into the United States. She departed China on November 18, 2005. On that same date a local civil summons was issued against petitioner for the debt owed by her father.

The definition under Matter of Acosta, said the court, is broad enough to encompass groups that share one trait, such as gender.

At the asylum hearing, petitioner presented, inter alia, a letter from her parents corroborating her story, a summons certificate dated November 18, 2005, requesting her to appear in court for the unsettled debt case, "I.O.U." notes made out to Zhang, and letters from Zhang to petitioner's parents indicating that they could either pay the debt or have their daughter marry him. Petitioner also testified that she could not relocated in China because Zhang would search for her everywhere. The IJ initially, after finding her credible, denied all applications. However, in a supplemental decision dated January 4, 2007, the IJ *sua sponte* reopened the hearing and granted petitioner's application for asylum. DHS then appealed that decision to the BIA. The BIA overturned the IJ's decision and ordered petitioner's removal to China.

The Sixth Circuit preliminarily stated that it had adopted the BIA's definition of "particular social group" set forth in *Matter of Acosta*. It noted that courts of appeals have deferred to *Acosta's* broad interpretation as encompassing any social group, however populous, which has been persecuted because of shared characteristics that are either immutable or fundamental. The definition, said the court, is broad enough to encompass groups that share one trait, such as gender.

The court then concluded that under the facts of petitioner's case she appeared to have shown that she was a member of a particular social group defined as women in China who have been subjected to forced marriage and involuntary servitude. The court quoted from the 2005 Department of State Country Report which indicates that although trafficking in women was prohibited, the abduction of women trafficking remains a serious problem.

The court then explained that while petitioner's case "deviates from the typical trafficking case" she "still shares the common, immutable characteristic of being a woman who has been abducted by a man trying to force her into marriage in an area where forced marriages are recognized." The court then concluded that petitioner had suffered a severe form of forced marriage and that therefore "under the definition laid out in Acosta" she would "classify as a member of a particular social group."

The court then determined that Zhang had persecuted the petitioner based on mixed motives – to secure repayment of the loan and because she was a woman whom he could force into a marriage. This was sufficient, said the court to establish the "nexus" for the persecution. The court also found that petitioner established a fear of future persecution because the government had not shown that conditions in China had changed fundamentally. However, the court then stated that although petitioner "seems to have made the requisite showing that she is a member of a particular social group for asylum purposes, the BIA did not make an explicit finding on this issue. The BIA seemed to view the entire matter as simply a debt collection dispute." Accordingly, the court remanded the case to the BIA to determine if petitioner "classifies a member of a particular social group" and if so, noting that substantial evidence in the record did not support the BIA's denial of asylum.

Finally, the court also found that petitioner had a "viable claim from CAT protection" because petitioner had testified that Zhang had powerful police connections and that her family had been unable to secure her release during the two weeks that she had been held captive.

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Contributions to the Immigration Litigation Bulletin Are Welcomed

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FURTHER REVIEW PENDING: Update on Cases & Issues

Particularly Serious Crimes

On June 2, 2010, the Ninth Circuit granted rehearing en banc 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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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 court ordered the alien to respond, the response was filed, and the Federal Public and Community Defenders have applied to file a brief as *amicus curiae*. 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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Derivative Citizenship Equal Protection

On November 10, 2010, the Supreme Court will hear argument in ***Flores-Villar v. United States,*** 130 S. Ct. 1878. The Court will consider 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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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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Convictions - State Expungements

On July 7, 2010, the government filed a petition for en banc rehearing in ***Nunez-Reyes v. Holder***, 602 F.3d 1102 (9th Cir. 2010). Based on Ninth Circuit precedents, the panel 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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Aggravated Felony — Pre-1988

On June 14, 2010, the government filed a petition for rehearing en banc in ***Ledezma-Garcia v. Holder***, (9th Cir. 2010), where the Ninth Circuit had held that the Anti-Drug Abuse Act of 1988, that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988. The petitioner had been order removed from the U.S. based on his commission of an aggravated felony of sexually molesting a minor. The question presented to the court is whether the Anti-Drug Abuse Act that made aliens deportable for aggravated felony convictions applies to convictions entered prior to its enactment on November 18, 1988.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Petitioner's Second Motion to Reopen Was Time and Number Barred, And Failed to Qualify for Equitable Tolling

In *Neves v. Holder*, __ F.3d __, 2010 WL 2836948 (1st Cir. July 21, 2010) (Lynch, Torruella, Ebel) (*per curiam*), the First Circuit held that, in cases where an alien's motion to reopen is time or number-barred, the court retains jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing motions to reopen. The court heard the case after the government requested remand in light of *Kucana v. Holder*, __U.S.__, 130 S. Ct. 827 (2010). Although the First Circuit declined to decide whether equitable tolling of the requirements is available, it held that, if it is, the BIA did not abuse its discretion in finding that the alien failed to exercise due diligence in pursuing reopening. The court noted, however, that the equitable tolling doctrine extends statutory deadlines in "extraordinary circumstances" and that it is "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs."

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Former Cambodian Police Officer Failed to Establish that Threats He Received Were on Account of a Protected Ground

In *Ly v. Holder*, __ F.3d __, 2010 WL 2940870 (1st Cir. July 28, 2010) (*Lynch*, Boudin, Thompson), the First Circuit held that substantial evidence supported the BIA's ruling that threats received by the petitioner were not on account of a ground protected under the INA but were instead entirely motivated by petitioner's performance of his duties as a police officer in Cambodia. The court found that the threats petitioner faced, however serious, were triggered by his participation in specific drug investigations and that he provided no evidence that the threats were motivated by petitioner's party affiliation. The court also held that petitioner knew that police work posed distinct risks when he opted for a law enforcement career and his testimony did not show that these risks were exacerbated by his political opinions.

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First Circuit Holds that It Lacks Jurisdiction to Review the Agency's Determination that an Alien Failed to Establish Exceptional and Extremely Unusual Hardship

In *Ayeni v. Holder*, __ F.3d __, 2010 WL 3220630 (1st Cir. Aug. 17, 2010) (*Selya*, Lipez, Howard), the First Circuit held that it lacked jurisdiction to review the denial of petitioner's application for cancellation of removal for lack of exceptional and extremely unusual hardship for his four American-born children.

The petitioner, a citizen of Nigeria who illegally entered the U.S. in 1987, sought cancellation of removal on the basis of hardship to his four United States citizen children, one of whom had asthma, another who had ADHD, and another whom had difficulties with language and speech. Initially, the IJ rejected the petitioner's claim and pretermitted his application for cancellation of removal for lack of good moral character because he had made a false claim to United States citizenship on an employment eligibility form.

