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LITIGATION HIGHLIGHTS

Inside

Supreme Court Soundly Rejects BIA's Comparability Grounds Approach To Adjudicating § 212(c) Waivers

In ***Judulang v. Holder***, __U.S.__, 132 S. Ct. 476 (U.S. December 12, 2011), the Supreme Court rejected the BIA's comparable-grounds rule which had limited the expansion of former INA § 212(c) waiver to aliens with a ground of removal comparable to a ground of inadmissibility. Justice Kagan writing for a unanimous Court, found the BIA's comparable-ground approach to be "arbitrary and capricious" under the APA, with "no connection to the goals of the deportation process or the rational operations of the immigration laws," and compared it to a coin flip and a "sport of chance."

Under the plain meaning of the statute, § 212(c) authorized the Attorney General to waive, in his discretion, the inadmissibility of a resident alien who had temporarily proceeded abroad and who was returning to a "lawful unrelinquished domicile of seven consecutive years." Over the years, however, through a series of decisions by the BIA and the courts, the waiver was extended to the deportation context, thus making it available to LPRs who had never left the United States.

In 1996, Congress repealed § 212(c), but in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court kept the relief available to aliens who had plead guilty prior to the effective date of the repeal. In the Court's words, "§ 212(c) has had an afterlife

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Asylum Denials Based Purely On Agency Discretion; A Litigator's Guide To Defense On Judicial Review

Can an alien's legitimate desperation to flee persecution in his homeland ever become so dire and inherently dangerous that to reward the success of his employing such dangerous tactics with an asylum grant would be wrong or violate public policy? In the interests of sending a message and protecting the lives of future refugees, should the United States deny that applicant, who is otherwise statutorily eligible, the benefits of asylum based solely on discretion?

In an interesting and somewhat surprising decision, the Ninth Circuit has answered both of these questions with a resounding "yes." In *Li v. Holder*, 656 F.3d 898, 899 (9th Cir. 2011), the alien's father paid a smuggler to take Li across the U.S. border in the following manner:

> The smuggler placed Li into a small iron box that was welded to the bottom of a vehicle. Once inside the box, Li was unable to extricate himself without assistance and had no means of communicating with the driver; he could not turn over or see outside of the compartment except for occasional glances at the road below. Li remained in the box for more than forty

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Supreme Court Soundly Rejects BIA's Comparability Grounds Approach

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for resident aliens with old criminal convictions." Indeed, after continuing litigation, in 2005, the BIA definitively adopted the comparable-ground rule In *Matter of Blake*, 23 I&N Dec. 722 (2005). Under *Blake*, the BIA evaluates whether the ground for deportation charged in a case has a close analogue in the § 212(a) list of exclusion grounds. If it does not, § 212(c) is not available even if the particular offense committed by the alien falls within an exclusion ground.

The petitioner, Judulang, has been an LPR since 1974. In 1988 he pleaded guilty to voluntary manslaughter and received a 6-year suspended sentence. In 2005 following a guilty plea to a theft offense, DHS institute removal proceedings against Judulang on the basis that he had been convicted of an aggravated felony involving a crime of violence, namely the manslaughter conviction. The IJ and the BIA determined, in pertinent part, that Judulang was ineligible for § 212(c) relief because the "crime of violence" deportation ground was not comparable to any exclusion ground, including the one for crimes involving moral turpitude. The Ninth Circuit denied Judulang's petition for review in reliance on circuit precedent upholding the BIA's comparable-grounds approach.

Initially, the Supreme Court declined the government's suggestion to review the BIA's decision under the *Chevron* two-step analysis and instead applied the APA "arbitrary [or] capricious" standard. It noted however, that its analysis would be the same "because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'" Nonetheless, the Court found the APA standard "the more apt analytic framework" because the "BIA's comparable-ground policy . . . is not an interpretation of any statutory language — nor could it be, given that § 212(c) does not mention deportation cases." Indeed, the Court throughout its decision identified the BIA's interpretation as a "policy."

The Court explained that under the APA "arbitrary [or] capricious" standard, courts review an agency action to ensure "that agencies have engaged in reasoned decisionmaking . . . [and] assess, among other matter, 'whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" "The BIA has flunked that test here," said the Court. "By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories — a matter irrelevant to the alien's fitness to reside in this country — the BIA has failed to exercise its discretion in a reasoned manner."

The BIA may have "legitimate reasons for limiting § 212(c)'s scope in deportation cases. But still, it must do so in some rational way."

The Court found the dispute between the parties, namely whether the BIA must make discretionary relief available to deportable and excludable aliens on identical terms, "beside the point, and we do not resolve it." The Court explained that the BIA may have "legitimate reasons for limiting § 212(c)'s scope in deportation cases. But still, it must do so in some rational way." As the Court explained, the comparable-ground approach is not a rational one because "[r]ather than considering factors that might be thought germane to deportation decision, the policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions." The Court said that "the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system. A method for disfavoring deportable aliens that bears no relation to these matters — that neither focuses on nor relates to an alien's fitness to remain in the country — is arbitrary and capricious. And that is true regardless whether the BIA might have acted to limit the class of deportable aliens eligible for § 212(c) relief on other, more rational bases."

The Court made it clear that it was not saying that "the BIA must give all deportable aliens meeting § 212 (c)'s requirements the chance to apply for a waiver [] The point is instead that the BIA cannot make that opportunity turn on the meaningless matching of statutory grounds."

Additionally, the Court also found arbitrary the fact that the BIA's comparable-grounds analysis "may rest on the happenstance of an immigration official's charging document . . . because an alien's prior conviction may fall within a number of deportation grounds, only one of which corresponds to an exclusion ground." "So everything hangs on the charge," noted the Court, and "that the Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring, or that those officials are exercising their charging discretion with § 212(c) in mind. [] So at base everything hangs on the fortuity of an individual official's decision. An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country." The Court found the BIA's policy "flawed," and with "no connection to the goals of the deportation process or the rational operation of the immigration laws," and it equated it to a "sport of chance."

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Review of discretionary denials of asylum

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> minutes as the driver transported him across the California desert at a time of year when temperatures often exceed 100 degrees Fahrenheit, though it is unclear from Li's testimony what time of day he was traveling.

Id. at 900.

The *Li* panel, in concurrence with the agency's determination, upheld the denial of asylum based solely on agency discretion, rendering *Li* the first precedential opinion where asylum was expressly denied with the safety of future refugees in mind. In fact, the Ninth Circuit acknowledged that, "there is a sense of unfairness in singling out Li for the purpose of sending a message to other potential asylum seekers," but it respected and gave meaning to the agency's power to exercise a discretionary denial under the facts of the case. *Id*. at 906.

While the facts of *Li* are unique, its general applicability and the import of its holding must not be lost in the unusual facts. The *Li* panel's message is clear — a defensible discretionary asylum denial requires a well-documented and thorough decision that clearly reflects the agency's due consideration of *all circumstances* of the case, without undue focus on a single, egregious negative factor. 656 F.3d at 906. Indeed, while it is easy to get distracted by the unconscionable level of danger to which the alien in *Li* subjected himself, the Ninth Circuit's affirmance was more broadly grounded:

> the BIA considered Li's specific circumstances, including the positive and negative factors associated with asylum. For example, in addition to Li's method of entry, the BIA considered the likelihood and severity of persecution against Li if he returned to China; that other relief had been granted; that Li did not have family members who would lose their legal status as a result of his denial of asylum; that Li was not compelled to leave Mexico; that his departure from Mexico was not triggered by an impending threat to him or his freedom; and that he was aware that he could walk to the United States and seek asylum, but in an attempt to avoid detection chose a significantly more dangerous method. The BIA concluded, after considering "all the circumstances of this case," that the IJ did not abuse his discretion in denying Li's asylum application.

A defensible discretionary asylum denial requires a well-documented and thorough decision that clearly reflects the agency's due consideration of *all circumstances* of the case.

Id.

Based on this holding, OIL will be well-poised to defend agency discretionary asylum denials so long as the briefing attorney can identify and explicate the agency's due consideration of all facts and circumstances considered in the exercise of that discretion.

In *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987), the BIA first delineated a non-exhaustive list of factors to consider when exercising discretion in the context of asylum grants or denials; (1) whether the alien circumvented orderly refugee procedures; (2) whether the alien passed through other countries before coming to the United States; (3) whether orderly refugee procedures were available to him in any country he passed through; (4) whether he made any attempts to seek asylum before coming to the Unites States; (5) the length of time an alien stayed in a third country plus its living conditions, safety and potential for long-term residence; (6) whether the alien has legal relatives in or other personal ties to United States; (7) whether the alien has personal ties to other safe countries; (8) whether the alien engaged in fraud to enter the country and the seriousness of that fraud; (9) any humanitarian considerations such as tender age or poor health, and (10) the danger of persecution. The BIA was particularly concerned with a situation where an alien is statutorily eligible for asylum but cannot meet the higher burden required for withholding of removal. *Id*. In such a case, the Board cautioned that the discretionary factors should be "carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution," and instructed that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Id*.

In 1999, the agency essentially codified *Pula's* sixth and seventh factors when it enacted 8 C.F.R. § 1208.16(e). That regulation mandates reconsideration of discretionary asylum denials where the applicant will be separated from his spouse and minor children by virtue of a grant only of withholding of removal. *Id*. Although *Pula* did not mention an alien's criminal record as a discriminatory factor, it has been used by many courts and the Board in the analysis of discretionary asylum. *See, e.g.*, *Shahandeh-Pey v. INS*, 831 F.2d 1384 (7th Cir. 1987); *see also Jian v. INS*, 28 F.3d 256, 258-59 (2d Cir. 1994) (upholding discretionary asylum when alien committed a particularly serious crime and did not present any mitigating factors); *Kouljinski*

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Review of discretionary denial of asylum

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v. Keisler, 505 F.3d 534, 542-43 (6th Cir. 2007) (finding that three-year residence and no qualification for withholding of removal were not compelling enough factors to overcome alien's three DUI convictions). In fact, all of the statutory bases for denial can be used as relevant factors for discretion, even if they don't meet the standard required in the statute for mandatory denial. *See Kouljinski*, 505 F.3d at 543.

