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

Immigration Litigation Bulletin

Vol. 17, No. 3 MARCH 2013

LITIGATION HIGHLIGHTS

Inside

Ninth Circuit Remands I-212 Class Action to District Court To Determine Whether Intervening Brand-X Decision Applies Retroactively To Class Members

In 2007, the Ninth Circuit held that plaintiff and a class of other Mexican citizens who had been previously deported or removed from the United States and then subsequently reentered without inspection, were ineligible "as a matter of law" to adjust their status because they were "ineligible to receive I-212 waivers." *Duran-Gonzales v. DHS,* 508 F.3d 1227 (9th Cir. 2007) (*Duran Gonzales I*). Plaintiffs contended that, notwithstanding the statutory requirement that ten year elapse between their last departure from the United States and their waiver application, Ninth Circuit case law permitted the waiver.

In *Duran Gonzales I,* the court deferred under *Brand X,* to the BIA's interpretation in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), that I-212 waiver applicants already unlawfully present in the United States are also subject to the ten-year bar under INA § 212(a)(9)(C)(ii).

Following the remand to the district court, plaintiffs sought, *inter alia*, to prevent the retroactive application of *Duran Gonzales I* to those class members who had filed their I-212 applications prior to that decision. The district court rejected the plaintiffs' contentions and they timely appealed contending that *Duran Gonzales I* should be given only prospective effect. In *Duran Gonzales II*, 659 F.3d 930 (9th Cir. 2011), the Ninth Circuit also rejected plaintiffs' contention, but stayed the issuance of the mandate pending the resolution of an en banc

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The Fugitive Disentitlement Doctrine

The fugitive disentitlement doctrine ("FDD") initially arose in the criminal context, contemplating the dismissal of an absconding criminal appellant's appeal. It reflects the inherent authority of the federal courts of appeals to place conditions on the exercise of their appellate jurisdiction. In one sense, the doctrine is a tool of case management, justifying the dismissal of certain cases from a court docket. Over time it has been extended to civil cases, including immigration cases, where the appellant qualifies as a fugitive. In the immigration context, because an alien is not threatened with deportation or removal while an appeal of an immigration judge's decision is pending before the BIA, it generally comes into play in two post-final-order scenarios: (1) while a petition for review is pending before a court of appeals; and (2) while a motion for reopening or reconsideration is pending before the BIA.

The Supreme Court and the Extension of the FDD from Criminal to Civil Cases

To date, the Supreme Court has addressed the doctrine in eight cases spanning over a century. In the first,

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Smith v. United States, 94 U.S. 97 (1876), the appellant absconded while his appeal of his conviction was pending before the Court. The Court was concerned that Smith might not be made to respond to any judgment, stating it was "not inclined to hear and decide what may prove to be only a moot case"; without hearing the case, it ordered dismissal unless the appellant surrendered himself by the end of the Court's current term. *Id*. at 97-98. The Court also entered a conditional dismissal in a similar case, *Bonahan v. Nebraska*, 125 U.S. 692 (1887).

The Court observed that absconding betrays contempt for the very process the appellant invokes and injures the dignity of the judiciary.

In the third case, an appellant convicted and sentenced to death absconded while his case was pending before a state supreme court. After being captured and resentenced, he claimed the court violated his due process by its dismissal, although this was after a period during which, if he had surrendered, his appeal would have continued. *Allen v. State of Georgia*, 166 U.S. 138 (1987). The Court held that a state court could follow its example and dismiss, so long as the dismissal was consistent with state law and practice. In addition to finding no due process violation, the Court observed that absconding betrays contempt for the very process the appellant invokes and injures the dignity of the judiciary.

Eisler v. United States, 338 U.S. 189 (1949), involved an appellant convicted of contempt of Congress in connection with hearings before the House Un-American Activities Committee. Eisler fled abroad after a grant of certiorari. The government informed the Court post-argument that it had exhausted its efforts to secure his return. Over several dissents, a majority directed that the case be dismissed at Term's end, to be reinstated only on the Court's directive.

In later cases, the Court dismissed outright rather than conditionally. In *Molinaro v. New Jersey*, 396 U.S. 365 (1970), the convicted appellant failed to surrender himself to state authorities as requested while his case was pending before the Court. The Court dismissed, asserting that, while flight does not strip a case "of its character as an adjudicable case or controversy," it "disentitles" the fugitive from calling upon the resources of the court to settle his claims. *Id*. at 366.

In 1975, the Court again endorsed, as in *Allen,* dismissal by a state court. *Estelle v. Dorrough*, 420 U.S. 534 (1975). After filing an appeal of his conviction in Texas, Dorrough absconded, only to be captured two days later. The Court upheld the applicable state law, which provided for dismissal unless an absconder voluntarily surrendered within 10 days of escape. The Court stated that such a dismissal "discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of" the appellate court. *Id.* at 539.

In contrast to the earlier cases, in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), the Court, without making a categorical pronouncement, limited application of the FDD on the facts before it. The criminal defendant fled after conviction, but was returned to custody eleven months later. He was no longer in flight when he was sentenced and when he appealed. The Court noted that all its rationales for the doctrine "assume some connection between the defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response." *Id*. at 244. Here, only deterrence was served and the Court opined that district courts had less harsh alternatives at their disposal.

In the most recent case, *Degen v. United States*, 517 U.S. 820 (1996), the Court addressed the FDD in a civil context. The appellant was involved in two proceedings; he fled abroad after both a criminal indictment and a civil forfeiture action had been lodged against him. Although he showed no interest in returning to face the criminal charges, he filed an answer in the civil case, but the district court (affirmed by the circuit court) granted the government summary judgment because of his fugitive status on the criminal side. The Court stated that three reasons had been given in its precedents for the FDD: (1) assuring the enforceability of a decision against the fugitive; (2) not allowing a fugitive to utilize the resources of the court when he has flouted the judicial system; and (3) discouraging escape and encouraging voluntary surrender. *Id*. at 824. It also observed that disentitlement might be "necessary to prevent actual prejudice to the Government from a fugitive's extended absence. . . ." *Id*. at 825. The Court found that many of these rationales did not apply in the context of this case, where the physical presence of the property owner was unnecessary. It concluded that disentitlement was not appropriate here, although it recognized that the court would suffer some indignity and the result would not discourage the voluntary surrender of similar absconders. Nevertheless, it deemed dismissal here "too blunt an instrument," eroding rather than enhancing respect for the judicial system. *Id*. at 828.