However, that the BIA concluded that petitioner's untruthful assertion of citizenship did not as a matter of law preclude a finding of good moral character and remanded the case for further proceedings. A newly assigned IJ reconsidered the petitioner's application and denied it on the basis that petitioner had failed to establish that his American-born children would suffer "exceptional and extremely unusual hardship" if he were sent back to Nigeria. The BIA affirmed.

Equitable tolling is "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs."

Before the First Circuit, petitioner claimed that the BIA had applied an incorrect standard of review, failed to consider evidence of the eldest child's asthma, and had failed to mention one of his children in its decision. The court rejected these assertions, noting that the BIA mentioned all four children, and explaining that "stripped of rhetorical flourishes, the claim comprises nothing more than a challenge to the correctness of the BIA's factfinding."

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First Circuit Holds that It Lacks Jurisdiction to Review Unexhausted Legal or Factual Issues Regarding the Denial of Cancellation

In *Santana-Medina v. Holder*, __ F.3d __, 2010 WL 3059955 (1st Cir. Aug. 5, 2010) (*Lynch*, Boudin, Howard), the First Circuit held that it lacked jurisdiction to review an alien's unexhausted legal or factual issues regarding the agency's denial of an alien's claim seeking cancellation of removal. Petitioner contended that because his petition was based on hardship to his child, the IJ was required to apply the "exceptional and extremely unusual hardship" standard of 8 U.S.C. § 1229b(b)(1)(D) in a manner consistent with the United Nations Convention on the Rights of the Child.

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However, because petitioner never made this argument before the IJ or the BIA the court held that it was therefore unexhausted.

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SECOND CIRCUIT

■ **Second Circuit Holds Individualized Analysis of Changed Country Conditions May Yield Different Outcomes for Applicants from the Same Country**

In ***Lecaj v. Holder***, __ F.3d __, 2010 WL 3001332 (2d Cir. Aug. 3, 2010) (*Jacobs*, Winter, McLaughlin), the Second Circuit affirmed the agency's denial of petitioner's application for asylum, withholding of removal, and CAT protection. The petitioner was born in Montenegro, back when it was a component of Yugoslavia. He claimed that he was persecuted because of his Albanian ethnicity and other characteristics during the time when Serbia and Montenegro were in a federation following the dissolution of Yugoslavia. The IJ denied asylum on the basis of changed circumstances in Montenegro noting that Montenegro was now independent. The BIA affirmed that in light of the United States Department of State Country Reports on Human Rights Practices-Montenegro 2006, the government had rebutted the presumption of a well-founded fear of future persecution.

The Second Circuit held that the issue of whether the government has rebutted the well-founded fear presumption entails an individualized analysis of whether the changes in country conditions were sufficiently fundamental. The court explained that this individualized analysis may justify different outcomes for different applicants from the same country, even where the agency considers the same documentary evidence. Although the court found that the BIA overlooked or discounted certain evidence in the record, it concluded that remand was not warranted because the ongoing police abuses noted in the Report were not tied specifically to Albanian ethnicity, the Muslim religion, or political advocacy on behalf of Albanians in Montenegro.

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■ **Second Circuit Holds that Motions to Dismiss Based on Fugitive Disentitlement Are Appropriately Addressed Only After Briefing on the Merits**

In ***Wu v. Holder***, __ F.3d __, 2010 WL 3023810 (2d Cir. Aug. 4, 2010) (*Calabresi*, Pooler, Chin), the Second Circuit denied a motion to dismiss pending briefing because the merits of immigration cases frequently inform the court's discretion when considering motions to dismiss under the fugitive disentitlement doctrine. Such motions are therefore "correctly addressed only after briefing – and, where appropriate, argument – on the merits of the appeal."

Motions to dismiss under the fugitive disentitlement doctrine are "correctly addressed only after briefing – and, where appropriate, argument – on the merits of the appeal."

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■ **Second Circuit Holds That No Temporal Limits Apply in Assessing NACARA Discretionary Factors**

In ***Argueta v. Holder***, __ F.3d __, 2010 WL 3063908 (2d Cir. Aug. 6, 2010) (McLaughlin, Calabresi, Livingston) (*per curiam*), the Second Circuit held that it had jurisdiction to review the alien's challenge to the IJ's consideration of a conviction outside the time period relevant to a determination of good moral character for cancellation of removal. The petitioner entered the United States in 1989 and between 1989 and 1996, was arrested four times for driving while under the influence of alcohol, in addition to being convicted of three separate offenses. He faced escalating penalties for these convictions that included fines, incarceration of up to ten months, probation, and the temporary revocation of his driver's license. The IJ denied the application as a matter of discretion in light of the DUI convictions. On appeal, the BIA considered, but rejected petitioner's argument that the IJ had erred by considering convictions that fell outside of the seven years used for the "good moral character" statutory requirement for cancellation of removal.

The Second Circuit preliminarily held that the claim the IJ had applied the wrong legal standard in exercising his discretion raised a question of law that is subject to judicial review. On the merits, the court held that no temporal limits applied to the discretionary factors the agency could consider in deciding whether to grant special rule cancellation under NACARA.

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THIRD CIRCUIT

■ **Third Circuit Remands for Consideration of Weight Given to the Number of Qualifying Relatives for Purposes of Cancellation of Removal**

In ***Pareja v. Att'y Gen. of the U.S.***, __ F.3d __, 2010 WL 2947239 (3d Cir. July 29, 2010) (Smith, *Fisher*, Greenberg), the Third Circuit held that it had jurisdiction over petitioner's claim that the BIA had misinterpreted 8 U.S.C. § 1229b(b)(1)(D) and impermissibly taken into account the number of qualifying relatives in its hardship determination. The court remanded for the limited purpose of the

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BIA considering this aspect of its application of *Matter of Recinas*. The court also deferred to the BIA's interpretation of the "exceptional and extremely unusual hardship" standard set forth in *Matter of Monreal*.

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FIFTH CIRCUIT

■ **Fifth Circuit Remands to Allow BIA to Address Whether a Grant of Relief Under Former Section 212(c) Waives All Convictions Listed on an Application**

In *Enriquez-Gutierrez v. Holder*, __ F.3d __, 2010 WL 2795327 (5th Cir. July 16, 2010) (Jones, *Benavides*, Prado), the Fifth Circuit held that the BIA erred in finding that in his previous deportation proceedings the alien had stipulated to a limited grant of relief under Former Section INA § 212 (c) which did not include a 2001 drug conviction. Agreeing with the Second Circuit that § 212(c) relief remains available to aliens in deportation proceedings for post-IIRIRA convictions, the court remanded the case to allow the BIA to address in the first instance whether a grant of § 212(c) relief waives all convictions listed on the waiver application as a matter of law.

