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

Immigration Litigation Bulletin

Vol. 17, No. 7 JULY 2013

LITIGATION HIGHLIGHTS

■ **ASYLUM**

►National from Guinea, ineligible for asylum based on possible female genital mutilation of his daughters (1st Cir.) **4**

►Asylum applicant failed to establish persecution based on future IUD insertion or speculative desire to have more children (1st Cir.) **4**

►Past incidents of harm too isolated to constitute persecution (1st Cir.) **5**

►BIA erred by failing to consider harm to child as persecution of parents for purposes of withholding of removal (9th Cir.) **12**

■ **CRIME**

►Connecticut second-degree larceny from the person is a categorical theft offense aggravated felony (1st Cir.) **6**

►Criminally negligent conduct resulting in no Injury is not a crime of child abuse (10th Cir.) **12**

■ **JURISDICTION**

► Determination required for a waiver of inadmissibility is an unreviewable discretionary decision (10th Cir.) **13**

■ **WAIVER**

►Reliance is not a requirement in retroactivity analysis of 212(c) (9th Cir.) **10**

Inside

3. Further Review Pending
4. Summaries of Court Decisions
9. Topical Parentheticals
12. DHS implements DOMA ruling

Use Of Pre-1988 Convictions as Aggravated Felonies For Purpose of Removal Is Impermissibly Retroactive

In ***Zivkovic v. Holder***, __F.3d __, 2013 WL 3927587 (7th Cir. July 31, 2013)(*Wood,* Wiiliams, Easterbrook (dissenting)), the Seventh Circuit held that it would be impermissibly retroactive to deport petitioner on the basis of having been convicted of aggravated felonies, because those convictions predated the Anti-Drug Abuse Act of 1988 when the "aggravated felony" removal ground was added.

The petitioner, a Serbian national, was admitted to the United States as an LPR in 1966. In 1976 he pleaded guilty to the Illinois crime of burglary, and in 1978, following a jury trial, he was convicted of attempted rape and sentenced to 4 to 12 years in prison. On November 6, 2010, he was convicted, also in Illinois, of criminal trespass to a residence.

When placed in removal proceedings as an alien convicted of aggravated felonies and CIMTs, petitioner conceded his deportability but sought INA §212(c) relief. The IJ determined that petitioner's 1976 and 1978 convictions were aggravated felonies and the 2010 conviction qualified as a crime of violence, and denied the § 212(c) relief. On appeal, the BIA, applying *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998), affirmed the IJ's determination and also found it unnecessary to reach the CIMTs charge. In *Lettman*, the BIA had held that an alien convicted of an aggravated felony was deportable regardless of when the conviction occurred.

The Seventh Circuit preliminary held that it did not owe *Chevron* defer-

(Continued on page 18)

The Continuing Viability of *Auer* Deference

Last term the Supreme Court decided *Decker v. Nw. Envtl. Def. Ctr.*, __ U.S. __, 133 S. Ct. 1326, 1338-44 (2013), in which two Justices suggested reconsideration, and one other Justice called for the abrogation, of the rule applying *Chevron*-type deference to agency interpretations of regulations.

In what is generally referred to as *Auer* deference, an agency interpretation of an ambiguous regulation is controlling unless its reading is "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Under this formulation of deference, "an agency's interpretation need not be the only possible reading of a regulation — or even the best one — to prevail." *Decker,* 133 S. Ct. at 1337. Rather, similar to *Chevron* deference, an agency interpretation of an ambiguous regulation survives judicial review so long as it is reasonable and, ultimately, not inconsistent with the relevant statute. *See Fed. Express Corp. v. Holowecki,* 552 U.S. 389, 397 (2008); *see also United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999); *Elgin Nursing and Rehab. Ctr. v. U.S. Dep't of Health and Human Servs.*, 718 F.3d 488, 493

(Continued on page 2)

The Continuing Viability of *Auer* Deference

(Continued from page 1)
(5th Cir. 2013) ("Agencies receive even greater deference under . . . *Auer* than they would under *Chevron* . . . [because an agency has] greater expertise and familiarity . . . with respect to the history and content of its own enacted rules.").

Notably, in addition to this ordinary boundary of agency action, namely, the foregoing concept of *Chevron*-type review, the Supreme Court has stated that *Auer* deference is "unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. Smithkline Beecham Corp.*, __U.S. __, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks omitted); *accord Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006) (no *Auer* deference where regulation did "little more than restate the terms of the statute itself"). Thus, *Auer* deference may not apply "when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating position or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack." *Smithkline Beecham Corp.*, 132 S. Ct. at 2166-67 (internal citations, quotation marks, and alteration omitted). Still, absent evidence of such arbitrary action, an agency's interpretation of a regulation — even when advanced in a legal brief — is entitled to *Auer* deference. *See Chase Bank USA, N.A. v. McCoy*, __ U.S. __, 131 S. Ct. 871, 880-81 (2011).

In contrast to *Chevron* deference, as that standard was enunciated in *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984),* the rule of law founding *Auer* deference entered the legal consciousness much earlier and without controversy. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Supreme Court pronounced, without explanation, that an agency interpretation of a regulation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." According to several commentators, this rule of law largely went unquestioned "perhaps because of the common sense idea that an agency is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule." John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 614 (1996) (internal quotation marks omitted). Serious doubts relating to the wisdom of *Auer* deference only arose several decades after *Seminole Rock*. *See, e.g., id*. at 615-17 (citing the dissents in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), and *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995)).

The Supreme Court has stated that *Auer* deference is "unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question."

Most recently, in last term's decision in *Decker*, the Supreme Court deferred to the EPA's interpretation of a regulation determining which activities required a permit under the Clean Water Act. *See* 133 S. Ct. at 1336-38. Although the majority opinion did not address the validity of *Auer* deference, Justice Scalia, in a partial dissent, objected to the continued application of the doctrine. *See id*. at 1339-44. Underlying Justice Scalia's objections to *Auer* deference was the concern that the doctrine "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Id.* at 1342. Justice Scalia primarily offered four points in support of abrogating *Auer* deference: (1) the doctrine was adopted without persuasive explanation for its existence, *id*. at 1339-40; (2) the rationale supporting the doctrine that the agency would "have some special insight into [the regulation's] intent when enacting it" was beside the point because courts "are bound *by what [the regulations] say*, not by the unexpressed intention of those who made them," *id.* at 1340 (emphasis in original); (3) while agency expertise should be used to formulate regulations, such expertise should not be used to re-interpret those regulations to essentially implement —without notice-and-comment rulemaking — new policies of successor administrations, *see id*.; and (4) the doctrine created an incentive for agencies to enact vague regulations "so as to retain a 'flexibility' that [would] enable [a subsequent] 'clarification,'" *id.* at 1340-41 ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.").

Notably, Justice Scalia's last point was previously suggested in a dissent filed by Justice Thomas and joined by Justices Stevens, O'Connor, and Ginsburg. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). There, Justice Thomas opined that "[i]t is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Id.* at 525. Justice Scalia's criticism of *Auer* deference, then, was not merely a pass-

(Continued on page 19)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

On June 24, 2013, the Supreme Court granted the government's petition for a writ of certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio, et al., v. Mayorkas, et al.***, 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argues that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the BIA reasonably interpreted INA § 203(h)(3).

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

Asylum — Corroboration

On December 11, 2012, an *en banc* panel of the Ninth Circuit heard argument on rehearing in ***Oshodi v. Holder***. The court granted a *sua sponte* call for *en banc* rehearing, and withdrew its prior published opinion, 671 F.3d 1002, which declined to follow, as *dicta*, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed *en banc* supplemental briefs.

Contact: John W. Blakeley, OIL
☎ 202-514-1679

Convictions – Modified Categorical Approach

On January 4, 2013, the government filed a petition for panel rehearing in ***Aguilar-Turcios v. Holder***, 691 F.3d 1025 (9th Cir. 2012), in which the Ninth Circuit applied *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), and held that the alien's convictions did not render him deportable. The rehearing petition argues that the court should permit the agency to address other grounds for removal on remand. In a supplemental brief on July 11, 2013, the government argued that the Supreme Court's ruling in *Descamps v. United States* did not alter the need for remand to the BIA.

Contact: Bryan Beier, OIL
☎ 202-514-4115

Convictions — Relating to a Controlled Substance

After oral argument before a panel of the Second Circuit in ***Rojas v. Holder***, No. 12-1227, the court *sua sponte* ordered *en banc* rehearing on January 23, 2013. The case presents the issue of whether a conviction for possession of drug paraphernalia under 35 Pa. Stat. Ann. 780-113(a)(32) categorically is a conviction of a violation of a law of a State relating to a controlled substance under INA § 237 (a)(2)(B)(i). *En banc* oral argument was heard on May 29, 2013.

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

Aggravated Felony — Theft v. Fraud/ Deceit

Following oral argument in June 2013, the Third Circuit *sua sponte* ordered initial *en banc* hearing in ***Al-Sharif v. USCIS***, No. 12-2767, which implicates the question of whether the court should overrule *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004), as well as the impact of the Supreme Court's decision in *Kawashima v. Holder*, 132 S. Ct. 1166 (2012). *Nugent* held that when a conviction involves both theft and fraud or deceit, to be an aggravated felony under the INA, it must meet the requirements of both INA §§ 101(a)(43)(G) (theft) and (a)(43)(M)(i) (fraud or deceit involving loss to victim exceeding $10,000). The government supplemental brief arguing that Nugent should be abandoned or overruled was filed on August 14, 2013.

Contact: Tim Belsan
☎ 202-532-4596

BIA Standard of Review

Oral argument on rehearing before a panel of the Ninth Circuit has been set for September 9, 2013, in ***Izquierdo v. Holder***, 06-74629, addressing the question of whether the Board the engaged in impermissible fact-finding when it ruled that the alien witnessed a human rights crime and made no effort to prevent it.

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

Ordinary Remand Rule

The Ninth Circuit has ordered the alien to respond to the government's petition for panel rehearing in ***Amponsah v. Holder***, 709 F.3d 1318. The rehearing petition argues that the panel violated the ordinary remand rule when it rejected as unreasonable under *Chevron* step-2 the BIA's blanket rule against recognizing state *nunc pro tunc* adoption decrees entered after the alien's 16th birthday .

Contact: Patrick Glen, OIL
☎ 202-305-7232

Standard of Review – Nationality Rulings

The Ninth Circuit ordered the government to respond to the alien's petition for *en banc* rehearing challenging ***Mondaca-Vega v. Holder***, 718 F.3d 1075, which held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same. The government response was filed August 13, 2013.

