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Immigration Litigation Bulletin

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DISTRICT COURT IN SEATTLE HALTS ALL REMOVALS OF ALIENS TO SOMALIA

Finding that petitioners raised a "matter of grave importance," the district court in ***Ali v. Ashcroft***, No.C02-2304P (W.D. Wash. December 9, 2002) (Pechman), granted petitioners' emergency motion for a temporary restraining order and certification of a nationwide class to enjoin removal of "all persons from the United States who are subject to final orders of removal, deportation, or exclusion to Somalia."

The district court held that members of the class would be harmed if removed to Somalia because it "is a war-torn country under strife with no government in control."

This action commenced on November 13, 2002, when five petitioners with final orders of removal filed a consolidated petition for writs of habeas corpus seeking relief from removal. They argued that the INS should not be allowed to remove them from the United States due to the absence of a functioning government in Somalia to accept their return. Petitioners then filed an emergency motion for temporary restraining order to maintain the status quo until a ruling by the court on the merits. They also sought certification of a class for nationwide relief from removal.

The district court held that members of the class would be harmed if removed to Somalia because it "is a war-torn country under strife with no government in control." The court found that the situation has deteriorated since 9/11,and, according to the government, terrorists are "indicated to be present" in the country. The court also found that some of the petitioners had left Somalia many years ago and, therefore, have no family there, and fear significant harm or death on return. When balanced against the harm claimed by the government, namely inability to remove aliens with final orders and the expense of detaining them, the court found that the balance strongly weighed in petitioners' favor.

The court also found that petitioners had demonstrated a "strong likelihood of success on the merits." It noted that in *Jama v. INS*, 2002 WL 507046 (D. Minn. March 31, 2002), the district court held that the Somali petitioner could not be removed to Somalia without acceptance by the Somali Govern-

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BIA REFORMS CHALLENGED IN D.C. DISTRICT COURT

A lawsuit challenging major aspects of the Board of Immigration Appeals' reform regulation has been filed in the District Court for the District of Columbia. ***Capital Area Immigrants' Rights Coalition v. Dept. of Justice***, No. 1:02cv02081 (D.D.C.) (Bates, J.).

The final rule to restructure the Board and to reform its procedures was promulgated by the Attorney General on August 26, 2002. *See* 67 *Fed. Reg*. 54878 (2002). The final rule seeks to achieve four important objectives: (1) eliminating the current backlog of cases pending before the Board; (2) eliminating unwarranted delays in the adjudication of administrative appeals; (3) utilizing the resources of the Board more efficiently; and (4) allowing more resources to be allocated to the resolution of those cases that present difficult or

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SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE SET FOR ST. LOUIS, APRIL 21-25, 2003

The Seventh Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation, will be held on April 21-25, 2003, in St. Louis, Missouri. The Conference will commence on the evening of Monday, April 21st with registration followed by an opening reception and will continue with three full days of substantive presentations.

The Conference Planning Committee, co-chaired by Francesco Isgro and Julia K. Doig, Senior Litigation Counsels at OIL, is planning this year's agenda to reflect the significant restruc-

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REMOVAL OF ALIENS TO SOMALIA HALTED

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ment. It also noted that two other district courts have issued injunctive relief barring removal to Somalia on the same grounds as those asserted by petitioners. The court rejected the government's arguments that it lacked jurisdiction to enter an injunction. In particular, the court rejected the argument that INA § 242(f)(1), limiting injunctive relief, applied to petitioners, finding that they do not seek to enjoin the legal operation of INA § 241(b); "instead they seek to ensure that the provision is properly implemented."

The court also rejected the contention that it lacked jurisdiction under INA § 242(g). The court determined that petitioners were not challenging the Attorney General's discretionary authority to execute their removal, but rather "the legality of removal to Somalia."

Finally, the district court found that petitioners had "demonstrated a strong likelihood of prevailing on certification of a nationwide class." The court found that the government did not contest its authority to certify a nationwide declaratory class "and such a class may be particularly appropriate when a discrete matter of federal law is at issue."

In its conclusion, the court admitted that "the matter was hurriedly considered" after requesting expedited briefing by the government and following a telephonic hearing.

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BIA REFORMS CHALLENGED IN DISTRICT COURT

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controversial legal questions--cases that are most appropriate for searching appellate review and that may be appropriate for the issuance of precedent decisions. The final rule also provides that, after a transition period of 180 days, the membership of the Board will be reduced to 11, with the Attorney General designating the Board members.

The plaintiffs, the American Immigration Lawyers Association ("AILA") and Capital Area Immigrants' Rights Coalition ("CAIR"), are two immigrant-rights and legal-representation organizations. They filed the complaint "on their own behalf and that of their members" under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*., against the Attorney General, the Department of Justice, and EOIR.