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■ **Fifth Circuit Upholds Denial of Citizenship, Determining Any Error in Admitting Documents Was Harmless.**

In *Escalante v. Clinton*, 2010 WL 2802369 (5th Cir. July 16, 2010) (Jolly, Stewart, Elrod) (*per curiam*), the Fifth Circuit dismissed the alien's appeal of the district court's decision that the alien failed to establish he was a United States citizen. The alien alleged error in the admission of two documents into evidence, arguing that neither document met the threshold requirement of trustworthiness. The court declined to hold whether the district court judge had in fact erred in allowing the documents into evidence; rather, it concluded that any such error was harmless.

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SIXTH CIRCUIT

■ **Sixth Circuit Upholds Reinstated Exclusion Order**

In *Villegas De La Paz v. Holder*, __ F.3d __, 2010 WL 2977622 (6th Cir. July 30, 2010) (Suhrheinrich, McKeague, *Kethledge*), the Sixth Circuit held that it had jurisdiction to review the alien's reinstated exclusion order, but that her factual, legal, and constitutional claims failed. The court ruled that the record sufficiently established that the alien had been excluded and deported prior to illegally returning to the United States. The court also rejected the alien's legal and constitutional challenges, concluding that she failed to demonstrate any prejudice resulting from the reinstatement procedures.

A lack of due diligence was not the likely cause of the alien's delay in moving to reopen, given that alien hired an attorney and was lied to by that attorney.

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■ **Sixth Circuit Holds that Alien Was Not Prejudiced by BIA's Rejection of Brief**

In *Ikharo v. Holder*, __ F.3d __, 2010 WL 3001756 (6th Cir. Aug. 2, 2010) (*Gilman*, White, Thapar), the Sixth Circuit rebuffed the alien's challenge to the BIA's rejection of his *pro se* brief because the alien could not show prejudice. The alien did not refile the brief with the BIA and he did not include a complete copy of the brief with his motion to reconsider. Moreover, to the extent the arguments the alien raised on review were identical to the arguments in the rejected brief, there was no prejudice because the arguments lacked merit. The alien did not challenge the agency's removability finding, and the court held that its review was limited to the alien's due process challenge because he was convicted of an aggravated felony.

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■ **Sixth Circuit Holds that Board Abused Its Discretion in Finding Alien Did Not Demonstrate Due Diligence where Alien's Delay Resulted from Her Attorney's Misadvice.**

In *Mezo v. Holder*, __ F.3d __, 2010 WL 2993325 (6th Cir. Aug. 2, 2010) (*Martin*, Gibbons, Marbley), the Sixth Circuit held that a lack of due diligence was not the likely cause of the alien's delay in moving to reopen, given that alien hired an attorney and was lied to by that attorney, and that alien lacked an understanding of immigration law. The court thus held that the BIA abused its discretion in finding that the alien was not diligent, and remanded for further fact-finding regarding the allegations of ineffective assistance of counsel.

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■ **Sixth Circuit Affirms Denial of Military Naturalization for Alien Separated on Account of Alienage**

In *Sakarapanee v. DHS*, __ F.3d __, 2010 WL 3258567 (6th Cir. Aug. 19, 2010) (*Gilman*, Cook, Oliver), the court affirmed the Middle District of Tennessee's dismissal of the alien's petition challenging the denial of his

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application for expedited military naturalization. The alien had sought and obtained discharge from the Navy based on alienage. The court of appeals held that the plain language of the statute, which permanently bars those separated from service on the grounds of alienage, clearly applied to both voluntary and involuntary military service.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds Ukrainian Government Is Not Unwilling or Unable to Control Anti-Semitic Violence**

In ***Borovsky v. Holder***, __ F.3d __, 2010 WL 2891074 (7th Cir. July 26, 2010) (*Tinder*, Williams, Sykes), the Seventh Circuit held that the BIA's application of Eighth Circuit instead of Seventh Circuit law was harmless. The petitioner is a citizen of Ukraine, where he was born, and also of Israel, where his family relocated in 1993. In 1997 petitioner and his family left for Canada. After petitioner's parents unsuccessfully applied for asylum in Canada, the family entered the United States illegally in 1998. In 2003 DHS commenced removal proceedings against the petitioner and he applied for withholding and CAT protection. Although the parties appeared in the immigration court in Kansas City, the IJ participated from Chicago by videoconference. Petitioner generally testified that while growing up in Ukraine he had been the target of anti-Semitic acts by his peers. He also stated that he could not return to Israel because he faced imprisonment for failing to register for mandatory military service. The IJ denied withholding and CAT. The BIA affirmed the denial and also held that venue was proper in the Seventh Circuit. However, the BIA only cited case law from the Eighth Circuit.

The court preliminarily ruled that the BIA's citation to cases from the Eighth Circuit was harmless error because the standard for withholding of removal was generally applicable across all circuits. On the merits, the court ruled that the anti-Semitic attacks, insults, and threats that petitioner endured as a child in Ukraine did not rise to the level of persecution and that the reported incidents of anti-Semitism could not be attributed to the government. With respect to petitioner's withholding claim from Israel based on his fear of imprisonment for failing to perform military service, the court held that petitioner did not demonstrate that he would be imprisoned based on an unsubstantiated internet article or that any potential punishment would be on account of a protected ground.

The court found jurisdiction to consider petitioner's challenge to the denial of deferral of removal, holding that such a denial did not fall under the INA's jurisdictional bars.

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■ **Seventh Circuit Holds that Alien's Deferral of Removal Application May be Reviewed Despite Statutory Jurisdictional Bars**

In ***Issaq v. Holder***, __ F.3d __, 2010 WL 3221835 (7th Cir. Aug. 17, 2010) (Posner, Ripple, *Wood*), the Seventh Circuit ruled that the BIA properly found petitioner ineligible for withholding of removal and CAT protection, concluding that his re-sentencing for a probation violation counted towards the five years of imprisonment in proving a "particularly serious crime." The court also concluded that it had jurisdiction to consider petitioner's challenge to the denial of deferral of removal, holding that such a denial did not fall under the INA's jurisdictional bars. Judge Ripple concurred, but would have declined to rule on the expansion of jurisdiction, noting that the question was not fully briefed and argued to the court.

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■ **Seventh Circuit Declines to Suppress Record Concerning Alienage and Rejects Ad Hominem Attack on IJ**

In ***Gutierrez Berdin v. Holder***, __ F.3d __, 2010 WL 3258267 (7th Cir. Aug. 19, 2010) (*Flaum*, Rovner, Wood), the Seventh Circuit held that the Fourth Amendment's exclusionary rule could not be used to suppress an alien's statements and concluded that an adverse inference was properly drawn by the Immigration Judge based on the alien's silence in response to questions about his alienage. The court declined to suppress the alien's admission to ICE agents that he was an alien who was not lawfully present in the United States. The court also rejected the alien's claim that the IJ's commentary on ICE's removal efforts demonstrated bias and a lack of impartiality.

