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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Immigration Judges Violate Due Process by Placing Undue Restrictions on an Alien's Direct Testimony Where Credibility is at Issue

In ***Oshodi v. Holder***, __ F.3d __, 2013 WL 4511636 (9th Cir. August 27, 2013) (Reinhardt, Wardlaw, Fletcher, Gould, *Paez*, Christen, M. Smith; dissenting, Kozinski, Rawlinson, Murguia, Bybee), an *en banc* panel of the Ninth Circuit held that asylum applicants have a constitutional right "to testify fully as to the merits of their application."

The petitioner, a Nigerian national, has resided in the United States since 1981. He is married to a United States citizen, and has a United States citizen daughter. He originally entered the United States on a student visa in 1978. In 1981, after his visa expired, petitioner was removed to Nigeria where he remained for two months. While there he claimed that he was detained, beaten, and tortured by the Nigerian authorities on at least two occasions on account of his political activities.

At the removal hearing, after petitioner began to discuss the first political rally he attended, a precursor to the two events of severe persecution and torture in his declaration, the IJ interrupted the direct examination by his attorney. The IJ suggested that petitioner limit his testimony to events not discussed in his asylum application. Petitioner's attorney followed the IJ's suggestion. At the conclusion of the hearing the IJ found petitioner not

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Seventh Circuit Holds That Young, Albanian Women Who Live Alone Constitute a Particular Social Group

In ***Cece v. Holder***, __ F.3d __, 2013 WL 4083282 (7th Cir. August 9, 2013), the *en banc* Seventh Circuit held that a decision of the BIA's, which rejected as a basis for asylum a "particular social group" comprising young single Albanian women targeted for prostitution by human traffickers, was inconsistent with the BIA's *Matter of Acosta* precedent and with the court's decisions applying *Acosta*.

The court reversed a prior panel decision, 668 F.3d 510, that had upheld the BIA's decision because the particular social group alleged as the basis for asylum was circularly defined by the feared persecution, and because the evidence did not compel the conclusion that the petitioner, Cece, could not reasonably relocate within Albania.

The *en banc* court concluded that the BIA failed to address expert testimony that Cece could not reasonably relocate, and that she had demonstrated a well-founded fear of persecution based on her membership in a cognizable particular social group for asylum. Chief Judge Easter-

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Young, Albanian Women Who Live Alone is a Social Group

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brook and Judge Manion each authored dissenting opinions.

Cece is a native and citizen of Albania who was granted asylum in 2006 based on her fear of persecution on account of her membership in a particular social group of young, single Albanian women who are targeted by human traffickers for prostitution. The BIA reversed, finding that the asserted group lacked social visibility and was defined by the persecution, and that Cece had not demonstrated that she could not reasonably relocate within Albania. After further hearings, the immigration judge denied her asylum for the reasons stated by the BIA. The BIA denied Cece's appeal, omitting its social visibility reasoning after precedent decisions of the Seventh Circuit had rejected the BIA's use of the social visibility criterion. A panel of the Seventh Circuit denied the petition for review.

The *en banc* Seventh Circuit ruled that the social group upon which the agency and the panel had ruled was better described as "young Albanian women living alone," and that the BIA's circularity reasoning for its rejection of that group as a particular social group for asylum was inconsistent with the BIA's precedent decision, *Matter of Acosta*, as well as the court's judgments in precedent opinions applying *Acosta*.

The court ruled that "[e]ven if the group were defined in part by the fact of persecution (and we do not believe it to be), that factor would not defeat recognition of the social group under the Act," because, according to the court, the Board "has never required complete independence of any relationship to the persecutor." The court pointed to its prior decisions in *Agbor v. Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007) (women who are opposed to and fear female genital mutilation); *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011) ("women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing"); and *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002) (Christian women in Iran who do not wish to adhere to the Islamic female dress code), as possessing comparable "common characteristics that members of the group either cannot change, or should not be required to change, because such characteristics are fundamental to their individual identities."

"Even if the group were defined in part by the fact of persecution (and we do not believe it to be), that factor would not defeat recognition of the social group under the Act."

The court declared this analysis to be consistent with the parallel line of reasoning found in mixed motive asylum cases. The court observed that many of the particular social groups accepted in the precedents of the BIA and courts are indeed quite broad, and that the "on account of" requirement should assuage "fear that the slope leading to asylum has been made too slick by broad categories" because "[a]lthough the category of protected persons may be large, the number of those who can demonstrate the required nexus likely is not."

The court acknowledged that "an appellate court errs by deciding in the first instance, without giving the BIA the first opportunity on remand, whether a proposed social group is cognizable[,]" but stated that the immigration judge and BIA "had before them all of the facts pertaining to Cece's proposed social group and yet determined [in error] that her social group was not cognizable." Having determined that the group at issue is "young Albanian women living alone," and that such a group "cannot be distinguished from others with immutable and fundamental traits," even if defined in some part by reference to the persecution feared, the court proceeded to rule that Cece's group is cognizable as a particular social group.

In a dissenting opinion, Chief Judge Easterbrook noted that Cece, who is now 34 years old, is no longer a member of the social group as defined by her or by the court. This fact should be dispositive of her claim, he wrote, because she sought asylum on the basis of future persecution. Judge Easterbrook also noted that "deplorable as human trafficking is, any given woman's danger in Albania may be modest," compared to many other countries. Moreover, "whatever risk Cece faces comes from criminals, not from the government."

Judge Easerbrook said that "the disposition of this and other cases demonstrate that the Seventh Circuit has rejected the Board's approach and established its own – one under which everyone belongs to a "social group" and the question whether that membership caused the persecution drops out of consideration."

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We encourage contributions to the Immigration Litigation Bulletin

FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

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

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Moral Turpitude – Assault with a Deadly Weapon

The Ninth Circuit, over government opposition, granted *en banc* rehearing of its published decision in ***Ceron v. Holder***, 712 F.3d 426, which held that a California conviction for assault with deadly weapon was crime involving moral turpitude, and the alien's conviction was a felony. *En banc* rehearing should address whether assault with a deadly weapon, in violation of California Penal Code Section 245(a)(1), is a categorical crime involving moral turpitude, and whether a sentence of imprisonment for a California misdemeanor conviction can exceed six months. *En banc* argument has been set for the week of December 9 -13, 2013.

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BIA Standard of Review

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

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Standard of Review – Nationality Rulings

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

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Consular Nonreviewability

On September 9, 2013, the government filed a petition for *en banc* rehearing challenging the 9th Circuit's decision in ***Din v. Kerry***, 718 F.3d 856, which reversed the district court's dismissal of the petition under the doctrine of consular reviewability. The district court had applied the exception to consular nonreviewability described in *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), and ruled that the government had proffered a facially legitimate reason for the visa denial. A divided panel of the court of appeals ruled that the government had not put forth a facially legitimate reason. The government rehearing petition argues that the panel majority's holdings constitute a significant violation of the separation of powers by encroaching on decisions entrusted solely to the political branches, and undermines the political branches' ability to protect sensitive national security information while excluding from admission aliens connected with terrorist activity.

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Convictions – Modified Categorical Approach

On September 10, 2013, the 9th Circuit withdrew its August 15, 2012 opinion in ***Aguilar-Turcios v. Holder***, 691 F.3d 1025, and stated that a new opinion would be forthcoming and the government's rehearing petition is moot. The prior decision applied *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), and held that the alien's convictions did not render him deportable. The rehearing petition argues that the court should permit the agency to address other grounds for removal on remand. In a supplemental brief on July 11, 2013, the government argued that the Supreme Court's ruling in *Descamps v. United States* did not alter the need for remand to the BIA.

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Ordinary Remand Rule

On September 12, 2013, the 9th Circuit withdrew its March 22, 2013 opinion in ***Amponsah v. Holder***, 709 F.3d 1318, requested reports on the status of the BIA's present case reconsidering of the rule asserted in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and stated that the government's rehearing petition is moot. The rehearing petition had argued that the panel violated the ordinary remand rule when it rejected as unreasonable under *Chevron* step-2 the BIA's blanket rule against recognizing state *nunc pro tunc* adoption decrees entered after the alien's 16th birthday.

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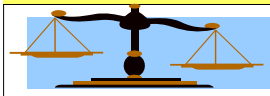

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds that under IIRIRA's Transitional Rules, the Stop-Time Rule Applies Retroactively to Alien's Application for Suspension of Deportation

In *Aguirre v. Holder*, __ F.3d __, 2013 WL 4531747 (1st Cir. August 28, 2013) *(Lipez*, Lynch, Howard), the First Circuit held that under IIRIRA's transitional rules, the stop-time rule for determining physical presence applies retroactively to an alien's application for suspension of deportation, notwithstanding the fact that the alien's case was administratively closed as of IIRIRA's effective date, and notwithstanding the equities in the alien's favor.