The Extension of the FDD to Immigration Cases Before the BIA

In the BIA's precedential *Matter of Barocio*, 19 I. & N. Dec. 255 (BIA 1985), a couple from Mexico were granted voluntary departure at a removal hearing, failed to depart, and

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then failed to report when asked to surrender. They filed a motion to reopen claiming they would now return home to await a relative's naturalization. The BIA denied the motion, noting that it lay within its discretion to deny motions even if they demonstrated *prima facie* eligibility for relief. The BIA noted the aliens: (1) overstayed their voluntary departure without providing a compelling explanation of why they did so; (2) failed to report for removal when ordered without providing any explanation; and (3) remained outside the reach of the INS even after filing the motion to reopen. The BIA presumably described these factors in chronological order, not necessarily in order of importance. Without explicitly using the term "disentitlement," the BIA referred to the related Supreme Court rationales and cited *Molinaro*. Considering the totality of the circumstances, the BIA was influenced by the "deliberate flouting of the immigration laws," stating that the motion before it "does not merit the favorable exercise of discretion required for reopening." *Id*. at 257-58. The decision highlights that application of the FDD by the BIA is dependent on the facts of individual cases.

The Extension of the FDD to Immigration Cases Before the Courts of Appeals

The courts of appeals which have addressed the issue have unanimously concluded that the FDD is applicable to petitions for review of final immigration orders. *See Bar-Levy v. U.S. INS*, 990 F.2d 33 (2d Cir. 1993); *Arana v. U.S. INS*, 673 F.2d 75 (3d Cir. 1982); *Giri v. Keisler*, 507 F.3d 833 (5th Cir. 2007); *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir. 2004); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Antonio-Martinez v. INS,* 317 F.3d 1089 (9th Cir. 2003); *Martin v. Mukasey*, 517 F.3d 1201 (10th Cir.2008). One strand of reasoning is that, because stronger constitutional and statutory procedural protections are afforded to criminal defendants than to aliens, the requirements for dismissing an immigration case should be less than those for a criminal matter. *See, e.g.* 673 F.2d at 77 n.2. The circuits agree on the relevance of the factors set forth in *Degen v. United States*, *supra*. However, the courts of appeals differ in their approaches on how to determine whether an alien is a fugitive subject to dismissal and to what extent, if at all, the merits of an absconder's claims should be considered when making this call. A circuit-by-circuit review of the applicable precedents follows:

The BIA was influenced by the "deliberate flouting of the immigration laws," stating that the motion before it "does not merit the favorable exercise of discretion required for reopening."

Second Circuit

In *Ofosu v. McElroy*, 98 F.3d 694 (2d Cir. 1996), the alien failed to surrender to the INS while pursuing a stay of removal from the court of appeals. The alien argued that he was not a fugitive because he was staying at his home address, which the immigration authorities and the court possessed. The court rejected this argument, noting that failing to report requires the agency to utilize extra resources to locate the alien and "deliberately increases the risks of flight and delay." *Id*. at 700-01. The court subsequently noted the need to protect the dignity, integrity, and efficient operation of the judicial process as well as the need to dissuade aliens from fleeing and attempting to acquire additional equities or claims giving rise to successive motions. *Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) (alien failed to surrender, gave no explanation for that failure, waited seven years to file his motion, and presented no circumstances weighing against dismissal). It explicitly stated, "for an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with that letter." *Ibid*. This analysis reflected its precedent from criminal law cases; the Second Circuit earlier had held that "[t]he intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities once he learns that charges against him are pending." *United States v. Catino*, 735 F.2d 718, 722 (2d Cir. 1984).

A different panel, however, reached a contrary conclusion in an immigration case decided four years after *Gao*. In *Nen Di Wu v. Holder*, 646 F.3d 133 (2d Cir. 2011) (Calabresi, Pooler, and Chin), the alien twice failed to surrender to DHS despite being protected from removal by a pre-existing stay. The panel declined to dismiss, although it ultimately denied the petition for review on the merits. It observed that "the authorities are well aware of how to locate Wu. . . ." *Id*. at 136. Stating, without support, that the most important of the factors discussed in *Degen* in this case was the failure of the government to show "Wu's fugitive status has prejudiced its case," the panel characterized *Gao* as "represent[ing] an extreme situation," and *Wu* "as the more normal case," because Gao's claims "rest[ed] largely on events of his own making that transpired while he was a fugitive," prejudicing the government by requiring it to address additional facts. *Id*. at 137-38.

Third Circuit

In *Arana v. U.S. INS*, *supra*, an alien failed to report and subsequently sought a stay in district court. After issuing a temporary stay while reviewing the case, the district court judge denied the habeas petition and ordered the alien to report for deportation. When the alien did not respond

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to a bench warrant and his attorney did not dispute that he could not be located, the circuit court dismissed his appeal challenging the warrant. It is not clear how the court would respond if an alien argued that DHS knew his or her whereabouts.

Fifth Circuit

The Fifth Circuit is amenable to motions to dismiss even where DHS knows the alien's whereabouts. In *Giri v. Keisler*, *supra*, the aliens failed to report for removal while their petition for review was pending, and the government moved to dismiss on that basis. The court stated that an alien "who demands that the government respect a favorable outcome must ensure that an adverse decision also can be carried out." *Id*. at 835-36. Referring to factors corresponding to those set forth in *Degen*, and noting that "it is uncontested that the Giris have become fugitives," 507 F.3d at 836, the court dismissed the aliens' petition.

"Someone who cannot be bound by a loss has warped the outcome in a way prejudicial to the other side."

Later the court directly addressed the issue of whether an alien could be deemed a fugitive even if his address was known to the government. In *Bright v. Holder*, 649 F.3d 397 (5th Cir. 2011), the court observed that there was a circuit split "on whether an alien is a fugitive where, as here, he has maintained the same address throughout his removal proceedings, the address was known to DHS, and DHS made no attempt to locate or arrest the alien following his failure to report for removal." *Id*. at 400. Noting that the Ninth Circuit held to the contrary in its precedent, and the Third (2010), Eighth (2006), and Eleventh (2008) circuits in unpublished decisions, the court joined the Second (2007) and Seventh Circuits (2004) in answering the question in the affirmative.

Sixth Circuit

In *Garcia-Flores v. Gonzales*, *supra*, the alien failed to report after his removal order became final. He was taken into custody by DHS the next year. The court granted the government's motion to dismiss his petition for review. It stated that "[s]omeone who cannot be bound by a loss has warped the outcome in a way prejudicial to the other side. . . ." *Id*. at 441. The court described the alien's conduct as "evinc[ing] an intent to avail himself of the 'heads I win, tails you'll never find me' approach, even if his subsequent arrest foiled the effort." *Id*. at 442. It is unclear how the court would respond to an alien's argument that his whereabouts were known to DHS.