The stated policy choices and explanations about the Board reforms and procedures "involve a complicated balancing of administrative factors, as well as policy judgments about agency resources and goals, that are particularly within the expertise of the Attorney General, not the courts."

Plaintiffs assert that the Attorney General's promulgation of the Board reform regulation is unlawful, and requests that it be vacated as invalid, on the grounds that four portions of it are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Specifically, plaintiffs challenge (1) the provisions making streamlined single-Member decision-making and writing the predominant method of review at the Board; (2) the provision requiring the Board to give priority to reducing its current case backlog within six months of implementation of the Board reform regulation; (3) the provision permitting the Attorney General to reduce the size of the Board to 11 Members within six months "or such other time as may be specified by the Attorney General"; and (4) the provision requiring parties in appeals involving detained aliens to file simultaneous rather than sequential briefs with the Board.

In addition, plaintiffs assert that the Acting Board Chairman's issuance of the three Streamlining Memoranda was improper rulemaking without notice-and-comment, as well as "arbitrary and capricious," and should be declared invalid and set aside.

The government has moved to dismiss the complaint for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) due to lack of standing, mootness, and unreviewability under the APA, or for failure to state a claim for which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the alternative, the government seeks summary judgment upholding the promulgation of the Board reform regulation and issuance of the Streamlining Memoranda.

The government contends, *inter alia*, that the stated policy choices and explanations about the Board reforms and procedures that plaintiffs are challenging, "involve a complicated balancing of administrative factors, as well as policy judgments about agency resources and goals, that are particularly within the expertise of the Attorney General, not the courts."

The court is expected to hear arguments on the motion to dismiss in February.

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SUMMARIES OF RECENT BIA DECISIONS

In ***Matter of Gomez-Gomez***, 23 I&N Dec. 522 (BIA 2002), the *en banc* Board considered the reliability of information contained in an I-213, where the information on the minor alien was provided by her alleged father, and whether removability had been proven. Relying on its own case law, the Board first found that I-213's are inherently reliable, even where the information contained is provided by the minor's alleged father, in the absence of other evidence casting doubt on the veracity of the information. Unlike the Immigration Judge, the Board found no basis to discount the reliability of the information provided on the I-213. The Board also addressed whether service of the minor's Notice to Appear on the father was proper and again rejected the Judge's rationale, finding that "we believe it is implicit in the statute and regulations dealing with notice that an adult relative who receives notice on behalf of a minor alien bears the responsibility to assure that the minor appears for the hearing, as required." 23 I&N Dec. at 528. The Board reversed the Immigration Judge's decision to terminate proceedings and remanded for further proceedings. A dissenting opinion was filed by Board Member Schmidt, joined by Board Members Guendelsberger, Moscato, Brennan, Espenoza, and Osuna.

The Board found that I-213s are inherently reliable, even where the information contained is provided by the minor's alleged father in the absence of other evidence casting doubt on the veracity of the information.

In a second case decided on a motion to reconsider *en banc*, ***Matter of Mejia-Andino***, 23 I&N Dec. 533 (BIA 2002), the Board concluded that a Notice to Appear was not properly served on a minor where the Notice was served only on an alleged uncle with whom the minor was apprehended and the INS made no effort to serve the Notice on the minor's parents who reside in the United States. Reaffirming its original decision in the case, the Board found that "when it appears that the minor child will be residing with her parents in this country, as in this case, [8 C.F.R. § 103.5a(c)(2)(ii)] requires service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative." 23 I&N Dec. at 536. A concurring opinion was filed by Board Member Espenoza with whom Board Members Schmidt, Moscato, Brennan, and Osuna joined.

In ***Matter of M-D-***, 23 I&N Dec. 540 (BIA 2002), a unanimous Board panel reviewed the statutory change regarding notice requirements for Notices to Appear and immigration court hearings. Significantly, in *M-D-*, the Board distinguished the facts of the case from its decision in *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001), noting that *G-Y-R-* "is instructive for making the point that the alien need not personally receive, read, and understand the Notice to Appear for the notice requirements to be satisfied." 23 I&N Dec. at 545. Unlike *G-Y-R-*, in *M-D-*, the service address was obtained from an asylum application filed only weeks before the scheduled hearing and M-D- admitted living there. Moreover, the Board rejected M-D-'s argument that service by regular mail was a violation of due process. The Board concluded that "[t]he method of service was reasonably calculated to ensure that notice reached the respondent, and the presumption of adequate notice has not been rebutted. The respondent can therefore be charged with receipt of the Notice to Appear." 23 I&N Dec. at 547.