The petitioner, a national of Colombia, entered the United States without inspection on or about August 10, 1986. On January 9, 1987, he was personally served with an order to show cause that placed him into deportation proceedings. Subsequently, the IJ ordered the case administratively closed because petitioner could not be located. In 2005, petitioner was issued a new NTA charging him with removability as a noncitizen present without being admitted or paroled. Petitioner conceded removability, but applied for asylum and withholding of removal. At some point, it was discovered that petitioner already had an open immigration case based on his 1987 OSC, and the proceedings based on his 2005 NTA were terminated. Petitioner then moved to reopen and recalendar the deportation proceedings that had begun in 1987, and applied for suspension of deportation. In a written submission and at a hearing before the IJ, he argued that the stop-time rule should not apply retroactively to him in part because the case had "been hanging around for 20, 25 years" due to delay that was not of his making. The IJ found Aguirre statutorily ineligible for suspension for failure to demonstrate the necessary years of continuous physical presence and the BIA subsequently affirmed.

The First Circuit rejected petitioner's contention that when his case had been administratively closed, those earlier proceedings were no longer pending. "Administrative closure does not terminate the proceedings or result in a final order of removal. Either the noncitizen or the government may move to recalendar the proceedings at any time, thus making administrative closure substantively "differ[ent] from . . . a conclusion of the proceedings," said the court.

"Administrative closure does not terminate the proceedings or result in a final order of removal."

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First Circuit Rejects Alien's Challenge to the Agency's Finding that He Attempted to Obtain an Immigration Benefit Through Fraud

In *Agyei v. Holder*, __ F.3d __, 2013 WL 4618389 (1st Cir. August 28, 2013) (Howard, Souter, *Lipez),* the First Circuit upheld the agency's factual finding that petitioner was statutorily ineligible for adjustment of status and cancellation of removal because he attempted to obtain an immigration benefit through fraud.

The petitioner, a Ghanaian national, entered the United States without inspection in 1984. He subsequently sought to avoid removal by, among other routes, applying for adjustment of status under INA § 245(i) and cancellation of removal. On February 23, 1999, petitioner married a U.S. citizen and sought adjustment through that relationship. However, immigration officers conducted separate interviews and concluded that petitioner had entered into a sham marriage for the purpose of obtaining immigration benefits. Consequently, the visa petition was denied. Ultimately, an IJ denied relief based on the fraud and the BIA dismissed the appeal. Petitioner did not timely seek judicial review. With the help of new counsel petitioner filed a motion to reopen and reconsider. The BIA denied the motion but reissued the dismissal of petitioner's direct appeal.

In upholding the BIA dismissal, the court specifically determined that the petitioner's failure to disclose his separation from his wife during the I-130 interview for his Petition for an Alien Relative, and the fact that he had fathered two children with another woman during his marriage constituted substantial evidence to support the agency's decision.

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First Circuit Determines that the One-Time Sale of One Firearm Constitutes "Trafficking in Firearms"

In *Soto-Hernandez v. Holder*, __F.3d __, 2013 WL 4618353 (1st Cir. August 30, 2013)(*Howard*, Selya, Thompson), the First Circuit concluded that the BIA's construction of "trafficking in firearms" to include any commercial exchange of a firearm, including a single transaction, was a permissible interpretation of INA § 101(a)(43)(C).

The petitioner, a citizen of the Dominican Republic entered the United States lawfully as a permanent resident. In June of 2003, he was convicted the assault and battery of a former girlfriend in violation of Rhode Island General Laws. In June of 2005, DHS initiated removal proceedings against petitioner pursuant to INA § 237(a)(2)(E)(i) as an alien convicted of a crime of domestic violence.

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At his removal hearings, petitioner conceded his removability, but filed an application for cancellation of removal under INA § 240A. In June of 2005, around the same time that DHS instituted the removal proceedings, petitioner was convicted of unlawfully delivering a .45 caliber semi-automatic pistol to a purchaser "without complying with" the Rhode Island General Laws. He was sentenced to two concurrent, suspended sentences of three years' imprisonment. The IJ found that petitioner's conviction satisfied the definition of an aggravated felony under § 101(a)(43)(C) and pretermitted his application for cancellation of removal. On appeal, the BIA held that petitioner's delivery of a firearm to a purchaser fit under the definition of trafficking and affirmed the IJ's determination that the conviction constituted an aggravated felony.

"In light of the deference owed to the BIA's constructions of the INA, the rule of lenity cannot apply to contravene the BIA's reasonable interpretation in this case."

In giving deference to the BIA's interpretation of "trafficking in firearms," the court noted that it "conform[ed] to the agency's own precedent in interpreting the INA," namely its determination that an alien can be considered a "drug trafficker" based on a single conviction for the sale of narcotics.

The court rejected petitioner's contention that the rule of lenity required the court to interpret immigration statutes in the light most favorable to him. "[I]n light of the deference owed to the BIA's constructions of the INA, the rule of lenity cannot apply to contravene the BIA's reasonable interpretation in this case," said the court, without deciding whether the rule applies in the immigration context.

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■ **First Circuit Holds BIA did not Abuse its Discretion in Denying a Motion to Reopen Alleging Changed Country Conditions**

In ***Yang Zhao-Cheng v. Holder***, __F.3d __, 2013 WL 3942931 (1st Cir. August 1, 2013) (*Lynch*, Torruella, Lipez), the First Circuit determined that the BIA did not abuse its discretion in finding that the petitioner had failed to demonstrate changed country circumstances based on his 2011 conversion to Christianity.

The petitioner, a citizen of the People's Republic of China, was denied asylum and ordered excluded in 1998. He did not leave. In 2012, he sought to reopen proceedings on the basis of changed circumstances arising in his country of nationality. Specifically, petitioner claimed that he had converted to Christianity in 2011 and that, since the time of his 1998 hearing, circumstances surrounding the practice of Christianity in China had changed — namely, persecution of unregistered Christian groups had increased.

The BIA determined that petitioner had failed to establish changed circumstances in China, and so his untimely motion did not qualify for the exception to the ninety-day rule. The BIA also noted that petitioner's changed personal circumstances, his 2011 conversion to Christianity, did not constitute changed country circumstances.

In upholding the BIA's denial of the motion to reopen, the court explained that petitioner bore the burden of proof and the BIA was not required to take administrative notice of a document available on the internet that petitioner selectively cited in his motion. The court concluded that the "BIA permissibly determined that, according to the evidence presented by [petitioner], the new regulations did not alter the amount of persecution faced by unregistered Christian groups, as the same levels of persecution persisted both before and after 2004."

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■ **First Circuit Lacks Jurisdiction to Review NACARA "Extreme Cruelty" Determination**

In ***Castro v. Holder,*** __ F.3d __, 2013 WL 4307478 (1st Cir. August 16, 2013) (*Lynch*, Howard, Thompson), the First Circuit held that it lacked jurisdiction to review the discretionary determination whether a special rule cancellation of removal applicant was "battered or subjected to extreme cruelty."

The petitioner, a citizen of Guatemala, entered the United States unlawfully in May 2000. When DHS placed him in removal proceedings on September 17, 2007, he admitted that he was removable but sought cancellation of removal under section 203 of NACARA. He claimed that his mother, Liliana Castro, a NACARA beneficiary, subjected him to extreme cruelty. The IJ determined that petitioner was not eligible for "special rule cancellation" because he had "not shown that his mother either battered him or subjected him to extreme cruelty." The BIA affirmed the decision.

In dismissing the case, the court also concluded that, while 8 C.F.R. § 204.2(c)(1)(vi) provides examples of extreme cruelty, it does not create a nondiscretionary legal standard for the court to review. The court joined a majority of circuits, concludimg that it lacked jurisdiction to review whether a petitioner was "battered or subjected to extreme cruelty" so as to warrant the cancellation of removal.

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■ **First Circuit Holds Board Properly Determined There Were Not Changed Country Conditions For Christians In China**

In ***Liu v. Holder***, __ F.3d __, 2013 WL 4054501 (1st Cir. August 13, 2013) (*Lynch*, Torruella, Thomson), the First Circuit ruled that there had not been a material change in country conditions for Christians returned to China who wish to practice in unregistered churches sufficient to warrant an exception to the time limits on motions to reopen.

The petitioner, a citizen of China, had been ordered removed in 2004 but did not leave the United States. In June 2012, she sought to reopen proceedings on the ground of changed country conditions in China, claiming that she had converted to Christianity. The BIA denied the motion to reopen.

In dismissing the petition, the court ruled that the "BIA reasonably concluded that the mistreatment of Christians who attend unregistered churches had not materially worsened since 2003 but rather was a longstanding and ongoing condition."

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■ **First Circuit Holds Alien Failed to Establish Pakistani Government Was Unable or Unwilling to Protect Him or that Internal Relocation Was Unreasonable**

In ***Khan v. Holder***, __F.3d __, 2013 WL 4034522 (1st Cir. August 9, 2013) (*Lynch*, Lipez, Thompson), the First Circuit held that petitioner failed to demonstrate that the Pakistani government was unable or unwilling to protect him solely because the government had not eliminated the threat posed by the Taliban.

The petitioner entered the United States on April 5, 2008, on a seaman crew visa that authorized him to remain in the United States until May 4, 2008. Petitioner had flown from Pakistan to Dubai and then to New York; his purported ultimate destination was Bermuda, where he was to rejoin the ship on which he worked. Instead, petitioner remained in New York and subsequently filed an application for asylum, withholding, and protection under the CAT. He claimed that he had been persecuted and feared future persecution by the Taliban.