Contact: Katherine Goettel
☎ 202-532-4115

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Petitioner Ineligible for Asylum Based on Possible Female Genital Mutilation of His Daughters

In ***Camara v. Holder***, __ F.3d __, 2013 WL 3836268 (1st Cir. July 26, 2013) (*Lynch*, Torruella, Howard), the First Circuit held that petitioner could not rely on the possible female genital mutilation of his U.S. daughters in Guinea to meet his burden of proof for asylum and related applications.

The petitioner, a native of Senegal and a citizen of Guinea, entered the United States on May 1, 1999, as a visitor with permission to remain for five months. He did not leave. When placed in removal proceedings as an overstay, he sought withholding of removal and CAT based on his future opposition to the possible FGM of his U.S. citizen daughters if he took them with him to Guinea.

The IJ and BIA determined that petitioner had not established past persecution or the likelihood of future persecution by his family or by members of his tribe. The BIA observed that, although petitioner had introduced evidence that FGM was widespread in Guinea, that evidence did not establish a threat of harm rising to the level of persecution to him in particular. In addition, the BIA agreed with the IJ that the evidence on the record did not support a finding that relocation within Guinea would be unreasonable. Finally, the BIA held that, insofar as petitioner's claim was predicated upon a fear of his daughters being subjected to FGM, the BIA had already determined in *Matter of A–K–*, 24 I&N Dec. 275 (BIA 2007), that such a fear is, by itself, not a basis for withholding of removal.

In upholding the denial of withholding the First Circuit rejected *inter alia*, petitioner's contention that the threat of FGM to his daughters constituted a threat of "direct" persecution to him in the form of psychological injury. "[F]ear that a petitioner's children will be subjected, if they accompany the parent, to FGM is not in itself a basis for immigration relief to the petitioner," said the court. Although in *Matter of A-K-*, the BIA indicated that in "cases where a person persecutes someone close to an applicant . . . with the intended purpose of causing emotional harm to the applicant . . . the persecution would not be 'derivative,' as the applicant himself would be the target of . . . emotional persecution," here, explained the court, the alleged risk of persecution was "derivative." The court also held that petitioner could relocate within Guinea to avoid harm.

"Fear that a petitioner's children will be subjected, if they accompany the parent, to FGM is not in itself a basis for immigration relief to the petitioner."

Contact: Jason Wisecup, OIL
☎ 202-532-4317

First Circuit Holds Asylum Applicant Failed to Establish Persecution Based on Future IUD Insertion or Speculative Desire to Have More Children In Light of Objective Evidence To the Contrary

In ***Lin v. Holder***, __ F.3d __, 2013 WL 3798204 (1st Cir. July 23, 2013) (*Lynch*, Lipez, Thompson), the First Circuit affirmed the BIA's decision vacating an IJ's decision to grant asylum where there was no individualized or objective evidence establishing that the possible insertion of an intra-uterine device (IUD) or refusal to its insertion would result in persecution.

The petitioner, a native and citizen of China, entered the United States in 2001, on a fiancée visa, and later filed an untimely affirmative application for asylum, withholding of removal, and CAT protection. After petitioner was placed in removal proceedings, the IJ granted her asylum application because she would, at minimum, undergo an IUD insertion that would limit her "freedom to determine family size" by preventing her from having more children. The BIA reversed.

The First Circuit held that the BIA did not err in reversing the asylum grant because there was no evidence that aggravating circumstances accompanied the IUD insertion, such that it would constitute persecution. The court also rejected petitioner's fear of persecution based on a mere "wish" to have more children because it was too speculative.

Contact: Virginia Lum, OIL
☎ 202-616-0346

First Circuit Awards EAJA Fees Incurred During Post-Remand Administrative Proceedings

In *Castañeda-Castillo v. Holder*, __ F.3d __, 2013 WL 3742447 (1st Cir. July 17, 2013) (*Torruella*, Ripple (by designation), Lipez), the First Circuit held that an alien may recover EAJA fees incurred during post-remand administrative proceedings where the court remands the case to the agency for further proceedings, the court retains jurisdiction over the case pending remand, and the administrative proceedings are so "intimately related" to the judicial proceedings so as to be considered part of the same "civil action."

However, the court declined to award EAJA fees incurred during a prior appeal (or during the post-remand administrative proceedings following that appeal) because the court did not retain jurisdiction in that case pending remand and the EAJA request was consequently untimely with respect to that civil action, and it therefore requested a new itemized statement of hours and expenses. The court ruled that its

(Continued on page 5)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 4)
judgment did not become final until it issued its final judgment dismissing the case as moot following the completion of the post-remand administrative proceedings. The court further declined to award enhanced fees, concluding that the case did not require "distinctive knowledge" or "specialized skill."

Contact: Matt Crapo, OIL
☎ 202-353-7161

■ **First Circuit Holds No Abuse of Discretion in BIA's Conclusion That Petitioner Neither Established Prima Facie Relief Eligibility Nor Materially Changed Conditions in Guatemala**

In ***Jutus v. Holder***, __ F.3d __, 2013 WL 3742485 (1st Cir. July 17, 2013) (*Howard*, Lipez and Thompson), the First Circuit ruled the BIA did not abuse its discretion in concluding the petitioner failed to establish either prima facie eligibility for asylum or materially changed conditions in Guatemala sufficient to support reopening.

The petitioner entered the United States without inspection on March 3, 1994. In March of 1998, he was placed removal proceedings for being present in the country without having been admitted or paroled. Petitioner then sought asylum, withholding, and CAT protection claiming that he feared torture by guerilla forces in Guatemala due to his father's service in the military and subsequent work in the civil patrol.

An IJ determined that petitioner was ineligible for asylum finding that the guerilla violence he experienced as a child did not amount to the level of "persecution or was inflicted on account of race, religion, nationality, membership in a particular social group or political opinion." The IJ also denied CAT protection for lack of evidence of torture or government acquiescence. The BIA summarily affirmed. On November of 2011, petitioner filed a motion to reopen claiming changes in country conditions, namely, that the country had been taken over by criminal gangs and drug traffickers whom government forces have failed to control. He also contended that as a long-time resident of the United States he would become an immediate target for extortion. The BIA denied the motion.

The First Circuit upheld the BIA's finding that that petitioner had failed to establish a prima facie case for asylum. Specifically, the court found no support for the petitioner's assertion that Guatemalan criminal gangs might be aided by the government. Moreover, said the court, even assuming *arguendo* that Guatemalans gangs may be aided by the government, "fear of financial extortion does not qualify as persecution on the basis of a statutorily protected ground. We have consistently rejected the theory that criminal exploitation motivated by greed or wealth, including that based on one's status as a former inhabitant of the United States, triggers statutory protection."

"We have consistently rejected the theory that criminal exploitation motivated by greed or wealth, including that based on one's status as a former inhabitant of the United States, triggers statutory protection."

The court also concluded that evidence of growing crime rates in Guatemala provided no new and material evidence that petitioner would face persecution "on account of" a protected ground. "Evidence of 'widespread violence . . . affecting all citizens' is not enough to establish persecution on a protected ground," said the court.

Contact: Ada E. Bosque, OIL
☎ 202-514-0179

■ **Evidence of Continuing Violence and Crime in Mexico Is Insufficient to Establish Materially Changed Conditions**

In ***Lopez v. Holder***, __ F.3d __, 2013 WL 3497691 (1st Cir. July 15, 2013) (*Lynch*, Howard, Thompson), the First Circuit determined that the BIA did not abuse its discretion because petitioner's evidence regarding lawlessness and corruption failed to establish materially changed conditions and instead reflected ongoing crime and violence in Mexico since the conclusion of his underlying removal proceedings.

The petitioner, a Mexican citizen, entered the United States as a visitor on June 23, 2001, but did not depart when his visa expired. When placed in removal proceedings in 2005, he sought asylum and withholding, claiming that he feared persecution due to his involvement in various community improvement projects in 1984-85. Apparently his charges for these projects were lower than a competitor, Martinez-Trejo, who subsequently threatened petitioner and killed his brother. The police arrested and convicted Martinez-Trejo. However, following his release from prison fifteen years later, petitioner again feared for his life and left Mexico. The IJ and BIA determined that petitioner's asylum claim was untimely, and that he had not shown a claim of persecution on account of a protected ground.

Petitioner did not seek judicial review, but two years later filed a motion to reopen claiming changed country conditions and also asking for *sua sponte* reopening. He claimed that his daughter, who had returned to Mexico, had her car stolen and was told by the robbers that they were waiting for her father. The BIA denied the motion rejecting petitioner's argument that changed conditions in Mexico materially affected his case. It noted that the auto theft gave no indication that the incident was attributable to Martinez–Trejo or his previous threat against petitioner.

The First Circuit found that "[t]he

(Continued on page 6)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 5)

BIA was within its discretion in finding that none of the evidence introduced calls into question its and the IJ's earlier determination that petitioner's fear is one of personal retaliation, not one of persecution on account of a protected ground." In addition, relying on *Stone v. INS,* 514 U.S. 386 (1995), the court refused to consider the petitioner's challenge to the agency's earlier decision denying his asylum application.

Contact: Brendan Hogan OIL
☎ 202-305-0189

■ **First Circuit Holds Connecticut Second-Degree Larceny from the Person Is a Categorical Theft Offense Aggravated Felony**

In ***Lecky v. Holder,*** __ F.3d __, 2013 WL 3388492 (1st Cir. July 9, 2013) (*Howard,* Selya, Thompson), the First Circuit held that a second-degree larceny conviction for taking property from the person of another under Connecticut General Statutes § 53a-123(a)(3) is categorically a theft offense aggravated felony.

The petitioner entered the United States in 1996 as a lawful permanent resident. In June 2006, the state of Connecticut charged petitioner with committing robbery and criminal assault for taking property from an individual outside of a Dunkin' Donuts in Stamford, Connecticut. The state later changed the charged offense to second-degree larceny, pursuant to Conn. Gen. Stat. § 53a–123 (a)(3), to which petitioner pleaded guilty under the *Alford* doctrine in November 2006. Although petitioner was seventeen at the time, he was convicted as an adult and sentenced to two years and a day of incarceration and five years of special parole. DHS then initiated removal proceedings against petitioner alleging that petitioner was removable as an alien convicted of an aggravated felony, specifically a theft offense. The IJ and BIA rejected petitioner's contention that he should be treated as juvenile offender for immigration purposes, and that an *Alford* plea cannot subject an alien to removal.