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■ **Seventh Circuit Rejects Due Process and Ineffective Assistance of Counsel Claims in Marriage Fraud Case**

In ***Surganova v. Holder***, __ F.3d __, 2010 WL 2813631 (7th Cir. July 29, 2010) (*Wood*, Bauer, Williams), the Seventh Circuit rejected the claim of a Ukrainian alien that she was denied an opportunity to present evidence to defend against charges of marriage fraud. The court found that the alien's counsel had a full opportunity to cross-examine government witnesses and that the denial of further cross-examination and access to investigative notes would not have undercut the sworn statement of the alien's husband that the marriage was a sham. For similar reasons, alien's claim of ineffective assistance of coun-

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sel failed because she could not show prejudice resulting from the inactions of counsel.

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■ **Alien Has Burden of Demonstrating that a Conviction Is Not an Aggravated Felony Rendering Him Statutorily Ineligible for Cancellation of Removal**

In *Sanchez v. Holder*, __ F.3d __, 2010 WL 2990916 (8th Cir. Aug. 2, 2010) (Riley, *Clevenger*, Colloton), the Eighth Circuit held that the alien, who removability is disputed, bore the burden of showing that his Iowa theft conviction did *not* render him ineligible for cancellation of removal on the ground that it is an aggravated felony. The court rejected the alien's argument that the government should bear the burden of showing that the conviction is an aggravated felony.

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■ **Eighth Circuit Holds that Discrepancies Identified by Forensic Document Examiner Support Adverse Credibility Finding**

In *Camishi v. Holder*, __ F.3d __, 2010 WL 3220379 (8th Cir. Aug. 17, 2010) (*Bye*, Arnold, Colloton), the Eighth Circuit affirmed the BIA's finding that an applicant failed to meet his burden of credibly establishing eligibility for asylum and withholding of removal because he submitted fraudulent documents.

The court held that, although the government forensic investigator made no affirmative finding that the applicant's Albanian documents were fraudulent, she testified about discrepancies the applicant did not explain. The court held the applicant failed to show he was prejudiced by the BIA's failure to address the timeliness of his asylum application. The court also declined to consider an unexhausted claim for protection under the Convention Against Torture.

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Misusing a SSN is a CIMT because the essential element of the crime was the intent to deceive for purpose of wrongfully obtaining a benefit.

■ **Eighth Circuit Holds that Misusing Another's Social Security Number Is a Crime Involving Moral Turpitude**

In *Guardado-Garcia v. Holder*, __ F.3d __, 2010 WL 3023659 (8th Cir. Aug. 4, 2010) (Riley, *Gibson*, Murphy), the Eighth Circuit held that an alien's conviction for misusing another person's social security number qualified as a "crime involving moral turpitude" because the essential element of the crime was the intent to deceive for purpose of wrongfully obtaining a benefit.

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■ **Eighth Circuit Defers to BIA's Interpretation that an Alien with Multiple Illegal Entries and More Than One Year of Illegal Presence Is Ineligible to Adjust Status**

In *Villanueva v. Holder*, __ F.3d __, 2010 WL 3034888 (8th Cir. Aug. 5, 2010) (*Smith*, Benton, Shepherd), the Eighth Circuit held that the BIA's determination in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), should be accorded deference. The *Briones* decision resolved a statutory ambiguity by concluding that aliens who have repeatedly entered the United States illegally and have more than one year of unlawful presence cannot adjust status to become a lawful permanent resident.

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NINTH CIRCUIT

■ **Ninth Circuit Holds Board Erred in Its Analysis of Alien's Asylum Claim**

In *Afriyie v. Holder*, __ F.3d __, 2010 WL 2891002 (9th Cir. July 26, 2010) (Tashima, Fisher, *Berzon*), the Ninth Circuit held that the Board of Immigration Appeals made numerous factual errors in its "unable or unwilling to control" analysis by ignoring evidence favorable to the alien (a Ghanian Baptist preacher who feared persecution by Muslims), misstating his testimony, and improperly treating as irrelevant police reports made by individuals other than the alien.

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■ **Ninth Circuit Upholds Denial of Asylum Based on Applicant's Failure to Prove that Dutch Government Was Unwilling and Unable to Protect Him**

In *Rahimzadeh v. Holder*, __ F.3d __, 2010 WL 2890998 (9th Cir. July 26, 2010) (Tashima, Fisher, *Berzon*), the Ninth Circuit held that substantial evidence supported the BIA's denial of asylum to an alien who credibly testified that he feared persecution by Muslim extremists in the Netherlands. The court agreed that the alien's failure to report the extremists' threats to Dutch authorities did not per se disqualify him from asylum, but did leave a gap in proof as to whether the government would have extended protection to him. Absent any evidence on the issue from the alien, the court held that the BIA properly relied on State Department evidence indicating that the Dutch government would have been responsive to a police report.

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■ **Italian Government Is Not Unwilling or Unable to Protect Vietnamese Family from Communists**

In ***Truong v. Holder***, __ F.3d __, 2010 WL 2902374 (9th Cir. July 27, 2010) (Friedman, D. Nelson, Reinhardt) (*per curiam*), the Ninth Circuit upheld the denial of asylum to two Vietnamese citizens, who became refugees in Italy in 1979. The petitioners, and their two Italian-born children claimed persecution at the hands of Vietnamese Communists in Italy. The IJ granted withholding from Vietnam but denied asylum from Italy because the source of harm to them was not the Italian government or a group the government was unable or unwilling to control. The court held that the petitioner prevailing in a prior petition for review did not require the agency to grant asylum. It further held that the record supported the finding that Italy was not unwilling or unable to protect Vietnamese refugees from Communist Vietnamese. Judge Reinhardt concurred, expressing hope that petitioners would not be removed.

The applicant's submission of a fraudulent newspaper article, alone, constituted substantial evidence to support an adverse credibility determination.

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■ **Ninth Circuit Denies Aliens' En Banc Petition and Reaffirms Holding that a Stipulated Plea Agreement Can Prove the Tax Loss Component of Certain Aggravated Felonies.**

In ***Kawashima v. Holder***, __ F.3d __, 2010 WL 3025017 (9th Cir. Aug. 4, 2010) (*O'Scannlain*, Leavy, Callahan), the Ninth Circuit denied the aliens' petition for rehearing *en banc* and modified its previous decision of January 27, 2010. In the modified decision, the court maintained its prior holdings that (1) tax offenses other than tax evasion may qualify as aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i); (2) the primary alien's tax crime necessarily involved fraud or deceit, and his stipulated plea agreement showing the actual tax loss was properly considered under *Nijhawan* to determine that the loss exceeded $10,000 as required under subsection (M)(i); and (3) the dependent alien's tax crime necessarily involved fraud or deceit, remand was required for the BIA to determine, in light of *Nijhawan*, what types of evidence may be considered to determine the total loss suffered by the government as a result of alien's crime. Judge Graber, joined by Judges Wardlaw and Paez, dissented from the denial of rehearing *en banc*.