An excellent starting point for an OIL attorney briefing this issue in any circuit is the Fourth Circuit's decision in *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008). *Zuh* is a comprehensive summary of the relevant factors to be weighed in the exercise of agency discretion, where the court considered relevant regulations along with circuit and administrative decisions and compiled a non-exhaustive list of positive and negative factors. Among the positive factors are: (1) whether the alien has a family business, is involved in his community, and employment ties to the United States and length of residence and property ownership in this country; (2) evidence of hardship to the alien and his family if deported to any country, or if denied asylum such that the alien cannot be reunited with family members (as derivative asylees in this country); (3) evidence of good character, value, or service to the community, including proof of genuine rehabilitation if a criminal record is present; (4) general humanitarian reasons, such as age or health; and (5) evidence of severe past persecution and/or well-founded fear of future persecution, including consideration of other relief granted or denied the applicant.

Conversely, negative factors include: (1) nature and underlying circumstances of the exclusion ground; (2) presence of significant violations of immigrations laws; (3) presence of a criminal record and the nature, recency, and seriousness of that record, including evidence of recidivism; and (4) lack of candor with immigration officials, including an actual adverse credibility finding. *Id*.

The *Zuh* Court emphasized that the agency need not analyze every factor but instead must demonstrate that it reviewed the entire record and balanced all relevant positive and negative factors. When OIL defends agency discretionary denials on appeal, the most important point to make is that the agency properly considered all relevant factors. If this did not occur, the briefing attorney should consider whether remand may be appropriate, particularly in cases where there is a strong fear of future persecution and/or compelling humanitarian factors. *See, e.g., Castro-O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988); *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007).

OIL attorneys should pay special attention to cases like Li, involving smuggling (or cases involving fraud), because of *Pula*'s mandate that one factor cannot be unduly weighed to the exclusion of other relevant factors.

It is also noteworthy that a criminal alien will have a particularly high burden to merit favorable agency discretion, as a criminal record is an adverse factor that "can only be overcome with a showing of 'outstanding' or 'unusual' countervailing equities." *Shahandeh-Pey,* 831 F.2d at 1384; *see also Jian*, 28 F.3d at 258-59; *Kouljinski*, 505 F.3d at 542-43. In fact, there are few precedential decisions where courts have remanded discretionary asylum denials involving criminal aliens. *See, e.g., Castro-O'Ryan*, 847 F.2d at 1314 (finding that the Board only considered the alien's criminal convictions without considering his rehabilitation, family support or danger upon returning to Chile); *Shahandeh-Pey*, 831 F.2d at 1388-89 (finding that the Board either ignored or overlooked the dangers facing the alien upon his potential return to Iran).

OIL attorneys should pay special attention to cases like *Li*, involving smuggling (or cases involving fraud), because of *Pula*'s mandate that one factor cannot be unduly weighed to the exclusion of other relevant factors. *See Pula*, 19 I&N Dec. at 473; *see also Aioub v. Mukasey*, 540 F.3d 609, 612 (7th Cir. 2008) (finding that alien did not present any factors to overcome his use of marriage fraud to gain illegal entry into the country); *Alsagladi v. Gonzales*, 450 F.3d 700, 702 (7th Cir. 2006) (finding that alien's use of an illegal tourist visa and his ability to have stayed safely in a third country was sufficient to warrant discretionary denial of asylum); *but see Huang v. INS*, 436 U.S. 89 (2d Cir. 2006) (finding that alien's use of an illegal smuggler to leave China did not outweigh his severe past persecution and desire for family reunification); *Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007) (finding that alien's use of fraudulent documents and professional smugglers did not outweigh his fear of persecution and his strong family ties to the United States); *Mamouzian v. Ashcroft*, 390 F.3d 1129 (9th Cir. 2004) (finding that an asylum seeker's use of false documents to gain entry into a safe haven supports, rather than detracts from, his claims of fear).

The bottom-line when defending the agency's discretionary denial of asylum is that courts are willing to let such agency decisions stand, so long as the agency has adequately weighed and addressed *on the record* the relevant positive and negative factors. The OIL attorney should ensure that the agency did so and should emphasize this our brief.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Retroactivity – "admission" definition

The Supreme Court has scheduled oral argument for January 18, 2012 in ***Vartelas v. Holder*** (S. Ct. 10 -1211). The question presented is whether the 1996 amended definition of "admission," which eliminated the right of a lawful permanent resident to make "innocent, casual, and brief" trips abroad without being treated as seeking admission upon his return, is impermissibly retroactive when applied to an alien who pled guilty prior to the effective date of the 1996 statute.

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Cancellation - Imputation

The Supreme Court has scheduled oral argument for January 18, 2012 in ***Holder v. Martinez Gutierrez*** (No. 10-1542), and ***Holder v. Sawyers*** (No. 10-1543). These two cases raise the question of whether the parent's time of legal residence be imputed to the child so that the child can satisfy the 7 years continuous residence requirement for cancellation.

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Aggravated Felony - Tax Fraud

On November 7, 2011, the Supreme Court heard oral argument in ***Kawashima v. Holder*** (No. 10-577). The question presented is whether, in direct conflict with the Third Circuit, the Ninth Circuit erred in holding that petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under INA § 101(a)(43)(M)(i), and petitioners were therefore removable.

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MTR - Post-Departure Bar

Oral argument was heard on November 15, 2011, by the Tenth Circuit on *en banc rehearing* in ***Contreras-Bocanegra v. Holder***, 629 F.3d 1170 (10th Cir. 2010). A panel of the court had held that the BIA appropriately applied the post-departure bar codified at 8 C.F.R. § 1003.2(d) when it determined it lacked jurisdiction to consider a motion to reopen filed by an alien who had already been removed.

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Aggravated Felony — Missing Element

In ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), the Ninth Circuit has withdrawn its decision and received supplemental briefing on the effect of its *en banc* decision in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (2011), which overruled the "missing element" rule established in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). The government *en banc* petition challenged the missing element rule.

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Conviction – Conjunctive Plea

An *en banc* panel of the Ninth Circuit, following December 12, 2011, oral argument on rehearing in ***Young v. Holder***, has requested supplemental briefing on whether it should overrule *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007). The panel decision, originally published at 634 F.3d 1014 (2011), ruled that where the conviction resulted from a plea to a charging document alleging that the defendant committed the charged offense in several ways, the panel had reasoned that the government need not have proven that the defendant violated the law in each way alleged. In its en banc petition, the government argued that the panel's opinion is contrary to the court's *en banc* decision in *U.S. v. Snellenberger*, 548 F.3d 699 (2008), and the law of the state convicting court.

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Child Status Protection Act

The Fifth Circuit has ordered the alien to respond to the government's petition for rehearing en banc challenging the panel decision in *Khalid v. Holder*, 655 F.3d 363, which ruled that the decision of the BIA in Matter of Wang, 25 I&N Dec. 28 (BIA 2009), holding that derivative beneficiaries of third- and fourth- preference category visas were not entitled to conversion and retention under section 203 (h)(3) of the INA, was not entitled to deference on review because it conflicted with the plain, unambiguous language of the statute.

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CIMT – Silva-Trevino Framework

On December 15, 2011, the government filed a petition for rehearing en banc challenging the panel decision in ***Sanchez-Fajardo v. U.S. Attorney General***, 659 F.3d 1303, which held that the BIA erred in concluding that an alien's conviction rendered him inadmissible as an alien convicted of a crime involving moral turpitude by relying in part on convictions for other offenses committed by the alien on the same day involving the same victim. The panel rejected the portion of *Matter of Silva- revino,* 24 I&N Dec. 687 (A.G. 2008), authorizing consideration of evidence outside the record of the particular conviction, holding it contrary to the unambiguously expressed intent of Congress.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that Immigration Judge Abused Discretion Where Decision Lacked Essential Analysis

In ***Romer v. Holder***, __F.3d__, 2011 WL 6144908 (1st Cir. December 12, 2011) (Torruella, Boudin, *Thompson*), the First Circuit held that the IJ abused her discretion in denying a motion to reopen based on ineffective assistance of counsel, where the decision lacked any analysis as to whether the time and number restrictions on motions to reopen should be tolled or whether the alien failed to "voluntarily" depart pursuant to an order of voluntary departure.

The petitioner, a citizen of Ukraine, entered the United States as a visitor in 1999. He overstayed his visa, and the government initiated removal proceedings. On November 8, 2005, an IJ granted petitioner voluntary departure by March 8, 2006. Petitioner then enlisted the services of an attorney, Sirota, who filed a timely motion to reopen. The IJ denied the motion on January 16, 2006, and mailed a copy to the attorney. Petitioner stated that he was never told the motion had been denied, so he remained in the country following the expiration of voluntary departure.

Beginning in November 2005 and continuing for years, petitioner and his wife alleged that they called the attorney's office and were often reassured by staff that cases like his can take time. They also claimed that they were advised that petitioner did not need to leave the country and could wait out his case's resolution — even after immigration officers came to his home looking for him. In 2008, the attorney sought an additional $4,000 from petitioner for another motion, claiming he had to apprise the immigration court of petitioner's wife's change from lawful permanent resident to citizen. Petitioner paid the $4,000 fee in full.

On April 15, 2010, Romer was arrested, and he has remained in custody ever since. On April 25, 2010, an attorney at Sirota's firm filed a second motion to reopen. The IJ again denied the motion, observing that petitioner had already reached his limit of one motion to reopen under 8 C.F.R. § 1003.23(b). The IJ further determined that, because petitioner had overstayed his voluntary departure period, 8 U.S.C. § 1229c(d)(1)(B) imposed an absolute ten-year bar on any adjustment of status.