The First Circuit found that the Connecticut statute met the definition of a theft offense and did not find it necessary to determine whether it also qualified as a crime of violence. The court agreed with the BIA's holding in *Matter of V–Z–S–*, 22 I&N Dec. 1338 (BIA 2000), that a theft offense requires the intent to deprive an owner of property rights, but such deprivation need not be permanent nor total. The court also reaffirmed its prior precedents that an alien's conviction by a state court as an adult is binding for immigration purposes, even if he was a juvenile at the time of conviction.

The court concluded that the husband's fear of future harm was not subjectively reasonable because he had left Indonesia and returned three times before coming to the United States, and his wife's fear of harm was not objectively reasonable.

Contact: Matthew B. George, OIL
☎ 202-532-4496

■ **First Circuit Rules Past Incidents of Harm Too Isolated to Constitute Persecution**

In ***Ang v. Holder,*** __ F.3d __, 2013 WL 3466210 (1st Cir. July 10, 2013) (*Howard*, Lynch, Thompson), the First Circuit upheld the denial of asylum to a couple from Indonesia.

The petitioners, husband and wife, and citizens of Indonesia, entered the United States on March 29, 2007, as nonimmigrant visitors, but failed to depart when their visas expired. In late 2007 petitioners applied to DHS for asylum, but that application was not granted and DHS placed them in removal proceedings, where they renewed their claims. The husband testified that he had been subject to persecution due to his Chinese ethnicity, while the wife claimed fear of persecution because she had converted from Islam to Christianity. The IJ and the BIA found no past persecution or well-founded fear of future persecution.

In affirming the denial of asylum, the court held that the husband failed to establish past persecution in Indonesia because his incidents of past harm occurred sixteen years apart and were thus too isolated to constitute persecution. The court also determined that the beating of the wife by her family did "not rise to the level of harm that amounts to persecution." Moreover, the court noted that there was no evidence of government involvement or acquiescence in the wife's beating by family members. Lastly, The court concluded that the husband's fear of future harm was not subjectively reasonable because he had left Indonesia and returned three times before coming to the United States, and his wife's fear of harm was not objectively reasonable because she failed to show that the Indonesian authorities could not or would not protect her.

Contact: Janette Allen, OIL
☎ 202-532-4095

■ **Asylum Applicant Failed to Show Changed Country Conditions in China for Pro-Democracy Activists**

In ***Ming Chen v. Holder***, __ F.3d __, 2013 WL 3388490 (1st Cir. July 9, 2013) (Lynch, *Howard*, Thompson), the First Circuit held that the BIA did not abuse its discretion in denying the petitioner's untimely motion to reopen, based on membership in the Chinese Democracy Party (CDP).

(Continued on page 7)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

The petitioner, a citizen of the PRC, entered the United States with a fraudulent passport in June 1997. An IJ denied petitioner's asylum claim based on violation of that country's the one-child policy and the BIA affirmed in 2002. He did not seek review of that decision. In 2011 petitioner filed a motion to reopen his removal proceedings. Attached to this motion to reopen was a successive application for asylum and withholding of removal based on his membership in the CDP. In March 2012, the BIA denied petitioner's motion to reopen as untimely, concluding that he had not demonstrated changed country conditions that would exempt his motion from the deadline imposed in the regulations.

The court held that the BIA did not abuse its discretion in denying petitioner's motion. "Any risk that Chen faces in China is not because of changes within that country, but due to his personal decision to engage in political activism" after he was ordered removed, said the court. Petitioner chose to join the CDP with the understanding that he could not remain in the U.S. legally and would likely be returned to China, explained the court. The court also rejected petitioner's contention that China had began to "crackdown" on CDP members, holding that the evidence showed that the treatment of pro-democracy activists over the relevant time period was consistent, even if negative.

Contact: Lori B. Warlick, OIL
☎ 202-532-4315

■ **First Circuit Holds Petitioner Abandoned Application for Relief by Missing Filing Deadline**

In ***Moreta v. Holder***, __ F.3d __, 2013 WL 3497687 (1st Cir. July 13, 2013) (*Howard*, Lipez, Lynch), the First Circuit held that the agency did not abuse its discretion in deeming petitioner's application for relief from removal abandoned where he failed to file the application in accordance with a filing deadline set by the IJ.

The court noted that IJs are invested with "broad authority to impose deadlines for court filings. This authority reflects the government's strong interest in the orderly and expeditious management of immigration cases." "[W]e have held that an IJ does not abuse her discretion when she deems the noncitizen to have abandoned an application for relief by missing a filing deadline without good cause," said the court.

Contact: Drew Brinkman, OIL
☎ 202-305-7035

SECOND CIRCUIT

■ **Second Circuit on Rehearing Reaffirms that New York Third Degree Criminal Sale of a Controlled Substance Is an Aggravated Felony**

In ***Pascual v. Holder***,__ F.3d __, 2013 WL 3388382 (2d Cir. July 9, 2013) (Jacobs, Kearse, Carney) (*per curiam*), the Second Circuit granted the petitioner's rehearing petition "to consider the issues raised" but adhered to its previous decision, 707 F.3d 403 (2d Cir. 2013), reaffirming that New York Penal Law § 220.39 (controlled substances sales) is categorically an aggravated felony. The court distinguished *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008) (statute that included "mere offers to sell" not categorically an aggravated felony), because the New York statute requires the intent and ability to follow through on the transaction. The court also distinguished *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) ("[s]haring a small amount of marijuana for no remuneration" is not an aggravated felony), because the statute criminalizes the sale of narcotics.

Contact: Benjamin Mark Moss, OIL
☎ 202-307-8675

SEVENTH CIRCUIT

Petitioner Failed to Demonstrate Changed Country Conditions in China to Excuse Untimely Motion to Reopen Based on Conversion to Christianity

In ***Gao v. Holder***, __ F.3d __, 2013 WL 3481355 (7th Cir. July 12, 2013) (*Wood*, Manion, Sykes), the Seventh Circuit held that the BIA did not abuse its discretion in denying the petitioner's untimely motion to reopen.

The petitioner, a citizen of China, entered the United States without inspection in 2005. Shortly after he arrived, his wife (back in China) gave birth to the couple's second child — a daughter — and was sterilized. Petitioner then sought asylum on the ground that his wife's sterilization amounted to persecution. The IJ denied asylum holding that petitioner had not personally suffered any harm in China. The BIA dismissed petitioner's appeal, citing its rule that spouses of persons subjected to forced sterilization no longer qualify automatically for asylum. Subsequently, petitioner filed an untimely (one-day late) motion to reopen, claiming that he feared religious persecution if he was returned to China. The BIA denied the motion finding that his conversion to Christianity reflected a change in his personal circumstances and, in itself, did not show changed circumstances in China.

The court agreed that he failed to demonstrate changed country conditions in China based on his conversion to Christianity after arriving in the United States. The court concluded that although petitioner's evidence demonstrated worsening conditions for Christians in China, the evidence predated his merits hearing and was previously available.

Contact: Tracie N. Jones, OIL
☎ 202-305-2145

(Continued on page 8)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

■ **Asylum Applicants Failed to Establish Past Persecution, Nexus to a Protected Ground, Unreasonableness of Relocation, or Prejudice**

In ***Bathula v. Holder***, __ F.3d__, 2013 WL 3833257 (7th Cir. July 25, 2013) (*Ripple,* Tinder, Zagel (by designation)), the Seventh Circuit upheld the denial of asylum and withholding, and the denial of a motion to reopen, to a married couple from India.

The BIA "did not irrationally deny their motion to reopen on the basis of ineffective assistance because the petitioners have not established prejudice from any of counsel's actions."

The petitioners originally applied for asylum in separate affirmative applications before the Asylum Office. They claimed that their family had been subjected to persecution at the hands of a local criminal group after the husband testified against certain of its members on trial for murder. The asylum applications were not granted and they were placed in removal proceedings, where they together renewed their request for asylum, withholding, and CAT. The IJ denied relief and ordered petitioners removed to India, and the BIA adopted and affirmed the IJ's decision. Thereafter, they sought reopening before the BIA on the basis of ineffective assistance of counsel. The BIA denied the motion finding no prejudice.

The court held that the petitioners failed to establish past persecution by the land mafia in India. "The character of the threats and the accompanying menacing behavior in the present case, even when we account for the fact that they were carried out by a group with the ability and will to physically harm or kill its opponents, are simply not such as would require the agency to conclude that they amount to persecution," said the court. Additionally, the court found that the BIA's decision that the petitioners failed to establish that any harm befell them on account of their membership in two possible social groups: "active, law-supporting citizens" and "those willing to participate in the legal process, despite great personal risk, to ensure justice against criminal elements" was supported by substantial evidence. The court also found a lack of nexus on petitioner's claim of persecution on account of political opinion.

Finally, the court found that the BIA "did not irrationally deny their motion to reopen on the basis of ineffective assistance because the petitioners have not established prejudice from any of counsel's actions."

Contact: Katharine Clark, OIL
☎ 202-305-0095

■ **Seventh Circuit Rules that 8 C.F.R. § 245.1(i) Is Invalid and Concludes That a K-4 Non-Immigrant May Adjust Status as a Result of Parent's Marriage to United States Citizen Regardless of the Alien's Ability to Demonstrate Step-parent Relationship**

In ***Akram v. Holder*** __ F.3d __, 2013 WL 3455692 (7th Cir. July 9, 2013) (Bauer, *Kanne,* Tinder), the Seventh Circuit ruled that in *Matter of Akram*, 25 I&N Dec. 874 (BIA 2012), the BIA incorrectly concluded that INA § 245(d) coupled with 8 C.F.R. § 245.1(i) requires K-4 non-immigrant visa holders to adjust status only as a child of the United States citizen who originally filed the petition.

Petitioner's mother, a citizen of Pakistan, married abroad a U.S. citizen, Farhan Siddique. Siddique then applied for K visas for his wife and her two daughters. He also filed visa petitions (I-130) on their behalf. Petitioner's mother received a K–3 visa and her I–130 petition was granted at a later date. Petitioner's younger sister received a K–4 visa and also had her I–130 petition granted. Petitioner also received a K-4 visa, but subsequently her I–130 petition was denied. USCIS found that, although petitioner was her mother's "minor child" for K-visa purposes, she was not Siddique's "child" for I–130 purposes because she is his stepdaughter, not his biological daughter.