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ANNUAL IMMIGRATION LITIGATION TO BE HELD IN ST. LOUIS APRIL 21-25

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turing of immigration responsibilities. In addition to topics relating to the defense of immigration suits filed against the new Department of Homeland Security, the Conference will present various panels to address topics of current interests, including the detention and removal of criminal aliens, asylum and withholding of removal, and relief under the Convention Against Torture.

The Conference is designed for government attorneys, including Assistant and Special Assistant United States Attorneys, INS attorneys, and attorneys from EOIR who litigate or assist in the litigation of civil immigration cases. The Conference will also be useful to Federal prosecutors who are involved with task forces established to locate, apprehend, and to prosecute or remove aliens subject to final orders of removal.

Registration is a two-step process. First, government attorneys who wish to attend should register for the Conference by calling Francesco Isgro at 202-616-4877 before March 21, 2003. It is very important that attendees advise Mr. Isgro at registration or anytime prior to the conference if they plan to be present for only part of the conference. This information is required to control the cost of the conference. Second, to receive the *per diem* rate, attendees must make their own hotel reservations before March 21, 2003, by calling the Ritz-Carlton St. Louis at 314-863-6300. Please request the group rate for DOJ/ Immigration Litigation.

Attendees are responsible for their own hotel, travel, and *per diem* costs. Registration and training materials are provided at no cost.

Questions regarding hotel accommodations and requests for any special need should be directed to Julia K. Doig at 202-616-4893.

Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit First To Uphold Denial Of Asylum Under New Refugee Definition Involving China's Population Control Program.

In ***Li v. Ashcroft***, __F.3d__, 2002 WL 31720646 (*Wallace*, Kozinski, Paez) (9th Cir. December 5, 2002), the Ninth Circuit, deciding an issue of first impression, upheld the BIA's denial of asylum to a Chinese couple who claimed eligibility under the amended refugee definition extending protection to applicants who resist a coercive population control program.

"Each persecution inquiry is unique and depends to a great extent on the facts of the particular case."

The couple, who met at a McDonald's restaurant, "quickly fell in love and began seeing each other on a daily basis." Rumors of their amorous relations began to circulate in their small village. One day, a man from the village confronted the petitioner and told her that she should end her relationship because it was "shameful." Petitioner told him that she did not believe "in the policy," that "this is freedom for being in love," and that, "she would have many babies," with her boyfriend. Two days later two nurses from the "Department of Birth Control" came to her house and forcibly took her for a pregnancy examination at a medical center. The examination lasted for approximately half an hour. Later that same month, petitioner and her boyfriend sought to obtain a marriage certificate from the Family Planning Department. However, because they did not meet the age requirement, she was nineteen, the boyfriend was twenty-one, their request was denied. Petitioner, nonetheless, decided to marry and planned a ceremony and banquet for October 24, 1998. On October 19, petitioner's boyfriend found out that an arrest order had been issued against him and petitioner. With the help of their parents they left their village and eventually took a ship to South Korea. From South Korea, they flew to San Francisco where they presented themselves as United States citizens. After being placed in removal proceedings, they applied for asylum. The Immigration Judge and subsequently the BIA found that they were not eligible for asylum because they had not demonstrated past persecution or a well-founded fear of future persecution.

Before the Ninth Circuit, petitioner contended that she was eligible for asylum under the amended refugee definition, providing in pertinent part that, "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion." INA § 101(a)(42). Thus in this case, the court said that petitioner had to demonstrate that she was "1) persecuted 2) on account of 3) her resistance to 4) a 'coercive population control program."

The court noted that although "each persecution inquiry is unique and depends to a great extent on the facts of the particular case," the court had "frequently relied on analogous factual settings in past cases" to help it decide whether to grant or deny asylum. The court found that the facts in petitioner's case were analogous to those found in *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995). In both cases the asylum applicants were detained by government officials and physically mistreated. However, the court noted that mistreatment suffered by the petitioner here was hardly comparable to that suffered by Prasad. Nonetheless, the court applied the approach taken in *Prasad*, namely that the BIA could have found that petitioner had been persecuted but that the evidence was not so compelling that it required such a conclusion. The court also found that petitioner's fears of future persecution were not objectively reasonable because there was no evidence to suggest that she would be persecuted upon her return to China now that she is old enough to marry legally.

Finally, the court held that her treatment was not an "extreme form of cruel and inhuman treatment" and consequently the BIA had properly denied her claim under the Convention Against Torture.

In a dissenting and concurring opinion, Judge Paez would have found that petitioner was a victim of past persecution, noting that her pregnancy examination was hardly routine, but rather it was a "physically invasive procedure."

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■Ninth Circuit Vacates Its Adverse Decision And Remands Chinese Smuggling Asylum/Torture Case.