Several days later, petitioner's wife hired another attorney, Romanovsky, who filed another motion to reopen – petitioner's third -- this time based on Sirota's alleged incompetence and also argued that the time and number limitations of § 1003.23(b) should be equitably tolled because petitioner had diligently pursued what he thought were legitimate means to remain in the country, and that the ten-year bar should not apply because petitioner did not voluntarily overstay his term for departure but instead reasonably relied on counsel's advice that he could remain in the United States. For the third time, the IJ denied petitioner's motion to reopen, concluding that the new allegations were nothing more than "excuses" for disregarding the court's then-five-year-old voluntary-departure order. The BIA affirmed without opinion.

The First Circuit declined petitioner's argument to apply equitable tolling to his case. The court explained that it had previously declined to decide whether time and number restrictions on motions to reopen may be equitably tolled. Instead the court found that the IJ had "inadequately explained its rationale for rejecting tolling and imposing the ten-year bar," and remanded to the IJ to consider whether equitable tolling is available to petitioner. The court also found that the IJ failed to adequately address petitioner's argument regarding his failure to depart voluntarily constituted an abuse of discretion.

The court found that the IJ had "inadequately explained its rationale for rejecting tolling and imposing the ten–year bar."

In a concurring opinion Judge Boudin posited that perhaps the IJ had not grappled with the issues raised by petitioner because she did not believe that petitioner had been misled, but noted that those negative credibility findings, were not adequately explained.

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First Circuit Denies Petitioner's Due Process Claim that He Withdrew His Visa Waiver Program Application and Had Other Avenues for Relief Besides Asylum

In ***Hadjari v. Holder***, __F.3d__, 2011 WL 6016143 (1st Cir. December 5, 2011) (Boudin, Lipez, Smith (by designation)) (*per curiam*), the First Circuit rejected the petitioner's argument that he withdrew his application for entry into the United States under the Visa Waiver Program, and therefore was entitled to contest his removal on grounds other than persecution.

The petitioner, a citizen of Albania entered the United States on a fraudulent Italian passport in December 2004. Italy participates in the VWP, which waives the visa requirement for entry into the United States for citizens of certain countries. The program requires that anyone invoking this exemption to enter the United States also waive any right "to contest, other than on the basis of an application for asylum, any action for removal." Although Albania is not a participant in the VWP, regulations provide that the

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waiver requirement apply to those falsely purporting to be citizens of a covered country. 8 C.F.R. § 217.4 (2011).

The petitioner was arrested at the airport on arrival in the United States; thereafter, in subsequent criminal proceedings, he pled guilty to false use of a passport, and applied for asylum, withholding of removal and CAT protection. Petitioner claimed that he had suffered physical abuse based on his support of the Democratic Party in Albania. The IJ rejected the asylum claim on the merits, the BIA upheld the decision, and the First Circuit court affirmed.

After the BIA's decision but before the First Circuit's ruling, petitioner sought to reopen his removal proceedings. He claimed that when his attorney had reviewed the administrative record, he found "new evidence" indicating that the IJ had lacked jurisdiction because petitioner had immediately withdrawn his application for entry, so he could not be considered a VWP applicant, but rather should have been placed in removal proceedings. The BIA denied the motion, pointing out that, during the administrative proceeding rejecting his asylum application, petitioner had never argued that he was entitled to contest his removal on grounds other than persecution.

The court agreed with the BIA, that petitioner, who fully contested and lost his asylum claim, should have raised a challenge to his waiver during his original proceedings and not through a motion to reopen.

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■ **First Circuit Upholds Denial of Alien's Hardship Waiver for Permanent Residency Based on Alien's Fraudulent Marriage**

In ***McKenzie-Francisco v. Holder***, 662 F.3d. 584 (1st Cir. 2011) (Boudin, *Selya*, Howard), the First Circuit upheld the agency's finding that the alien entered into a fraudulent marriage and, therefore, was not entitled to a hardship waiver of a condition for permanent residency.

Petitioner had the burden show that, "at the time that the newlyweds plighted their troth, he intended to establish a life with his spouse."

The petitioner entered the United States illegally in 1999. On March 23, 2001, he married a United States citizen and subsequently obtained conditional resident status. The couple divorced in early 2004, while the petitioner was still a conditional resident. The petitioner nonetheless sought to remove the condition within the prescribed two-year period by applying for a hardship waiver under 8 § 1186a(c)(4)(B). In furtherance of this waiver request, he represented that his failed marriage had been entered into in good faith. The waiver was denied it and the petitioner was placed in removal proceedings.

In the immigration court, the petitioner renewed his waiver request. The IJ received documentary evidence and heard testimony from both the petitioner and his ex-wife. At the close of all the evidence, the IJ concluded that the marriage had not been entered into in good faith, denied the waiver, and ordered the petitioner removed to the Dominican Republic. The BIA affirmed the IJ's decision.

The court preliminarily determined that petitioner had the burden of proof to establish "good faith." "To carry this burden, he must show that, at the time that the newlyweds plighted their troth, he intended to establish a life with his spouse," said the court. The court then agreed with the IJ's finding that petitioner and his divorced spouse were not credible, explaining that "[t] his web of inconsistencies and gaps in knowledge defies explanation. "What is even more telling," noted the court, is that the IJ observed a *pas de deux* that erased any doubts about the couple's lack of veracity." (During petitioner's ex-wife's testimony, the IJ caught the petitioner signaling to his ex-wife by shaking his head). "This was a blatant attempt to influence a witness's testimony by improper means and, as such, strongly supports an adverse credibility determination," said the court. "To say more on this point would be to paint the lily," it concluded.

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THIRD CIRCUIT

■ **Third Circuit Rules that Civilian Witnesses Against Central American Gangs Are a Particular Social Group**

In ***Garcia v. Holder***, __F.3d__, 2011 WL 5903780 (3d Cir. November 28, 2011) (*Hardiman*, Aldisert, Restani), the Third Circuit concluded that the Guatemalan government's decision to relocate petitioner to Mexico, and to help her seek asylum there, amounted to an admission that it was unable to protect her and, thus, there was no support for the agency's finding that she did not have a reasonable fear of persecution in Guatemala.

The petitioners, Claudia and Silvia, are two sisters who separately entered the United States illegally in 1998 and 2005 respectively. When placed in removal proceedings they both conceded removability but applied for asylum, withholding of removal, and CAT protection, claiming that if they are returned to Guatemala, they will be persecuted by Valle del Sol, a violent gang the Guatemalan government allegedly cannot control. Petitioners testified that in 1996, shortly after their father died, their mother

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moved to the United States, leaving them with her mother's sister, Gloria. One of Gloria's children, Hilda was violent, and associated with gang members, one of whom, Jorge Solis Mexicanos, became her husband. Mexicanos was a career criminal and a leader of Valle del Sol. Apparently in the summer of 2003, Hilda used Silvia's home telephone to help Valle del Sol assassinate a prominent human rights activist named Jose Lopez–Lopez. After the murder was accomplished, Hilda warned Silvia that she would be killed if she helped the authorities find Lopez–Lopez's killers. Silvia eventually cooperated with the authorities and in return for her assistance she and her younger sister Danay were relocated to Mexico, where the Guatemalan and Mexican governments, along with the United Nations and other international organizations, arranged for them to get refugee status. According to Silvia, however, the threats persisted and Hilda, who was in prison at the time, kept calling her. Following a relocation to Guadalajara, Silvia illegally entered the United States in October 2005.

Petitioner shared a "'common, immutable characteristic' with other civilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Central America."

The IJ denied Silvia's application, finding that she was barred from receiving asylum because she had firmly resettled in Mexico before entering the United States. The IJ also determined that she was not eligible for asylum or withholding of removal because any persecution she might face is not on account of her membership in a cognizable "particular social group" (i.e., individuals who testify against gang members). On appeal, the BIA affirmed the IJ's decision relying primarily on two of the IJ's findings: (1) "that Silvia did not demonstrate an objectively reasonable fear of future persecution in Guatemala because she did not show that she is unable or unwilling to avail herself of the protection of the Guatemalan government;" and (2) "that the Guatemalan government is willing to protect Silvia such that she cannot be considered a 'refugee' within the meaning of the [INA]." The BIA added in a footnote that it "also concur[s] with the [IJ]'s alternative ruling that the harm [Silvia] fears is not on account of a protected ground."

The Third Circuit first disagreed with the BIA's finding that Silvia had not established her "[inability] or unwilling[ness] to avail herself of the protection of the Guatemalan government," finding that the evidence compelled the conclusion that her government did not have "the ability to protect her." Second, the court rejected the BIA's alternative holding — that any persecution Silvia might face in Guatemala would not be based on her membership in a "particular social group." The court held that under *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), Silvia shared a "'common, immutable characteristic' with other civilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Central America. It is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members of this group can recant their testimony, they 'should not be required to' do so."

However, the court remanded Silvia's case to the BIA to address several other elements of her application for asylum and withholding - including whether the harm she might face in Guatemala rises to the level of persecution, whether there would be a nexus between any persecution and her membership in a particular social group, and whether she was "firmly resettled" in Mexico such that she is barred from receiving asylum under 8 C.F.R. § 1208.13 (c)(2)(i)(B).

Finally, the court denied Claudia's claim to asylum, withholding, and CAT protection, finding that her interactions with Valle del Sol were quite limited, she never testified against Hilda or any of Hilda's associates, and she never requested protection from the Guatemalan government.

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■ Third Circuit Rejects Ineffective Assistance of Counsel and Due Process Arguments

In ***Calla-Collado v. Att'y Gen. of the U.S.***, __F.3d__, 2011 WL 4828658 (3d Cir. December 1, 2011) (Rendell, Jordan, Van Antwerpen) (*per curiam*), the Third Circuit rejected petitioner's claim that he had received ineffective assistance of counsel.