A stepchild qualifies as a "child" for immigration purposes only if she "had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." INA § 101(b)(1)(B). Because petitioner was already eighteen when her mother married Siddique, USCIS found that she was too old to be his "child," even though she was still her mother's "minor child." As a result, USCIS determined that petitioner could not show a family relationship with Siddique, and the I–130 petition that he filed on her behalf was denied on January 23, 2006. Petitioner was subsequently placed in removal proceedings where she challenged the agency's interpretation. The BIA concluded in a precedential decision, that petitioner could not adjust status as Siddique's "child" and that it lacked the authority to declare 8 C.F.R. § 245.1(i) unconstitutional or *ultra vires.*

The court disagreed with the BIA's interpretation. Applying traditional tools of statutory construction, the court found that Congress intended to give K–4s like petitioner the opportunity to adjust status and join their parents in the United States. Accordingly, the court held that insofar as the regulations required K–4s to adjust status via a relationship to a U.S. citizen instead of merely "as a result of the marriage" of their parents, "8 C.F.R. §

(Continued on page 9)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

245.1(i) and the BIA's decision applying that rule are invalid." Consequently, because the court's holding disposed of the case, it saw no need not address petitioner's alternative argument that 8 C.F.R. § 245.1(i) is also unconstitutional.

Contact: Lisa Damiano, OIL
☎ 202-616-4213

■ **Seventh Circuit Vacates and Remands for Consideration of Evidence Not in the Administrative Record**

In ***Zheng v. Holder***, __ F.3d __, 2013 WL 3466778 (7th Cir. July 11, 2013) (Flaum, Hamilton, *Feinerman* (by desig.)), the Seventh Circuit vacated the decision of the BIA and remanded for consideration of evidence that was not submitted to the agency. The court concluded that the asylum applicant, from China's Fujian Province, was entitled to have the evidence discussed in *Ni v. Holder*, 715 F.3d 620 (7th Cir. 2013), and *Chen v. Holder,* 715 F.3d 207 (7th Cir. 2013), considered in her case. In those two cases, the court determined that the BIA had overread and placed undue reliance on the 2007 Country Profile, and also that it had ignored other materials, such as the Congressional–Executive Commission on China Annual Reports indicating that Fujian authorities enforce China's one-child policy far more vigorously than the BIA had supposed.

Contact: Andrew Oliveira, OIL
☎ 202-305-8570

■ **Seventh Circuit Upholds Terrorism Bar Against Eritrean National and Declines to Intervene in Agency's Terrorism Waiver Process**

In ***FH-T v. Holder***, __ F.3d __, 2013 WL 3800252 (7th Cir. July 23, 2013) (*Flaum*, Sykes, Bauer), the Seventh Circuit upheld the BIA's application of the terrorism bar against the petitioner because he provided material support to the Eritrean People's Liberation Front (EPLF), a Tier III terrorist organization.

Petitioner fled Eritrea and applied for asylum in the United States, claiming that he had been persecuted by the Eritrean government for complaining about the government-run labor conscription program. The IJ denied petitioner's asylum application because (1) he was not credible, (2) any persecution was not on account of a political opinion, and (3) he worked for the EPLF for nine years, thus triggering the material support bar. The BIA affirmed the IJ's material support finding and did not reach the merits of petitioner's claims.

The court refused to intervene in the agency's process for considering discretionary waivers of the terrorism bar because nothing in the statute forced the government to consider a terrorism waiver at any particular time.

The Seventh Circuit rejected FH-T's claim that he qualified for a statutory "knowledge exception" to the material support bar and upheld the BIA's decision. The court also refused to intervene in the agency's process for considering discretionary waivers of the terrorism bar because nothing in the statute forced the government to consider a terrorism waiver at any particular time, or required "the Board to adjudicate the merits [of a removal case] in any particular fashion."

Contact: Ethan Kanter, OIL
☎ 202-616-9123

■ **Seventh Circuit Upholds Denial of Asylum and Related Relief, Addresses Finality of BIA Decisions that Order Remand Solely for Grant of Voluntary Departure**

In ***Almutairi v. Holder***, __ F.3d __, 2013 WL 3481356 (7th Cir. July 12, 2013) (Flaum, *Wood*, Hamilton), the Seventh Circuit ruled that it lacks jurisdiction to address the denial of asylum as untimely, and refused to disturb the denial of withholding due to petitioner's failure to challenge the agency's finding that he will not be harmed by the Kuwait government or a group the government is unwilling or unable to control. The court also ruled that an order of removal denying all substantive relief is final for purposes of judicial review, even where it remands for the purpose of re-issuing a grant of voluntary departure. However, it stated that the best course of action in such cases is to stay proceedings on any petition for review until the voluntary departure issue is resolved.

Contact: Colin Tucker, OIL
☎ 202-514-0566

EIGHTH CIRCUIT

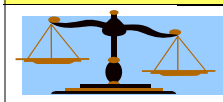
■ **Eighth Circuit Holds Kansas Conviction for Possession of Drug Paraphernalia Is a Conviction Relating to a Controlled Substance**

In ***Mellouli v. Holder***, __ F.3d __, 2013 WL 3388052 (8th Cir. July 9, 2013) (Riley, *Loken*, Shepherd), the Eighth Circuit concluded that the BIA's application of the "relates to" provision in INA § 237(a)(2)(B)(i), was reasonable and entitled to deference.

The petitioner, a citizen of Tunisia and a lawful permanent resident, was convicted for violating a Kansas drug paraphernalia statute. Petitioner contended that he was not removable because the state court record of conviction did not identify the controlled substance underlying his state paraphernalia conviction.

(Continued on page 10)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)



Summaries Of Recent Federal Court Decisions

(Continued from page 9)

The court deferred to the BIA's interpretation in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009), where it had concluded that a state court drug paraphernalia conviction "relates to" a federal controlled substance because it is a crime "involving other conduct associated with the drug trade in general." The court found that the BIA's conclusion was "a reasonable interpretation of the term 'relating to,' a term that reflects congressional intent to broaden the reach of the removal provision to include state offenses having 'a logical or causal connection' to federal controlled substances." Accordingly, because the BIA correctly concluded that a conviction for violating the Kansas paraphernalia statute categorically related to a controlled substance within the meaning of § 1227(a)(2)(B)(i), the court found that the use of the modified categorical approach as urged by the petitioner unnecessary.

The BIA properly applied the "circumstances specific" approach to determine whether the "personal use" exception for marijuana was applicable to petitioner's conviction.

Additionally, the court held that the BIA properly applied the "circumstances specific" approach to determine whether the "personal use" exception for marijuana was applicable to petitioner's conviction.

Contact: Anthony P. Nicastro, OIL
☎ 202-616-9358

■ **Eighth Circuit Holds Petitioner Did Not Present Reviewable Question of Law Regarding His Untimely Asylum Application**

In ***Goromou v. Holder*** __ F.3d __, 2013 WL 3779976 (8th Cir. July 22, 2013) (*Smith*, Wollman, Murphy), the Eight Circuit ruled that an asylum applicant must prove either changed circumstances or extraordinary circumstances to excuse an untimely asylum application, but ultimately rejected the contention that the BIA conflated those standards.

The petitioner, a citizen of Guinea who was admitted to the United States on December 1, 2005, as a nonimmigrant government official to attend training with the United States Coast Guard in Connecticut. He was authorized to remain in the United States until July 19, 2006. On May 19, 2006, the United States Coast Guard Academy dismissed petitioner for academic and military aptitude deficiencies. Although he was ordered to depart the United States on May 22, 2006, and flight arrangements were made for him, petitioner instead moved to Minnesota and remained in the United States beyond July 19, 2006. On January 3, 2007, petitioner affirmatively filed an asylum application. He was subsequently placed in removal proceedings where he renewed his claim for asylum, withholding, and CAT protection.

The IJ determined that petitioner was ineligible for asylum because he had filed an untimely asylum application, but granted withholding of removal based on his claim of persecution on account of his ethnicity, religion, political opinion. The BIA ultimately affirmed the IJ's ruling, also finding that petitioner had not shown changed circumstances or extraordinary circumstances to excuse the untimely request for asylum.

The court held that it lacked jurisdiction over the BIA's determination that petitioner had not established an exception to the untimely asylum bar, and rejected petitioner's contention that the BIA required him to prove *both* the extraordinary and changed circumstances. The court explained that the agency clearly separately analyzed both exceptions. The court also rejected petitioner's challenge to whether he submitted "material" evidence supporting his claim for failure to raise a question of law or constitutional claim.

Contact: Kristofer McDonald, OIL
☎ 202-532-4520

NINTH CIRCUIT

■ **Ninth Circuit Holds that Reliance Is Not a Requirement in Retroactivity Analysis**

In ***Cardenas-Delgado v. Holder***, __ F.3d __, 2013 WL 3198491 (9th Cir. June 26, 2013) (*Hug, Jr.*, Farris, Leavy), the Ninth Circuit, relying on *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), overruled its prior precedent which required detrimental reliance to show that the repeal of the § 212 (c) was impermissibly retroactive. "[A]fter *Vartelas*, it is clear that someone seeking to show that a civil statute is impermissibly retroactive is not required to prove any type of reliance and that the essential inquiry is whether the new statute attaches new legal consequences to events completed before the enactment of the statute," said the court. The court rejected the government's contention that an alien, such as petitioner, who chose to go to trial and was convicted prior to IIRIRA's effective date is ineligible for § 212 (c) relief, cannot establish reasonable reliance on pre-IIRIRA law.

In applying *Vartelas* to petitioner, the court said that "[t]here can be no doubt that eliminating the possibility of discretionary relief would impose a serious new disability on Cardenas–Delgado. Like the petitioner in *Vartelas*, if Cardenas–Delgado is removed, his ability to be with his family will be severely restricted. His wife and three children are in the United States and he not only would be forced to leave them, but also would be forced to leave the country that has been his home for

(Continued on page 11)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

over thirty-five years. These facts, along with the fact that it appears that Cardenas–Delgado has not committed a crime in over twenty years, make it significantly more likely that he would, in fact, receive relief from removal if he is eligible for such relief."

Contact: Andrew Oliveira, OIL
☎ 202-305-8570

■ Ninth Circuit Holds that It Lacks Jurisdiction over the Petitioner's Unexhausted Procedural Due Process Claim

In ***Sola v. Holder***, __ F.3d __, 2013 WL 3215245 (9th Cir. June 27, 2013) (O'Scannlain, Paez, Ikuta) (*per curiam*), the Ninth Circuit held that petitioner failed to exhaust her procedural due process claim before the BIA. Petitioner claimed that her due process rights had been violated by her placement in removal proceedings without her husband, who was granted temporary protective status (TPS), and that prevented her from asserting her claims to derivative relief based on her husband's claims for cancellation of removal under NACARA and for asylum. The court found that because the BIA could have addressed the petitioner's claim and corrected the alleged denial of due process, it lacked jurisdiction to consider the unexhausted claim in the first instance.