Seventh Circuit

The court seems generally sympathetic to government motions to dismiss, but has carved out an exception where the alien, though initially failing to report, subsequently does so. In *Sapoundjiev v. Ashcroft*, *supra*, after their order became final, the aliens failed to report. When their petition for review was before the court, their counsel argued that they were not fugitives because immigration officials knew their address. The court rejected this reasoning, stating that it could not be known if the aliens would be at home if agents came to arrest them, and concluding that "anyone who is told to surrender [to a lawful order], and does not, is a fugitive." *Id*. at 729. The court also rejected the arguments that: (1) aliens are entitled to ignore bag-and-baggage letters because custody prevents their "having a meaningful opportunity to be heard," *id*. at 730; and (2) aliens cannot know that a stay of removal does not relieve them of the obligation to report. 384 F.3d 916, 917 (7th Cir. 2004) (denying rehearing).

However, in a subsequent case, the court denied the government's motion to dismiss where: (1) the alien's counsel stated that the alien failed to report due to his poor advice; and (2) once the government's motion was filed, counsel informed DHS the alien was willing to surrender and the alien did so several days later. *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956 (7th Cir. 2006).

Eighth Circuit

This court declined to apply the FDD in a case featuring an alien both already outside the U.S. and with claims the court deemed meritorious. In *Hassan v. Gonzales*, *supra*, a woman subjected to female genital mutilation ("FGM") in Somalia sought asylum, contending that her two daughters would be subjected to FGM if she was removed. When her claim was denied, she and her children went to Canada within the time period of her voluntary departure grant. From Canada, she requested a stay of deportation but because she"failed to meet with government officials to discuss her request, the government assert[ed] that she thus waived her claim." *Id*. at 516. The court held that the rationales for dismissal of her review petition were not present, as the alien had departed in compliance with a lawful order rather than to evade the law, and enforceability was not an issue, because she would be outside the U.S. if her petition was denied. Further, the court remanded to the agency for further proceedings. Regarding how the court might view possible dismissal of the more typical case where an alien does not exercise his privilege of voluntary departure and fails to report, note that in an earlier extradition case, the court stated, "[a]lthough the concealment of one's identity or location is certainly probative evidence of the intent to

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avoid arrest or prosecution, we are not persuaded that concealment per se is necessary to infer the intent to avoid arrest or prosecution." *Matter of Assarsson*, 687 F.2d 1157, 1162 (8th Cir. 1982).

Ninth Circuit

Over time, the law in this court – as in the Second Circuit – has tilted more in favor of aliens. In *Antonio-Martinez v. INS*, *supra*, the attorney of an alien whose review petition had been pending before the court for about 10 years (because he was affected by the *ABC* litigation) advised the court he had been out of touch with his client for at least two years; the government then sought dismissal. The court held that disregard for the "legal and common-sense obligation to stay in touch while . . . lawyers appeal an outstanding deportation order should be sanctioned." *Id*. at 1093. Equating the situation here with the "heads I win, tails you'll never find me" described in non-immigration contexts, the court granted dismissal. The same outcome obtained in *Armentero v. INS*, 412 F.3d 1088 (9th Cir. 2005), in a pithy three-sentence order accompanied by a lengthy dissent from J. Berzon.

Several months later, another panel (B. Fletcher, Lay, and Hawkins) granted remand on the motion to reopen of a 63-year-old female asylum seeker; the court found the BIA abused its discretion both in improperly discounting the alien's affidavit and in invoking the FDD where there were "numerous flawed mailings of notice." *Bhasin v. Gonzales*, 423 F.3d 977, 989 (9th Cir. 2005). The decision in *Wenquin Sun v. Mukasey*, 555 F.3d 802 (9th Cir. 2009) (Schroeder, Nelson, and Reinhardt), arrived four years later. Its first sentence recognizes the alien as a battered spouse. The decision states that "No court has ever applied the doctrine [FDD] to an alien whose whereabouts are known and who has not fled from custody." *Id*. at 804. The court cited the requirement in *Ortega-Rodriguez v. United States*, *supra*, that there be "some connection between a defendant's fugitive status and the appellate process," and observed that, although the alien had not reported for removal in 2004, her whereabouts had been known to her counsel, DHS, and the court since she filed her review petition. *Id.* at 805. The court found it would be "inappropriate" to dismiss the case. *Ibid*.

Tenth Circuit

The only precedent in this circuit dismissed a non-reporting alien's petition for review. The alien failed to report to DHS as requested after his order became final; when DHS sought him shortly thereafter, he had quit his job and moved from his last known address without advising DHS of a change of address as required by law. *Martin v. Mukasey*, *supra*. Discussing the rationales behind the FDD and noting that other courts separately had found failing to report and failing to provide a current address sufficient to label an alien a fugitive, the court had "no reservation about concluding that the two failures together" justified this result. *Id*. at 1203-04. In reaching this conclusion, the court cited the Second Circuit's decision in *Gao,* suggesting that the court's intent was to allow for dismissal even where DHS knows the whereabouts of the non-reporting alien.

Conclusion

We can deduce several principles from this line of development. First, invoking the fugitive disentitlement doctrine requires a strong connection between the act of absconding and "the appellate process." Second, application of the doctrine must be supported by at least one of the rationales the Court has cited in its various cases. Third, even if these conditions are satisfied, the ultimate determination about whether to apply the doctrine is left to the sound discretion of the court.

The ultimate determination about whether to apply the fugitive disentitlement doctrine is left to the sound discretion of the court.

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DED Extended for Liberians

USCIS automatically extended employment authorization documents (EADs) for Liberian nationals covered under Deferred Enforced Departure (DED) through Sept. 30, 2013. This automatic extension of EADs follows President Obama's announcement on March 15, 2013, of his decision to extend DED through Sept. 30, 2014 for qualified Liberians and those persons without nationality who last habitually resided in Liberia.

The six-month automatic extension of existing EADs will permit eligible Liberians to continue working in the United States while they file their applications for new EADs that will cover the full 18 months of the DED extension through Sept. 30, 2014. The extension will also allow USCIS to complete processing and issuance of those new EADs.