In ***Chen v. Ashcroft***, __F.3d__ (9th Cir. December 12, 2002) (Schroeder, *Noonan*, Fletcher), the Ninth Circuit vacated its May 13 decision against the government, 289 F.3d 1113, and remanded the case to the BIA. This was in response to a Ninth Circuit *sua sponte* order for the parties to brief whether the case should be reheard en banc. The government recommended that the court vacate and remand, rather than rehear the case, so that the BIA could address the entirety of the record and apply recent administrative interpretations of the Convention Against Torture. In its May 13 decision, the panel had held that Chen demonstrated a well-

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founded fear of future persecution by the Chinese government on account of his membership in his immediate family, where the government threatened to imprison the whole family because his mother failed to repay a bank loan, and he demonstrated he would be tortured in prison by smugglers because he did not pay them and testified against them.

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■First Circuit Finds No Compelling Evidence To Reverse BIA's Denial Of Asylum To Algerian National

In ***Mediouni v. INS***, __F.3d__, 2002 WL 31856108 (1st Cir. December 20, 2002) (Selya, *Stahl*, Lipez), the First Circuit affirmed the BIA's conclusion that petitioner was ineligible for asylum because he did not produce sufficiently compelling evidence to prove that his fear of persecution, based on his kinship with a colonial-era police officer, was objectively reasonable.

The court held that the BIA could have inferred from the record that petitioner was still at risk of persecution and could be targeted for attack by terrorists in Algeria, but the evidence did not compel such a finding.

The petitioner was born in Algeria in 1962. His father, a Tunisian-born naturalized French citizen and former French military police officer, was stationed in Algeria during the French colonial government. He married an Algerian woman. Petitioner was born stateless, and suffered mistreatment until he was nine years old because he was the son of a French police officer. He eventually acquired Algerian citizenship. However, after opening a video rental store, he stated that the Algerian authorities repeatedly interfered with his business and investigated him for distributing videos with anti-Algerian content. On November 16, 1991, petitioner entered the United States as a visitor. When his visa expired he failed to depart. In 1992, civil war erupted in Algeria. In 1995, the INS instituted deportation proceedings. An Immigration Judge found petitioner deportable and denied his application for asylum and relief under the Convention Against Torture. The BIA dismissed his appeal.

The First Circuit affirmed the BIA's finding that he had failed to produce sufficiently compelling proof of his fear of future persecution. The court held that the BIA could have inferred from the record that petitioner was still at risk of persecution and could be targeted for attack by terrorists in Algeria, but the evidence did not compel such a finding.

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■Eighth Circuit Upholds Denial Of Asylum And Relief Under CAT To Alien Involved With A Terrorist Organization

In ***Perinpanathan v. INS,*** 310 F.3d 594 (8th Cir. 2002) (8th Cir. November 12, 2002) (Hanson, *Heaney*, Arnold), the Eighth Circuit dismissed the appeal of a Sri Lankan national who sought asylum, withholding of removal, and relief under the Convention Against Torture (CAT). The petitioner, who attempted to enter the United States with a falsified Canadian passport, testified that he was a member of Liberation Tigers of Tamil Eelam (LTTE), but later testified that he was only coerced into helping the LTTE. The Immigration Judge found that he was not credible and denied his request for asylum. The BIA agreed with the Immigration Judge's credibility findings, but remanded the case to consider petitioner's claim under CAT. The Immigration Judge found that petitioner had not shown by a preponderance of the evidence that he would be tortured by government officials if returned to Sri Lanka. The BIA affirmed that finding.

The Eighth Circuit held that substantial evidence supported the BIA's determination that the alien was not credible, did not have an objectively reasonable fear of future persecution, voluntarily participated in the activities of the LTTE, and was ineligible for withholding of removal under the CAT. The court also found that even if petitioner had proven a well-founded fear of persecution, the BIA had properly denied asylum as a matter of discretion.

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■Ninth Circuit Holds Ethiopian Member Of All-Amhara People's Organization Entitled To Asylum

In ***Aron v. INS,*** 2002 WL 31654821 (9th Cir. November 21, 2002) (Graber, Hawkins, Tallman), the Ninth Circuit in an unpublished decision reversed the BIA's denial of asylum and withholding of removal. Aron left Ethiopia shortly after she became active in the All-Amhara People's Organization (AAPO), testifying credibly that she was detained overnight and warned to cease her activities in support of the AAPO. The court found that the evidence that her siblings were granted asylum and that a friend was persecuted was consistent with the State Department reports of detention and harsh treatment of political activists in Ethiopia. The court held that Aron's evidence compelled the finding that she had a well-founded fear of future persecution.

