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

Immigration Litigation Bulletin

Vol. 6, No. 2 **VISIT US AT: https://oil.aspensys.com** *February 28, 2002*

ATTORNEY GENERAL ANNOUNCES REORGANIZATION OF THE BOARD OF IMMIGRATION APPEALS, PUBLISHES PROPOSED RULE

At a press conference held on February 6, 2002, Attorney General Ashcroft announced a major reorganization of the Board of Immigration Appeals. Quoting William Gladstone's statement that "justice delayed is justice denied," the Attorney General said that the Board "has allowed the accumulation of a massive backlog of more than 56,000 pending cases. This bottleneck in the immigration court system gravely undermines the enforcement of our country's immigration laws." "When a case takes seven years, justice isn't merely denied, it's derailed," he said. As an example, the Attorney General noted one case where the Board took more than five and one-half years to adjudicate the appeal of an alien accused of trafficking $50 million worth of heroin. During that time the alien became a fugitive.

The Board "has allowed the accumulation of a massive backlog of more than 56,000 pending cases. This bottleneck in the immigration court system gravely undermines the enforcement of our country's immigration laws."

The Attorney General's plan to reorganize the Board was published as a proposed rule in the Federal Register on February 19, 2002. 67 *Fed. Reg*. 7309. According to the proposal, the reform initiative seeks to accomplish four objectives: (1) Eliminate the current backlog of cases pending before the Board; (2) Eliminate unwarranted delays in the adjudication of administrative appeals; (3) Utilize the resources of the Board more efficiently; and (4) Allow more resources to be allocated to the resolution of those cases that present difficult or controversial legal questions.

The proposal notes that the addition of new Board members "has not appreciably reduced the backlog of cases" because the "problem is rooted in the structure and procedures of the Board, which makes it nearly impossible for Board members to accomplish their mission." Accordingly, the proposal would reform the appeal procedures and reduce the Board's membership to eleven.

Under the proposed rule all appeals would be sent to a screening panel of individual

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DISTRICT COURT REJECTS CHALLENGE TO POST-FINAL ORDER DETENTION BY ALLEGED TERRORIST

On February 19, 2002, the Southern District of Florida dismissed the latest legal challenge by a suspected alien terrorist who sought release from detention pending his removal from the United States. ***Najjar v. Ashcroft***, __F. Supp. 2d__, 2002 WL 257357 (S.D. Fla. 2002) (J. Lenard). The petitioner, Maze al Najjar, who overstayed his visa by seventeen years, is a suspected terrorist with close ties to the Palestinian Islamic Jihad (PIJ), a designated foreign terrorist organization, and PIJ leader Ramadan Shalah. Petitioner's challenge to his deportation order was denied by the Eleventh Circuit last July in *Najjar v. Ashcroft*, 257 F.3d 1262 (11th Cir. 2001).

Petitioner's efforts to secure release from the INS pending deportation

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ASSISTANT ATTORNEY GENERAL, INS COMMISSIONER, AND EOIR DIRECTOR TO SPEAK AT SIXTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

Robert D. McCallum, Jr., Assistant Attorney General for the Civil Division, James Ziglar, Commissioner of the Immigration and Naturalization Service, Kevin Rooney, Director of the Executive Office for Immigration Review, and Paul K. Charlton, U.S. Attorney for the District of Arizona, will be among the Department officials who will be speaking at the Sixth Annual Immigration Litigation Conference. For the first time, the Conference will also feature a panel presentation by United States District Court Judges and remarks by Stephen M. McNamee, the

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Highlights Inside

BOARD REORGANIZATION

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Board members who may review the cases and render decisions in relatively simple matters. If a case presents an issue that requires the resources and attention of a three-member panel, the Board member will send it on to the larger panel. The proposal identifies five categories of cases which would be appropriate for a three-member panel review. These would be cases where there is a need to settle inconsistencies between the rulings of different Immigration Judges, resolve ambiguities in immigration law, decide issues involving matters of national importance, correct decisions that are not plainly in conformity with the law, or, correct a factual determination that is clearly erroneous.

The proposed rule would also eliminate the Board's *de novo* review of factual issues. The Board will accept the factual findings of the immigration judges, including findings as to credibility, disturbing them only if they are "clearly erroneous."

To facilitate the new screening process, the proposed rule would require that an appellant who asserts that an appeal warrants review by a three-member panel must identify in the Notice of Appeal the specific factual or legal basis for that contention. The decision in each case whether to assign an appeal to a three-member panel will be made, after consideration of the case, under the standards of the proposed rule according to the judgment of the single Board member on the screening panel to whom the appeal is assigned.