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■ **Ninth Circuit Holds that IJ Must Warn Asylum Applicant that He May Make a Frivolous Finding**

In ***Khadka v. Holder***, __ F.3d __, 2010 WL 3239467 (9th Cir. Aug. 18, 2010) (Hall, Noonan, *Thomas*), the Ninth Circuit held that the IJ's frivolous finding was not supported by a preponderance of the evidence because fabrication of material evidence does not necessarily constitute fabrication of a material element, and because the IJ failed to inform the applicant that he was considering making a frivolous finding. However, the court also held – for the first time – that the applicant's submission of a fraudulent newspaper article, alone, constituted substantial evidence to support an adverse credibility determination, where the record evidence supported that the alien was aware that the document was fraudulent.

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■ **Ninth Circuit Reverses Western District of Washington Decision Declaring U.S. Citizenship and Immigration Services Regulation Invalid**

In ***Ruiz-Diaz v. United States of America***, __ F.3d __, 2010 WL 3274284 (9th Cir. Aug. 20, 2010) (*Rymer*, Smith, Walter), the Ninth Circuit held that a USCIS regulation providing that alien beneficiaries of special immigrant religious worker visa petitions may file an application for adjustment of status only when their visa petition has been approved, 8 C.F.R. § 245.2(a)(2)(i)(B), is a permissible construction of 8 U.S.C. § 1255 (a). The court reversed the district court's decision finding the rule invalid and vacated a permanent injunction requiring the government to accept adjustment of status applications from special immigrant religious workers concurrently with visa petitions.

Applying the *Chevron* two-step analysis, the court determined that the INA is silent with respect to the timing of the filing of visa petitions and applications for adjustment of status. The court then noted that Congress conferred discretion on the Attorney General to devise regulations to implement § 1255(a), and that the court could not say "that the agency's interpretation in 8 C.F.R. § 245.2(a)(2)(i)(B) is arbitrary, capricious, or manifestly contrary to the statute."

Because the district court declined to reach the challenges made pursuant to the Due Process and Equal Protection Clauses, the First Amendment, and the Religious Freedom Restoration Act, the court of appeals remanded those claims to the district court for further proceedings.

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■ **Ninth Circuit Holds that State Department Must Send Notice of Approved Visa Petition to Alien Beneficiary**

In ***Singh v. Clinton***, __ F.3d __, 2010 WL 3274493 (9th Cir. Aug. 20, 2010) (Ripple, Rymer, *Fisher*), the Ninth Circuit held that the INA § 203 (g) "unambiguously" requires the State Department to send notice of an approved visa petition to the alien beneficiary. The petitioner is a native of India who became a United States citizen in 1987. In 1988, he filed an I-130 petition with the then- INS to establish that Sukhwinder was his brother and to begin the process of establishing Sukhwinder's eligibility for an immigrant visa. In 1991, petitioner retained attorney Gordon Quan to assist with the I-130 petition, which the government soon thereafter approved.

After nearly a decade, petitioner contacted Quan in September 2000 to request an update concerning the petition. Quan sent a letter to Sukhwinder's address in India to inform him that the Visa Bulletin had not yet reached the priority date. On September 4, 2000, the National Visa Center ("NVC") mailed an instructional packet to Quan at his office address listed on the 1991 I-130 petition. Quan's records do not indicate that he received the packet or any subsequent mailing concerning petitioner's I -130 petition. In 2001, 2002 and 2003, the U.S. Embassy sent follow-up materials to Quan's 1991 address, back in the United States. Then on September 9, 2004, the State Department terminated Sukhwinder's visa registration and destroyed related records, based on Sukhwinder's failure to apply.

While these events were transpiring, Sukhwinder had left India on November 27, 1991 for the United States and petitioned for asylum, although his wife and children have continued to live at the address listed on the I-130 petition. DHS placed Sukhwinder in removal proceedings in September 1994, and in February 2005 he applied for an adjustment of status to become a permanent resident. However, the government denied his request because his visa registration had been terminated in 2004. As of June 2010, removal proceedings against Sukhwinder were still ongoing. After the government denied Sukhwinder's application for adjustment of status, the Singhs commenced this collateral litigation under the APA, seeking reinstatement of the approved I-130 petition. The district court granted the government summary judgment finding that the notice sent to attorney Quan was reasonably calculated to get the message to the visa applicant.

The Ninth Circuit held that notice to the alien's attorney was insufficient for purposes of terminating eligibility under the INA § 203(g) for failure to apply for the visa within one year of notice. "Because the government did not send notice 'to the alien,' termination of Sukhwinder's visa registration was contrary to law. The APA requires that the agency action be declared unlawful and set aside," said the court.

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■ **Personal Use Exception Does Not Apply Where Alien Has More Than One Controlled Substance Offense**

In ***Rodriguez v. Holder***, __ F.3d __, 2010 WL 3293348 (9th Cir. Aug. 23, 2010) (Kozinski, Callahan, Martinez) (*per curiam*), the Ninth Circuit held that, under a plain reading of the statute, the personal use exception under 8 U.S.C. § 1227(a)(2)(B)(i) applies only to aliens who have committed just one controlled substance offense, where that offense is possession for personal use of less than thirty grams of marijuana. The court held that petitioner who had been convicted for possession of concentrated cannabis, was ineligible for the exception because of his prior convictions for possession of cocaine and heroin.

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ELEVENTH CIRCUIT

■ **Vacated Guilty Plea to State Drug Trafficking Charge Did Not Provide Reason to Believe that Alien Engaged in Drug Trafficking.**

In ***Garces v. United States Att'y Gen.***, __ F.3d __, 2010 WL 2899024 (11th Cir. July 26, 2010) (*Carnes*, Anderson, Stahl), the Eleventh Circuit reversed the BIA's determination that the alien was inadmissible under INA § 212(a)(2)(C), as an alien whom the Attorney General "knows or has reason to believe is or has been an illicit trafficker in any controlled substance." The petitioner a citizen of Cuba, was paroled into the United States in 1980. Three years later, on April 6, 1983, he was caught up in a drug bust at a Miami Beach hotel and later pleaded guilty to the trafficking and aggravated assault charges. He was sentenced to three years' probation on the drug charge; he received deferred adjudication and a suspended sentence on the assault charge. Eventually DHS instituted removal proceedings in 2006, with an immigration hearing in 2007, and BIA decision in 2009. In August of 2000 to the same state court that had convicted him sixteen years earlier, Garces filed a motion to vacate and set aside his guilty plea. He asserted that the plea was involuntary because the court had failed to advise him of potential immigration consequences.