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CRIMES

■Ninth Circuit Holds Alien's Conviction May Not Be Vacated For Equitable Reasons Under All Writs Act

In ***United States v. Bravo-Diaz,*** __ F.3d__, 2002 WL 31687623 (9th Cir. December 3, 2002) (Hall, Thompson,

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Wardlaw), the Ninth Circuit reversed the district court's decision to vacate the alien's 1974 drug-smuggling conviction on purely equitable grounds under the All Writs Act so that he might acquire legal status in the United States. Citing *Doe v. INS*, 120 F.3d 200, 204 (9th Cir. 1997), the court held "we expressly reaffirm and restate" that district courts "do not have jurisdiction, under the All Writs Act, to vacate convictions on solely equitable grounds. Any contrary decisions from other courts are of no authority in this circuit." The court held that an Article III court cannot "arrogate such power to itself," and that vacating convictions on grounds of fairness usurped the power of Congress, which determined that criminal convictions for aliens should have collateral consequences.

"We expressly reaffirm and restate" that district courts "do not have jurisdiction, under the All Writs Act, to vacate convictions on solely equitable grounds."

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DUE PROCESS

■Fifth Circuit Holds Retroactive Application Of IIRIRA Does Not Violate Due Process.

In ***Lopez De Jesus v. INS,*** 312 F.3d 155 (5th Cir. 2002)(King, Jolly, *Higginbotham*), the Fifth Circuit held that, under the IIRIRA transitional rules, the petitioner, a lawful permanent resident, was excludable and statutorily ineligible for a waiver of inadmissibility under INA § 212(11). Petitioner was apprehended by the INS in 1996, while trying to smuggle his girlfriend into the United States. Subsequently, the petitioner and his girlfriend entered into a common law marriage. The Immigration Judge found that petitioner was statutorily ineligible for the waiver in light of IIRIRA's amendments, which restricted the availability of the waiver to aliens who smuggled family members. On appeal to the BIA, petitioner also argued that his trip to Mexico did not interrupt his presence, and thus because he had not made an "entry" into the United States he should not have been placed in exclusion proceedings. The BIA dismissed the appeal finding that petitioner's departure to Mexico was not innocent, and that the waiver was only available to smugglers who had the qualifying relationship with the person they were assisting at the time of their entry.

The Fifth Circuit held that petitioner had failed to show that the evidence was "so compelling that no reasonable fact finder could conclude against it." The court found that substantial evidence supported the BIA's finding that petitioner departed the United States with the intent to bring his girlfriend back from Mexico. Accordingly, the court held that petitioner did not prove that he came within the statutory definition of "entry" under INA § 101(a)(13). The court also found that IIRIRA made the amendments to the waiver provision applicable to "application for waivers filed before, on, or after the date of enactment." The court held that the retroactive application of the amended waiver provision to petitioner did not violate his right to due process.

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■Ninth Circuit Holds Failure To Send Notice Of Hearing To Alien's Attorney Violated Due Process.

In ***Dobrota v. INS,*** __F.3d__, 2002 WL 31730719 (Wardlaw, *Berzon*, Ishii (E.D. Cal., by designation)) (9th Cir. December 6, 2002), the Ninth Circuit held that the alien's due process right to notice of his hearing was violated by the Immigration Judge's in absentia order of deportation issued upon his failure to attend the hearing, and the subsequent decisions of the Immigration Judge and the BIA refusing to reopen proceedings. The alien's attorney had filed a notice of appearance with the INS, but not with the immigration court, and the immigration court therefore did not mail the notice of hearing to the attorney. The court ruled that the OSC was ambiguous because it implied that the notice of hearing would be sent to the attorney and failed to state that the attorney of record up until that point would not be considered the alien's attorney in immigration court unless he entered his appearance in accordance with the regulation.

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■Ninth Circuit Holds Immigration Judge Required To Advise Alien Of Evidence Needed To Support Application For Adjustment Of Status

In ***Potoi v. Ashcroft,*** 2002 WL 31769638 (9th Cir. December 10, 2002) (Goodwin, Trott, Graber), the Ninth Circuit in an unpublished decision, reversed the BIA's decision upholding the Immigration Judge's denial of adjustment of status. The Immigration Judge found that petitioner had abandoned his adjustment application because he repeatedly failed to include necessary information about the sponsor who provided his affidavit of support. The Ninth Circuit held, citing *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002), that Immigration Judges have heightened duties toward pro se litigants in custody.

The court found that petitioner's due process rights were violated because the Immigration Judge did not explain what types of evidence he should submit to support his adjustment application, and did not instruct him to have his sponsor testify about her nationality and income.

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FLEUTI

■Seventh Circuit Holds Lawful Permanent Resident Who Knowingly Accompanied Undocumented Cousin To United States Is Excludable.