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

■ Ninth Circuit Holds Regulation Establishing Expiration Date for Labor Certifications Not Impermissibly Retroactive

In ***Elim Church of God v. Harris***, __ F.3d __, 2013 WL 3455674 (9th Cir. July 10, 2013) (*Thomas,* Nguyen, Dearie (by designation)), the Ninth Circuit affirmed an order from a district court granting summary judgment in favor of the government in an action challenging the government's denial of a petition for alien worker filed on behalf of a youth pastor. The petition was denied for lack of a valid, unexpired labor certification. The court held that the Department of Labor's enforcement of a new regulation providing that the pastor's labor certification, although valid indefinitely when issued to the Church, now expired 180 days after the new regulation became final did not constitute an impermissible retroactive rule. The court further held that publication of the proposed and final rules in the Federal Register afforded adequate notice of the revision and that actual notice was not required.

Contact: Aram A. Gavoor, OIL-DCS
☎ 202-305-8014

"[L]ine-drawing decisions made by Congress or the President in the context of immigration and naturalization must be upheld if they are rationally related to a legitimate government purpose."

■ Child Status Protection Act ("CSPA") Does Not Apply to a Derivative Beneficiary of Special Rule Cancellation of Removal under NACARA

In ***Tista v. Holder***, __ F.3d __, 2013 WL 3368973 (9th Cir. July 8, 2013) (*Fernandez,* Callahan, Vance), the Ninth Circuit held that petitioner could not rely on the definition of "child" in the Child Status Protection Act (CSPA) to qualify as a derivative beneficiary under the NACARA because the plain language of CSPA makes no reference to NACARA applications.

The petitioner, a Guatemalan citizen, in 1999 applied for special rule cancellation of removal on the basis that he was so entitled because he was a child whose father had been granted special rule cancellation of removal under NACARA. However, the BIA determined that petitioner did not meet NACARA's definition of a child at the time that his father was granted relief, and that the CSPA did not apply to him.

The court rejected the petitioner's argument that Congress' failure to apply the CSPA to NACARA violated equal protection because Congress could rely on several rational bases for treating him differently than the child of an asylum applicant. "[L]ine-drawing decisions made by Congress or the President in the context of immigration and naturalization must be upheld if they are rationally related to a legitimate government purpose," said the court. Here, although petitioner claimed that Congress had no possible rational basis to deny CSPA protection to aliens situated similarly as petitioner, the court noted a number of "plausible bases" for the distinction.

Contact: Benjamin J. Zeitlin, OIL
☎ 202-305-0489

■ Ninth Circuit Holds Omission of Detail from a Naturalization Application Later Included in an Asylum Application Does Not Support an Adverse Credibility Determination

In ***Bassene v. Holder***, __ F.3d __, 2013 WL 3802302 (9th Cir. July 23, 2013) (*Pregerson*, Fletcher, Piersol (by designation)), the Ninth Circuit held that the petitioner's failure to mention details related to his asylum claim in a mistakenly-filed N-400 naturalization application did not constitute substantial evidence that he lacked credibility, as the naturalization application "was not designed to elicit information about persecution."

Petitioner, a native and citizen of Senegal, was admitted to the United States on a cultural exchange visa. Subsequently, petitioner mistakenly filed an N-400 citizenship

(Continued on page 12)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

application in an attempt to seek asylum and later filed an asylum application. The IJ found petitioner not credible because, while he testified consistently with his asylum application, petitioner omitted any mention of an arrest and detention from the statement he attached to his N-400 application, in which generally discussed violence in his home region. The BIA adopted the IJ's adverse credibility finding.

The Ninth Circuit reversed the agency because the N-400 application was not designed to elicit information about persecution and the IJ had no reason to expect a detailed statement. The court also held that the IJ improperly speculated that petitioner should have known to include the information based on his level of education. Finally, the court rejected other inconsistencies related to petitioner's claim that he was never arrested for "breaking or violating any law" because he was only arrested after the military mistakenly identified him as a member of an armed militant group.

The court upheld the determination that changed country conditions did not excuse the untimeliness of the asylum application because the petitioner did not file within a reasonable period after the deterioration of conditions in Indonesia.

Contact: Andrew O'Malley, OIL
☎ 202-305-7135

■ **Ninth Circuit Holds Agency Erred by Failing to Consider Harm to Child as Persecution of Parents for Purposes of Withholding of Removal**

In ***Sumolang v. Holder***, __ F.3d __, 2013 WL 3821599 (9th Cir. July 25, 2013) (Paez, *Watford*, Kennelly (by designation)), the Ninth Circuit held that it lacked jurisdiction to review the agency's determination that the petitioners' asylum application was untimely and not excused by extraordinary circumstances because the determination rested on an underlying factual dispute. The court further upheld the determination that changed country conditions did not excuse the untimeliness of the asylum application because the petitioner did not file within a reasonable period after the deterioration of conditions in Indonesia. However, with regard to withholding of removal, the court determined that the agency erred by failing to consider whether the death of the petitioner's daughter constituted past persecution of the petitioner, where petitioner testified that the hospital staff denied treatment to his daughter because of his Chinese ethnicity and Christian religion.

Contact: Marshall Golding, OIL
☎ 202-616-4871

■ **Ninth Circuit Concludes Board Erroneously Engaged in Factfinding, then Holds Record Compels Conclusion Filipino Homosexual Entitled to Withholding of Removal**

In ***Vitug v. Holder***, __ F.3d __, 2013 WL 3814772, (9th Cir. July 24, 2013) (*Pregerson*, Fletcher, Nguyen), the Ninth Circuit held that the BIA failed to apply clear error review to the IJ's factual findings, and ignored other findings, when it overruled the IJ's decision that the Filipino petitioner had experienced past persecution and was more likely than not to face future persecution on account of his homosexuality.

Petitioner overstayed his tourist visa and, after being arrested for possession of methamphetamine, was placed in removal proceedings. The IJ found that petitioner was persecuted on account of his membership in the group "homosexual Filipino men," noting that he was beaten and robbed, harassed by the police, and denied employment. The IJ also found that the government failed to rebut the presumption of future persecution or torture. The BIA vacated the IJ's grant, observing that petitioner failed to prove past persecution and the IJ's finding that the government was unable or unwilling to protect petitioner was clearly erroneous.

The Ninth Circuit held that the BIA erroneously engaged in *de novo* review of the IJ's factual findings while ignoring other findings. The court declined to remand for the BIA to apply the correct standard of review because record evidence showed there were no changed country conditions regarding the treatment of homosexuals in the Philippines that would rebut the presumption of future persecution.

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

TENTH CIRCUIT

■ **Tenth Circuit Holds Criminally Negligent Conduct Resulting in No Injury Is Not a Crime of Child Abuse under INA § 237(a)(2)(E)(i)**

In ***Ibarra v. Holder***, __ F.3d __, 2013 WL 3490753 (10th Cir. July 1, 2013) (Murphy, *Seymour*, Holmes), the Tenth Circuit held that the BIA's interpretation of "crime of child abuse, child neglect, or child abandonment" in *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (2008), and *Matter of Soram*, 25 I&N Dec. 378 (2010), to include criminally negligent conduct resulting in no injury, was an impermissible interpretation of the federal statute.

The petitioner entered the United States from Mexico in 1985 at the age of four and is the mother of seven children, all U.S. citizens. Although her father was a lawful permanent resident, petitioner was never naturalized while he was alive. At the time of the proceedings before

(Continued on page 13)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

the IJ she had worked for the same employer for ten years. In 2004, petitioner pled guilty to one count of "child abuse — negligence — no injury," a class three misdemeanor, in violation of Colo. Rev. Stat. §§ 18–6 –401(1)(a), (7)(b)(II). Petitioner's children were unintentionally left home alone one evening while she was at work. The oldest child was ten at the time, and no child was injured.

The court held that because the majority of states in 1996, when Congress added "crimes against children" to INA § 237(a)(2), did not criminalize conduct committed with criminal negligence and resulting in no injury, the alien's child abuse conviction under the Colorado statute for acting criminally negligent in permitting a child to be unreasonably placed in a situation that posed a threat of injury to the child's life or health did not fit the generic federal definition of "crime of child abuse, child neglect, or child abandonment" in INA § 237(a)(2)(E)(i).

Contact: Lisa Morinelli, OIL
☎ 202-532-4522

■ **Tenth Circuit Rejects Challenge to BIA Regulation Deeming Appeals Abandoned if the Alien Departs the United States**

In *Montano-Vega v. Holder*, __ F.3d__, 2013 WL 3285584 (10th Cir. July 1, 2013) (Briscoe, *Gorsuch*, Matheson), the Tenth Circuit upheld the BIA's decision dismissing the petitioner's appeal under 8 C.F.R. § 1003.4 after he voluntarily departed the United States. Petitioner, who had a criminal record, sought permission to leave the country voluntarily to avoid the 10-year bar. The IJ denied the request and petitioner appealed to the BIA.

As the court explained, petitioner was then faced with a choice: "to continue to pursue the appeal he had to remain in the country. If he left, the BIA would deem his appeal abandoned as a matter of law under 8 C.F.R. § 1003.4. That, in turn, would leave him subject to a ten-year bar on readmission for aliens who have 'departed the United States while an order of removal was outstanding.' INA § 212(a)(9)(A)(ii)(II). By contrast, if he stayed in the country to pursue his appeal, he would quickly face another statutory ten-year bar applicable to aliens unlawfully present in the country for a year or more." In the face of this dilemma, petitioner chose to leave the United States. The court noted that "[a]dmittedly, no option — staying or going — held much attraction from his perspective. But neither is there any doubt that the choice he made bore a real and rationally attractive advantage to him, guaranteeing him that he'd have to face and seek a waiver from just one rather than potentially two statutory bars."

In an issue of first impression, the Tenth Circuit held that "the hardship determination required for a waiver of inadmissibility under § 212(h)(1)(B) is an unreviewable discretionary decision."

In dismissing the appeal, the court explained that its prior decision striking down 8 C.F.R. § 1003.2(d), the BIA departure bar regulation was not applicable to petitioner, whose case was dismissed under 8 C.F.R. § 1003.4. The court concluded that petitioner failed to show how 8 C.F.R. § 1003.4 similarly conflicted with the express terms of the statute and rejected petitioners' constitutional challenges.

Contact: Jamie Dowd, OIL
☎ 202-532-4214

■ **Determination Required for a Waiver of Inadmissibility Is an Unreviewable Discretionary Decision**

In *Munis v. Holder*, __ F.3d __, 2013 WL 3306406 (10th Cir. July 2, 2013) (Hartz, *Brorby,* Ebel), the Tenth Circuit held that the hardship determination required for a waiver of inadmissibility under 8 U.S.C. § 1182(h)(1)(B) is an unreviewable discretionary decision.