Petitioner failed to establish, for the purpose of removing the conditional status on his lawful residency, that he entered into his marriage in good faith.

The IJ denied the claims and the BIA dismissed petitioner's appeal finding that he failed to he "would not be able to relocate in Pakistan or that the Pakistani government would not assist or protect the respondent from the Taliban."

In upholding the BIA's denial, the court explained that the evidence showed that the Pakistani government had actively sought to protect petitioner from the Taliban and that it had been to some extent successful in controlling the Taliban in the Swat valley, where he resided, even if it had not eradicated the threat the Taliban poses. "Where, as here, the government has experienced both setbacks and successes in its fight," the BIA does not err in concluding that there is no government connection to support a finding of past or future persecution," said the court.

The court also found that the BIA had not erred in concluding that petitioner had failed to show he could not reasonably relocate within Pakistan to avoid persecution. In particular, the court noted that petitioner had "admitted that the Taliban did not control Islamabad or Karachi, and that his children had safely resided in Islamabad since he left Pakistan, despite his assertion that they were Taliban targets."

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■ **First Circuit Upholds Agency's Finding That Alien Failed to Establish That His Marriage Was Entered into in Good Faith**

In ***Kinisu v. Holder,*** 721 F.3d 29 (1st Cir. 2013) (*Lynch*, Torruella, Howard), the First Circuit held that the petitioner failed to establish, for the purpose of removing the conditional status on his lawful residency, that he entered into his marriage in good faith.

The petitioner came to the United States in May 1992 on a B–1 visa. According to his testimony before the IJ, he met Theresa Johnson, a United States citizen, in 2000, and they dated for approximately two years. On October 9, 2002, petitioner and Johnson married. Approximately a year later, on October 23, 2003, petitioner obtained an adjustment of his status to that of a conditional permanent resident. The couple remained together until October 2005 when, according to petition, Johnson left the marital home. They obtained a final judgment of divorce on December 28, 2006. In June 2008, petitioner filed a Form I–751 petition to remove the conditions on his residency, which included a request for waiver of the requirement that the petition be filed jointly with his spouse. On August 6, 2010, USCIS denied petitioner's petition. The agency found that the documents petitioner had provided did not support his claim that the marriage had been in good faith.

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An IJ likewise determined that petitioner had failed to show that the marriage had been entered into in good faith, terminated his resident status, and ordered his removal from the United States. The BIA adopted and affirmed the IJ's decision.

In upholding the BIA's decision, the court concluded that the petitioner had not presented sufficient documentation of the bona fides of his marriage, that his explanations for this failure were unreasonable, and that petitioner's testimony regarding the reason for the dissolution of his marriage was not convincing.

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■ First Circuit Holds that Alien Was Properly Classified as a Crewman Rendering Him Ineligible for Cancellation of Removal

In ***Guerrero v. Holder,*** __ F.3d __, 2013 WL 4457434 (1st Cir. August 21, 2013) (*Torruella*, Lipez, Thompson), the First Circuit held that an alien who chooses to seek entry to the United States as a crewman "agreed to the limitations associated with that status" and "cannot now avoid the consequences of those restrictions in removal proceedings by claiming not to be a crewman."

On September 1, 1998, the petitioner was issued a C–1/D visa. The annotation on the visa reads: "as 2–engineer aboard Poseidon." Petitioner then entered the United States on October 5, 1998, following his arrival at Miami International Airport. At the airport, Guerrero was admitted as a "C–1 nonimmigrant in transit," and was authorized to remain in the United States until November 4, 1998. According to petitioner, after leaving the airport he checked in with Rigel Ships Agency, a shipping agency he had worked with in the past. But due to adverse weather conditions, the ship that petitioner was scheduled to work on, the Sea Mist, had departed Miami earlier than planned. Petitioner remained in the United States and eventually married a United States citizen. In 2006, petitioner applied for an adjustment of status, which was denied, and was subsequently placed in removal proceedings. He then applied for cancellation of removal.

The IJ found petitioner ineligible for cancellation of removal because he had last entered the United States as a crewman. On appeal, the BIA ruled that even though petitioner's visa was annotated "C–1," and he had not been employed as a crewman since his arrival, the following facts were dispositive of his classification as a crewman: "[he] secured a visa as a crewman; entered the United States on that visa; arrived in this country with the intention of working as a seaman; and was pursuing employment as a crewman, even though he was unable . . . due to adverse weather conditions." Thus, the BIA concluded that petitioner was ineligible for cancellation

The court upheld the BIA's ruling, noting in particular that it had recently determined in *González v. Holder*, 673 F.3d 35, 38 (1st Cir. 2012), that "the particular type of visa with which a person enters is [not] outcome determinative . . . it is apparent . . . that the alien was issued a visa as a crewman and entered the United States in pursuit of his occupation as a seaman, then he is to be regarded as an alien crewman." Here, the court found that the type of visa petitioner possessed supported the BIA's determination that petitioner was properly classified as an alien crewman because the record clearly demonstrated that petitioner had been issued a C–1/D visa to serve as an engineer aboard the Poseidon. The court also found that the circumstances surrounding petitioner's entry indicated that he arrived in the United States with the intention of working as a seaman.

Accordingly, the court upheld the determination that pursuant to INA § 240A(c)(1), petitioner was ineligible for cancelation.

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■ First Circuit Holds that Alien Conceded Removability for Fraud

In ***Urizar-Carrascoza v. Holder,*** __ F.3d __, 2013 WL 4051883 (1st Cir. August 12, 2013) (*Lynch,* Lipez, Howard), the First Circuit concluded that an IJ properly relied on petitioner's concession to the facts alleged in the Notice to Appear, namely that he obtained an immigrant visa through fraud, to establish removability. Additionally, the court rejected the petitioner's claim that his counsel's concession of visa fraud was "de facto withdrawn" moments after it was made because the record showed that petitioner was unclear about the details of his prior removal order and not his concession of fraud in procuring a visa.

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SECOND CIRCUIT

■ Second Circuit Holds Alien's Failure to Become a Lawful Permanent Resident Before Turning Eighteen Does Not Bar Him from Deriving Citizenship from His Parents

In ***Nwozuzu v. Holder***, __ F.3d __, 2013 WL 2013 WL 4046273 (2d Cir. August 12, 2013) (Walker, *Chin,* Restani (by designation)), the Second Circuit held that petitioner's failure to become an LPR before turning eighteen years old did not bar him from claiming derivative citizenship from his parents by operation of former INA § 321(a).

Under former § 321(a)(5), a petitioner could satisfy the citizenship requirements in two ways. A minor who was a lawful permanent resident

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AILA InfoNet Doc. No. 13080190. (Posted 8/1/14)

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automatically became a citizen at the time the last parent was naturalized, or a minor could derive citizenship if, after the last parent naturalized, he "beg[an] to reside permanently in the United States while under the age of eighteen years." Petitioner's claim was based on the latter provision.

The petitioner was born on March 8, 1977 in Nigeria. In 1982, he entered the United States as the child of F–1 nonimmigrant students. In 1990, his father filed an immediate relative visa petition, Form I–130, on petitioner's behalf, which was approved in March 1993. In 1994, both his parents were naturalized as U.S. citizens. On February 6, 1995, at the age of seventeen, petitioner applied for an adjustment of status to become a lawful permanent resident. His application was not decided at that time. Five months later, petitioner filed a Form I –131 "Application for Travel Document" to visit his ailing grandmother in Nigeria, but he left for Nigeria before that application was approved. On August 21, 1995, petitioner was denied admittance because he had left the country without obtaining a travel document. He was readmitted on December 12, 1998, after becoming a lawful permanent resident at the age of 21.

The words "lawfully admitted for permanent residence" and "reside permanently" have plainly different meanings."

On January 7, 2004, petitioner was convicted of several crimes, including firearm offenses. A year later DHS charged petitioner with removability under INA § 237(a)(2)(C), based on his 2004 convictions for possession of a firearm. Petitioner then applied for citizenship in August 2005 and April 2006, but his application was not approved. On October 6, 2006, the IJ held that DHS failed to meet its burden to establish alienage and terminated proceedings against petitioner. DHS appealed and on September 10, 2008, the BIA issued a precedent decision sustaining DHS's appeal and remanding the case to the IJ to complete removal proceedings. *See Matter of Nwozuzu*, 24 I&N Dec. 609, 616 (BIA 2008). The BIA read the phrase "begins to reside permanently" in § 321(a) to require petitioner to have become an LPR before turning eighteen to derive citizenship from his naturalized parents.

The Second Circuit rejected the BIA's interpretation, finding that the words "lawfully admitted for permanent residence" and "reside permanently" have plainly different meanings. The former is a term of art, denoting admission as an LPR, while the latter, said the court, requires something less than a lawful admission of permanent residency. "Thus, under section 321(a)(5), a minor derived citizenship if the second parent was naturalized and he thereafter 'beg[an] to reside permanently in the United States while under the age of eighteen year' — irrespective of whether he had been lawfully admitted for permanent residence before turning eighteen," said the court. Additionally, the court found that "the history of the laws governing the derivative naturalization of children demonstrates clearly that Congress intended 'lawful admission for permanent residence' and 'reside permanently' to mean different things," and that the legislative history "makes clear Congress's intent to preserve the family unit and to keep families intact."