In ***Selimi v. INS***, __F.3d__, 2002 WL 31704620 (7th Cir. December 4, 2002) (*Rovner*, Wood, Williams), the Seventh Circuit upheld the BIA's decision finding a lawful permanent resident excludable and ineligible for a waiver of excludability because he accompanied his cousin on a flight to the United States although he knew her entry documents were falsified.

The petitioner, a native and citizen of the former Yugoslavia, was admitted as an LPR in 1991. In 1993, he returned to the former Yugoslav Republic of Macedonia, where his wife and three children continued to live. Apparently, his family members had qualified for immigrant visas but had not yet received them. Four days after his arrival, petitioner returned to the United States with his wife, children, and a cousin who traveled with falsified passports. The group was questioned at New York's Kennedy Airport, and petitioner stated that he had gone home to bring his family to the United States and that he had paid $5,000 to obtain the falsified passports. The INS charged petitioner with excludability on the basis of alien smuggling under INA § 212(a)(6)(E). Petitioner conceded his deportability and obtained a change of venue to Chicago. The Immigration Judge in Chicago found him excludable as charged and denied his application for a waiver under INA § 212(d)(11). The BIA dismissed the appeal.

Before the court of appeals, petitioner argued that under *Fleuti* doctrine, he should not have been placed in exclusion proceedings. The court found that petitioner's trip abroad was not "innocent" and that it interrupted his continuous physical presence in the United States. Consequently, petitioner was excludable rather than deportable. The court also agreed with the BIA's finding that petitioner was not eligible for the waiver because he had aided the attempted entry of his cousin as well as his wife and children.

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IN ABSENTIA

Seventh Circuit Holds That Migraine Headache Excuses Alien's Failure To Appear

In ***Yweil v. Ashcroft,*** No. 02-1498 (Coffey, Ripple, Kanne) (7th Cir. November 7, 2002), the Seventh Circuit, in an unpublished decision, reversed the BIA and remanded the case for a hearing on petitioner's asylum application. Petitioner had failed to attend her removal hearing because she allegedly suffered from a migraine headache. The BIA found that her supporting affidavit and a short conclusory physician's note did not establish an exceptional circumstance meriting rescission of the removal order. The court held that petitioner's evidence was sufficient proof of her illness, which the court was "convinced" was an exceptional circumstance beyond her control.

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JURISDICTION

■Ninth Circuit Holds Alien's Habeas Petition Not Mooted By His Deportation.

In ***Zegarra-Gomez v. INS,*** __F.3d__ (9th Cir. January 3, 2003) (Schroeder, Fletcher, *Weiner* (E.D. Pa.)), the court held that if an alien is deported after he files a habeas petition, the fact that he is no longer in custody will not deprive the courts of jurisdiction, or moot the case, if "a case or controversy" continues to exist. Petitioner had been ordered deported for having committed an aggravated felony. He then filed a petition for habeas corpus. While the petition was pending, the INS informed the district court that it intended to execute the removal order. Petitioner then filed a motion of stay of deportation in the district court. That motion was denied on October 6, 2000. On April 24, 2001, the INS executed the removal order. Subsequently, the district court dismissed the habeas petition on the ground of mootness.

"The case or controversy requirement is satisfied where the petitioner is deported, so long as he was in custody when the habeas petition was filed and continues to suffer actual collateral consequences of his removal."

On appeal, the Ninth Circuit, relying on *Spencer v. Kemna*, 5223 U.S. 1 (1998), found that petitioner's case was not mooted by his removal from the United States. The court held that "the case or controversy requirement is satisfied where the petitioner is deported, so long as he was in custody when the habeas petition was filed and continues to suffer actual collateral consequences of his removal."

Here those requirements were satisfied because petitioner was in INS custody when he filed his petition and his removal as an aggravated felon prohibits reentry for 20 years.

The Ninth Circuit joined similar holdings in the Fourth and Seventh Circuits. *See Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 1002); *Chong v. INS*, 264 F.3d 378 (3d Cir. 2001).

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■Second Circuit Applies Exhaustion Requirement In Habeas Context And Finds No *St. Cyr* Exception Where Alien Was Convicted After Jury Trial.

In ***Theodoropoulos v. INS,*** __F.3d__, 2002 WL 31831518 (2d Cir. December 18, 2002) (Winter, *Parker*; Walker, concurring), the Second Circuit held that the district court lacked jurisdiction over the criminal alien's habeas petition seeking to vacate the Immigration Judge's removal order, and to apply for relief under former INA § 212 (c).

The Second Circuit held that when the petitioner waived his appeal to the BIA he failed to exhaust his administrative remedies for jurisdictional purposes.