Although DED for Liberian nationals was scheduled to end on March 31, 2013, President Obama determined that there are compelling foreign policy reasons to continue deferring enforced departure for eligible Liberian nationals presently living in the United States under the existing grant of DED.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Convictions – Modified Categorical Approach

On January 7, 2013, the Supreme Court heard oral argument in ***Descamps v. United States,*** a criminal sentencing case in which the question presented is whether the Ninth Circuit was correct in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach. Resolution of the case is expected to implicate the reasoning of *Aguila-Montes* and the "missing element" rule that it overruled. The government's brief was filed on December 3, 2012.

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Asylum – Particular Social Group

On September 27, 2012, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510 (2012), which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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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.

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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 grant rehearing and hold the case, and decide it when the Supreme Court rules in *Descamps v. United States*. The petition also argues that the court should permit the agency to address other grounds for removal on remand.

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Jurisdiction – Fact Issues regarding CAT

On March 4, 2013, the government filed a petition for en banc rehearing in ***Alphonsus v. Holder***, 705 F.3d 1031 (9th Cir. 2013), challenging the court's rule that the jurisdictional bar in INA § 242(a)(2)(C) does not apply to claims under the Convention Against Torture where the application was not denied based on a criminal offense specified in the jurisdictional bar. Judge Graber had dissented from the panel opinion, arguing that the court's rule is wrong as described in her concurring opinion in *Pechenkov v. Holder*, 705 F.3d 444, 449-52 (9th Cir. 2013), that the *Alphonsus* case squarely presents the jurisdictional question, and that the court should take the case en banc. The court has since ordered and received a response from *Alphonsus*.

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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). Oral argument before the panel suggests that the court's concern is whether possession of drug paraphernalia "relates to" a controlled substance. En banc oral argument has been calendared for May 29, 2013.

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Child Status Protection Act Aging Out

On January 25, 2013, the government filed in the Supreme Court a 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 Board of Immigration Appeals reasonably interpreted INA § 203(h)(3). The aliens' response is due May 3, 2013.

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AILA InfoNet Doc. No. 13030190. (Posted 3/1/13)

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Concludes Substantial Evidence Supports BIA's Refusal to Remove Conditions on Permanent Residency and Denial of Cancellation of Removal for Lack of Good Moral Character

In *Reynoso v. Holder*, __ F.3d __, 2013 WL 1197744 (1st Cir. March 26, 2013) (Torruella, *Ripple*, Howard), the First Circuit upheld the BIA's decision to deny removal of the conditions on the petitioner's permanent residency based on her failure to establish that she had entered her marriage in good faith.

The petitioner, a native and citizen of the Dominican Republic, was granted conditional permanent residency in the United States in 2002 on the basis of her marriage to a United States citizen. Sometime following that grant, petitioner and her husband began divorce proceedings. When she later sought to remove the conditions on her residency, she filed her application without her husband co-signing the relevant form. Although his signature would have been necessary in the ordinary course, petitioner sought to employ an alternate method in which she was required to prove that the marriage, although now ended, had been bona fide. DHS denied her petition upon concluding that she had not carried her burden of establishing that she had entered her marriage for reasons other than obtaining immigration status in the United States. It therefore terminated her conditional resident status and initiated removal proceedings against her. Petitioner then renewed her request to remove the conditions on her residency and also sought cancellation of removal.

The IJ also concluded that petitioner had not established that she had entered her marriage in good faith and denied the request for removal of conditions. The IJ further determined that petitioner was ineligible for cancellation of removal because she had given false testimony in the proceedings and therefore could not establish the requisite good moral character. Consequently, the IJ ordered petitioner's removal, and the BIA dismissed her appeal.

The court concluded that the "limited record" submitted by petitioner "certainly cannot be said to require the conclusion that [petitioner's] marriage to [a U.S. citizen] was bona fide."

The court also determined that it had jurisdiction to review the BIA's denial of cancellation of removal, and found no error in that denial, where the BIA correctly found petitioner had given false testimony about her marriage and this constituted a statutory bar to meeting the requirement of good moral character necessary for cancellation.

Using a fraudulent Social Security card to gain employment involved "inherently deceptive" conduct, and is thus a crime involving moral turpitude.

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FIFTH CIRCUIT

Fifth Circuit Holds Terrorism Inadmissibility Bar Does Not Apply to Asylum Grantee

In *Amrollah v. Holder*, __ F.3d __, 2013 WL 789734 (5th Cir. Mar. 4, 2013) (Stewart, Davis, *Clement*), the Fifth Circuit reversed the district court, holding that the government was collaterally estopped from finding that the alien was inadmissible, and ineligible for adjustment, on the ground that the alien had engaged in terrorist activity. The court held that the government was precluded from finding that the alien gave material support to a terrorist organization because the immigration judge's grant of asylum necessarily included a determination that he did not provide material support to a terrorist organization or member of such organization.

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SEVENTH CIRCUIT

Seventh Circuit Holds Fraudulent Use of a Social Security Card Is a Crime Involving Moral Turpitude

In *Marin-Rodriguez v. Holder*, 710 F.3d 734 (7th Cir. 2013) (*Manion*, Tinder, Lee), the Seventh Circuit held that using a fraudulent Social Security card to gain employment involved "inherently deceptive" conduct, and is thus a crime involving moral turpitude. The court agreed that the petitioner's conviction records established that he committed a CIMT and affirmed the *Matter of Silva-Trevino* CIMT framework. The court also declined to adopt *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), which recognized a CIMT exemption for aliens who use fraudulent cards to engage in otherwise lawful behavior.

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Seventh Circuit Holds that Alien Failed to Prove Changed Conditions in China Excusing His Late Filing of Motion to Reopen to Apply for Asylum Based on His Recent Conversion to Christianity

In *Zheng v. Holder*, 710 F.3d 769 (7th Cir. 2013) (Posner, *Williams*, Norgle), the Seventh Circuit affirmed the BIA's denial of petitioner's fourth untimely motion to reopen to reapply for asylum, this time based on his conversion to Christianity while in detention pending his removal to China.

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The petitioner arrived in the United States in 1991 and filed an application for asylum the following year, which was not granted. The INS then charged him with removability in 1998 where he renewed his request for asylum, asserting that his wife (who arrived from China in 1994 and whom he married in 1995) would be forcibly sterilized under China's one-child policy because they already had two children. The IJ denied the request in 1999, relying in part on petitioner's lack of credibility, and the BIA affirmed in 2002. Petitioner did not depart. Instead he filed three motions to reopen which were all denied by the BIA because they were untimely (and successive with respect to the second and third motions), and because petitioner failed to demonstrate changed country conditions as to forced sterilization that would justify an exception to the statutory bar against untimely and successive motions to reopen.