Accordingly, the court concluded that the BIA's interpretation of section 321(a) was unreasonable and that petitioner satisfied the conditions of § 321(a). "He began to reside permanently in the United States, while still under the age of eighteen, after his parents were naturalized. His application of adjustment to lawful permanent resident status on February 6, 1995 — after his parents naturalized and when he was still seventeen — is an objective and official manifestation of his intent to reside permanently in the United States."

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■ **Second Circuit Holds Burden Shifted to Government to Establish Consent to Enter Residence, and Facts as Alleged Portrayed Egregious Fourth Amendment Violation**

In ***Sicajau Cotzojay v. Holder,*** 725 F.3d 172 (2d Cir. 2013) (*Wesley*, Droney, Nathan (by designation)), the Second Circuit held that, although the petitioner did not personally observe Immigration and Customs Enforcement officers enter his home, the burden shifted to the government to establish consent once the petitioner offered testimony based upon personal knowledge. The court also concluded that the alleged facts, depicting a pre-dawn, warrantless entry into the home, portrayed an egregious Fourth Amendment violation requiring application of the exclusionary rule. The court remanded to give the government an opportunity to show that the officers obtained consent to enter the home.

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■ **Second Circuit Holds that *Lopez-Mendoza* Sets Out a Jurisdictional Rule and that Government Failed to Show that Its Evidence Was Independent**

In ***Pretzantzin v. Holder***, __ F.3d __, 2013 WL 3927587 (2d Cir. July 31, 2013) (*Wesley,* Droney, Nathan (by designation)), the Second Circuit,

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in a published decision held that the statement in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), that identity is not suppressible is a jurisdictional rule, not an evidentiary one. The court ruled that "jurisdictional identity evidence" is not suppressible, but did not define or limit that term beyond an individual's name. Evidence of petitioner's alienage had otherwise been obtained in violation of the Fourth Amendment. Because the government failed to show that only names were used to obtain preexisting alienage evidence, the court determined that the evidence was not independent and remanded for the BIA to decide whether an egregious constitutional violation occurred.

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THIRD CIRCUIT

■ **En Banc Third Circuit Abandons "Hybrid-Offense" Theory for Aggravated Felony Definition, Upholds Denial of Naturalization Application**

In ***Al Sharif v. USCIS,*** __ F.3d __, 2013 WL 4405689 (3d Cir. August 19, 2013), the *en banc* court overruled *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004), a prior panel decision that created the "hybrid-offense" theory for determining whether a conviction constituted an aggravated felony. Under that theory, an offense which implicated multiple subparagraphs of the aggravated felony statute, INA § 101(a)(43), must satisfy the requirements of each implicated subsection. The court abandoned that theory "which has been rejected by other courts and conflicts with the plain language of the statute." Under a plain-language approach, the court upheld USCIS's denial of the alien's application for naturalization due to his conviction for conspiracy to commit wire fraud. The court also rejected the alien's arguments that the aggravated felony definitions were impermissibly retroactive and that he was entitled to relief under the rule of lenity.

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■ **En Banc Third Circuit Holds that Removability Based on Drug-Related Offense Requires Proof that State Drug Conviction Involved a Federally Controlled Substance**

The plain language of INA § 237(a)(2)(B)(i), requires that, for an alien to be deportable based on a state-law controlled substance conviction, the government must prove that the crime of conviction involved a substance covered by the federal Controlled Substances Act.

In ***Rojas v. Holder,*** __ F.3d __, 2013 WL 4504648 (3d Cir. August 23, 2013), the *en banc* Third Circuit held that the plain language of section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), requires that, for an alien to be deportable based on a state-law controlled substance conviction, the government must prove that the crime of conviction involved a substance covered by the federal Controlled Substances Act. The court concluded that, under the "rule of the last antecedent," a parenthetical in the statute reading "(as defined in section 802 of Title 21)" modifies the term "a controlled substance" and, thus, the phrase restricted deportable offenses to those involving federally controlled substances. Because the Pennsylvania controlled substance schedules, differed from the federal schedules and the government had not established the identity of the underlying substance involved in the alien's Pennsylvania conviction for possession of drug paraphernalia, the court held that the conviction was not a deportable offense.

Judge Greenberg dissented, arguing that the last antecedent rule required viewing the phrase "relating to a controlled substance (as defined in section 802 of Title 21)" as modifying the word "law," such that an individual could violate a law relating to a federally controlled substance even if the particular drug involved was not federally controlled.

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■ **Third Circuit Lacks Jurisdiction to Review Denial of Continuance Where Alien Removable on Criminal Grounds**

In ***Rachak v. Attorney General***, __ F.3d __, 2013 WL 4437227) (3d Cir. August 21, 2013) (Sloviter, *Chagares*, Greenberg), the Third Circuit held that it lacked jurisdiction to review the IJ's denial of a continuance in the case of an alien who was removable on criminal grounds, where the alien did not raise a constitutional claim or legal issue.

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■ **Third Circuit Dismisses as Untimely a Collateral Challenge to an Underlying Removal Order in Reinstatement Proceedings**

In ***Verde-Rodriguez v. Holder,*** __ F.3d __, 2013 WL 4105633 (3d Cir. August 15, 2013) (Smith, Fisher, *Chagares),* the Third Circuit dismissed the petition for review challenging the underlying removal order in a reinstatement case, because the petition was not filed within thirty days of the underlying order, even though it was filed within thirty days of the reinstatement. The court further concluded that the district court lacked jurisdiction to review the reinstated order because the REAL ID Act eliminated habeas review of removal orders.

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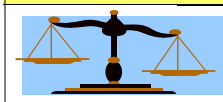

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FIFTH CIRCUIT

■ Fifth Circuit Denies EAJA Motion in TRIG Case

In ***Amrollah v. Napolitano,*** (5th Cir. August 14, 2013) (Stewart, Davis, Clement), in a *per curiam* decision, the Court of Appeals for the Fifth Circuit denied appellant's motion for fees under the Equal Access to Justice Act ("EAJA"). Appellant requested EAJA fees after the Fifth Circuit overturned the district court and ordered that U.S. Citizenship and Immigration and Services ("USCIS") was estopped from denying appellant's application for lawful permanent resident status on terrorism-related inadmissibility grounds. The Fifth Circuit found that USCIS was bound by an immigration judge's decision granting appellant asylum despite his alleged support of an undesignated Tier III terrorist organization.

USCIS was bound by an immigration judge's decision granting appellant asylum despite his alleged support of an undesignated Tier III terrorist organization.

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■ Fifth Circuit Upholds Denial of Motion to Reopen an *In Absentia* Removal Order Because Alien Received Adequate Notice and Failed to Show Prejudice

In ***Ojeda-Calderon v. Holder***, __ F.3d __, 2013 WL 4029146 (5th Cir. August 8, 2013) (Jones, Smith, *Garza)*, the Fifth Circuit held that the petitioner should be charged with receipt of the notice of hearing because it was sent by certified mail to the address he had provided, and that his denial of receipt was insufficient to rebut the presumption of effective service.

The court then concluded that the agency did not abuse its discretion in denying the motion to reopen because, although the alien claimed he did not receive the notice, the fact that it was only printed in English did not prejudice him.

The court also rejected petitioner's contention that due process requires the Notice of Hearing to be in a language that the alien can understand. "Due process allows notice of a hearing to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required," said the court. "A rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process."

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SIXTH CIRCUIT

■ Sixth Circuit Rejects Particular Social Group Based on Prior Gang Resistance For Lack of Particularity and Social Visibility

In ***Umana-Ramos v. Holder***, __ F.3d __, 2013 WL 3880207 (6th Cir. July 30, 2013) (*Moore*, Kethledge, Stranch), the Sixth Circuit held that young Salvadoran males who refuse recruitment by the MS gang do not constitute a cognizable particular social group for purposes of asylum because the group was not sufficiently particular or socially visible. The court made clear that social visibility refers to whether those with the relevant shared characteristic are perceived as a group by society, rather than whether the group's individual members are visually recognizable "on-sight."

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■ Sixth Circuit Holds that a Conviction Under Michigan's Second-Degree Murder Statute Constitutes an Aggravated Felony

In ***Wadja v. Holder***, __ F.3d __, 2013 WL 3811635 (6th Cir. August 20, 2013) (Gibbons, White, *Cohn* (by designation), the Sixth Circuit designated for publication its previously unpublished July 23, 2013 decision, in which it upheld the BIA's categorical analysis determining that Michigan's second-degree murder statute matched the generic definition of "murder" for purposes of the aggravated felony defined by INA § 101(a)(43)(A). The court rejected the alien's claim that *Leocal v. Ashcroft*, 543 U.S. 1 (2004), controlled because, while the facts were similar, the aggravated felony at issue in that case was a "crime of violence," a wholly separate provision from the "murder" aggravated felony provision.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds BIA Violated Standard of Review Regulation by Reviewing De Novo Immigration Judge's Factual Findings

In ***Rosiles-Camarena v. Holder***, __ F.3d __, 2013 WL 4457283 (7th Cir. August 21, 2013) (*Easterbrook*, Bauer, Wood), the Seventh Circuit held that the BIA violated 8 C.F.R. § 1003.1(d)(3) by reviewing *de novo* the IJ's finding regarding the probability of future harm in Mexico as to the petitioner, a HIV-positive homosexual. The court joined the Second, Third, Fourth, Ninth and Eleventh Circuits in rejecting the BIA's analy-

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sis in *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), concerning its standard of review, and holding that the probability of future harm is a factual question reviewed for clear error. Consequently, the court remanded to the BIA to review for clear error the judge's decision regarding the probability of future harm.