The petitioner, a native of Greece, immigrated to the United States in 1969. However, on March 29, 1988, he was convicted, after a jury trial, of distribution of cocaine and other drug offenses. After his release on parole from prison in 1999, the INS took him into custody and placed him in removal proceedings. In light of his convictions, the Immigration Judge found him ineligible for any form of relief. Petitioner specifically stated to the Immigration Judge that he did not want to appeal his decision and that he wanted to be removed to Greece. While petitioner was in detention, on October 4, 2002, he filed a petition for a writ of habeas corpus and also an appeal from the Immigration Judge's decision. Despite these filings, the INS deported him on October 5, 2002. The BIA dismissed his appeal on procedural grounds. The district court, on the other hand, held that petitioner's application for § 212(c) relief could proceed under *St. Cyr*. The INS appealed that decision.

The Second Circuit held that when the petitioner waived his appeal to the BIA he failed to exhaust his administrative remedies for jurisdictional purposes. The court then held that *St. Cyr* did not apply to create an exception from the statutory exhaustion requirement because petitioner's conviction resulted from a jury trial, not a plea. Accordingly, the court concluded that the district court lacked jurisdiction to review petitioner's habeas petition.

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Sixth Circuit Holds In Transition-Rule Case That It Lacks Jurisdiction To Address BIA's Discretionary "Extreme Hardship" Finding.

Alcantar v. INS, __F.3d__, 2002 WL 3156480 (*Martin*, Nelson, Gilman) (6th Cir. November 13, 2002), the Sixth Circuit joined its sister circuits in holding that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 bars the court's review of discretionary decisions relating to applications for suspension of deportation in transition-rule cases. The court held that it could not review the alien's appeal of the BIA's discretionary finding that under INA § 244, he had not proven extreme hardship to himself or his two United States-citizen children.

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MOTIONS

■Tenth Circuit Hold That Motions To Reopen Are Subject To Equitable Tolling

In ***Riley v. INS***, 310 F.3d 1253 (10th Cir. 2002) (Briscoe, McWilliams, *McKay*), a case subject to the IIRIRA transition rules**,** the Tenth Circuit held, *inter alia*, that the regulatory time limit for filing motion to reopen was subject to equitable tolling.

The petitioner, a native of Egypt and citizen of Lebanon, had been ordered deported in 1991 as an overstay. In 1998, the BIA found him deportable and denied his application of asylum. Petitioner did not seek judicial review of that final order. In 1999, the INS notified petitioner to report for deportation. He did not do so. The INS then went to his home and arrested him. Petitioner remained in custody for two years because he failed to cooperate with the INS to facilitate his return to Lebanon. The INS eventually released him subject to an order of supervision.

In 2000, he sought unsuccessfully to have the INS join him in filing a motion to reopen based on ineffective assistance of counsel. On September 2000, petitioner filed a petition for a writ of habeas corpus challenging his detention pending removal and the INS' refusal to join in a motion to reopen. The district court found the detention permissible under the constitution and found no due process violation in the INS's refusal to join in a motion to reopen. Petitioner appealed the decision to Tenth Circuit. While the appeal was pending, petitioner filed a motion to reopen with the BIA citing ineffective assistance of counsel. The BIA denied that motion. Petitioner also appealed that decision to the Tenth Circuit which consolidated the two appeals.

The Tenth Circuit preliminarily held that the district court had habeas corpus jurisdiction to consider the petitioner's challenge to the final order of deportation. The court then found that, "based on the record," petitioner's challenge to his detention was moot. It made it clear, however, that the fact that petitioner was no longer in custody did not automatically moot his petition because he was in custody at the time of filing. Finally, the court held, following

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DISTRICT COURT DECLINES TO ENJOIN REGISTRATION PROGRAM

In ***Momtazian. v. Ashcroft***, No. CV02-1140 (C.D. Cal) (*Stotler*), the district court on December 23 denied plaintiffs' application for a temporary restraining order against the government's special registration program. "Enjoining the INS from arresting anyone who registers threatens over-involvement by the judiciary in interfering with the duties, responsibilities, and discretion vested by law in the INS," said the court.

"Enjoining the INS from arresting anyone who registers threatens over-involvement by the judiciary in interfering with the duties, responsibilities, and discretion vested by law in the INS."

The plaintiffs are a group of eleven aliens who claim to be citizens of Iran and who were required to register with the INS by December 16th as part of the "National Security Entry – Exit Registration System," also known as "NSEERS."

At the time the complaint was filed, only the lead plaintiff, Momtazian, had registered pursuant to NSEERS. Momtazian was taken into custody after the INS discovered that he had overstayed his visa.