The petitioner, a native of Rwanda and a citizen of Tanzania, entered the United States as a nonimmigrant student in 1999. He stopped attending school and got a job without authorization, which led to the initiation of removal proceedings against him in 2006 for failing to maintain his nonimmigrant status. The government presented evidence of petitioner's criminal history, which began in 2000. Petitioner conceded the charge of removability but sought discretionary relief from removal. He sought adjustment of status under 8 U.S.C. § 245 based on his 2003 marriage to a United States citizen. But because one of his convictions constituted a CIMT, making him inadmissible under INA § 212(a)(2)(A)(i)(I), he also sought a waiver of inadmissibility under § 212(h)(1)(B), based on alleged extreme hardship to his wife. The IJ denied the request for a waiver, and request for voluntary departure, and the BIA dismissed his appeal.

In an issue of first impression, the Tenth Circuit held that "the hardship determination required for a waiver of inadmissibility under § 212(h)(1)(B) is an unreviewable discretionary decision." The court also held "the agency's decision not to grant voluntary departure is also discretionary and outside our jurisdiction in the absence of a constitutional or legal question."

Contact: Lindsay Corliss, OIL
☎ 202-532-4214

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

DISTRICT COURTS

■ **Northern District of Oklahoma Holds Relief from Removal under INA 212(c) for an Aggravated Felony Does Not Have a *Res Judicata* Effect for Naturalization Purposes**

In ***Dar v. Olivares,*** __ F. Supp. 2d __, 2013 WL 3849133 (N.D. Okla. July 25, 2013), (Dowdell, J.), the District Court for the Northern District of Oklahoma granted summary judgment in favor of the government in an action under 8 U.S.C. § 1421(c), holding that an aggravated felon was permanently ineligible to naturalize despite having received relief from removal under former INA § 212(c).

The court held that the statutory text, context, and framework of 8 U.S.C. § 1226(c) applies only to those criminal aliens detained immediately upon release from criminal custody or within a reasonable period of time thereafter.

The court agreed with the reasoning of other courts that § 212(c) relief for an aggravated felony does not cause a *res judicata* effect that precludes consideration of such felony in an alien's naturalization application. The district court also found that the government did not violate the Ex Post Facto Clause in classifying the underlying crime as an aggravated felony based on a retroactive expansion of the aggravated felony definition in the immigration context.

Contact: Aram A. Gavoor, OIL-DCS
☎ 202- 305-8014

■ **District of Massachusetts Holds Detention of an Alien under 8 U.S.C. § 1226(c) Must Begin upon Release from Criminal Custody or within a Reasonable Period of Time Thereafter**

In ***Castaneda v. Souza,*** __ F. Supp.2d __, 2013 WL 3353747 (D. Mass. July 3, 2013) (Young, J.), the District Court for the District of Massachusetts held that 8 U.S.C. § 1226(c) did not give ICE the authority to detain an alien taken into immigration custody five years after she was released on probation for a drug possession conviction. The court held that the statutory text, context, and framework of 8 U.S.C. § 1226(c) applies only to those criminal aliens detained immediately upon release from criminal custody or within a reasonable period of time thereafter.

Contact: Elianis N. Perez, OIL-DCS
☎ 202-616-9124

■ **District of Columbia Grants Summary Judgment Revoking Citizenship of Individual Who Obtained U.S. Citizenship by Concealing His Previous Removal**

In ***United States v. Alrasheedi***, __ F. Supp.2d __, 2013 WL 3491135 (D.D.C. July 11, 2013) (Leon, J.), the District Court for the District of Columbia granted the government's motion for summary judgment, revoking Younes Alrasheedi's citizenship. Prior to naturalizing, Alrasheedi applied for asylum under an assumed identity and was ordered removed.

The court agreed with the government that Alrasheedi "illegally procured" and "procured by concealment of a material fact or by willful misrepresentation" his naturalization because he was never lawfully admitted into the United States and because he lacked the good moral character necessary to naturalize. The court found that Alrasheedi's refusal to participate in the denaturalization proceeding was not an impediment to his denaturalization because the government met its very high burden for denaturalization.

Contact: Lana L. Vahab, OIL-DCS
☎ 202-532-4067

■ **Southern District of California Holds Dismissal as a Matter of Prosecutorial Discretion Is Not the Same as "Deferred Action" for Purpose of Obtaining Employment Authorization**

In ***Victoria v. Napolitano,*** No.12-cv-1827 (S.D. Cal. July 15, 2013) (*Curiel, J.*), the District Court for the Southern District of California granted the government's motion for summary judgment in an action challenging USCIS's denial of an alien's application for employment authorization. While she was in removal proceedings, the petitioner asked for and ICE agreed to exercise its prosecutorial discretion. Subsequently, petitioner filed an application for employment authorization, which USCIS denied, finding that the dismissal of her removal proceedings did not qualify as deferred action under 8 C.F.R. § 274a.12(c)(14).

The district court agreed with USCIS, holding that petitioner never requested and never received "deferred action" under the regulation and thus was not eligible for employment authorization.

Contact: Will Silvis, OIL-DCS
☎ 202-307-9802

OIL TRAINING CALENDAR

October 28-31, 2013. OIL 19th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law. Attorneys from our client agencies and Assistant United States Attorneys are invited to attend.

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

This Month's Topical Parentheticals

ASYLUM

■ *Umana-Ramos v. Holder*, __F.3d __, 2013 WL 3880207 (6th Cir. July 30, 2013)(holding that asylum applicant's proposed particular social group of "young Salvadorans who ha[ve] been threatened because they refused to join [particular] gang" was not cognizable under the INA because it lacks social visibility and particularity)

■ *Camara v. Holder,* __F3d__, 2013 WL 3836268 (1st Cir. July 26, 2013) (upholding finding that asylum applicant could reasonably relocate internally and that threat of FGM to his USC daughters could not support withholding of removal)

■ *FH-T v. Holder,* __ F.3d __, 2013 WL 3800252 (7th Cir. July 23, 2013) (upholding denial of asylum and withholding because applicant provided material support to a Tier III terrorist organization, and finding that lack of coordination of the waiver process between federal agencies is not unlawful)

■ *Vitug v. Holder,* __ F.3d __, 2013 WL 3814772 (9th Cir. July 23, 2013) (in a withholding claim filed by male Filipino claiming past and future persecution on account of his homosexuality, holding that (i) the Board violated its review standard by engaging in its own factfinding rather than clear-error review in determining that past harms, including inability to find a job, did not rise to the level of "persecution" and that Philippine government was not "unable or unwilling to protect" the applicant; ii) the Board abused its discretion in ignoring key findings by the IJ; and iii) court would not remand for the agency to apply the past-persecution presumption and determine if it was rebutted (per Ventura), because in the court's view, evidence of gay activism and local laws protecting homosexuals from employment discrimination did not establish changed circumstances in the Philippines)

■ *Lin v. Holder,* __ F.3d __, 2013 WL 3798204 (1st Cir. July 23, 2013) (affirming the Board's reversal of IJ's grant of asylum for a female applicant from Changle City, Fujian Province, China, claiming future forced sterilization, or IUD insertion on account of the birth of two children in the U.S.; holding that the applicant failed to show presence of aggravating circumstances to support claim that future IUD insertion would constitute "persecution;" further holding that the Board reasonably concluded that the alleged fear of future forced sterilization was too speculative to be well-founded)

■ *Bassene v. Holder*, __ F.3d __, 2013 WL 3802302 (9th Cir. July 23, 2013) (pre-REAL ID Act adverse credibility case, holding that lack of detail in asylum applicant's mistakenly filed citizenship application about details of a claim of persecution did not support the adverse credibility finding in his asylum proceeding because the citizenship application did not provide sufficient opportunity to elaborate; and discrepancies between the applicant's citizenship application and asylum application regarding whether he was arrested or was a member of a certain political party were not inconsistent and did not support the adverse credibility finding)

■ *Bathula v. Holder*, __ F.3d __, 2013 WL 3833257 (7th Cir. July 25, 2013) (substantial evidence supports the Board's conclusion past encounters and a home invasion by a local mafia group against husband and wife asylum applicants from India did not constitute "persecution," because no serious harm ever befell them; further holding that substantial evidence supports the Board's conclusion that acts by the local mafia were on account of a personal dispute with the husband, not on account of any political opinion based on his role as a local party official, or on membership in two alleged social groups: "active, law-supporting citizens" or "those willing to participate in the legal process, despite great personal risk, to ensure justice against criminal elements")

■ *Sumolang v. Holder*, __ F.3d __, 2013 WL 3821599 (9th Cir. July 25, 2013) (pre-REAL ID Act case holding that (i) due to disputed issues of fact, court lacked jurisdiction to review asylum applicant's claim of extraordinary circumstances excusing late filed application; ii) Board's conclusion that outbreak of anti-Chinese violence in Indonesia in 1998 does not constitute changed circumstances excusing late-filing of asylum application four years later in 2002 is reasonable; iii) harm to a child may constitute past "persecution" of the parent for purposes of asylum or withholding, if that harm is "at least in part" directed against the parent on account of the parent's race, religion, nationality, membership in a particular social group, or political opinion, and iv) remanding the case to the Board to determine if a hospital's failure to provide prompt medical care to daughter was on account of the parents' Christianity and/or Chinese ethnicity)

■ *Almutairi v. Holder,* __ F.3d __, 2013 WL 3481356 (7th Cir. July 12, 2013) (holding that court lacks jurisdiction to address the denial of asylum as untimely, and affirming denial of withholding; court further found that an order of removal denying all substantive relief is final for purposes of judicial review, even where it remands for the purpose of re-issuing a grant of voluntary departure)

■ *Goromou v. Holder,* __ F.3d __, 2013 WL __ (8th Cir. July 22, 2013) (rejecting argument that BIA conflated the "changed" and "extraordinary" circumstances exceptions to the one-year asylum bar; concluding that court lacked jurisdiction to review the BIA's determination that the alleged changed circumstances materially affected asylum claim) (Judge Murphy dissented)

(Continued on page 16)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

This Month's Topical Parentheticals

(Continued from page 15)

■ ***Chen v. Holder***, _ F.3d _, 2013 WL _ (1st Cir. July 9, 2013) (affirming denial of untimely motion to reopen 1998 asylum proceeding to file successive asylum application based on joining the China Democracy Party in the U.S., for failure to show changed country conditions in China: i) allegation that alien became a target of government as of 2010 when he joined the CDP is insufficient because this shows changed personal circumstances and ii) allegation of recent government crackdown on pro-democracy activists is insufficient because this was occurring well before 1998)