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■ **Seventh Circuit Holds That Petitioner Failed to Establish Ukrainian Government Was Unable or Unwilling to Control Alleged Persecutors**

In *Yasinskyy v. Holder*, __ F.3d __, 2013 WL 3944264 (7th Cir. August 1, 2013) (*Williams,* Posner, Easterbrook), the Seventh Circuit held that an asylum applicant from Ukraine failed to establish that the Ukrainian government was unable or unwilling to control unknown assailants during Ukraine's Orange Revolution. The court faulted the IJ for misapplying court precedent in evaluating whether past harm rose to the level of persecution, but concluded that the error was harmless given the applicant's failure to meet the "unable or unwilling to control" requirement.

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■ **Seventh Circuit Holds Documents Are Inadmissible without Cross-Examination of Declarants**

In *Pouhova v. Holder*, __F.3d __, 2013 WL 4054994 (7th Cir. August 13, 2013) (Bauer, *Hamilton*, Tharp (by designation)), the Seventh Circuit held that a Form I-213 drafted seven years after the incident it addressed and an airport interview transcript relating to a third-party were improperly admitted hearsay evidence. The court concluded that both documents violated petitioner's statutory procedural rights. "As hearsay, neither document was reliable enough to be fairly admitted without the opportunity for [petitioner] to cross-examine either the declarant or the questioner/scribe."

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■ **Seventh Circuit Holds BIA Did Not Provide a Rational Explanation for Its Holdings that Alien Was Not Seeking Admission into the United States After Being Denied Admission into Canada and Was Ineligible for a *Nunc Pro Tunc* Section 212 (h) Waiver**

In *Margulis v. Holder*, __ F.3d __, 2013 WL 3970051 (7th Cir. August 5, 2013) (*Posner*, Manion, Rovner), the Seventh Circuit held that the BIA had not provided a rational basis for its decision finding that petitioner had not "departed" from the United States and therefore had not been seeking admission to this country, a perequisite to waiver, "when he returned from his blink-of-the-eye visit to Canada."

The definition of "entry" had been repealed, "yet the Board has failed to explain why *Matter of T*, which turned on the meaning of "entry," nevertheless controls [petitioner's] case."

The petitioner, an LPR, embarked on a business trip to Canada but was stopped by Canadian immigration officers just inside Canadian territory. They refused to allow him to "enter" Canada. So he turned his car around and drove back across the border. He had to clear U.S. customs. The immigration officers at the customs station conducted database inquiries and discovered that petitioner had a criminal record in the United States. They allowed him to return to his home in Illinois — but also placed him in removal proceedings under INA § 237(a)(2) on the basis of his criminal record. Petitioner argued that as an arriving alien he should be eligible for a § 212(h) waiver, and asked that the removal proceedings be terminated and that he be placed in admissibility proceedings instead.

Ultimately the BIA denied the request, ruling that petitioner "was not an arriving alien because he was never lawfully admitted to another country, and therefore never effected a departure from the United States." The BIA relied its ruling on *Matter of T-,* 6 I&N Dec. 638 (BIA 1955). In that case, an LPR boarded a ship for Germany, but was not permitted to debark there because, as he was checking his travel documents preparatory to debarking, a gust of wind swept them out of his hands and into the water. No other foreign country would let him debark either. So back he came to the United States, never having left the ship, and the BIA held that this was not a new entry because he had not been admitted to any foreign country. He had entered German territorial waters, and to that extent the case is comparable to the present one. The court found that the definition of "entry" had been repealed, "yet the Board has failed to explain why *Matter of T*, which turned on the meaning of "entry," nevertheless controls [petitioner's] case."

The court also noted that the BIA had overlooked *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1976), where it had held that a "a waiver of the ground of inadmissibility may be granted in a deportation proceeding when, at the time of the alien's last entry, he was inadmissible because of the same facts which form the basis of his deportability." The holding in *Sanchez*, said the court, "describes this case."

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In granting the petition, the court remarked that it was not ruling that petitioner was eligible for a waiver, noting the recent ruling *Matter of* Rivas, 26 I&N Dec. 130 (BIA 2013) (holding that "granting a [212(h)] waiver *nunc pro tunc* would violate the plain language of the statute), and also referred to a possible alternative explanation, not used by the BIA, as to why petitioner was properly charged with removability under § 237 as a previously admitted alien.

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■ Seventh Circuit Upholds Denial of Motion to Reopen Because Indonesian Asylum Seeker Failed to Submit New Evidence

In ***Salim v. Holder,*** __ F.3d __, 2013 WL 4537190 (7th Cir. August 28, 2013) (Easterbrook, *Williams,* Hamilton), the Seventh Circuit, agreed with the agency that the alien's evidence related to religious tensions in Indonesia was not new, previously unavailable evidence that could support a motion to reopen. The court also rejected the alien's reliance on the Ninth Circuit's decision in *Tampubolon v. Holder*, 610 F.3d 1056 (9th Cir. 2010), both because it was not "new" evidence and because the court had previously rejected the disfavored group analysis.

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■ Seventh Circuit Overturns Denial of Reopening, Holds Agency Failed to Explain Adequately Rejection of Belarusian Alien's New Evidence

In ***Boika v. Holder,*** __ F.3d __, 2013 WL 4399231 (7th Cir. August 16, 2013), (Ripple, Williams, *Hamilton*), the Seventh Circuit held that the agency abused its discretion by denying reopening without adequately addressing the alien's evidence relating to increasingly severe persecution of Belarusian political dissidents and her own *prima facie* eligibility for relief. The court also suggested that the agency wrongly relied on a prior determination that the alien lacked credibility to justify rejection of her new evidence. The court stressed that it "take[s] no position on the merits of the motion to reopen," but remanded with instructions for the agency to at least "articulate a reasoned response."

The court held that petitioner was not statutorily eligible for § 212(c) relief because he had not demonstrated reliance where the crime, at the time of conviction, did not render him removable.

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■ Seventh Circuit Holds It Lacks Jurisdiction to Review Agency's Conclusion that Petitioner Did Not Merit Section 212(h) Waiver as a Matter of Discretion

In ***Papazoglou v. Holder***, __ F.3d __, 2013 WL 3991878) (7th Cir. August 6, 2013) (Bauer, *Rovner*, Williams), the Seventh Circuit concluded that INA § 212(h) precludes a waiver only for aliens who, at the time they lawfully entered the United States, had attained the status of lawful permanent resident.

The court therefore concluded that the petitioner was eligible for a § 212(h) waiver, but held that it lacked jurisdiction to review the BIA's conclusion that her did not merit the waiver as a matter of discretion.

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■ Aggravated Felony Convictions Prior to 1988 Do Not Render Alien Removable

In ***Zivkovic v. Holder***, __ F.3d __, 2013 WL 3942248, (7th Cir. July 31, 2013) (Easterbrook, *Wood,* Williams), the Seventh Circuit joined the Ninth Circuit in holding that aggravated felony convictions prior to 1988 do not render aliens removable because removability based on such convictions is not clearly retroactive. The court also ruled the agency's interpretation on retroactivity was not entitled to deference.

Additionally, the court held that petitioner was not statutorily eligible for § 212(c) relief because he had not demonstrated reliance where the crime, at the time of conviction, did not render him removable. The court also concluded that the petitioner's conviction in Illinois for residential trespass was not a crime of violence aggravated felony. Judge Easterbrook dissented.

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■ Seventh Circuit Holds Alien Engaged in Terrorist Activity by Helping Plan a Military Mutiny in Niger

In ***Abdoulaye v. Holder***, __ F.3d __, 2013 WL 3944261 (7th Cir. August 1, 2013) (Posner, *Wood,* Tinder), the Seventh Circuit held that substantial evidence supported the BIA's rulings that petitioner's participation in a military mutiny in Niger amounted to terrorist activity under the INA, making him ineligible for asylum, withholding of removal, and adjustment of status. The court also determined that petitioner failed to demonstrate eligibility for deferral of removal under the Convention Against Torture.

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EIGHTH CIRCUIT

Eighth Circuit Holds a Nebraska Conviction for Tampering with a Witness or Informant is a Categorical Aggravated Felony

In *Armenta-Lagunas v. Holder*, __ F.3d __, 2013 WL 3942885 (8th Cir. August 1, 2013) (*Melloy,* Loken, Colloton), the Eighth Circuit held that an alien convicted of tampering with a witness or informant under Neb. Rev. Stat. § 28-919(1)(c), (d), was convicted of a categorical obstruction of justice aggravated felony. The court declined to address whether *Chevron* deference was due to the Board's generic definition of an "offense relating to obstruction of justice," but nevertheless concluded that the Nebraska statute fell within the Board's definition.