The petitioner, a citizen of Peru, illegally entered the United States in 2005. In September 2007, he was arrested for driving while intoxicated and without a license. When he arrived at police headquarters, police officers contacted ICE, and were informed that petitioner was an undocumented alien. Petitioner, was then detained in New Jersey and placed in removal proceedings. He was subsequently transferred to Oakdale, Louisiana. An IJ hearing was held in Louisiana on November 19, 2007, where petitioner, through his attorney, admitted removability requested a change of venue to New Jersey, which was granted.

In New Jersey, petitioner retained new counsel, filed a motion to withdraw the pleadings and filed a

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motion for an evidentiary hearing. The IJ did not rule on the motions, finding that petitioner's admission waived the issues raised in his motions. Because petitioner did not apply for any additional relief, the IJ ordered him removed to Peru. The BIA dismissed petitioner's appeal, finding that (1) he failed to establish that his previous concession to removability should be suppressed; (2) his rights were not violated when he was transferred to Louisiana; and (3) that evidence of his alienage was not suppressible under the Fourth Amendment.

An alien "does not have the right to be detained where he believes his ability to obtain representation and present evidence would be most effective."

The court held that held that the admission made by petitioner's attorney was binding and did not prejudice petitioner. The court explained that petitioner himself acknowledged that the concession may have been a tactical decision by his attorney to obtain the desired change of venue to New Jersey. "If the allegations to which he admitted are accurate, petitioner's removal was in a sense a foregone conclusion because he alleges no plausible grounds for relief from deportation," and therefore petitioner "cannot demonstrate that his counsel's purported ineffectiveness affected the result of his deportation proceeding and therefore cannot establish prejudice to sustain an ineffective assistance of counsel claim."

The court further held that petitioner was not prejudiced by a violation of a state attorney general directive even if police officers improperly contacted immigration officials. Finally, the court held that the alien's transfer to Louisiana for detention was not an egregious violation of his constitutional rights. The court explained that ICE "necessarily has the authority to determine the location of detention of an alien in deportation proceedings . . . and therefore, to transfer aliens from one detention center to another." Although an "alien is guaranteed the right to counsel and the right to present witnesses and evidence at his deportation proceedings, an alien, however, does not have the right to be detained where he believes his ability to obtain representation and present evidence would be most effective," said the court.

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■ **Third Circuit Holds that the BIA Used an Incorrect Legal Standard and Failed to Consider Evidence in Declining to Defer Petitioner's Removal Under CAT**

In ***Pieschacon-Villegas v. Atty Gen. of the U.S.***, __F.3d__, 2011 WL 6016134 (3d Cir. December 5, 2011) (Jordan, *Greenaway*, Stapleton), the Third Circuit held that the BIA committed two legal errors in declining to defer the alien's removal under the Convention Against Torture. The court held that the BIA made three unqualified statements regarding the issue of governmental acquiescence that contradicted circuit precedent. Furthermore, the court determined that the BIA's decision did not show that it had considered all evidence relevant to the possibility of future torture.

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■ **Sexual Assault Under 18 Pa. Cons. Stat. § 3124.1 Constitutes a Crime of Violence**

In ***Aguilar v. Atty. Gen. of the U.S.***, __F.3d__, 2011 WL 5925141) (3d Cir. November 29, 2011) (Rendell, *Jordan*, Barry), the Third Circuit held that sexual assault, as defined by 18 Pa. Cons. Stat. § 3124.1, which has a minimum *mens rea* of recklessness, constitutes a crime of violence under 18 U.S.C. § 16(b). The court reasoned such crimes raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds that It Has Jurisdiction to Review an Order of the BIA Remanding for Voluntary Departure Determination, But Declines Review on Prudential Grounds**

In ***Qingyun Li v. Holder***, __F.3d__, 2011 WL 6008978 (4th Cir. December 2, 2011) (Wilkinson, Shedd, *Agee*), the Fourth Circuit rejected the government's argument that the court lacks jurisdiction over a BIA's order remanding for a grant of voluntary departure because it is not a final order of removal. But the court dismissed the petition for review without prejudice for prudential reasons. The court followed decisions from the First and Sixth Circuits regarding 8 C.F.R. § 1240.26 (i), the new voluntary departure regulation.

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■ **Fourth Circuit Upholds Adverse Credibility Determination as Being Supported By Substantial Evidence**

In ***Djadjou v. Holder***, 662 F.3d 265 (4th Cir. 2011) (Wilkinson, *Floyd*, Wynn (dissenting)), the Fourth Circuit upheld the agency's adverse credibility determination because the

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petitioner's testimony was inconsistent with the supporting documentation, contained material omissions, and was not supported by objective evidence of past persecution.

The petitioner, an asylum applicant from Cameroon, claimed that Cameroonian officials arrested her four times and beat and raped her during her detainments. She testified that her persecution resulted from her political activities with opposition organizations. The IJ did not find her credible and denied the requested reliefs. On appeal the BIA affirmed, agreeing with the IJ that petitioner had "provided conflicting statements and material omissions regarding the alleged mistreatment in Cameroon."

"Under a flexible, pragmatic reading, termination of asylum cannot be viewed as a 'consummation' of agency decision making. Instead, it represents only an intermediate step in a multi-stage administrative process, succeeded (or accompanied) by removal proceedings before an IJ and intra-agency appeal to the BIA."

In finding that substantial evidence supported the adverse credibility findings, the court explained that, "the inconsistency and omission reasonably cast doubt on aspects of [petitioner's] testimony that went to the heart of her claims of past persecution, and their cumulative effect could cause a reasonable adjudicator to question the veracity of her overall testimony."

The court also found that there was insufficient independent evidence to establish past persecution. In particular, the court rejected petitioner's challenge to the IJ's refusal to credit the affidavits and letters provided by petitioner's uncle, sister, and friend on the ground that such evidence was not objective. "Letters and affidavits from family and friends are not objective evidence in this context," said the court.

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FIFTH CIRCUIT

Fifth Circuit Holds that USCIS's Asylum Termination Decision Is Not a Final Agency Action Under the Administrative Procedures Act

In ***Qureshi v. Holder***, __F.3d__, 2011 WL 5903789 (5th Cir. November 28, 2011) (*Smith*, Barksdale, Benavides), the Fifth Circuit held that USCIS's asylum termination decision is not a final agency action under the APA.

The petitioners were originally granted asylum from Pakistan because of lead petitioner, Mr. Qureshi's support for the Jammu Kashmir Liberation Front. Later, the USCIS decided to terminate petitioners' asylum based on that same support, applying the "persecutor bar" to Mr. Qureshi. When removal proceedings ensued, petitioners sued USCIS to challenge its application of the bar. The district court granted USCIS's motion to dismiss for lack of subject matter jurisdiction on the ground that the termination was not a final agency action.

The court noted that removal proceedings always follow USCIS's asylum termination decisions. "Under a flexible, pragmatic reading, termination of asylum cannot be viewed as a 'consummation' of agency decision making. Instead, it represents only an intermediate step in a multi-stage administrative process, succeeded (or accompanied) by removal proceedings before an IJ and intra-agency appeal to the BIA," explained the court. Consequently, even though neither the IJ nor the BIA have jurisdiction to directly review USCIS's asylum termination decision, the court concluded that the availability of alternative administrative relief within removal proceedings rendered USCIS's termination decision not final under the APA.

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Fifth Circuit Holds, in Unpublished Case, that Removed Aliens Are Not "In Custody" for Habeas Purposes

In ***Merlan v. Holder***, WL 6091152 (5th Cir. December 6, 2011) (Higginbotham, Davis, Elrod), the Fifth Circuit, in a *per curiam* opinion, held that an alien who has been deported pursuant to a final order of removal is not "in custody" for habeas purposes. The alien, an aggravated felon living in Mexico, argued that he was in custody because he was restrained from returning to the United States, a restraint not shared by the population at large. The court rejected this argument, reasoning that the alien failed to demonstrate that his deportation was the result of extreme circumstances or that he is subject to any restraints in Mexico not experienced by other non-citizens without documentation to enter the United States.

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Fifth Circuit Holds Asylum Applicants Can Be Required to Provide Reasonably Obtainable Corroborating Evidence Even When Their Testimony Is Credible

In ***Yang v. Holder***, __F.3d__, 2011 WL 6143429 (Higginbothan, Davis, *Stewart*) (5th Cir. December 12, 2011), the Fifth Circuit held that the BIA reasonably interpreted 8 C.F.R. § 1208.13(a) when it determined that an alien is eligible for asylum based solely on credible testimony only if corroborating evidence is not reasonably available.

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The petitioner, an asylum applicant from China, challenged the BIA's determination that his failure to provide corroborating evidence provided a sufficient rationale for the BIA to deny his application for asylum, even without making a determination about his credibility. The court, after noting a circuit split on this issue, deferred to the BIA's interpretation in *Matter of S–M–J–*, 21 I&N Dec. 722 (BIA 1997), and held that the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted. "Our conclusion that this interpretation is reasonable is supported by Congress's codification of a similar rule, see 8 U.S.C. § 1158(b)(1)(B)(ii), and by the importance we ascribe to IJs' ability to verify applicants' testimony," said the court.

"Our implicit approval of the 'requirement' that applicants for asylum submit corroborating evidence further implies that we approve of rejecting applicants for the sole reason that they do not meet this requirement."

"Our implicit approval of the 'requirement' that applicants for asylum submit corroborating evidence further implies that we approve of rejecting applicants for the sole reason that they do not meet this requirement. Additionally, in an unpublished opinion, we rejected an applicant's argument that the BIA's failure to make a credibility determination with respect to her testimony necessitated remand of her application for asylum. *See Mei He v. Holder*, No. 10–60915, 2011 WL 4436627, at *2 (5th Cir.2011) (unpublished). Accordingly, the BIA need not make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted."