In September 2011, petitioner filed a fourth motion to reopen arguing that he would be persecuted in China because he is a Christian. He claimed he converted to Christianity in 2010 while in immigration detention, submitting evidence that he and his family were baptized at the First Chinese Free Methodist Church. Without questioning the sincerity of his alleged conversion, the BIA denied petitioner's motion to reopen based on his failure to demonstrate materially changed conditions in China pertinent to this claim since the 1999 hearing.

The court held that the BIA erred by not explaining why the petitioner failed to prove changed conditions in China sufficient to exempt him from the time and number restrictions on motions to reopen. Nonetheless, the court concluded that the error was harmless because the petitioner, in fact, produced nothing indicating changed conditions since his original removal hearing. The court explained that "highly generalized statements" that conditions for those who practice Christianity in China had worsened since 1999 "simply do not satisfy [petitioner's] burden."

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds Immediate Family Members of a Local Business Owner Is Not a Particular Social Group**

In *Quinteros v. Holder*, 707 F.3d 1006 (8th Cir. 2013) (Loken, Beam, *Smith*), the Eighth Circuit concluded that immediate family members of a local business owner is too indiscriminate to adequately describe a particular social group for purposes of asylum.

The court noted that "under BIA precedent, the term 'family business owner' is too amorphous to adequately describe a social group."

The petitioner entered the United States in 2003 at the age of 14 without being admitted or paroled. In April 2008, the former INS charged petitioner with removability. He conceded removability initially but later filed an application for asylum, withholding of removal, and protection under CAT in September 2008. He asserted that he was targeted for persecution because of his membership in a particular social group consisting of family members of local business owners. Petitioner's father owned a dairy farm and bus transportation company and was well known within the town of 6,000 in El Salvador. Petitioner claimed that the Mara Salvatrucha ("MS-13") gang pressured him to join but he refused.

Several years after petitioner fled the country and before he submitted his asylum application, his 14-year-old brother was shot and killed in El Salvador. Petitioner alleged that the MS-13 gang was responsible for his brother's murder. The El Salvadoran government arrested suspects, but those charged were acquitted. Calles Quinteros also testified that the MS-13 gang threatened to rape his sister. He further testified that the gang had extorted money from his father, at some point torching two of his father's buses.

The IJ denied the asylum claim because it was untimely filed, and also on the merits for failure to prove past persecution and future persecution. The IJ acknowledged that while "[t]he country information does indicate that there are problems with gangs in El Salvador," "fear of gangs [is not] a basis for asylum in the United States." Given the higher proof standards for withholding of removal, the IJ also denied that relief, as well as relief under CAT.

The court agreed with the IJ's reasoning that the harm suffered by family members, including the MS-13 gang's attempts to extort money from the alien's family because his father owned a dairy farm and a bus transportation company, did not demonstrate a well-founded fear of future persecution on account of a protected ground. The court noted that "under BIA precedent, the term 'family business owner' is too amorphous to adequately describe a social group."

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■ **Eighth Circuit Holds Unsuccessful Police Efforts Did Not Establish Government Was Unable or Unwilling to Control a Private Actor**

In *Gutierrez-Vidal v. Holder*, __ F.3d __, 2013 WL 869652 (8th Cir. Mar. 11, 2013) (Riley, Beam, *Bye*), the Eighth Circuit concluded that the petitioner failed to establish that the Peru-

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vian government was unable or unwilling to control the Shining Path terrorist organization, where police efforts, including two investigations, arrests and a protective order, did not result in convictions or prevent an attack.

Petitioner entered the United States without inspection on January 12, 2003. After DHS placed him in removal proceedings, petitioner filed an affirmative application for asylum and claimed that he would be killed if he returned to Peru. The IJ found petitioner credible but denied his application because he did not show that the government was unwilling or unable to control the Shining Path. The BIA denied petitioner's appeal.

The Eighth Circuit agreed that petitioner failed to show that the Peruvian government was unwilling to protect him because the police investigated various incidents, made arrests, and entered an order of protection on his behalf. The court further observed that petitioner's failure to establish that the Peruvian government was unable or unwilling to control the Shining Path fatally undercut his future persecution claim.

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NINTH CIRCUIT

■ **Ninth Circuit Holds that Congress Could Rationally Limit an Exception to the Continuous Presence Requirement to Aliens who Served in the U.S. Military**

In ***Lim v. Holder***, __ F.3d __, 2013 WL 1197875 (9th Cir. March 26, 2013) (O'Scannlain, *Trott*, Clifton), the Ninth Circuit rejected a due process challenge to the agency's holding that petitioner was not entitled to the cancellation of removal statute's exception to the continuous presence requirement, because he had not served on active duty in the U.S. military.

The petitioner, a citizen of South Korea, who had first entered the United States in 1989, raised the novel argument that he could meet the 10-year continuous residence requirement by counting his military service in the South Korean Armed Forces from May 1995 to May 1998. He asserted that he qualified for the special continuous presence exception available to honorably discharged aliens who have served for twenty-four months "in active duty status in the Armed Forces of the United States." *See* 8 U.S.C. § 1229b(d)(3).

The Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

The Ninth Circuit held that Congress had a rational basis for limiting the exception to aliens who served in the U.S. military, since "the limited exception fashioned by Congress functions as a valuable *quid pro quo* for assistance in our national defense." Moreover, said the court, the Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens, and that "the power to expel or exclude aliens [is] a fundamental sovereign attribute . . . largely immune from judicial control."

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■ **Ninth Circuit Holds Conviction for Misdemeanor Sexual Battery Is a Crime Involving Moral Turpitude**

In ***Gonzalez-Cervantes v. Holder***, __ F.3d __, 2013 WL 934432 (9th Cir. Mar. 8, 2013) (*Nelson*, Murguia, Tashima (dissenting)), the Ninth Circuit concluded that convictions for misdemeanor sexual battery under California Penal Code § 243.4(e) categorically constitute crimes involving moral turpitude.

The petitioner, a native and citizen of Mexico, entered the United States without inspection in 1994 and later adjusted his status based on his marriage to a U.S. citizen. Petitioner pleaded no contest to four separate counts of misdemeanor sexual battery and was subsequently placed in removal proceedings. The IJ found him removable for committing two or more CIMTs. After petitioner appealed, the BIA determined that there was no "realistic probability" that California would apply § 243.4(e) to non-morally turpitudinous conduct, dismissed the appeal, and denied petitioner's later motion to reconsider.