■ ***Ang v. Holder***, _ F.3d _, *2013 WL 3466310 (1st Cir. July 10, 2013)* (holding that i) stabbing of male, Indonesian, Christian asylum applicant during 1998 riots was not past "persecution" because it was isolated and there was no government involvement; ii) beating of applicant's wife by her family for marrying a Christian was not "persecution," because it was not severe and there was no government involvement; iii) male applicant did not have a genuine subjective fear of future persecution where he returned to Indonesia three times before coming to the U.S.; iv) the wife did not have a "well-founded fear" of future persecution where she failed to show government cannot or will not protect her; and v) there is no pattern or practice of persecution against Christians in Indonesia)

■ ***Zheng v. Holder***, _ F.3d _, 2013 WL 3466778 (7th Cir. July 11, 2011) (vacating and remanding agency's denial of asylum for failure to show well-founded fear of future sterilization in Fujian province China based on birth of two U.S. citizen children; treating *Ni v. Holder*, 715 F.3d 620 (7th Cir. 2013) and *Chen v. Holder*, 715 F.3d 207 (7th Cir. 2013) as requiring remand for consideration of new, extra-record country conditions research created by court in *Ni*, and error under *Chen* in relying on stale 2007 DOS country report)

■ ***Gao v. Holder***, _F.3d _, 2013 WL 3481355 (7th Cir. July 12, 2013) (affirming denial of untimely motion to reopen to apply for asylum based on claim of future religious persecution in China due to adoption of Christianity in U.S., where evidence regarding worsening country conditions in China for Christians was not new or previously unavailable; cautioning that the Board mischaracterized the alien's alleged conversion as a changed personal circumstance, when it was merely a predicate to support his claim of worsening country conditions since coming to the U.S.)

■ ***Justus v. Holder***, _ F.3d _, 2013 WL 3742485 (1st Cir. July 17, 2013) (affirming denial of untimely motion to reopen 1999 asylum proceeding of Guatemalan asylum applicant claiming changed country conditions consisting of increased gang violence; holding that Board properly denied the motion for failure to demonstrate material change in country conditions and failure to state *prima facie* claim for relief based on being a returning expatriate who may be subject to gang extortion)

■ ***Lopez v Holder***, _ F.3d _, 2013 WL __ (1st Cir. July 22, 2013) (affirming denial of untimely motion to reopen asylum proceeding of Mexican, male asylum applicant for failure to show changed country conditions; holding that alien's allegedly new evidence merely makes the same showing of criminality in Mexico that was previously made and is an improper attempt to call into question the Board's prior rejection of the asylum claim as based on personal vendetta rather than persecution on account of a statutory ground, which is not subject to review)

■ ***Matter of J-G-***, 26 I&N Dec. 161 (BIA July 18, 2013) (holding that an alien who is subject to an *in absentia* removal order need not first rescind the order before seeking reopening of the proceedings to apply for asylum and withholding of removal based on changed country conditions, and that such motion is not subject to the numerical limitations on filing a MTR)

CANCELLATION

■ ***Tista v. Holder***, __ F.3d __, 2013 WL 3368973 (9th Cir. July 8, 2013) (affirming the BIA's denial of special rule cancellation under NACARA because petitioner was over the age of 21 at the time his father was granted special rule cancellation; further holding that the Child Status Protection Act does not make aged-out NACARA applicants such as petitioner eligible for relief, and that such result does not violate equal protection)

■ ***Galindo de Rodriguez v. Holder***, __F.3d __, 2013 WL 3888057 (9th Cir. July 30, 2013) (holding that petitioner's thirteen-day trip to Mexico, pursuant to an authorization of advance parole, severed the continuity of her United States residence for purpose of meeting the 7-year requirement of cancellation)

CITIZENSHIP

■ ***Tuaua v. United States***, __ F. Supp.2d __, 2013 WL 3214961 (D.D.C. June 26, 2013) (rejecting plaintiffs' claim that the Fourteenth Amendment's Citizenship Clause extends to the unincorporated territory of the American Samoa)

■ ***Porter v. Quarantillo***, __ F.3d__, 2013 WL 3368888 (2d Cir. July 8, 2013) (holding that the district court did not abuse its discretion in excluding as inadmissible hearsay, statements from petitioner's mother and several others asserting that the mother was born in the US and left after her first birthday; reasoning that the exception for hearsay statements pertaining to family history does not encompass statements regarding age of relocation).

(Continued on page 17)

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

This Month's Topical Parentheticals

(Continued from page 16)

■ *United States v. Alrasheedi*, __ F. Supp.2d., 2013 WL 3491135 (D.D.C. July 11, 2013) (granting the government's motion to set aside the order admitting Alrasheedi to citizenship because his naturalization was illegally procured and procured by concealment of a material fact or willful misrepresentation)

CRIMES

■ *Zivkovic v. Holder*, __F.3d __, 2013 WL 3942248 (7th Cir. July 31, 2013) (holding that petitioner, whose convictions for burglary and attempted rape were not removable offenses when committed, is ineligible for 212(c) relief and, that the aggravated felony definition cannot be applied retroactively to find petitioner deportable on those crimes; also finding that Illinois conviction for residential trespass is not an aggravated felony)

■ *Pascual v. Holder,* __ F.3d __, 2013 WL __ (2d Cir. July 9, 2013) (affirming on rehearing that a conviction for third-degree criminal sale of a controlled substance in violation of NY law is an aggravated felony)

■ *Matter of Tavarez-Peralta*, 26 I&N Dec. 171 (BIA 2013)(holding that an alien convicted of violating 18 U.S.C. § 32(a)(5) (2006), who interfered with a police helicopter pilot by shining a laser light into the pilot's eyes while he operated the helicopter, is removable under INA § 237(a)(4)(A)(ii), as an alien who has engaged in criminal activity that endangers public safety, and that a violation of 18 U.S.C. § 32(a)(5) is not a crime of violence under 18 U.S.C. § 16)

■ *United States v. Aparicio-Soria,* __ F.3d __, 2013 WL 3359069 (4th Cir. July 5, 2013) (holding that for purposes of the sentencing guidelines (§ 2L1.2(b)), a conviction for resisting arrest under Maryland law categorically constitutes a crime of violence because it has as an element the "threatened use of physical force") (Judge Davis dissented)

■ **United States v. Flores-Cordero, __ F.3d __,** 2013 WL 3821604 (9th Cir. July 25, 2013)(holding, in prosecution for criminal reentry, that defendant's prior conviction for resisting arrest under Arizona law was not categorically a crime of violence)

■ *United States v. South Carolina,* __ F.3d __, 2013 WL 3803464 (4th Cir. July 23, 2013)(upholding preliminary injunction finding several criminal provisions of a South Carolina immigration statute, including provision criminalizing "unlawful presence" preempted by federal law)

DEPARTURE BAR

■ *Montano-Vega v. Holder,* __ F.3d __, 2013 WL 3285584 (10th Cir. July 1, 2013) (affirming BIA's decision dismissing petitioner's appeal under 8 C.F.R. § 1003.4 after he voluntarily departed the US; distinguishing recent decisions striking down the "departure bar" relating to MTRs and reasoning that petitioner failed to show how § 1003.4 similarly conflicted with the express terms of the INA or raised constitutional concerns)

DETENTION

■ *Castaneda v. Souza,* __ F. Supp.2d __, 2013 WL 3353747 (D. Mass. July 3, 2013) (disagreeing with Third and Fourth Circuits and holding that the mandatory detention statute at 8 U.S.C. § 1226(c) applies only to those criminal aliens detained immediately upon release from criminal custody or within a reasonable period of time thereafter)

DOMA

■ *Matter of Zeleniak,* 26 I&N Dec. 158 (BIA July 17, 2013) (holding that Section 3 of the Defense of Marriage Act is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the INA if the marriage is valid under the laws of the State where it was celebrated)

EAJA FEES

■ *Castaneda-Castillo v. Holder,* __ F.3d __, 2013 WL 3742447 (1st Cir. July 17, 2013) (holding that petitioner may recover EAJA fees incurred during post-remand administrative proceedings where the court remanded case to BIA for further proceedings but retained jurisdiction over the case pending remand because the administrative proceedings were so "intimately related" to the judicial proceedings so as to be considered part of the same "civil action")

■ *United States v. $186,416 In US Currency,* __ F.3d __, 2013 WL 3722076 (9th Cir. July 17, 2013) (holding that under the Civil Asset Forfeiture Reform Act, attorney fee awards could be paid directly to the petitioning attorney where the client had assigned any fee award to the attorney, and there were no competing claimants)

EXECUTIVE POWER

■ *Zivotofsky v. Secretary of State,* __ F.3d __, 2013 WL 3799663 (D.C. Cir. July 23, 2013)(holding that the President exclusively holds the constitutional power to determine whether to recognize a foreign sovereign and therefore statute requiring designation of "Jerusalem, Israel" as place of birth on U.S. passports is unconstitutional)

FOURTH AMENDMENT

■ *Cotzo Jay v. Holder*, __ F.3d __, 2013 WL 3927605 (2d Cir. July 31, 2013) (holding that a 4:00 am warrantless entry into an individual's home and absence of consent or exigent circumstances would constitute an egregious violation requiring suppression, but remanding case to BIA to determine whether ICE officers had obtained consent to enter home)

■ *Pretzantzin v. Holder*, __ F.3d __, 2013 WL 3927587 (2d Cir. July 31,

(Continued on page 18)

This Month's Topical Parentheticals

(Continued from page 17)
2013) (ruling that the government had presented insufficient evidence to demonstrate that proffered evidence was independent of the alleged violation, and remanding to BIA to determine whether government seized evidence of alienage in the course of committing an egregious violation of the Fourth Amendment)

STATUTORY INTERPRETATION

■ ***Shweika v. DHS,*** __ F.3d __, 2013 WL 3821545 (6th Cir. July 25, 2013)(holding that *Chevron* deference does not apply to an agency's interpretation of a federal court's jurisdiction and that INA § 310(c) administrative-hearing requirement does not impose a jurisdictional limitation on judicial review)

WAIVER

■ ***Munis v. Holder,*** __ F.3d __, 2013 WL 3306406 (10th Cir. July 2, 2013) (holding that the hardship determination required for a waiver of inadmissibility under § 1182(h) is an unreviewable discretionary decision; further holding that the agency's decision not to grant voluntary departure is also discretionary and unreviewable)

NOTED

■ ***Villas at Parkside Partners v. City of Farmers Branch, TX,*** __ F.3d __, 2013 WL 3791664 (5th Cir. July 22, 2013)(holding that criminal offense and penalty provisions of city ordinance, which required all adults living in rental housing within the city to obtain an occupancy license conditioned upon the occupant's citizenship or lawful immigration status, as well as its state judicial review process, conflicted with federal immigration law, and therefore was preempted)

■ **United States v. Charles**, __ F.3d __, 2013 WL 3827664 (6th Cir. July 25, 2013)(holding that interpreter's English language statements of what defendant told her in Creole during an officer's interrogation were testimonial and that interpreter was the declarant of the out-of-court English language statements, giving defendant the right to confront the interpreter)

■ ***Lucas v. Jerusalem Cafe, LLC***, __ F.3d __, 2013 WL 3868144 (C.A.8 July 29, 2013)(holding FLSA does not allow employers to exploit any employee's immigration status or to profit from hiring unauthorized aliens in violation of federal law)

Pre-1988 Convictions Not Aggravated Felonies for Removal Purposes

(Continued from page 1)
ence to the BIA's interpretation because the issue of retroactivity raised by petitioner was a question of law subject to *de novo* review.