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SEVENTH CIRCUIT

■ Seventh Circuit Holds Notice Requirements of Voluntary Departure Regulations Are Not Retroactive

In ***Bachynskyy v. Holder***, __F.3d__, 2011 WL 6287868 (7th Cir. December 15, 2011) (*Williams*, Tinder, Gottschall), the Seventh Circuit held that the notice requirements in the current voluntary departure regulations, 8 C.F.R. § 1240.26(c)(4) (2009), which direct immigration judges to advise aliens of the amount of the bond and the duty to post the bond within five business days, do not apply retroactively prior to the effective dates of the regulations, January 20, 2009.

The petitioner, an Ukranian citizen, entered the country illegally in July 2, 2000. An IJ denied his request for withholding and CAT protection, but granted him voluntary departure and ordered the posting of a $500 bond. Petitioners attorney alleged that he did not receive the IJ decision until the day before the bond was due, and the bond was never paid.

In his appeal to the BIA, petitioner also filed a motion to reinstate voluntary departure, alleging that notice regarding the bond was deficient. While the BIA was considering the motion, the new VD regulations went into effect. Petitioner then filed a motion to reopen claiming that he was entitled to notice under the new rules. On January 10, 2010, the BIA dismissed petitioner's appeal and rejected his request to reinstate voluntary departure. On July 10, 2010, the BIA denied petitioner's motion to reopen, finding that the new regulations regarding notice were not retroactive.

Preliminarily, the court found that it had jurisdiction over petitioner's claim because he was raising a question of law, namely "whether certain advisals given to a noncitizen before being granted voluntary departure, which are required by current regulations, are applicable to his case, when his grant of voluntary departure preceded the effective date of those regulations." The court then found that petitioner conceded that the post-January 20, 2009 regulations were not retroactive, and that the current mandatory pre-grant warnings by the IJ were not required by specific regulations in effect at the time of his hearing. Nonetheless, petitioner urged the court to find that a failure to advise an alien of the bond requirement and the consequences of failing to depart even before January 20, 2009 warranted reversal. The court declined to do so and also found no due process violation because that lack of notice could not serve as the "defect" underlying a due process claim.

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■ Seventh Circuit Affirms Summary Judgment for United States in Denaturalization Action

In ***United States v. Suarez***, __F.3d__, 2011 WL 6882155 (7th Cir. December 16, 2011) (Kanne, *Rovner*, Sykes), the Seventh Circuit held that a naturalized citizen who committed a drug trafficking crime during the statutory period for good moral character – but was not convicted until after he naturalized – illegally procured his citizenship and was thus subject to denaturalization. The court adopted the government's position that the crime, a crime involving moral turpitude, fell within the unlawful acts "catch-all" provision of the INA (8 U.S.C. § 1101 (f)) and its implementing regulations, making him ineligible for citizenship

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on account of lack of good moral character. The court also suggested that the naturalized citizen could have been denaturalized under the provision of the INA prohibiting a finding of good moral character for applicants who have committed a crime involving moral turpitude during the statutory period (8 U.S.C. § 1101(f)(3)), because that bar does not depend on the timing of the applicant's conviction, but merely the commission of the crime.

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■ **Seventh Circuit Holds that It Has Jurisdiction to Review a Denial of a Continuance that Does Not Implicate the Merits of a Final Unreviewable Order**

In ***Calma v. Holder***, __F.3d__, 2011 WL 6016158 (7th Cir. December 5, 2011) (Posner, Rovner, *Wood*), the Seventh Circuit, in a decision consolidating two cases, held that "judicial review is foreclosed by 8 U.S.C. § 1252(a)(2)(B)(i) only if the agency's rationale for denying the procedural request also establishes the petitioner's inability to prevail on the merits of his underlying claim." In these cases, the petitioners, who were both seeking adjustment, were both denied requests for continuances. In the first case, the petitioner sought a continuance to appeal the revocation of his son's I-130 relative visa petition. The BIA found that a pending I-130 appeal was insufficient cause for granting the continuance. In the second case, petitioner sought a continuance until his wife, who was an LPR at the time, naturalized rendering petitioner immediately eligible for adjustment.

In concluding that the court had jurisdiction to review the denials of continuance, the court explained that the inability of the court to review the underlying relief was, standing alone, an insufficient basis to preclude review of a related procedural motion. Rather, review would only be precluded if the rationale for the denial of the motion also established the petitioners inability to prevail on the merits of the requested relief. The court explained that in both cases, the rulings challenged by the petitioners "do not implicate the merits of a final unreviewable order but instead defer the resolution of the merits so that the process as a whole can be completed with integrity."

The court held that review would only be precluded if the rationale for the denial of the motion also established the petitioners inability to prevail on the merits of the requested relief.

Here, in the first case, the court found that petitioner could not show that he had been prejudiced by the denial of continuance because the BIA subsequently had denied petitioners challenge to the revocation of his son's I-130 petition. Without an approved I-130 petitioner could not adjust his status. In the second case, the court found that the IJ had given a sound reason for the denial of continuance, namely that it was proper for the IJ to refuse to speculate about the ultimate eligibility of petitioner's wife for naturalization and his hope for later adjustment.

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■ **Seventh Circuit Holds that Repeal of Section 212(c) Did Not Apply Retroactively to Alien Who Affirmatively Abandoned His Right to Pursue Judicial Recommendation Against Deportation (JRAD)**

In ***Khodja v. Holder***, __F.3d__, 2011 WL__ (Flaum, *Kanne*, Wood) (7th Cir. December 12, 2011), the Seventh Circuit held that the repeal of INA § 212(c) did not retroactively apply to an alien who moved for a JRAD but then withdrew the motion when a government attorney advised the trial judge that the alien would be able to apply for relief under § 212(c) in lieu of a JRAD. The court reasoned that the alien demonstrated actual reliance in foregoing the JRAD, which would have operated as a complete defense to deportation. The court agreed with the BIA however, that the alien was ineligible for a waiver under INA § 212(h) because his Illinois aggravated battery conviction was a "crime of violence" under 18 U.S.C. § 16(b) (and thus an aggravated felony) based on the modified categorical approach. The court found that the Board committed harmless error by considering the alien's actual conduct while utilizing the modified categorical approach.

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■ **Seventh Circuit Holds Alien Failed to Establish Nexus Between His Religion or Youth Group Membership and Persecution**

In ***Bueso-Avila v. Holder***, __F.3d__, 2011 WL 5927504 (7th Cir. November 29, 2011) (*Manion*, Rovner, Tinder), the Seventh Circuit held that an asylum applicant failed to establish that his religion or youth group membership were "at least one central reason" for the harm he suffered at the hands of the Mara Salvatrucha-13 street gang.

The applicant, a citizen of Honduras, claimed that when he was 15 years old he joined a youth group with an evangelical Christian church called La Cosecha, the largest church in Honduras. He stated that evangelization and recruiting young people in the local community were essential parts of the mission of his church. He testified that before the meetings, his church group would

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walk around the neighborhood with their Bibles and invite other people to their meetings and away from gang life. On one occasion gang members approached and tried to recruit him to the gang. He refused but was able to run away from the gang members unharmed. On two other occasions, however, the gang beat him severely. Following this final attack, he left Honduras, traveled by foot and by train across Guatemala and Mexico, and entered the United States where he has a sister living in Florida. In May 2005, he arrived in the country, but was apprehended shortly after crossing the border.

The IJ and the BIA denied asylum, withholding and CAT, on the basis that petitioner had failed to establish that the gang's harassment and attacks were on grounds protected by the INA. When petitioner sought review of that decision, the court remanded the case to the BIA for reconsideration in light of two recent intervening cases which indicated that social visibility is not required to establish membership in a particular social group. On remand, the BIA denied the requested relief finding that there was insufficient testimonial and documentary evidence establishing a nexus between the harm petitioner suffered and his religion or his membership in the evangelical Christian church youth group. Specifically, the BIA found that the violent actions of the gang members instead "stemmed from the efforts of the gang members to forcibly recruit him," and that even if the gang members had a mixed motive, petitioner had not established that his religion or membership in the youth group "was at least one central reason" for his persecution.

The Seventh Circuit, in affirming the BIA's decision, held the record did not contain direct evidence of the motivations of the gang members. The court explained that there was no testimony that petitioner's attackers ever mentioned his religion or church youth group membership, nor that they gave any indication that they were aware of or even cared about these factors. "The fact that some of the threats against [petitioner] occurred after church group meetings does not necessarily mean that the gang members were reacting to [petitioner's] religious belief," said the court.

"The fact that some of the threats against [petitioner] occurred after church group meetings does not necessarily mean that the gang members were reacting to [petitioner's] religious belief."

The court said that its conclusion was consistent with case law involving forced recruitments, citing to *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), where the Supreme Court held that the applicant's refusal to agree to forced recruitment was insufficient by itself to show that his persecutors acted "on account of" his political views.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Asylum Claim Based on Criminal Violence and Recruitment Efforts by Guatemalan Gangs Does Not Implicate an Protected Ground**

In ***Ortiz-Puentes v. Holder***, __F.3d__, 2011 WL 5984289 (8th Cir. December 1, 2011) (*Loken*, Beam, Murphy), the Eighth Circuit held that individuals who suffer violence because they refuse to join criminal gangs lack the visibility and particularity required to constitute a particular social group under 8 U.S.C. § 1101(a)(42)(A).

The petitioners, three siblings, and citizens of Guatemala, attempted to enter the United States in December 2004 and were placed in removal proceedings. Conceding removability, they applied for asylum and withholding of removal, claiming past persecution and a well-founded fear of future persecution by "criminal gangs which control most of Guatemala now." Petitioners argued they were members of a "social group" comprised of young Guatemalans who refused to join gangs and were persecuted — beaten — as a result.

An IJ denied the applications, and the BIA dismissed their appeals on the merits. Some months later, the BIA denied their motion to reconsider its prior decision and to reopen the proceedings based on ineffective assistance of counsel.