The Ninth Circuit first concluded that conduct punishable under § 243.4(e) falls within the generic federal definition for morally turpitudinous conduct in the context of sex-related offenses. The court further held that petitioner failed to meet his burden of showing a "realistic probability" that California would apply § 243.4(e) to conduct falling outside of that generic definition because each of his proffered cases involved sexually abusive battery that necessarily inflicts actual harm on a victim. Judge Tashima dissented and argued that California courts have applied § 243.4(e) to conduct involving intent to insult or humiliate that is not morally turpitudinous under Ninth Circuit law.

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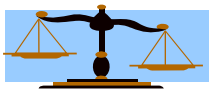

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■ **Ninth Circuit Holds Agency Must Recognize Nunc Pro Tunc Adoption Decrees and Alien's Due Process Rights Were Violated**

In ***Amponsah v. Holder***, 709 F.3d 1318 (9th Cir. 2013) (Fletcher, *Fisher*, Quist (by designation)), the Ninth Circuit concluded, under step two *of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 843 (1984)), that the BIA's blanket rule against recognizing state courts' adoption decrees entered *nunc pro tunc* after a child's 16th birthday constituted an impermissible construction of the statutory definition of a "child" under INA § 101(b)(1), and that case-by-case consideration of such adoption decrees is required. "The BIA's interpretation is unreasonable because it gives little or no weight to the federal policy of keeping families together, fails to afford deference to valid state court judgments in an area of the law — domestic relations — that is primarily a matter of state concern and addresses the possibility of immigration fraud through a sweeping, blanket rule rather than considering the validity of *nunc pro tunc* adoption decrees on a case-by-case basis," explained the court.

"That some nunc pro tunc adoptions decrees may involve fraud does not justify the BIA's categorical refusal to recognize *nunc pro tunc* decrees issued after the age of 16."

The petitioner, a citizen of Ghana, was born in March 1984. She entered the United States as a visitor in July 1999, when she was 15 years old. On July 28, 2000, the Pierce County, Washington, Superior Court issued a decree providing for petitioner's adoption by her United States citizen aunt, Beatrice Apori. In September 2000, petitioner's adoptive mother filed an I-130 family visa petition on her behalf and petitioner filed a corresponding I-485 application to adjust status. The I-485 was denied in May 2001 and that there was no separate formal denial of the I-130. Petitioner's adoptive mother filed a second I-130 petition in 2007, and petitioner ultimately renewed her application for adjustment of status.

In October 2001, the Washington superior court issued an order modifying the July 2000 decree of adoption *nunc pro tunc*. The court provided that "the Decree of Adoption herein is hereby modified, *nunc pro tunc*, in so far as the effective date of filing of the Decree of Adoption is hereby February 28, 2000, four days prior to the sixteenth birthday of the adoptee."

Following commencement of removal proceedings, the IJ concluded that petitioner could not satisfy the statutory definition of child because she did not show that she had "been in the legal custody of, and has resided with, the adopting parent . . . for at least two years." INA § 101(b)(1)(E). On appeal, the BIA, reviewing *de novo*, affirmed without deciding the legal custody question, but agreeing with DHS that petitioner could not satisfy the definition of child because she was not adopted before the age of 16. The BIA relied on *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), where it had held that an adoption decree entered *nunc pro tunc* after the age of 16 is not given retroactive effect under the immigration laws.

In rejecting the BIA's interpretation, the court explained that the fact "that some *nunc pro tunc* adoptions decrees may involve fraud does not justify the BIA's categorical refusal to recognize *nunc pro tunc* decrees issued after the age of 16."

The Ninth Circuit noted that in *Mathews v. USCIS*, 458 Fed. Appx. 831, 833 (11th Cir. 2012) (unpublished), the Eleventh Circuit recently had accorded deference to *Matter of Cariaga* at Chevron step two, but said that *Mathews*, however, provided "only a cursory analysis" of the issue.

The court also held that petitioner was denied due process because the BIA took administrative notice of the finding of fraud in her husband's visa petition case without affording her notice or an opportunity to be heard. "When taking administrative notice of controversial or individualized facts, the BIA must provide an alien with notice and an opportunity to rebut them," explained the court.

Consequently, the court concluded that neither of the bases the agency gave for pretermitting the petitioner's adjustment of status application could be sustained.

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■ **Ninth Circuit Affirms Dismissal of Class Action Challenge to Visa Allocation Program**

In ***Li v. Kerry***, 710 F.3d 995 (9th Cir. 2013) (Reinhardt, Kleinfeld, *Smith*), the Ninth Circuit affirmed the district court's dismissal of a purported class action lawsuit under the APA. The plaintiffs, certain individuals from China seeking permanent residency in the United States, alleged that the Department of State and DHS had misallocated immigrant visas to eligible applicants in the employment-based third preference category (EB-3) during the 2008 and 2009 fiscal years. They requested that visa numbers be made available to them and other members of their class so that they could obtain visas

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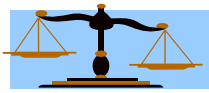

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or adjustment of status before the end of the fiscal year.

The court held that USCIS did not have a duty to approve applications for adjustment of status in priority date order, and the claims against the Department of State with respect to the alleged misallocation of visa numbers in fiscal years 2008 and 2009 were moot because the Department of State lacks the authority to recapture visa numbers from prior years. The court further held that the plaintiffs could not state a claim for prospective relief under the APA because courts lack the authority to "compel agency action merely because the agency is not doing something we may think it should do."

Judge Reinhardt wrote a separate concurring opinion "to note the importance of the problem that Plaintiffs identify, and to suggest that, despite our affirmance of the district court's dismissal of Plaintiffs' complaint, our opinion should not be viewed as approving of the misallocation of immigrant visas."

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■ **Ninth Circuit Affirms Dismissal of Habeas and Mandamus Claims Challenging Removal Order and Non-Final Agency Action**

In ***Mamigonian v. Biggs***, __ F.3d __, 2013 WL 1092713 (9th Cir. Mar. 14, 2013) (Gould, Smith, *Duffy*), the Ninth Circuit affirmed the district court's dismissal of the petitioner's habeas and mandamus claims for lack of jurisdiction.

Petitioner, a native and citizen of Armenia, arrived in the United States on February 2, 2003, and presented a U.S. passport that did not belong to her. DHS paroled petitioner into the country and later placed her in removal proceedings. While in proceedings, petitioner married a U.S. citizen and was approved for a visa. USCIS denied her adjustment application based on her alleged false claim of citizenship.