The district court held that ten of the eleven plaintiffs could not demonstrate standing because they were not in INS custody or facing a threat of imminent custody. "Any potential injury," said the court, "is merely speculative given the dearth of facts presented relating to plaintiff's status."

The court then found that the only plaintiff in custody, Momtazian, could not show a likelihood of success because the harm he complained resulted from his illegal status and not the registration requirements. The court explained that the "injury to Momtazian, his arrest and detention, related to the status of his visas and the status of any pending adjustment of status." The court found that plaintiff could litigate those issues in his pending removal proceedings.

Finally, the court found that INA § 242(g) "vests broad authority in the Attorney General with the power to commence proceedings, adjudicate cases, and execute removal orders." Consequently, the court declined to enjoin the INS proceedings against the lead plaintiff, including the implementation of NSEERS.

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Federal Court Decisions

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the Second Circuit in *Iavorsky v. INS*, 232 F.3d 124 (2d Cir. 2000), and the Ninth Circuit in *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001), that the time and numerical limitations on motions to reopen were subject to the doctrine of equitable estoppel. Here, the court found that the BIA abused its discretion because it did not consider whether petitioner's case warranted equitable tolling.

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■Ninth Circuit Equitably Tolls 90-Day Statutory Period For Filing Motions To Reopen

In ***Minney v. INS***, 2002 WL 31650802 (9th Cir. November 22, 2002) (Reinhardt, Rymer, Silverman), the Ninth Circuit in an unpublished decision reversed the BIA's denial of petitioner's two motions to reopen. Petitioner alleged in his motions that his attorney failed to tell the BIA of his marriage to a United States citizen and this fact would have made a difference to the outcome of his appeal to the BIA. The BIA ruled that the motions were time and number barred, unsupported by prima facie evidence that he was eligible to adjust status, and did not comply with the BIA's ineffective assistance criteria set forth in *Matter of Lozada*. The court equitably tolled the 90-day deadline for filing motions to reopen until petitioner became aware of the harm stemming from his attorney's misconduct, and remanded to the BIA for consideration of the two motions.

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■District Court Approves Settlement Agreement In Class Action Case Involving IIRIRA's Amendments To Suspension

On December 18, the district court approved a settlement agreement in ***Barahona-Gomez v. Reno,*** No. C 97-0895 (N.D. Cal.), a class action case. In 1997, plaintiffs challenged the Executive Office for Immigration Review's (EOIR's) decision to withhold suspension grants, contending that EOIR's decision would result in some plaintiffs losing eligibility under the new "stop time" requirement, which became effective on April 1, 1997. Plaintiffs' suit resulted in an injunction preventing the deportation of a class of aliens whose hearings took place within the Ninth Circuit prior to April 1, 1997, and whose grants of suspension were withheld by EOIR adjudicators to comply with the newly-enacted statutory cap of 4,000 annual suspension grants. The Ninth Circuit had sustained the injunction in two separate published opinions.

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CASES SUMMARIZED IN THIS ISSUE

CONTRIBUTIONS TO THE IMMIGRATION LITIGATION BULLETIN ARE WELCOMED

INSIDE OIL

Three OIL attorneys, **Andrew MacLachlan, John Hogan**, and **Stephen Flynn**, have been recalled to active duty with the United States Marine Corps. Their caseloads have been redistributed in their absences, which is expected to be at least one year.

Several OIL staff members received awards from Assistant Attorney General Robert D. McCallum, Jr. at the Civil Division's Awards Ceremony held December 12, 2002. Supervisory Paralegal Specialist **Marian Bryant** received the Award for Excellence in Paralegal Support in recognition of her leadership and management of OIL's caseload, which has increased exponentially in the last year. Senior Litigation Counsel **Papu Sandhu** received a Special Commendation Award in recognition of vigorous advocacy and dedicated service in support of the Attorney General's enforcement powers related to implementation of reinstatement of removal legislation.

Special Commendation Awards also went to the Division's Anti-Terrorism Team, including OIL attorneys **Chris Fuller**, **Doug Ginsburg**, **Lyle Jentzer**, **Ethan Kanter**, **Mike Lindemann**, **John McAdams**, **Brenda O'Malley**, **Terri Scadron,** and **Thankful Vanderstar**.

Congratulations to OIL Attorney **Anthony Payne** who has been selected as a 2003 American Marshall Memorial Fellow. This prestigious and highly competitive fellowship program seeks to promote the importance of the transatlantic relationship to young leaders and to prepare them to work with their European counterparts on a range of international and domestic issues. As a fellow, Mr. Payne will spend one month in Europe, where he will attend briefings, site visits, and meetings to discuss the European Union, NATO, and other significant transatlantic issues.

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. The deadline for submission of materials is the 20th of each month. 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.

Office of Immigration Litigation

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

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