The court agreed with the BIA's ruling that a group of persons defined as those who suffer violence because they refused to join criminal gangs "lacks the visibility and particularity required to constitute a social group" for purposes of INA § 101(a)(42)(A). The court also noted that petitioners had not presented present evidence to show that the gang violence they suffered was persecution on account of their political opinion.

The court also concluded the BIA properly denied their motion to reopen finding that petitioners were not denied effective assistance of counsel due to their former attorney's alleged failure to advise their father to naturalize.

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NINTH CIRCUIT

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■ **Ninth Circuit Denies Derivative Citizenship Claim Because Petitioner's Paternity Was Legitimated Under Salvadoran Law**

In ***Romero-Mendoza v. Holder***, __F.3d__, 2011 WL 6318336 (9th Cir. December 19, 2011) (Fisher, *Rawlinson*, Timlin (by designation)), the Ninth Circuit rejected petitioner's contention that he obtained derivative citizenship from his mother's naturalization and upheld his removal for a crime of violence.

The petitioner, an LPR, was born in El Salvador, out of wedlock, in August, 1979. His birth certificate lists the names of both parents: Oscar Armando Romero–Rivera (Romero–Rivera), father, and Nora Julia Mendoza–Galdamez (Mendoza), mother. Petitioner's mother was naturalized in Los Angeles on February 14, 1997, when he was seventeen. As of August 22, 1996, petitioner's mother was married to his father and Mendoza's naturalization certificate reflected her married status.

In January 2008, DHS instituted removal proceedings against the petitioner on the basis that he had been convicted of a drug offense, and convicted of a crime of violence. Petitioner conceded that he was not a United States citizen, that he was born in El Salvador and was a LPR, but denied the two charges of removability. In removal proceedings, petitioner argued that he had obtained derivative citizenship through his mother's 1997 naturalization, thereby precluding his removal. The IJ found that petitioner had been legitimated under Salvadoran law by the inclusion of his father's name on his birth certificate and, therefore, had not derived citizenship from his mother. As a result, the IJ found petitioner removable due to his conviction of a crime of violence. On appeal, the BIA affirmed the IJ's decision, holding that because petitioner failed to adequately refute his legitimation by operation of Salvadoran law, he had failed to "rebut the presumption of alienage that arises by virtue of his foreign birth."

Former INA § 321 provided, as of the time when petitioner's mother was naturalized, that a child who was born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, would obtain U.S. citizenship through, among other possibilities, "the naturalization of the . . . mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation."

Here, as the court noted, although petitioner was born out of wedlock, his parents' subsequent marriage prior to his mother's naturalization established petitioner's paternity by legitimation. Therefore, the court found that the marriage of petitioner's parents legitimated petitioner and precluded a claim of derivative citizenship.

Petitioner also sought to argue that he had not been legitimated under Salvadoran law. However, in 1983, El Salvador amended its constitution to eliminate any distinctions between children born during a marriage and those born out of wedlock. In *Matter of Moraga*, 23 I&N Dec. 195 (BIA 2001), the BIA ruled that the 1983 amendment to the Salvadoran constitution eliminating legitimacy distinctions served to legitimate any child born out of wedlock. The court found the BIA's interpretation persuasive and concluded that the fact that petitioner was born prior to the enactment of the 1983 constitutional amendment, and his contention that his father did not necessarily consent to civil registration of his son's birth certificate did not negate petitioner's legitimation under Salvadoran law.

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■ **Ninth Circuit Holds Certified Copy of Abstract of Judgment Is Sufficient to Establish Alien's Conviction for First-Degree Burglary, a Crime of Violence**

In ***Kwong v. Holder***, __F.3d__, 2011 WL 6061513 (*Canby*, Bea, M.D. Smith) (9th Cir. December 7, 2011), the Ninth Circuit held that under *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008), a contemporaneous, officially prepared abstract of judgment that clearly described the nature of the prior conviction was, in the absence of rebuttal evidence, presumed reliable and accurate. The court thus ruled that the certified copy of the abstract of judgment established the alien's conviction was for first-degree burglary in violation of California Penal Code § 459, which the court concluded constituted a crime of violence as defined in 18 U.S.C. § 16 (b), following *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011).

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■ **Replacement Opinion Withdraws Holding that the Unlawful Presence Bar Applies When the Unlawful Presence Occurred Before the Enactment of the Bar**

In ***Carrillo de Palacios v. Holder***, __F.3d__, 2011 WL 5986605 (9th Cir. December 1, 2011) (Graber, *M.D. Smith*, Benitez (by designation)), the Ninth Circuit denied the alien's petition for *rehearing en banc*, and in a separate order, the panel withdrew and replaced its previous decision, which had been published at 651 F.3d 969. The replacement decision adds that substantial evidence supports the agen-

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cy determination that the alien is inadmissible under the unlawful reentry bar, 8 U.S.C. § 1182(a)(9)(C)(i)(II), and therefore ineligible to adjust her status. The replacement decision states that it is therefore unnecessary to address the unlawful presence bar to admissibility, 8 U.S.C. § 1182(a)(9)(C)(i)(I). The earlier decision had held that the unlawful presence bar applies when the unlawful presence occurred before the enactment of the bar. The panel did not change its holding that the alien was ineligible for the exception to inadmissibility described at 8 U.S.C. § 1182(a)(9)(C)(ii) because she failed to remain outside the country for more than ten years before returning.

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■ **Ninth Circuit Holds that an Unintended Departure from the United States Does Not Constitute Abandonment of an Application for Relief**

In ***Lezama-Garcia v. Holder***, __F.3d__, 2011 WL 5966204 (9th Cir. November 30, 2011) (Goodwin, *Seabright,* Rawlinson (dissenting)), the Ninth Circuit held that an alien's unintended departure from the United States did not constitute an abandonment of his application for relief under the Nicaraguan Adjustment and Central American Relief Act.

The petitioner entered the United States without inspection from Nicaragua. He has remained in this country continuously since at least April 1993 with the exception of an incident in March 2004 when he apparently accidentally drove into Mexico. Petitioner was subject to an order of removal, having had a prior asylum application denied in absentia in 1997. In March of 2000, however, he applied for relief under NACARA § 202 — a provision excusing both his prior entry without inspection and the pending 1997 order of removal — to adjust his status to that of an alien lawfully admitted for permanent residence.

The IJ denied NACARA relief finding that petitioner abandoned his application when he traveled to Mexico on March 25, 2004. On that date, petitioner was driving a company truck from Long Beach, California, to a company office in San Diego. He could not locate his destination, and found himself in traffic on the "I–5" freeway going toward the Mexico border near San Ysidro, California. As he neared the border, he was unable to locate an exit and tried to move out of traffic, but a police officer motioned for him to keep going. He drove into Mexico, immediately turned around to come back to the United States, but was refused admission at the San Ysidro Port of Entry because he lacked a valid entry document. He tried again four days later at the Otay Mesa Port of Entry, with someone else's identification, and was detained.

The court found that the consequence of failing to obtain advance parole (abandonment) does not apply to an 'undesired' or inadvertent departure.

Petitioner was subsequently charged with being an "arriving alien" subject to removal because he lacked valid entry documents when applying for admission. Petitioner filed a motion to terminate removal proceedings, contending he was not an "arriving alien." He argued that, because he did not intend to depart the United States, he was not making an "entry" into the country when he returned. The IJ and the BIA ruled that petitioner's departure from the United States, while his application for adjustment of status was pending, effected the abandonment of his application for adjustment under NACARA.

The court determined that petitioner had not abandoned his NACARA § 202 application under 8 CFR § 245.13(k)(1). The court explained that in reading the regulation as whole, petitioner never "desired' to travel outside the United States. As a result, the court stated, the consequence of failing to obtain advance parole (abandonment) does not apply to an 'undesired' or inadvertent departure. That is, abandonment occurs only for a desired departure absent advance parole. Under NACARA § 202 (c)(2), while petitioner application remains pending, he is not removable, said the court. The court further explained that even if his departure rendered him an "arriving alien," he remains eligible for adjustment of status.

In a dissenting opinion Judge Rawlinson would have held that under 8 C.F.R. § 245.13(k)(1), an alien's intent is not relevant to the question of whether his departure from the United States constituted an abandonment of his application. But, even if the majority opinion's were correct, Judge Rawlison would have found it inappropriate to apply "this novel interpretation of the regulation without first giving the BIA the opportunity to consider this case in view of the new interpretation of the regulation."

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■ **Ninth Circuit Grants Rehearing, Holds Alien's Concession During the Pleading Stage Supported Removability**

In ***Pagayon v. Holder***, __F.3d__, 2011 WL 6091276 (9th Cir. December 8, 2011) (Kozinski, N.R. Smith, Block) (*per curiam*), the Ninth Circuit granted the petition for panel rehearing of its June 24, 2011 decision,

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Summaries Of Recent Federal Court Decisions

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and held that an alien's concession during the pleading stage supported removability. In the original decision, the court held an alien's evidentiary stage admission to conviction of the controlled substances offense listed in a charging document provided the necessary connection between an inconclusive abstract of judgment and the charging document. *Pagayon v. Holder*, 642 F.3d 1226 (9th Cir. 2011). On rehearing, the court adopted the government's suggestion to rely instead on *Perez-Mejia v. Holder*, __F.3d__, 2011 WL 5865888 (9th Cir. Nov. 23, 2011), when an alien's admissions in the pleading stage of removal were sufficient to establish removability.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Concludes that the BIA Ignored Substantial Evidence Supporting the Petitioner's Claim for Withholding of Removal**

In ***Seck v. U.S. Att'y Gen.,*** -__F.3d__, 2011 WL 6091204 (Tjoflat, Wilson, *Seymour*) (11th Cir. December 8, 2011), the Eleventh Circuit concluded that the BIA failed to issue a reasoned decision because it ignored substantial evidence that supported petitioner's claim for withholding of removal. The petitioner feared that if returned to Senegal she would be persecuted by her daughter's paternal family members for attempting to protect her United States citizen daughter from being subjected to FGM.