The court held that the alien's admission that in 1983 he pleaded guilty to a drug trafficking crime was not substantial evidence giving the Attorney General "reason to believe" the alien engaged or assisted in drug trafficking because the conviction had been vacated, and Florida law allows a defendant to plead guilty without making a factual admission of guilt.

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This Month's Topical Parentheticals

ASYLUM

■ ***Kone v. Holder,*** __ F. 3d __, 2010 WL 3398162 (7th Cir. Aug. 31, 2010) (remanding because the BIA failed to address petitioners' claim that FGM of their daughter would constitute *direct* psychological persecution of her parents)

■ ***Lecaj v. Holder,*** __F.3d __, 2010 WL 3001332 (2d Cir. Aug. 3, 2010) (presumption of future persecution rebutted by general evidence of changed country conditions)

■ ***Mejilla-Romero v. Holder,*** __ F. 3d __, 2010 WL 3075494 (1st Cir. Aug. 6, 2010) (remanding to BIA for consideration of petitioner's claim that BIA had not complied with DHS guidelines for children's asylum claims and cases involving unaccompanied alien children)

■ ***Khadka v. Holder,*** __ F. 3d __, 2010 WL 3239467 (9th Cir. Aug. 18, 2010) (IJ's determination that petitioner fabricated a document in support of his asylum claim cannot sustain a *sua sponte* finding that petitioner filed a frivolous claim where the possibility of such a finding was not raised by the IJ or DHS, and where other documents supported petitioner's claim of Maoist threats)

■ ***Martinez-Buendia v. Holder,*** __ F.3d __, 2010 WL 3184227 (7th Cir. Aug. 10, 2010) (distinguishing *Elias-Zacarias* and holding that the record compels the conclusion that petitioner, a Colombian national, was persecuted by FARC guerrillas on account of her political opinion where petitioner "politically opposed the FARC and [] her political beliefs were the reason for her refusal to cooperate") (Judge Hamilton filed a concurring opinion)

■ ***Barsoum v. Holder,*** __ F.3d __, 2010 WL 3307365 (1st Cir. Aug. 24, 2010) (affirming denial of asylum to a Coptic Christian where harassment by other university students did not rise to the level of persecution)

■ ***Kamalyan v. Holder,*** __ F.3d __, 2010 WL 3325850 (9th Cir. Aug. 25, 2010) (holding that the government failed to establish a fundamental change in country conditions in Armenia where the country reports entered into the record were inconclusive regarding improvements in the country's religious freedom)

■ ***Qu v. Holder,*** __ F.3d __, 2010 WL 3362345 (6th Cir. Aug. 27, 2010) (finding that "it appears" petitioner established she is a member of a particular social group of women in China who have been subjected to forced marriage and involuntary servitude, and that she was targeted on account of her membership)

■ ***Matter of X-M-C-***, 25 I&N Dec. 322 (BIA Aug. 25, 2010) (holding that an IJ may make a finding that an alien has filed a frivolous asylum application without reaching the merits of the application, and that withdrawal of an asylum application after the required warnings and safeguards have been provided does not preclude a finding that the application is frivolous).

ADJUSTMENT

■ ***Yepremyan v. Holder,*** __ F. 3d __, 2010 WL 3122871 (9th Cir. Aug. 10, 2010) (holding that marriage certificate and two vague affidavits attesting to a couple looking happy do not constitute clear and convincing evidence that a marriage is bona fide)

CANCELLATION

■ ***Argueta v. Holder,*** __ F.3d __, 2010 WL 3063908 (2d Cir. Aug. 2010) (IJ permissibly considered CIMT convictions and arrests to deny NACARA special rule cancellation in the exercise of discretion, even though the convictions were more than seven years old, because nothing in statute temporally limits the discretionary factors the agency may consider in deciding whether to grant relief to alien otherwise statutorily eligible for relief)

■ ***Sanchez v. Holder,*** __ F.3d __, 2010 WL 2990916 (8th Cir. Aug. 2, 2010) (where alien denied aggravated felony charge, but conceded that he was removable on other grounds, burden of proof shifted to alien to prove whether he was eligible for cancellation, hence government not required to prove whether crime was an aggravated felony)

■ ***Matter of Cortez,*** 25 I&N Dec. 301 (BIA Aug. 13, 2010) (holding that alien's welfare fraud conviction rendered alien ineligible for cancellation of removal because, although this CIMT conviction qualified for the petty offense exception, it was an offense under INA § 237(a)(2) because a sentence of one year could be imposed)

CRIMES

■ ***Rodriguez v. Holder,*** __ F.3d __, 2010 WL 3293348 (9th Cir. Aug. 23, 2010) (holding that the personal use exception at section 1227(a)(2)(B)(i) – concerning the personal use of less than 30 grams of marijuana – does not apply to aliens who have more than one drug conviction)

■ ***Restrepo v. U.S. Att'y Gen.,*** __ F.3d __, 2010 WL 3211138 (3d Cir. Aug. 16, 2010) (deferring to BIA's definition of sexual abuse of a minor and holding alien's conviction for "aggravated criminal sexual contact" constituted sexual abuse of a minor and thus an aggravated felony)

■ ***United States v. Chavira***, __ F.3d __, 2010 WL 3034765 (5th Cir. Aug. 4, 2010) (conviction for knowingly and willfully making false statement to CBP officer vacated because officer failed to give *Miranda* warnings before subjecting defendant to "custodial interrogation," where case had changed from immigration to criminal inquiry, defendant was searched and handcuffed, and questions were intended to elicit incriminating admissions before warnings were given)

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This Month's Topical Parentheticals

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■ ***Guardado-Garcia v. Holder***, __ F.3d __, 2010 WL 3023659 (8th Cir. Aug. __, 2010) (conviction for knowingly and falsely using a SSN of another to apply for an airport employee ID badge was a CIMT)

■ ***Carachuri-Rosendo v. Holder,*** __ F. 3d __, 2010 WL 3064479 (5th Cir. Aug. 6, 2010) (holding, after the Supreme Court's reversal of its prior decision, that petitioner was not ineligible for cancellation of removal based on his recidivist state misdemeanor conviction for drug possession because the state did not enhance his conviction based on the prior conviction)