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Eighth Circuit Holds Evidence Compels Conclusion that Mungiki Defectors Constitute a Particular Social Group

In *Gathungu v. Holder*,__ F.3d __, 2013 WL 3988710 (8th Cir. August 6, 2013) (Smith, *Melloy,* Benton), the Eighth Circuit held that the BIA''s misapplied the "social visibility" criterion in its finding that the petitioners did not show Mungiki defectors in Kenya were a particular social group, and that the evidence compelled the conclusions that Mungiki defectors are socially visible and the government cannot or will not control the Mungiki. The court also concluded the BIA abused its discretion in denying the aliens' motion to remand to allow in-person testimony because, if the additional testimony was credited, it would likely change the outcome of the case.

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NINTH CIRCUIT

Ninth Circuit Holds Government May Not Execute a Reinstated Removal Order After Original Order Found Constitutionally Invalid in Criminal Reentry Prosecution

In *Villa-Anguiano v. Holder,* __ F.3d __, 2013 WL 4082028 (9th Cir. August 14, 2013) (*Berzon*, Tallman, M. Smith), the Ninth Circuit held that the DHS may not deport an alien on the basis of a reinstated prior removal order after a federal district court had found the original order constitutionally invalid for purposes of an illegal reentry prosecution. The Ninth Circuit held that due process required the agency to (1) provide the alien with an opportunity after the dismissal of the criminal prosecution to contest reinstatement, and (2) reassess whether to reinstate the prior removal order or instead to instigate full removal proceedings. Judge Tallman, in dissent, criticized the majority as imposing "a new procedural rule by judicial legislation" and intruding on the Government's exercise of prosecutorial discretion.

The Ninth Circuit held that due process required the agency to provide the alien with an opportunity after the dismissal of the criminal prosecution to contest reinstatement.

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Ninth Circuit Holds Landownership May Constitute Particular Social Group

In *Cordoba v. Holder*, __ F.3d__, 2013 WL 4055590 (9th Cir. August 13, 2013) (*Reinhardt*, Murguia, Zouhary (by designation)), the Ninth Circuit, consolidating two appeals, ruled that there were "clear inconsistencies" between the BIA's rejection of landowners as a particular social group and the court's recent decision *in Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (*en banc*), issued after the BIA's decisions in these consolidated cases. The court explained that *Henriquez-Rivas*'s clarifications to the particularity and social visibility requirements provided "substantial additional support" for recognizing land ownership as a basis for a particular social group, and thus remanded for the BIA to reconsider petitioners' respective asylum claims. The court also remanded a CAT claim for the BIA to reconsider the issue of government acquiescence in light of *Tapia-Madrigal v. Holder*, which held that "awareness" of torturous activity did not require "actual knowledge of the *specific incident of torture*." 716 F.3d 499, 509 (9th Cir. 2013) (emphasis added).

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On Supreme Court Remand, Ninth Circuit Rules Car Theft Is Aggravated Felony

In *Duenas-Alvarez v. Holder,*__ F.3d __, 2013 WL 4417587 (9th Cir. August 20, 2013) (*Graber*, Wardlaw, Reinhardt), the Ninth Circuit held that the records of an alien's conviction for violating California Vehicle Code § 10851, "Theft and Unlawful Taking or Driving of a Vehicle," proved a "theft offense" aggravated felony conviction that rendered him deportable and barred relief. Reasoning that the complaint charged the alien with acting as a principal rather than an accessory-after-the-fact because it did not include language that refers to accessories, the court held that circuit precedent

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foreclosed the alien's challenges to the agency's ruling.

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■ **Ninth Circuit Holds Brandishing a Firearm Qualifies Categorically as a Crime of Violence Aggravated Felony**

In ***Jimenez-Bolanos v. Holder,*** __ F.3d __, 2013 WL 4437603 (9th Cir. August 21, 2013) (*Graber*, Rawlinson, Watford), the Ninth Circuit held that California Penal Code § 417.3, brandishing a firearm in the presence of a motor vehicle occupant, qualifies categorically as a crime of violence under 18 U.S.C. § 16(a), and thus as an aggravated felony, because it has as an element the threatened use of physical force against another person.

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■ **Asylum Applicant Established Past Persecution Based on Injuries to Parents When She Was a Child, Despite Lack of Evidence Showing Effect of Injuries on Her**

In ***Rusak v. Holder***, __ F.3d __, 2013 WL 4466079 (9th Cir. August 22, 2013) (Fletcher, Rawlinson, *Korman* (by designation)), the Ninth Circuit held that the petitioner could rely on the religious persecution of her parents to establish her own persecution claim because she was a child at the time of her parents' injuries. The court acknowledged that the petitioner did not present evidence "directly linking" her parents' injuries to her own psychological state, but concluded that such evidence was not necessary in light of the severity of the injuries, which included her father's death and her mother's imprisonment and rape. Judge Rawlinson dissented.

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■ **Ninth Circuit Holds Petitioners Failed to File Their Asylum Applications Within a Reasonable Period Following Extraordinary Circumstances**

In ***Al Ramahi v. Holder,***__ F.3d __, 2013 WL 3988706 (9th Cir. August 6, 2013) (*Ikuta,* McKeown, Gilman (by designation)), the Ninth Circuit held that the petitioners' fifteen month delay in filing their applications for asylum following the lapse of their lawful status was not reasonable. The court held that, despite the petitioners' claims that they received deficient advice of counsel, had difficulty securing other counsel, and were placed in removal proceedings, substantial evidence supported the BIA's determination that they failed to file their applications within a reasonable period. In particular, the court noted that "in the absence of the evidentiary support required by *Lozada*, the BIA could reasonably conclude that it lacked a basis from which to analyze petitioners' claim that [their counsel's] advice was deficient."

The court held that the relevant statute requires full completion of I-9 Forms and that copying and retaining documents is not sufficient for compliance.

In a footnote, the court noted that although it reviewed the claim, "we are alone in interpreting the REAL ID Act to allow for such broad review in this area. Nearly all our sister circuits have rejected [this court's] view that the REAL ID Act grants jurisdiction to review the BIA's application of the changed or extraordinary circumstances exception. They have concluded that the determination entails an unreviewable exercise of discretion or that "questions of law" does not include mixed questions of law and fact."

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■ **Ninth Circuit Holds that Requiring Employers to Complete I-9 Forms Fully is Neither Arbitrary Nor Capricious**

In ***Ketchikan Drywall Services, Inc. v. ICE***, __ F.3d __, 2013 WL 3988679 (9th Cir August 6, 2013) (Nelson, *Tashima*, Callahan), the Ninth Circuit upheld a civil penalty of $175,250 for an employer's violation of an employment eligibility verification requirement. The court held that the relevant statute requires full completion of I-9 Forms and that copying and retaining documents is not sufficient for compliance. The court gave *Skidmore* deference to a policy memorandum outlining the difference between "substantive" violations and "technical or procedural" violations for which a "good faith" defense may be available. The court also concluded that the ALJ's choice of a calculation method for the penalty was "allowable" and that the ALJ's application of the chosen method was neither arbitrary nor capricious.

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■ **Ninth Circuit Holds the Lawfulness of an Alien's Presence in the United States is Immaterial to the Continuity of Residence for Cancellation of Removal Purposes**

In ***Galindo de Rodriguez v. Holder***, 724 F.3d 1147 (9th Cir. 2013) (Trott, Fletcher, *Stein* (by designation)), the Ninth Circuit held that the BIA erred by concluding the alien's residence "after having been admitted in any status" was not continuous as required by INA § 240A(a)(2)

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This Month's Topical Parentheticals

ADJUSTMENT

■ ***Matter of Estrada***, 26 I&N Dec. 180 (BIA Aug. 8, 2013) (holding that a spouse or child accompanying or following to join a principal grandfathered alien cannot qualify as a derivative grandfathered alien for purposes of section 245(i), by virtue of a spouse or child relationship that arose after April 30, 2001))

■ ***Agyei v. Holder***, __ F.3d __, 2013 WL 4618389 (1st Cir. Aug. 30, 2013) (affirming BIA's conclusion that petitioner was ineligible for adjustment of status based on marriage fraud and ineligible for cancellation of removal for lack of good moral character (false testimony)

ADMISSION

■ ***Ward v. Holder***, __ F.3d __, 2013 WL 4106270 (6th Cir. Aug. 15, 2013) (holding that the government has the burden of proving by clear, unequivocal and convincing evidence that a lawful permanent resident is inadmissible upon his departure and return to the United States)

■ ***Matter of Pinzon,*** 26 I&N Dec. 189 (BIA Aug. 19, 2013) (holding that an alien who enters the US by falsely claiming US citizenship is not deemed to have been inspected by an immigration officer, so the entry is not an "admission" under section 101(a)(13)(A) of the INA; further concluding that the offense of knowingly and willfully making any materially false, fictitious, or fraudulent statement to obtain a US passport in violation of 18 U.S.C. § 1001(a)(2) is a CIMT)