The court then held that § 212 (c) relief was not available to petitioner. The court explained that petitioner's "underlying offenses were not even on the aggravated felony list until 18 and 20 years after his conviction for them. He is thus in the strange position of seeking relief under § 212(c) based on offenses that did not became aggravated felonies until the passage of the very statute that repealed § 212(c)." Therefore, the court found that petitioner had not incurred a new legal disability nor had he relied on the availability of § 212(c) relief. Therefore, as the BIA found, as a matter of law, petitioner was ineligible for § 212(c).

The court then disposed of petitioner's 2010 criminal trespass conviction by holding that under the categorical approach that conviction did not qualify as a "crime of violence" for purposes of the aggravated felony provision of the INA. The court explained that under Illinois law, "a person could commit residential trespass by walking through a neighbor's open door under the mistaken belief that she is hosting an open house, a party, or a garage sale."

Finally, the court held that the BIA could not rely on petitioners' convictions in 1976 and 1978 to order his removal as an alien convicted of an aggravated felony. The court reasoned the § 7344 of the Anti-Drug Abuse Act of 1988, which first defined "aggravated felony" provided that the deportation consequences of the newly defined group of aggravated felonies operated prospectively as of the effective date of the 1988 Act. The court then determined that it was unclear whether the subsequent amendments, namely the 1990 Immigration Act of 1990, and IIRIRA had repealed § 7344(b). The court found that "this level of ambiguity, cannot overcome the presumption against implied repeal and retroactivity." Therefore, petitioner could not be ordered deported as an alien convicted of aggravated felonies. The court, however, remanded the case to the BIA to consider the CIMT charge.

Judge Easterbrook in his dissenting opinion noted that this was a "simple case" because the aggravated felony definition of § 101(a)(43) states that it applies "regardless of whether the conviction was entered before, on, or after September 30, 1996." "A plainer declaration of retroactivity is hard to imagine," said the dissent. Moreover, he added, given "the knotty question about the relation among the 1988, 1990, and 1996 Acts . . . The agency's views therefore should be respected, not thrown into the trash."

Contact: Aimee Carmichael, OIL
☎ 202-305-7203

AILA InfoNet Doc. No. 13070190. (Posted 7/1/13)

The Continuing Viability of Auer Deference

(Continued from page 2)

ing concern but a culmination of the building unease with the doctrine. *See generally Talk Am., Inc. v. Michigan Bell Tel. Co.,* __ U.S. __, 131 S. Ct. 2254, 2265-66 (2011) (Scalia, J., concurring). As Chief Justice Roberts stated in his concurring opinion in *Decker*, "[t]he bar is now aware that there is some interest in reconsidering [*Auer* deference], and has available to it a concise statement of the arguments on one side of the issue." 133 S. Ct. at 1338-39 ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case.").

Post-*Decker*, advocates of *Auer* deference still stand on firm ground. While doubts have been raised, *Auer* deference remains the governing rule of law. *See Decker*, 133 S. Ct. at 1337. That said, it may be more difficult to respond to one of the most serious contests to *Auer* deference*, i.e.,* that it encourages agencies to issue vague regulations. This is especially so, not only because the incentives intuitively appear to align with such opportunistic behavior, but also because of the inherent dangers associated with consolidating the powers of both *making* and *interpreting* the law. *See Decker,* 133 S. Ct. at 1340 -41 (Scalia, J., dissenting) (noting concern with separation of powers*); see also* Manning, *supra*, 96 Colum. L. Rev. at 645-47.

There are, of course, several responses to this criticism. For example, a vague regulation does not necessarily imply an abuse. There may be instances where the agency cannot foresee and detail all of the specific scenarios to cover the expressed purpose of the relevant statute, and some vagueness may be necessary. Flexibility allows for a workable government and is particularly appropriate for agencies, which have direct involvement with the public as administrator of the relevant statutory laws. Furthermore, the deference given to agency interpretations of regulations does not appear to have translated into a systemic pattern of abusively vague regulations or of the tyranny of centralized power described in Justice Scalia's partial dissent in *Decker,* despite nearly 70 years — and many, many thousands of regulations — since *Seminole Rock*.

To the extent some abuse may occur, the Supreme Court has limited the application of Auer deference, refusing to apply the doctrine where an agency interprets a regulation for illegitimate purposes or under inadequate circumstances.

To the extent some abuse may occur, the Supreme Court has limited the application of *Auer* deference, refusing to apply the doctrine where an agency interprets a regulation for illegitimate purposes or under inadequate circumstances. *See Smithkline Beecham Corp*., 132 S. Ct. at 2166-67; *accord Oregon*, 546 U.S. at 257 ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). And, while it is an accepted reality that "modern government is marked by agencies that simultaneously house legislative, executive, and judicial functions," Manning, *supra,* 96 Colum. L. Rev. at 632, this reality is a function of legislative power, and centralization is not a permanent — or in any way independent or unlimited — structure within the constitutional government. The agency, which itself is composed of many minds focused on a narrow subject area, remains under watch, is frequently challenged, and its decisions are tempered by the public and the legislative, executive, and judicial powers.

While there are other arguments that refute Justice Scalia's concerns about *Auer* deference, the immigration context may permit an additional reason for applying the doctrine. Specifically, the INA confers broad authority on the Attorney General to administer and enforce the immigration laws, establish regulations, and make determinations and rulings on questions of law. *See* INA § 103(a) ("[The] determination and ruling by the Attorney General with respect to all questions of law shall be controlling."). Thus, perhaps in recognition of some shared authority over immigration matters with the Executive Branch, *see Ekiu v. United States*, 142 U.S. 651, 659 (1892), the INA appears to intend the Executive Branch to not only "make" the law but to "interpret" it as well, *see* INA § 103(a). Although the INA does not resolve the constitutional issue of separation of powers, it may be an important consideration in terms of determining the nature and scope of congressional delegation of authority. *See generally Matthews v. Diaz*, 426 U.S. 67, 80-81 (1976) (recognizing the unique responsibilities of the executive and legislative branches over the subject of immigration).

There are many arguments for and against *Auer* deference, but those contests remain mostly latent at this time. This article described a narrow sample of what may culminate in a substantial challenge in the future. For now, *Auer* deference is the governing law. Still, we should be mindful of its pedigree and choose our arguments wisely. In the end, *Auer* deference should be a reflection of the integrity and virtue of government actions, and should not be a tool to excuse administrative determinations that are incompatible with fairness and substantial justice.

By Kohsei Ugumori, OIL
☎ 202-532-4600

Legislative Update

Excerpts of written testimony of USCIS Refugee, Asylum, and International Operations Associate Director Joseph Langlois before House Committee on Oversight and Government Reform, Subcommittee on National Security July 17 hearing titled "Border Security Oversight, Part III: Examining Asylum Requests"

The United States has a long history of providing humanitarian protection to refugees and other vulnerable individuals. We are party to the 1967 Protocol relating to the Status of Refugees and the Convention against Torture (CAT), which obligate contracting states to abide by the principle of non-refoulement -- to refrain from returning individuals to countries where they fear certain types of harm. Our obligations under the Protocol and the CAT are implemented through various mechanisms, all of which incorporate the principle of non-refoulement. For example, individuals may seek asylum in the United States in one of two ways, either by applying for asylum "affirmatively" with USCIS or "defensively" while in removal proceedings before an Immigration Judge within the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR).

Affirmatively Filed Asylum Applications

In general, any individual present in the United States and not in removal proceedings may file an affirmative asylum application with USCIS. Affirmative asylum procedures require an in-depth, in-person interview of every principal asylum applicant. This interview is conducted by specially trained Asylum Officers. These officers are a professional cadre within USCIS, dedicated full-time to the adjudication of asylum claims. They are extensively trained in national security issues, the security and law enforcement background check process, eligibility criteria, country conditions, making proper credibility determinations, and fraud detection. The Asylum Officer fully explores the applicant's persecution claim, considers country of origin information and other relevant evidence, assesses the applicant's credibility and completes required security and background checks. The Asylum Officer then determines whether the individual is eligible for asylum and drafts a decision. Supervisors review 100 percent of Asylum Officers' cases prior to issuance of a final decision.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Akram v. Holder	***08***
Almutairi v. Holder	***09***
Ang v.Holder	***06***
Bassene v. Holder	***11***
Bathula v. Holder	***08***
Camera v. Holder	***04***
Cardenas-Delgado v. Holder	***10***
Castañeda-Castillo v. Holder	***04***
Casteneda v. Souza	***14***
Dar v. Olivares	***14***
Elim Church of God v. Harris	***11***
FH-T v. Holder	***09***
Gao v. Holder	***07***
Goromou v. Holder	***10***
Ibarra v. Holder	***12***
Jutus v. Holder	***05***
Lecky v. Holder	***06***
Lin v. Holder	***04***
Lopez v. Holder	***05***
Mellouli v. Holder	***09***
Ming Chen v. Holder	***06***
Montano-Vega v. Holder	***13***
Moreta v. Holder	***07***
Munis v. Holder	***13***
Pascual v. Holder	***07***
Sola v. Holder	***11***
Sumolang v. Holder	***12***
Tista v. Holder	***11***
United States v. Alrasheedi	***14***
Victoria v. Napolitano	***14***
Vitug v. Holder	***12***
Zheng v. Holder	***09***
Zivkovic v. Holder	***01***

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:

linda.purvin@usdoj.gov

Stuart F. Delery
Assistant Attorney General

August Flentje
Senior Counsel for Immigration
Civil Division

David M. McConnell, Director
Michelle Latour, Deputy Director
Donald E. Keener, Deputy Director
Office of Immigration Litigation

Francesco Isgro, Editor
Tim Ramnitz, Assistant Editor
Carla Weaver, Writer

Linda Purvin
Circulation