The IJ dismissed the charges related to the alleged false claim of citizenship but ordered petitioner removed for being present in the United States without a valid visa. Petitioner filed two additional adjustment applications that were denied but later reopened by USCIS. Petitioner then filed a petition in district court to enjoin her removal, reverse the denial of her first adjustment application, and compel USCIS to approve her two subsequent adjustment applications. Subsequently, USCIS denied petitioners' applications and the district court dismissed the case for lack of jurisdiction.

The Eleventh Circuit rejected the IJ's implausibility grounds because his repeated references that the story "just seems suspicious to me" was grounded in personal perception rather than the record facts.

The Ninth circuit affirmed the district court's dismissal for lack of jurisdiction because the statute precludes review of final orders of removal in district court. The court also found that there was no final agency action at the time petitioner filed because her adjustment applications were still open before USCIS and that USCIS's subsequent denial of her applications mooted the mandamus action. The court further held that district courts have jurisdiction to hear cases under the Administrative Procedures Act challenging final agency non-discretionary determinations for immigration benefits enumerated in 8 U.S.C. § 1252(a)(2)(B)(i), provided there is no pending removal proceeding in which petitioner could seek those benefits.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds Inconsistencies Between an Asylum Claim and State Department Reports Cannot Serve as the Sole Basis for an Adverse Credibility Finding**

In ***Wu v. Holder***, __ F.3d __, 2013 WL 898148 (11th Cir. Mar. 12, 2013) (Tjoflat, *Wilson*, Kravitch), the Eleventh Circuit rejected the IJ's finding that the petitioner's claim was implausible and concluded that the purported inconsistencies between petitioner's claim and the State Department reports were insufficient to support the adverse credibility finding.

Petitioner entered the country on August 2, 2008, without being admitted or paroled. After being placed in removal proceedings, petitioner filed for asylum and claimed that Chinese authorities forced her to have an abortion after she became pregnant out of wedlock. The IJ found petitioner's story inherently implausible, questioned the credibility of her documentation from China, and relied on evidence in the Country Profile that petitioner's region had no recent cases of forced abortions. The BIA upheld the IJ's credibility finding and dismissed petitioner's appeal.

The Eleventh Circuit rejected the IJ's implausibility grounds because his repeated references that the story "just seems suspicious to me" was grounded in personal perception rather than the record facts. The court faulted the IJ for finding petitioner's story inconsistent solely because it did not conform to the Country Profile and reasoned that, in the absence of any finding regarding petitioner's demeanor, the consistency of her statements, or some

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This Month's Topical Parentheticals

ASYLUM

■ *Wu v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 898148 (11th Cir. March 12, 2013) (reversing adverse credibility determination against female Chinese applicant claiming past forced abortion, on grounds that IJ's conclusion that applicant's story was implausible was based on impermissible speculation and conjecture about how Chinese officials would act, and that IJ could not rely on inconsistencies between applicant's story and general country conditions evidence unless there was an actual inconsistency or discrepancy in applicant's testimony)

■ *Quinteros v. Holder,* __ F. 3d __, 2013 WL 764719 (8th Cir. March 1, 2013) (rejecting claim that "family members of a local business owner" are a particular social group because the terms "family" and "business owner" are too amorphous to adequately describe a PSG; holding that past murder of brother, past gang threat to rape sister, past gang recruitment of applicant, and past gang extortion of father do not establish "well-founded fear" of future persecution of applicant where his father, mother and sisters continue to live unharmed in El Salvador)

■ *Gutierrez-Vidal v. Holder,* __ F. 3d __, 2013 WL 869652 (8th Cir. March 11, 2013) (affirming IJ and BIA determinations that past threats and beatings, and feared future killing by Shining Path terrorists in Peru, do not constitute "persecution," because: (i) private conduct is not "persecution" unless it is by persons the government is unable or unwilling to control; and (ii) applicant failed to show the Peruvian government was unable or unwilling to control the Shining Path, where police investigated past beatings, made arrests, attempted unsuccessfully to convict the perpetrators, and entered a protective order for applicant)

CHILD

■ *Amponsah v. Holder,* __ F. 3d __, 2013 WL 1180298 (11th Cir. March 22, 2013) (holding that the BIA's rule of not recognizing state courts' nunc pro tunc adoption decrees for purposes of determining whether the statutory definition of "child" is met constitutes an impermissible construction of the INA because: (a) it gives little weight to the federal policy of keeping families together; (b) fails to afford deference to valid state court judgments; and (c) addresses the possibility of immigration fraud through a "blanket" rule rather than on a case-by-case basis; further holding that the BIA violated petitioner's due process rights by relying on USCIS's finding of marriage fraud even though that ground was not raised by ICE before the IJ)

CRIMES

■ *Cole v. United States Att'y Gen.,* __ F. 3d __, 2013 WL 978199 (11th Cir. March 14, 2013) (holding that petitioner's guilty plea and indeterminate sentence of up to five years under SC law for pointing a firearm at another person was a conviction for immigration purposes despite a "possible expungment" in the future, and constituted a crime of violence; further treating indeterminate sentence as a 5-year sentence disqualifying petitioner from withholding of removal; finding that the criminal alien review bar precluded review over most of petitioner's CAT arguments, which were factual in nature)

■ *Matter of Ortega-Lopez,* 26 I&N 99 (BIA March 8, 2013) (holding that the offense of sponsoring or exhibiting an animal in an animal fighting venture in violation of 7 U.S.C. § 2156(a)(1) is categorically a CIMT)

■ *Marin-Rodriguez v. Holder,* __ F. 3d __, 2013 WL 819383 (7th Cir. March 6, 2013) (holding that petitioner's conviction under 18 U.S.C. § 1546(a) for using a fraudulent social security card to obtain and maintain employment constituted a CIMT where he admitted as part of his guilty plea that he engaged in deceptive behavior by knowingly using a social security card to deceive his employer into thinking that he was legally employable)

■ *Gonzalez-Cervantes v. Holder,* __ F. 3d __, 2013 WL __ (9th Cir. March 8, 2013) (holding that petitioner's conviction for misdemeanor sexual battery under Cal. Pen. Code § 243.4(e) categorically constitutes a CIMT, and agreeing with the BIA that there is not a realistic probability that California would apply § 243.4(e) to conduct that is not morally turpitudinous)