■ ***Mezo v. Holder***, __F.3d __, 2010 WL 2993325 (6th Cir. Aug. 2, 2010) (remanded because BIA abused its discretion in ruling that alien failed to exercise due diligence, where alien hired attorney to file appeal four days before deadline, appeal was not received in time, attorney moved to reconsider without alien's knowledge and lied to alien, and alien moved to reopen within a month of discovering the fraud)

■ ***Kawashima v. Holder***, __ F.3d __, 2010 WL 3025017 (9th Cir. Aug. 4, 2010) (holding that tax offenses other than tax evasion may qualify as aggravated felonies under 8 U.S.C. § 1101 (a)(43)(M)(i))

■ ***Villegas de la Paz v. Holder***, __ F.3d __, 2010 WL 2977622 (6th Cir. July 30, 2010) (alien not prejudiced by failure to make a statement, review file, or challenge underlying order, where record established that she was previously ordered excluded and did not appeal that order to BIA)

■ ***Daas v. Holder,*** __ F. 3d __, 2010 WL 3307494 (9th Cir. Aug. 24, 2010) (holding that petitioner's conviction for distributing listed chemicals under the Controlled Substances Act (ephedrine and pseudoephedrine) with reasonable cause to believe they would be used to manufacture methamphetamine qualifies as a "drug trafficking crime" and thus constitutes an aggravated felony)

■ ***Matter of Pedroza***, 25 I. & N. Dec. 312 (BIA Aug. 13, 2010) (holding alien's shoplifting theft offense punishable by not more than 6 months in jail did not render alien ineligible for cancellation of removal under INA § 240A(b)(1)(C) because this CIMT conviction was not an offense under INA § 212(a)(2) because it qualified for the petty offense exception and it was not an offense under INA § 237(a)(2) because a sentence of one year or more could not be imposed)

DUE PROCESS – FAIR HEARING

■ ***Ikharo v. Holder,*** __ F.3d __, 2010 WL 3001756 (6th Cir. Aug. 2, 2010) (holding that the alien could not show prejudice stemming from the BIA's rejection of his *pro se* brief on appeal, where the alien neither re-filed the brief with the BIA nor included a complete copy of the brief with his motion to reconsider, and where the alien did not establish that the arguments he presumably raised in his appeal brief were meritorious)

■ ***Gutierrez-Berdin v. Holder,*** __ F. 3d __, 2010 WL 3258267 (7th Cir. Aug. 19, 2010) (holding that the IJ did not err in refusing to suppress the I-213 because the exception to the non-applicability of the exclusionary rule in immigration proceedings was not triggered where the immigration officer's "very minor physical abuse coupled with aggressive questioning" did not constitute "egregious" conduct as contemplated by the Supreme Court in *Lopez-Mendoza*)

■ ***Martinez-Medina v. Holder,*** __ F.3d __, 2010 WL ___(9th Cir. Aug. 12, 2010) (holding that, even assuming there was a Fourth Amendment violation, it was not egregious where there was no evidence that the sheriff deliberately violated the Fourth Amendment and a reasonable officer would not have known that he lacked probable cause to detain petitioners given that the law was unclear as to whether an alien's admission to being illegally present in the United States created probable cause to detain the alien)

JURISDICTION

■ ***Toby v. Holder***, __ F.3d __, 2010 WL 3363191 (8th Cir. Aug. 27, 2010) (holding that court lacks jurisdiction over the BIA's discretionary denial of adjustment of status and 212(i) relief, as well as the denial of asylum for untimeliness)

■ ***Aguilar-Mejia v. Holder,*** __ F.3d __, 2010 WL 3063155 (7th Cir. Aug. 6, 2010) (court lacked jurisdiction to review factual challenges to the denial of withholding of removal because alien is removable due to drug possession offense)

■ ***Zhang v. Holder,*** __ F. 3d __, 2010 WL 3169292 (2d Cir. Aug. 12, 2010) (upholding BIA's determination that it lacked jurisdiction to exercise *sua sponte* jurisdiction over untimely motion to reopen when alien was removed prior to BIA decision but after the BIA's denial of a stay motion filed with the untimely motion to reopen; declining to resolve whether the departure bar precludes *nunc pro tunc* relief because petitioner failed to show such equitable relief was warranted)

■ ***Issaq v. Holder,*** __ F. 3d __, 2010 WL 3221835 (7th Cir. Aug. 17, 2010) (suggesting that the criminal alien review bar does preclude review over the agency's deferral of removal findings based on the Supreme Court's analysis in *Negusie*)

■ ***Fernandes v. Holder,*** __ F.3d __, 2010 WL 3274502 (9th Cir. Aug. 20, 2010) (holding that the IJ's jurisdiction is limited only when the BIA expressly retains jurisdiction and limits the scope of the remand to a specific purpose; affirming IJ's adverse credi-

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This Month's Topical Parentheticals

(Continued from page 15)
bility/frivolous findings with regard to asylum)

■ ***Ghouri v. Holder,*** __ F.3d __, 2010 WL 3386579 (1st Cir. Aug. 30, 2010) (holding court lacks jurisdiction over agency's finding of no extraordinary circumstances for purposes of one-year asylum bar)

■ ***Ayeni v. Holder,*** __ F.3d __, 2010 WL 3220630 (1st Cir. Aug. 17, 2010) (holding that the court lacked jurisdiction to review discretionary denial of cancellation, and rejecting petitioner's attempts to allege questions of law)

■ ***Saleheen v. Holder,*** __ F. 3d __, 2010 WL 3363140 (8th Cir. Aug. 27, 2010) (holding that court lacked jurisdiction to review discretionary denial of cancellation of removal, and rejecting petitioner's attempts to allege questions of law)

■ ***Patel v. Att'y Gen. of United States,*** __ F.3d __, 2010 WL 3307372 (3d Cir. Aug. 24, 2010) (holding that court lacks jurisdiction to stay petitioner's voluntary departure because, pursuant to the new voluntary departure regulation, her grant of voluntary departure terminated upon the filing of a petition for review)

■ ***Rajinder Pal Singh v. Napolitano,*** __ F.3d __, 2010 WL 3293696 (9th Cir. Aug.23, 2010) (applying *Matter of Compean*'s jurisdictional holding retroactively and finding that petitioner was required to exhaust his administrative remedies by filing a motion to reopen with the BIA asserting his post-order IAC claim before bringing a habeas petition in district court)

■ ***Santana-Medina v. Holder,*** __ F.3d __, 2010 WL 3059955 (1st Cir. Aug. 5, 2010) (holding court lacked jurisdiction over argument that IJ should have applied hardship standard for cancellation of removal in a manner consistent with the U.N. Convention on the Rights of the Child)

■ ***Ginters v. Holder***, __ F.3d __, 2010 WL 3034894 (8th Cir. Aug. 5, 2010) (holding that alien and second USC spouse were not collaterally estopped from challenging denial of their second visa petition in district court)