In finding that petitioner could safely relocate within Senegal, the IJ relied on country reports, which indicated that the threat of FGM was unlikely in heavily populated urban areas. The BIA, agreeing with the IJ, also concluded that petitioner failed to show that internal relocation to another part of the country was not possible to avoid her daughter being subjected to FGM.

The court remanded the case because neither the IJ nor the BIA discussed the petitioners' "undisputed evidence of specific family conditions" that placed petitioner and her daughter "in greater danger than what is reflected by the general statistics of the State Department reports," which were primarily relied upon by the IJ.

The court remanded the case because neither the IJ nor the BIA discussed the petitioners' "undisputed evidence of specific family conditions" that placed petitioner and her daughter "in greater danger than what is reflected by the general statistics of the State Department reports."

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DISTRICT COURTS

■ **Central District of California Dismisses VWP Alien's Challenge to USCIS's Discretionary Denial of Adjustment of Status Application**

In ***Crippa v. United States***, No. 11-5811 (C.D. Cal. November 29, 2011) (*Tucker, J.*), the Central District of California District Court granted the governments' motion to dismiss plaintiff's complaint challenging USCIS's discretionary denial of his application for adjustment of status. USCIS's decision weighed the negative factors of plaintiff's VWP overstay, unlawful employment, and DUI convictions, against his recent marriage to a United States citizen and lengthy residence in the United States, and concluded that plaintiff did not warrant a favorable exercise of the agency's discretion. The district court concluded that review of this discretionary denial was precluded by 8 U.S.C. §§ 1252(a)(2)(B)(i) and (ii). The court also found that the complaint alleged no colorable constitutional claims because those claims were simply restatements of the abuse of discretion claims, and therefore did not provide a basis for jurisdiction.

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■ **Southern District of Indiana Grants Summary Judgment for United States in Action by Former Terrorist Challenging Denial of His Application for Naturalization**

In ***Olayan v. Holder***, No. 11-cv-0003 (S.D. Ind. December 15, 2011) (Barker, J.), the District Court for the Southern District of Indiana granted the government's motion for summary judgment in an action pursuant to 8 U.S.C. § 1421(c), challenging the denial of an application for naturalization by USCIS. The alien belonged to a group that was preparing to bomb the United States Embassy in Amman, Jordan, but he ultimately backed out of the plot. In July of 2003, he applied for United States citizenship. USCIS denied the alien's application, finding that he should not have been granted lawful permanent resident status due to his involvement in a terrorist plot. The alien argued that USCIS was estopped from denying his application because an immigration judge previously granted him asylum and the government granted him lawful permanent resident status. The court concluded that the alien is not eligible for United States citizenship as a matter of law.

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We encourage contributions to the Immigration Litigation Bulletin

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This Month's Topical Parentheticals

ADJUSTMENT

■ *Carrillo de Palacios v. Holder*, __ F.3d __, 2011 WL 5986605 (9th Cir. Dec. 1, 2011) (denying alien's *en banc* rehearing petition, but withdrawing and replacing prior decision. The new opinion holds that substantial evidence supports the BIA's finding that the alien is inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II) because of her illegally reentry, and thus ineligible to adjust status; the court found it is unnecessary to consider the unlawful presence inadmissibility bar at 8 U.S.C. § 1182(a)(9)(C)(i)(I), and the issue of whether application of that bar to unlawful presence time that pre-dated enactment of the bar would be impermissibly retroactive)

■ *McKenzie-Francisco v. Holder*, __ F.3d __, 2011 WL 6016139 (1st Cir. Dec. 5, 2011) (holding that the IJ's denial of a hardship waiver to convert conditional residency status into permanent residency was based on substantial evidence in light of the "glaring contradictions in the divorced spouses' accounts of how their wedding was celebrated")

■ *Matter of Guillot,* 25 I.&N. Dec. 653 (BIA Dec. 6, 2011) (holding that an alien who has adjusted status to LPR status pursuant to the Cuban Refugee Adjustment Act has been admitted to the United States and is subject to charges of removability under section 237(a) of the INA)

ASYLUM

■ *Bueso-Avila v. Holder*, __ F.3d __, 2011 WL 5927504 (7th Cir. Nov. 29, 2011) (in post-REAL ID Act case, holding that substantial evidence supports BIA's conclusion that Honduran asylum applicant failed to establish that his evangelical religion or church youth group membership were motives for harm suffered by MS-13 gang, because there was no direct, circumstantial, or country-condition evidence compelling this conclusion, and evidence showed he was harmed solely because he was a youth who refused to join the street gang, regardless of his religious activities; further holding that BIA correctly rejected claims of IAC because applicant failed to show prejudice)

■ *Ortiz-Puentes v. Holder*, __ F.3d __, 2011 WL 5984289 (8th Cir. Dec. 1, 2011) (rejecting asylum claim and reasoning that "[a] group of persons defined as those who suffer violence because they refused to join criminal gangs 'lacks the visibility and particularity required to constitute a social group;'" further rejecting claim that attorney was ineffective for failing to advise petitioner's LPR father to apply for naturalization or to file an I-130 visa petition on behalf of the petitioners where petitioners failed to include the applications for the relief sought with the motion to reopen)

■ *Yang v. Holder*, __ F.3d __, 2011 WL 6143429 (5th Cir. Dec. 12, 2011) (pre-REAL ID Act corroboration case affirming Board's corroboration rule in *Matter of S-M-J-* that even if asylum applicants are credible they can be required to provide reasonably available corroborating evidence to meet their burden of proof; also, applying the REAL ID Act standard of review provision, effective as of 2005, to hold that the evidence did not compel the conclusion that corroborating letters from applicant's family members in China were unavailable given that applicant was in regular phone contact with his family)

■ *Djadjou v. Holder*, __ F.3d __, 2011 WL 6016971 (4th Cir. Dec. 5, 2011) (pre-REAL ID Act credibility case affirming agency's adverse credibility finding based on material inconsistencies between petitioner's testimony and documentary evidence, and fixing Fourth Circuit's double-standard corroboration rules in *Anim* and *Tassi*, by holding that IJs may properly discount and refuse to give independent effect to: i) letters or documentary evidence by relatives on grounds that they are not objective; ii) affidavits with multiple levels of hearsay that fail to show source of information reported therein on grounds that they are unreliable; and iii) documents or letters that are inconsistent with one another; further suggesting that IJs may discount alleged police or other documents for lack of authenticity if doubts about authenticity arose at the IJ hearing and DHS objected to their introduction) (Judge Wynn dissented)

■ *Seck v. United States Att'y Gen.*, __ F.3d __, 2011 WL 6091204 (11th Cir. Dec. 8, 2011) (vacating and remanding IJ's and Board's conclusions that female applicant for withholding of removal from Senegal failed to show she is "more likely than not" to be beaten or killed by relatives of man who fathered her children if she tries to prevent them from inflicting FGM on applicant's U.S. citizen daughter, because IJ and BIA erred in concluding applicant could relocate to an urban area given general country conditions showing risk of FGM in such areas is only 22%, without discussing evidence indicating that risk of future FGM of the daughter may be much higher than general statistics because father's family lives in urban Dakar and has expressed the intent that the daughter have FGM)

CANCELLATION

■ *Matter of Camarillo,* 25 I.&N. Dec. 644 (BIA Dec. 2, 2011) (holding that under the "stop-time rule" at section 240A(d)(1) of the INA, any period of continuous residence or continuous physical presence of an alien applying for cancellation of removal is deemed to end upon the service of an NTA on the alien, even if the NTA does not include the date and time of the initial hearing)

CONVENTION AGAINST TORTURE

■ *Pieschacon-Villegas v Att'y Gen. of United States*, __ F.3d __, 2011

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This Month's Topical Parentheticals

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WL 6016134 (3d Cir. Dec. 5, 2011) (holding in a CAT claim by a convicted Colombian money-launderer who collaborated with FBI against Colombian drug traffickers, that (1) under REAL ID Act court has jurisdiction to review legal standard BIA applied to assess government "acquiescence" in drug traffickers' torture but not the sufficiency of the evidence regarding acquiescence; (2) BIA violated Third Circuit law by taking 3 categorical positions that government "acquiescence" in torture is not established by evidence government is unable to control entities, evidence of mass human rights violations, or evidence that government actively opposes the entities the applicant fears; and (3) BIA misapplied the "legal standard" for CAT protection by ignoring evidence relevant to whether the applicant will "more likely than not" be subject to torture)

CRIMES

■ *Aguilar v. Att'y Gen. of United States* , __ F.3d __, 2011 WL 5925141 (3d Cir. Nov. 29, 2011) (holding that sexual assault, as defined by 18 Pa. Cons. Stat. § 3124.1, which has a minimum *mens rea* of recklessness, constitutes a crime of violence under 18 U.S.C. § 16(b); reasoning that such crimes raise a substantial risk that the perpetrator will intentionally use force in the course of committing the crime)

■ *Kwong v. Holder*, __ F.3d __, 2011 WL 6061513 (9th Cir. Dec. 7, 2011) (holding that under the court's *en banc* decision in *United States v. Snellenberger* a contemporaneous, officially prepared abstract of judgment which clearly described the nature of the prior conviction was presumed to be reliable and accurate; further holding that the alien's conviction for first-degree burglary in violation of Cal. Pen. Code § 459 constituted a crime of violence)

■ *Pagayon v. Holder*, __ F.3d __, 2011 WL 6091276 (9th Cir. Dec. 8, 2011) (granting rehearing, denying rehearing *en banc*, and issuing new opinion. The original opinion relied on the vulnerable proposition that the pro se alien's admission in the evidentiary stage was sufficient to establish removability; on rehearing, the court adopted the government's argument that it should rely instead on *Perez-Mejia* (issued after original decision) and its distinction between a concession in the pleading stage and one made in the evidentiary stage)