■ *United States v. Rangel-Castaneda*, __ F. 3d __, 2013 WL 829149 (4th Cir. March 7, 2013) (reversing the district court and holding that because Tennessee's statutory rape provision sets the age of consent at eighteen and is therefore significantly broader than the generic offense (which sets the age of consent at 16), the defendant alien's conviction under that statute does not categorically qualify as a crime of violence for purposes of a sentencing enhancement in an illegally reentry proceeding)

■ *United States v. Rodriguez,* __ F.3d __, 2013 WL 1092568 (5th Cir. March 15, 2013) (en banc) (adopting a "plain-meaning approach" to the crime of violence enhancements of sexual abuse of a minor and statutory rape under the sentencing guidelines, and holding in an illegal reentry case that the meaning of "minor" in "sexual abuse of a minor" is a person under the age of majority (18) and that the age of consent for purposes of statutory rape is the age of consent as defined by statute in the jurisdiction where the prior conviction was obtained) (Judges Owens and Jones concurred)

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JURISDICTION

■ *Mamigonian v. Biggs,* __ F. 3d __, 2013 WL 1092713 (9th Cir. March 14, 2013) (declining to dismiss appeal under fugitive disentitlement doctrine because, although petitioner failed to report for deportation, her whereabouts were known to her counsel, DHS, and the court during pendency of her case; affirming district court's dismissal for lack of jurisdiction because: (a) the REAL ID Act eliminated habeas jurisdiction over removal orders; (b) there had been no final agency action by USCIS on the two adjustment applications pending at the time she filed the petition; and (c) her mandamus claim was mooted when USCIS subsequently decided those two applications; further holding that because USCIS had denied all pending applications, the district court would now have jurisdiction under the APA)

■ *Belleri v. United States,* __ F. 3d __, 2013 WL 979121 (11th Cir. March 14, 2013) (remanding to district court to address whether petitioner is a US citizen for purposes of determining whether 8 U.S.C. § 1252(g) precludes a claim for money damages against a federal official and the US arising out of petitioner's 8-month immigration detention)

FOURTH AMENDMENT

■ *United States v. Castro,* __ F. Supp.2d __, 2013 WL 1010655 (D.N.M. March 14, 2013) (granting defendant's motion to suppress all evidence resulting from a vehicle stop after finding that the border patrol agent did not have reasonable suspicion to stop the vehicle, and no reasonable suspicion developed in the course of the stop)

VISAS

■ *Li v. Kerry,* __ F. 3d __, 2013 WL 1150482 (9th Cir. March 20, 2013) (affirming district court's dismissal of plaintiffs' claim on mootness grounds where plaintiffs alleged that visa numbers should be made available to them because defendants misallocated immigrant visas to eligible Chinese applicants in the employment based third preference category (EB-3) during fiscal years 2008 and 2009; reasoning that no authority allows visa numbers from previous years to be recaptured and allocated during the current year) (Judge Reinhart concurred)

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other individualized reason for questioning her credibility, it could not say that the IJ's adverse credibility determination was supported by "specific, cogent reasons."

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■ **Eleventh Circuit Holds Conviction for Pointing or Presenting a Firearm Is a Particularly Serious Crime of Violence, Disqualifying Petitioner from Relief**

In *Cole v. United States Att'y Gen.*, __ F.3d __, 2013 WL 978199 (11th Cir. Mar. 14, 2013) (*Marcus*, O'Connor, Pryor), the Eleventh Circuit held that the petitioner's youthful offender conviction for pointing and presenting a firearm in violation of South Carolina Code § 16-23-410 constituted an adult conviction for a particularly serious crime.

Petitioner was admitted as a lawful permanent resident in 2006 and was subsequently convicted of § 16-23-410 and placed in removal proceedings. The IJ determined that petitioner was ineligible for asylum or withholding of removal because he was convicted of an aggravated felony particularly serious crime. The IJ denied petitioner's CAT claim because he failed to show he would be tortured with the acquiescence of the Jamaican government due to his disabilities, his status as a deportee, or his imputed political opinion as a result of his father's political activities. The BIA dismissed petitioner's appeal.

The Eleventh Circuit held that petitioner's conviction was: (1) an adult conviction for immigration purposes, despite the designation of "youthful offender" status; (2) an aggravated felony crime of violence under 18 U.S.C. § 16(b), because the South Carolina court required a showing of specific intent to threaten for conviction, and because threatening someone with a gun always involves a substantial risk of force; and (3) a particularly serious crime barring eligibility for withholding of removal, because the suspended indeterminate 5-year sentence qualified as a five-year sentence for immigration purposes. The court also held that it lacked jurisdiction over the majority of the challenges to the agency's denial of CAT protection, as they were factual predictions about the likelihood of future events, and upheld the BIA's finding that petitioner's detention upon return to Jamaica would not rise to the level of torture.

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AILA InfoNet Doc. No. 13030190. (Posted 3/1/13)

Retroactivity of Brand-X Decisions

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decision *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012).

In ***Duran-Gonzales v. DHS,*** __ F.3d __, 2013 WL 1276522 (9th Cir. March 29, 2013) (Canby, *Silverman*, Callahan (dissenting)) (*Duran Gonzales III*), the Ninth Circuit reversed its panel decision in *Duran Gonzales II*. A majority of the panel determined that the *en banc* decision in *Garfias* should apply to the class in this case. In *Garfias*, the Ninth Circuit held that when the court of appeals defers to an intervening agency decision conflicting with its prior decision, a reliance analysis is required to determine whether the intervening decision retroactively applies to the party before the court. In particular, the Ninth Circuit set forth a different test for retroactivity in *Brand X* cases, namely the multi-factor inquiry articulated in *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982).

The *Montgomery Ward* factors include: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Consequently, the panel remanded the case to the district court to conduct a retroactivity analysis. "Given the stage of this litigation and the fact that the record has not been fully developed, as in *Garfias–Rodriguez*, it would not be proper for us to apply that test in the first instance," said the court.

Judge Callahan dissented from the majority. He would have held that there had been no intervening controlling authority to reconsider the panel's decision, and that the law-of-the-case doctrine precluded rehearing on retroactivity grounds.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

Guilty plea in sex trafficking case in Mississippi

According to court documents, Moonseop Kim, 54, posted an internet ad offering Korean female escort services in September 2012. Undercover officers with the Biloxi police responded to the ad and conducted a sting operation which resulted in the arrest of Kim and a Korean female. ICE investigators subsequently discovered Kim was connected to a multi-state prostitution ring operated out of Atlantic City, N.J., and that Kim and the female had both overstayed their visas and were illegally in the country.

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

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

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