■ ***Renteria-Ledesma v. Holder,*** __ F.3d __, 2010 WL 3023674 (8th Cir. Aug. 4, 2010), and ***Villanueva v. Holder,*** __ F.3d __, 2010 WL 3034888 (8th Cir. Aug. 5, 2010) (deferring to BIA's construction of INA in, *e.g., Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), holding that adjustment of status under INA § 245 (i)(2)(A) does not waive inadmissibility under § 212(a)(9)(C)(i)(I) in case of recidivist immigration violator who was previously unlawfully present and again enters or attempts to enter without admission)

MOTIONS TO REOPEN

■ ***Pafe v. Holder,*** __ F. 3d __, 2010 WL 3155195 (8th Cir. Aug. 11, 2010) (holding that the petitioner failed to show due diligence to warrant equitable tolling based on ineffective assistance of two different counsel where petitioner waited nearly three years before hiring new attorneys to replace each ineffective one, and six years to file her motion to reopen)

■ ***Victor v. Holder,*** __ F.3d __, 2010 WL 3069563 (7th Cir. Aug. 6, 2010) (denial of motion to reconsider not an abuse of discretion where petitioner claimed only that the immigration judge should have reached a different conclusion and issue could have been raised on petition for review of the initial decision denying asylum)

NATURALIZATION

■ ***Sakarapanee v. DHS,*** __ F.3d __, 2010 WL 3258567 (6th Cir. Aug. 19, 2010) (affirming CIS' denial of petitioner's naturalization application under INA § 329 on the ground that he previously sought and received an early discharge from the United States Navy based on his status as an alien)

REINSTATEMENT

■ ***Molina v. Holder,*** __ F.3d __, 2010 WL 3325469 (8th Cir. Aug. 25, 2010) (holding that reinstatement of prior order against an alien who had an asylum application pending prior to IIRIRA was not impermissibly retroactive where the asylum application was adjudicated on the merits under the same standards that existed prior to 1996)

VISAS

■ ***Ruiz-Diaz v. United States,*** __ F.3d __, 2010 WL 3274284 (9th Cir. Aug. 20, 2010) (upholding regulation providing that alien beneficiaries of special immigrant religious worker visa petitions may file an adjustment application only after their visa petition has been approved)

■ ***Singh v. Clinton,*** __ F.3d __, 2010 WL 3274493 (9th Cir. Aug. 20, 2010) (holding that INA § 203(g) "unambiguously" requires the State Department to send notice of an approved visa petition to the alien beneficiary; notice to the alien's attorney is insufficient for purposes of terminating eligibility under § 203(g) for failure to apply for an immigrant visa within one year of the notification)

WAIVERS

■ ***Mancillas-Ruiz v. Holder,*** __ F.3d __, 2010 WL 3156544 (7th Cir. Aug. 11, 2010) (holding 212(c) relief is not available to alien charged with removability for having been convicted of a crime of violence aggravated felony as well as two crimes of moral turpitude because there is no statutory counterpart)

■ ***Camishi v. Holder,*** __ F.3d __, 2010 WL 3220379 (8th Cir. Aug. 17, 2010) (affirming IJ's adverse credibility finding where forensic examiner testified about discrepancies which supported the finding of fraudulent documents, and where petitioner provided no explanation for the discrepancies)

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The Blog @ Homeland Security

August 26, 2010

By John Morton, Director, United States Immigration and Customs Enforcement

Too often, political posturing rather than facts dominates the debate surrounding immigration. But when you look at the facts, including record-breaking statistics, our record shows this Administration is serious about sensible and tough enforcement.

Let's start with the facts. As required by federal law, one of Immigration and Customs Enforcement's (ICE) primary missions is to remove illegal aliens from this country. Under this Administration, ICE has focused its efforts on removing criminal aliens, recent border entrants, and immigration fugitives. The results have been unprecedented. Last fiscal year, ICE removed a record 389,000 illegal aliens from the United States, 136,000 of whom were criminals. So far this fiscal year, we have removed a record 170,000 criminals and have placed more people—criminal and non-criminal--in immigration proceedings than ever before.

The recent expansion of Secure Communities, which uses biometrics to identify criminal aliens in local jails and prisons, has significantly increased the number of criminal aliens subject to removal. To ensure these individuals who have been convicted of crimes such as assault, arson, drug trafficking, burglary, drunk-driving, do not pose further danger to our communities, ICE has implemented a policy to expedite the removal of convicted criminal aliens and ensure these cases are prioritized by our courts. Simply put, this is a common sense solution to ensure convicted criminal aliens are not released into our communities and address the record backlogs cases our courts currently have pending.

The First Annual OIL's NFL Kickoff Party was held on September 10, 2010. The event was hosted by the Keener, Goad, and Molina Teams. Pictured above, Wanda Evans and David McConnell.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

■ OIL's 14th Annual Immigration Litigation Conference will be held at the National Advocacy Center in Columbia, South Carolina on September 27—October 1, 2010. This is an advanced immigration law conference intended for experienced attorneys who are litigating in the federal courts or advising their client agencies on immigration matters that may lead to litigation.

■ OIL's 16th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC on November 15-19, 2010. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law.

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INSIDE OIL

OIL welcomes back two former OIL attorneys and welcomes two new attorneys.

Nicole Nardone is a returning OIL employee. She worked for OIL from 2004 through 2006, when she left due to her husband's relocations with the U.S. Army. Since that time, she worked for the Attorney General's Office of the State of Hawaii and for the Philadelphia Court of Common Pleas. She is a graduate of King's College and the University of San Francisco, School of Law.

Front: Dara Smith, Nicole Nardone; back: Colin Tucker, Kohsei Ugumorri

Dara Smith received her B.A. in Linguistics and Cultural Anthropology from the University of Michigan in 2004 and her J.D. from George Washington University Law School in 2008. She joined OIL after working for two years as an attorney advisor to Administrative Law Judge Ellen Thomas at the Office of the Chief Administrative Hearing Officer within the Executive Office for Immigration Review, which adjudicates cases involving immigration-related unfair employment practices.

Kohsei Ugumori is a graduate of the State University of New York at Binghamton and New York Law School. Kohsei returns to OIL after completing a two-year clerkship with the Hon. Roger J. Miner of the U.S. Court of Appeals for the Second Circuit. Kohsei initially joined OIL through the Honors Program in 2006.

Colin Tucker received a BA in Political Science from the University of Pittsburgh in 2006 and his JD from the Catholic University of America's Columbus School of Law in 2008. He joined OIL in late 2010, after having spent two years working with The Nath Law Group in Alexandria, Virginia.

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"

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