JURISDICTION

■ *Qingyun Li v. Holder*, __ F.3d __, 2011 WL 6008978 (4th Cir. Dec. 2, 2011) (reaffirming prior precedent and concluding that there is a final order for judicial review purposes where the BIA affirmed the IJ's adjustment denial but remanded for the required advisals for voluntary departure; declining, however, to exercise jurisdiction over the PFR for prudential reasons in light of the recent voluntary departure regulation)

■ *Hajdari v. Holder*, __ F.3d __, 2011 WL 6016143 (1st Cir. Dec. 5, 2011) (holding that petitioner cannot challenge the validity of his VWP waiver through a MTR in asylum-only proceedings, and that, in any event, it would not matter because he does not challenge removal on any ground other than asylum)

■ *Calma v. Holder*, __ F.3d __, 2011 WL 6016158 (7th Cir. Dec. 5, 2011) (asserting jurisdiction and affirming the IJ's denial of petitioners' motions for continuances as proper exercises of discretion)

■ *O'Neil v. Cook*, __ F. Supp.2d __, 2011 WL 6225195 (D. Del. Dec. 14, 2011) (holding that USCIS's decision to deny an I-601 waiver was unreviewable as an exercise of agency discretion; affirming agency's denial of I-212 application)

FAIR HEARING

■ *Calla-Collado v. Att'y Gen. of United States*, __ F.3d __, 2011 WL 4828658 (3d Cir. Oct. 12, 2011) (redesignated as a published decision) (rejecting ineffective assistance claim where counsel's concession of allegations in NTA was not prejudicial; affirming BIA's conclusion that DHS did not violate petitioner's rights by transferring him from one detention facility to another because DHS has discretion to do so, and the transfer did not affect petitioner's ability to present his case)

■ *Romer v. Holder*, __ F.3d __, 2011 WL 6144908 (1st Cir. Dec. 12, 2011) (holding that IJ abused his iscretion in denying MTR based on ineffective assistance where the IJ's decision lacked any analysis as to whether the time and number restrictions on MTRs should be tolled or whether petitioner's failure to timely depart pursuant to a grant of voluntary departure was "voluntary")

NACARA

■ *Lezama-Garcia v. Holder*, __ F.3d __, 2011 WL 5966204 (9th Cir. Nov. 30, 2011) (holding that the IJ erred in determining that pursuant to 8 C.F.R. § 245.13(k)(1), petitioner abandoned his pending NACARA adjustment application at the moment he drove from the US into Mexico even if his unplanned departure was not desired; reasoning that deeming the application abandoned was contrary to the regulation and Congress' intent in NACARA)

NATURALIZATION

■ *Garcia v. USICE*, __ F.3d __, 2011 WL 6825581 (2d Cir. Dec. 29, 2011) (holding that for purposes of former INA § 321(a)(3), "legal custody" is defined by federal law, which looks to the law of the state having personal jurisdiction over the custody determination in question)

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§ 212(c) Comparable Ground Approach Rejected

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The Court rejected the government's argument that the BIA's approach was more faithful to the statutory text, because "fundamentally § 212 (c) simply has nothing to do with deportation." "We well understand the difficulties of operating in such a text-free zone," said the Court, "and we appreciate the Government's yearning for a textual anchor. But § 212(c), no matter how many times read or parsed, does not provide one."

The Court also disagreed with the government contention that the BIA had historically and consistently applied the comparable ground rule. The Court said that the BIA had "vacillated" in its approach and that, regardless, "arbitrary agency action becomes no less so by simple dint of repetition." Finally, the Court disagreed with the government's contention that the BIA's approach saved time and money. "Cheapness alone cannot save an arbitrary agency policy," it said, "and we suspect the Government exaggerates the cost savings."

In concluding, the Court said that "the BIA's comparable-grounds rule is unmoored from the purposes and concerns of the immigration laws. It allows an irrelevant comparison between statutory provisions to govern a matter of the utmost importance — whether lawful resident aliens with longstanding ties to this country may stay here. And contrary to the Government's protestations, it is not supported by text or practice or cost considerations. The BIA's approach therefore cannot pass muster under ordinary principles of administrative law."

By Francesco Isgro, OIL

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THIS MONTH'S PARENTHETICALS

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■ *Romero-Mendoza v. Holder*, __ F.3d __, 2011 WL 6318336 (9th Cir. Dec. 19, 2011) (rejecting petitioner's contention that he obtained derivative citizenship from his mother's naturalization and reasoning that his paternity was legitimated under Salvadoran law, precluding a claim of derivative citizenship based on the naturalization of one parent)

RES JUDICATA

■ *Maldonado v. Holder*, __ F.3d __, 2011 WL 6439350 (11th Cir. Dec. 22, 2011) (refusing to apply the doctrine of res judicata to bar new removal proceedings where an intervening change in the law (1996 amendment to aggravated felony definition) provided a new legal basis for removal that could not have been raised in the prior proceedings, particularly when Congress clearly intended that new basis to apply retroactively)

■ *Bachynskyy v. Holder*, __ F.3d __, 2011 WL 6287868 (7th Cir. Dec. 15, 2011) (holding that the notice requirements in the current voluntary departure regulations, which direct IJs to advise aliens of the amount of the bond and the duty to post the bond within five business days, do not apply retroactively prior to the effective dates of the regulations, January 20, 2009; further holding that lack of notice could not serve as the "defect" underlying a due process claim)

WAIVERS

■ *Judulang v. Holder*, __ U.S. __, 2011 WL 6141311 (Dec. 12, 2011) (rejecting BIA's comparable-grounds rule limiting 212(c) eligibility to aliens with a ground of removal comparable to a ground of inadmissibility; reasoning that the rule is unconnected to the purposes of immigration law and appropriate operation of the immigration system)

■ *Khodja v. Holder*, __ F.3d __, 2011 WL __ (7th Cir. Dec. 12, 2011) (holding that an alien convicted at trial of an aggravated felony was eligible for 212(c) relief under *St. Cyr* because he demonstrated reliance on the availability of such relief when he abandoned his right to pursue a JRAD following sentencing; concluding that a conviction for an aggravated battery under an Illinois statute is a crime of violence because the statute requires a showing of bodily harm)

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

February 7, 2012. Brown Bag Lunch & Learn with Jim Stolley, Director, Field Legal Operations for the DHS ICE's Office of the Principal Legal Advisor.

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INSIDE OIL

Congratulations to the following OIL attorneys and support staff who received awards from the Assistant Attorney General **Tony West**, at the Civil Division Awards Ceremony held on December 8, 2011, in the Great Hall. **Thomas Perrelli**, the Associate Attorney General, was the Keynote Speaker.

Thomas Hussey, Special Litigation Counsel, received the Assistant General's Platinum Service Award, in recognition of exceptional talent, professionalism, and commitment to the mission of the Civil Division for over 30 years.

David Bernal, Assistant Director, and **Theodore Hirt**, Trial Attorney, received the Dedicated Service Award. **Neelam Ihsanullah,** Trial Attorney, District Court Section, received the Rookie of the Year Award.

Terri Leon-Benner, Christopher Dempsey and **Gisela Westwater,** District Court Section, received the Special Commendation Award.

Trial Attorney **Stuart Nickum** and Senior Litigation Counsel **Anthony Payne** received the Perseverance Award in their litigation of *Loa-Herrera*.

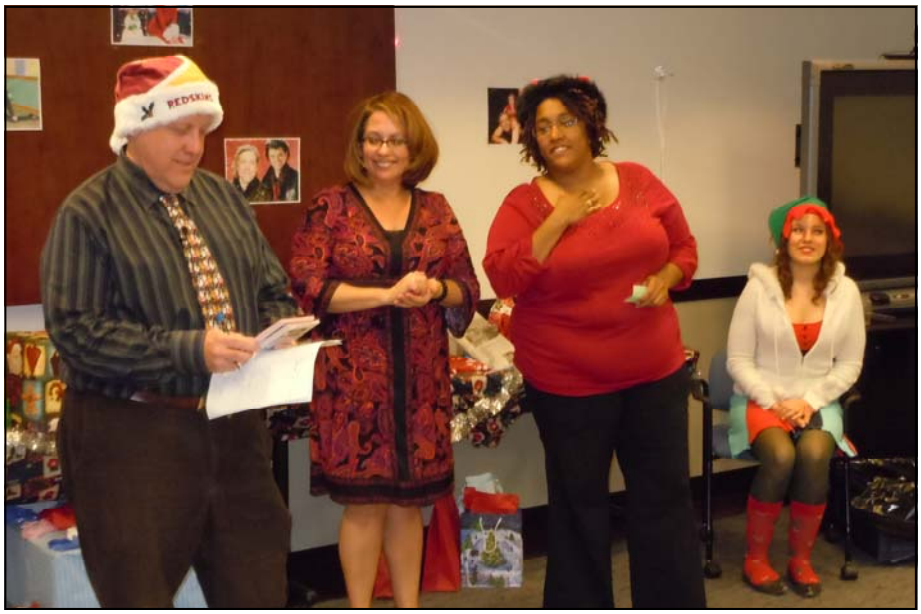
Also receiving special commendation awards for the litigation of *Vega-Alvarez,* were **Katharine Clark**, Trial Attorney, **Shelley Goad,** Assistant Director, and **Russell Verby,** Senior Litigation Counsel.

Paralegals **Jamie Smith**, District court Section, and **Gwendolyn Warren,** received the Award for Excellence in Paralegal Support.

Samatha Miner, Secretary, received the Award for Excellence in Administrative Support.

Thomas Hussey and **Richard Evans**, were recognized for their military service in southeast Asia during the Vietnam war.

OIL Celebrated Holiday with Annual White Elephant Affairs



David MConnell, Terri Leon-Benner, LaRoi Scrivner, Farrah Farley

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

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

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

Office of Immigration Litigation

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