ASYLUM

■ ***Oshodi v. Holder***, __ F.3d __, 2013 WL 4511636 (9th Cir. Aug. 27, 2013) (*en banc*) (holding that asylum applicants have a due process right to testify fully as to the merits of their application; further holding that placing restrictions upon the petitioner's ability to testify in full is particularly troublesome in credibility cases, where the restrictions hamper the ability of the IJ to evaluate the totality of the circumstances; concluding that where credibility is at issue, any restrictions on the ability to testify necessarily prejudice the applicant)

■ ***Cece v. Holder***, __F.3d __, 2013 WL _(7th Cir. Aug. 9, 2013) (*en banc*) (holding that BIA decision rejecting a "particular social group" of young single Albanian women targeted for prostitution by human traffickers is inconsistent with its precedent decision in *Matter of Acosta* (and circuit decisions applying *Acosta*), and without sufficient explanation; further holding that a social group of young Albanian women living alone is a PSG regardless of the fact that the group is circularly defined by the fact that it suffers persecution; further ruling that the BIA failed to address evidence that a single woman in Albania, particularly one who had previously been targeted, could not reasonably relocate safely within the country)

■ ***Gathungu v. Holder***, __ F.3d __, 2013 WL 3988710 (8th Cir. Aug. 6, 2013) (holding that; i) the "social visibility" criterion for PSG refers to whether "members of the group are perceived as a group by society" and 'these individuals suffer from a higher incidence of crime than the rest of the population'"; ii) "Munglki defectors" in Kenya satisfy the "social visibility" criterion because media reports show defectors are subject to higher crime rates by the Mungiki than others in the population; and iii) the status of being a Munglki defector "is the reason for" the persecution; also, joining the Seventh Circuit in holding that country reports show the Kenyan government is unable or unwilling to control the Mungiki because the government is complicit in Mungiki violence)

■ ***Abdoulaye v. Holder***, __ F.3d __, 2013 WL 3944261 (7th Cir. Aug. 1, 2013)) (upholding findings that that petitioner's participation in a military mutiny in Niger constituted terrorist activity, and that substantial evidence supported determination that petitioner failed to meet his burden of establishing his eligibility for deferral of removal under CAT)

■ ***Yasinkyy v. Holder,*** __ F.3d __, 2013 WL 39442.64 (7th Cir. Aug. 1, 2013) (changing Seventh Circuit law by applying a court-created dividing-line test for the meaning of "persecution" and holding it is error for the agency to apply the traditional case-comparison method to determine if conduct is harassment or persecution)

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

■ ***Cheng v. Holder***, __ F.3d __, 2013 WL 3942931 (1st Cir. Aug. 1, 2013) (holding that the BIA did not abuse its discretion in denying an untimely MTR to apply for asylum based on Chinese applicant's conversion to Christianity while in the US, because: i) conversion to Christianity is a changed personal circumstance, not change in country conditions; ii) the Board did not abuse its discretion in refusing to take notice of DOS reports after applicant selectively quoted them in his MTR; iii) the availability of reports on the internet does not relieve an applicant of the burden to submit the reports to the BIA; iv) new 2004 regulations in China regarding unregistered Christian groups did not constitute changed circumstances, because level of restrictions on unregistered groups has been consistent both before and after 2004; and v) the BIA was not required to decide if the applicant made a *prima facie* showing of asylum eligibility)

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■ ***Khan v. Holder***, __ F.3d__, 2013 WL 4034522 (1st Cir. Aug. 9, 2013) (holding that the Pakistani government was able and willing to control Taliban threats against a male asylum applicant, where local police appropriately investigated past threats and grenade by making arrests and asking the army to occupy the area and subdue the Taliban; further holding that the applicant failed to show a well-founded fear of future persecution because he could reasonably relocate elsewhere in Pakistan like Islamabad, where his family had safely relocated despite Taliban threats against them)

■ ***Kumar v. Holder***, __ F.3d __, 2013 WL 4563189 (9th Cir. Aug. 29, 2013) (in a case involving an asylum applicant who worked as a constable in a prison where prisoners were tortured or killed, holding that as a matter of Ninth Circuit case law, in order for the asylum persecutor bar to apply, the agency must make a "particularized evaluation" of the following "factors": (i) the level of "personal involvement in the persecution", *i.e.,* whether the applicant was "present," "active", or "involved" in the persecution of others, or was not present, or was "passive," or his involvement was "attenuated"; and ii) whether the applicant's conduct was "material" to the persecution "measured by the degree of relation his acts had to the persecution", i.e., whether the applicant's work was "integral" not only to the functioning of the persecuting facility but also "integral to the alleged persecution) (Note: The Ninth Circuit has now added "active involvement" and "material assistance" requirements to the persecutor bar, in addition to self-defense and involuntariness exceptions))

■ ***Sharma v. Holder***, __ F.3d __, 2013 WL __ (5th Cir. Aug. 30, 2013) (remanding asylum claim by applicant from Nepal claiming persecution by Maoists consisting of kidnapping and detention while a high school volleyball team member, for failure of the agency to consider all relevant circumstantial evidence of political motive for the kidnapping, including circumstantial evidence of length of detention and level of mistreatment experienced by the applicant)

■ ***Salim v. Holder***, __ F.3d __, 2013 WL 4537190 (7th Cir. Aug. 28, 2013) (holding the BIA's denial of a MTR the asylum proceeding of a Chinese Christian Indonesian was warranted, where the evidence the applicant submitted was dated prior to his original hearing and was not new and previously unavailable; further, rejecting Ninth Circuit's disfavored group approach to well-founded fear to the extent it requires a lower showing of individualized risk of future persecution)

■ ***Al Ramahi v. Holder***, __ F.3d __, 2013 WL 3988706 (9th Cir. Aug. 6, 2013) (affirming that asylum applications were untimely, because even assuming that the end of lawful status is an "extraordinary circumstance" excusing the delay in filing, substantial evidence supports the BIA's decision that the applicants did not file within a "reasonable period" following the end of their status, where applicants: i) filed their applications more than 15 months after the lapse of their lawful status; and ii) failed to file even after an attorney informed them of the one-year deadline and urged them to file as soon as possible; further holding that there is a reasonable presumption that delay of filing for asylum less than six months after lawful status has expired is reasonable, but this does not foreclose that longer delays may also be reasonable given the individualized circumstances of the case)

CANCELLATION

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

CREWMAN

■ ***Guerrero v. Holder***, __ F.3d __, 2013 WL 4457434 (1st Cir. Aug. 21, 2013) (holding that an alien who chooses to seek entry to the US as a crewman "agreed to the limitations associated with that status" and "cannot now avoid the consequences of those restrictions in removal proceedings by claiming not to be a crewman"; court accordingly rejected petitioner's claims that he did not fit within the "crewman" classification because he was admitted into the US as a C-1 nonimmigrant in transit, and because the circumstances surrounding his entry indicated that he was not intending to pursue a calling as a crewman)

CRIMES

■ ***Rojas v. Att'y Gen. of United States***, __ F.3d __, 2013 WL 4504648 (3d Cir. Aug. 23, 2013) (*en banc*) (holding that the plain language of section 237(a)(2)(B)(i) requires that for an alien to be deportable based on a state-law controlled substance conviction, the government must prove that the crime of conviction involved a substance covered by the federal Controlled Substances Act; reasoning that because the Pennsylvania controlled substance schedules differed from the federal schedules and the government had not established the identity of the underlying substance involved in the petitioner's Pennsylvania conviction for possession of drug paraphernalia, the conviction was not a deportable offense)

■ ***Al-Sharif v. USCIS***, __ F.3d __, 2013 WL 4405689 (3d Cir. Aug. 19, 2013) (*en banc*) (overturning *Nugent v. Ashcroft*, a prior decision that created the "hybrid-offense" theory for determining whether a conviction constituted an aggravated felony,

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and reasoning that the theory has been rejected by other courts and conflicts with the plain language of the statute; upholding USCIS's naturalization denial due to his conviction for conspiracy to commit wire fraud)

■ *Villa-Anguiano v. Holder,* __ F.3d __, 2013 WL 4082028 (9th Cir. Aug. 14, 2013) (holding that due process requires a reinstated alien have an additional opportunity -- following the dismissal of his criminal reentry indictment on the merits -- to contest reinstatement by requesting ICE exercise its discretion to place him in 240 removal proceedings despite an already existing reinstatement order; and further, that ICE must "independently reassess" whether it should exercise such discretion in light of the district court's findings in the criminal reentry case) (Judge Tallman dissented)

■ *Soto-Hernandez v. Holder*, __ F.3d __, 2013 WL 4618353 (1st Cir. Aug. 30, 2013) (deferring to the BIA's holding that a one-time sale of a single firearm constituted "trafficking in firearms" under 8 U.S.C. § 1101(a)(43)(C))

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

■ *Armenta-Lagunas v. Holder*, __F.3d __, 2013 WL 3942885 (holding that a Nebraska state conviction for witness tampering is an aggravated felony)

DUE PROCESS

■ *Ching v. Mayorkas*, __ F.3d __, 2013 WL 400756 (Cir. Aug. 7, 2013) (holding that USCIS violated due process by denying the US citizen spouse's 1-130 petition based on fraud in a previous marriage without allowing him and his noncitizen spouse the opportunity to cross-examine the noncitizen former husband or the USCIS officer who took his statement; remanding case to USCIS for an evidentiary hearing)

FOURTH AMENDMENT

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

■ *Pretzantzin v. Holder*, __ F.3d __, 2013 WL 3927587 (2d Cir. July 31, 2013) (ruling that the government had presented insufficient evidence to demonstrate that proffered evidence was independent of the alleged violation, and remanding to BIA to determine whether government seized evidence of alienage in the course of committing an egregious violation of the Fourth Amendment)

JURISDICTION

■ *Urizar-Carrascoza v. Holder*, __ F.3d_ _, 2013 WL 4051883 (1st Cir. Aug. 12, 2013) (holding that substantial evidence supported the BIA's determination that petitioner was removable as an alien who procured a visa by fraud; further holding that court lacks jurisdiction to review BIA's discretionary determinations regarding a waiver relating to fraud or unlawful presence)

NATURALIZATION

■ *Iwozuzu v. Holder*, __ F.3d__, 2013 WL __ (2d Cir. Aug. 12, 2013) (refusing to defer to the BIA's precedent decision in *Matter of Nwozuzu*, and holding that under section 321 (a) of the INA, petitioner qualified for derivative citizenship once began to reside permanently in the US as a minor after his parents were naturalized, even if he did not become an LPR before turning 18 years of age)

NOTICE

■ *Ojeda-Calderon v. Holder*, __ F.3d __, 2013 WL 4029146 (5th Cir. Aug. 8, 2013) (affirming denial of MTR in absentia order where record reflected that Notice of Hearing was delivered by certified mail to petitioner's last known address and petitioner failed to submit evidence rebutting presumption of receipt; finding that notice was statutorily deficient because it was not printed in Spanish, but that petitioner failed to demonstrate any prejudice)

REINSTATEMENT

■ *Verde-Rodriguez v. Att'y Gen. of United States,* __ F.3d __, 2013 WL 4105633 (3d Cir. Aug. 15, 2013) (dismissing PFR challenging underlying reinstated order because it was not filed within 30 days of underlying order, even though it was filed within 30 days of the reinstatement; further concluding that district court lacked jurisdiction to review reinstated order because the REAL ID Act eliminated habeas review of removal orders)

WAIVERS

■ *Papazoglou v. Holder*, __ F.3d __, 2013 WL 3991878 (7th Cir. Aug. 6, 2013) (holding that petitioner was not ineligible for 212(h) relief because that statute precludes a waiver only for individuals who, at the time they lawfully entered the US, had attained LPR status, but concluding lacked jurisdiction to review petitioner's challenge to the BIA's separate determination that petitioner did not

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merit a waiver as a matter of discretion)

■ *Kinisu v. Holder*, __F.3d __, 2013 WL 3942934 (1st Cir. Aug. 1, 2013) (affirming denial of a waiver of the filing a joint petition where IJ weighed the totality of the evidence)

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

■ *Zambrano-Reyes v. Holder*, __F3d__, 2013 WL 3871002 (7th Cir. August 2, 2013) (upholding BIA's ruling that 8 C.F.R. § 1003.44(k)(2) bars an alien who reentered illegally from seeking section 212(c) discretionary relief)

NOTED

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

Asylum Applicants Have Due Process Rights To Present Testimony

(Continued from page 1)
credible on the basis of his use of aliases, his failure to provide the corroborating evidence, and various inconsistencies between his testimony, his initial credible-fear interview, and his asylum application. On this basis, he denied withholding of removal and CAT. The BIA affirmed the IJ's decision and rejected petitioner's due process claim that the IJ denied him an opportunity to testify fully in support of his application for relief.

"A vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf"

The Ninth Circuit explained that under the Fifth Amendment due process clause, an individual in removal proceedings is entitled to a full and fair hearing in removal proceedings. "A vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf" said the court.

Here, the court found that the petitioner was not provided a reasonable opportunity to present evidence on his behalf. "In particular, the IJ precluded him from providing critical testimony about the events of persecution that are the foundation of his withholding of removal and CAT claims," said the court. Accordingly, the court held that "by refusing to allow [petitioner] to testify to the contents of his written application, the IJ violated [petitioner's] due process right to present oral testimony about the events at the heart of his claim for withholding of removal, testimonial evidence that the BIA has recognized is central to the 'integrity of the asylum process itself.'" The court held that a violation of this sort was especially bothersome where the ultimate determination turned on the alien's credibility.

The court also held that petitioner demonstrated that he was prejudiced because the outcome of the proceeding "may have been affected by the alleged violation." The court explained that the outcome of petitioner's case turned on his credibility and "given the importance of an applicant's live testimony to an IJ's credibility determination . . . it follows that the IJ's failure to allow Oshodi to testify about the persecution he described in his application may have influenced his adverse credibility decision."

In a dissenting opinion, Judge Kozinski would have held that the immigration judge did not unfairly restrict the alien's ability to testify, that there is no right to unrestricted testimony, and that even if there was, this alien could not establish prejudice, even under the court's "questionable" prejudice standard. He wrote that the court's "ruling impairs the ability of immigration judges to manage their crushing caseload, and benefits fabulists and charlatans at the expense of the real victims of persecution. It disregards Supreme Court precedent and takes a giant step towards importing the Constitution into the realm of administrative procedure. I can't say precisely where my colleagues' ill-conceived constitutional venture will end, but it will be nowhere good. I'll have none of it."

BY Francesco Isgro, OIL

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Summaries Of Recent Federal Court Decisions

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because she took a thirteen day trip to Mexico pursuant to a grant of advance parole.

The court found that the government's reliance on petitioner's thirteen-day trip to end her period of continuous residence in the United States was inconsistent with the definition of "residence" in the statute. Under INA § 101(a)(33), the term 'residence' means "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." "By that or any definition, a brief visit to family does not change a person's residence. The statute does not treat every dwelling in which an alien stays as a new residence; the text instructs courts to take a wider view, deeming the "principal, actual dwelling place [and] . . . the place of general abode" to be the residence," said the court.

The court also held that whether an alien remains in the country unlawfully is immaterial to the continuity of residence because "Congress in § 240A(a)(2) did not include maintenance of status as a prerequisite for relief."

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■ **BIA Applied the Wrong Standard in Determining that the Alien Was Personally Involved and Purposefully Assisted in the Persecution of Others**

In ***Kumar v. Holder***, __ F.3d __, 2013 WL 4563189 (9th Cir. August 29, 2013) (*Noonan,* Fisher, Nguyen), the Ninth Circuit held that the BIA's erred by determining that and asylum applicant, who worked as an armed guard at a prison facility at which persecution occurred, was subject to the persecutor bar because the BIA failed to adequately assess the applicant's "personal involvement" and "purposeful assistance" in the persecution itself (as opposed to the functioning of the facility).

The BIA had affirmed the IJ's finding that petitioner's "position as a sentry or guard, a constable and later head constable . . . was analogous to that of the petitioner in *Fedorenko v. United States*." The BIA also agreed with the IJ's finding that petitioner was eligible for deferral of removal under the CAT, because he would more likely than not be subjected to harm in India.

The Ninth Circuit framed the question presented by petitioner as follows: Does the statute's bar to entry into this country by a persecutor exclude a police officer who tortured no prisoner, interrogated no prisoner, struck no prisoner, and who himself risked his job and lost it by protesting the treatment of several prisoners? The court then determined that "the BIA misunderstood and misapplied relevant precedent."

The court held that the BIA must assess whether an applicant, who did not actively participate in, and whose involvement was highly attenuated to, such persecution, may be subject to the persecutor bar. In particular, said the court, the BIA should consider (a) whether the work of a sentry on the perimeter of an intelligence facility is integral not only to the functioning of the facility but also to the persecution that occurred inside of it, and (b) the differences between the role of a Nazi guard at a Nazi concentration camp and petitioner, an individual working for a legitimate arm of a recognized government at a legitimate prison facility.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

NEW DATE: November 4-7, 2013. OIL 19th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. This is a basic immigration law course intended to introduce new attorneys to immigration and asylum law. Attorneys from our client agencies and Assistant United States Attorneys are invited to attend. *Contact Francesco.Isgro@usdoj.gov.*

OIL'S FALL INTERNS

Pictured L to R: Dave McConnell (OIL Director), Jenna Munnelly (Catholic University of America Columbus School of Law, 2L), Jessica Willard (George Washington University Law School, 3L), Utrophia Robinson (University of Georgia School of Law, 3L), Lauren Shryne (Boston University School of Law, 3L), Meg Naveed (Georgetown University Law School, 3L), Daniel Mullen (University of Pittsburg School of Law, 3L), Virginia Gordon (Earl Mack School of Law at Drexel University, 3L), Kathryn Martinez (Chicago-Kent College of Law, 3L) , Rebecca Dames (University of San Francisco School of Law, 3L), Lucy Sun (Boston University School of Law, 3L), Rachel Lesniak (George Washington University, Senior), Michelle Latour (OIL Deputy Director).

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

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

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

Office of Immigration Litigation

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

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