The proposed rule would also restore as a separate ground for summary dismissal the filing of an appeal for an improper purpose, such as delay, or where the appeal lacks an arguable basis in fact or in law. The proposal notes that "summary dismissal of appeals that are determined to be frivolous is distinct from a summary affirmance without opinion." The proposal seeks to deter the filing of frivolous appeals by noting that EOIR may impose disciplinary action against attorneys or representatives who are identified as repeat offenders.

The proposed rule would also eliminate the Board's *de novo* review of factual issues. The Board will accept the factual findings of the immigration judges, including findings as to credibility, disturbing them only if they are "clearly erroneous." However, the Board would not be precluded "from reviewing mixed questions of law and fact, including, without limitation, whether an alien has established a well-founded fear of persecution or has demonstrated extreme hardship, based upon findings of fact made by the immigration judge." The proposed rule would also prohibit the introduction and consideration of new evidence in proceedings before the Board.

The proposed procedural changes would establish stricter guidelines for filing and deciding appeals. A Board member on the screening panel will have 90 days in which to decide a case or refer the matter to a three-member panel.

The proposed rule directs the Chairman of the Board to establish a new case management system to implement the new standards, and to assign Board members to the screening panels and to the three-members panels as may be deemed appropriate. The Chairman is also directed to notify the Director of EOIR and the Attorney General if any Board member repeatedly fails to meet the assigned deadlines for the disposition of appeals, and to prepare an annual review concerning the timeliness of disposition by each Board member.

Finally, the proposed rule would also remove the jurisdiction of the Board over appeals from decisions by the INS imposing various kinds of administrative fines (*see* 8 C.F.R. 280) and transfer it to the Office of the Chief Administrative Hearing Officer (OCAHO)

In announcing the proposed reorganization, the Attorney General underscored the point that "America is a nation built on immigration, and we welcome those who come here legally." "At the same time, our nation's security demands that our immigration laws be enforced efficiently, fairly and without delay," he added. "Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process. We ask immigrants who come to America to respect our laws. However, we also need an immigration court system that commands our own respect, one that is fair, one that is prompt, one that is efficient."

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HISTORICAL FOOTNOTE

The Board of Immigration Appeals was established by the Attorney General in 1940 when the administration of the immigration laws was transferred from the Department of Labor to the Department of Justice.

However, the BIA's roots go back to at least 1922, when the Secretary of Labor established the Board of Review to assist him in performing his quasi-judicial duties under the immigration and naturalization laws. Indeed, the first precedent decision, *Matter of L*, 1 I&N 1, dated August 29, 1940, is a decision of the Board of Review.

For more than fifty years of its existence the BIA consisted of a Chairman and four Board members. In 1983, the Attorney General created the Executive Office for Immigration Review (EOIR) as a separate agency within the Department of Justice. The Director of EOIR supervises the BIA, the immigration judges through the Chief Immigration Judge, and the Office of the Chief Administrative Hearing Officer (OCAHO).

ATTORNEY GENERAL ANNOUNCES BIA'S REORGANIZATION

The following are excerpts of a transcript of the press conference held by the Attorney General on February 6, 2002.

ATTORNEY GENERAL ASHCROFT

On November the 8th, I pledged that the Department of Justice would undertake a series of reorganizations to serve better our mission of protecting America from terrorist attack, our mission of enforcing our nation's laws and safeguarding our civil liberties.

A critical part of our mission is enforcing our immigration laws -- enforcing them fairly, deliberately, and without delay. Today, to accomplish that objective, I am announcing a reorganization of the Board of Immigration Appeals.

America is a nation built on immigration, and we welcome those who come here legally. At the same time, our nation's security demands that our immigration laws be enforced efficiently, fairly and without delay.

The immigration court system receives a staggering 271,000 cases a year, most of which move through the trial-level immigration courts in a timely manner. However, the Board of Immigration Appeals, which adjudicates appeals in immigration cases, is badly in need of comprehensive reform. The Board is broken in several respects. Most notably, it has allowed the accumulation of a massive backlog of more than 56,000 pending cases. This bottleneck in the immigration court system gravely undermines the enforcement of our country's immigration laws.

Both a cause and a consequence of this backlog is the fact that the board takes an inordinately long time to resolve cases. More than 34,000 of those pending cases are over a year old, and more than 10,000 cases are over three years old. That kind of delay is unacceptable in any court, anywhere.

Even worse, there are some cases pending before the Board that are more than seven years old. It's often said that justice delayed is justice denied. But when a case takes seven years, justice isn't merely denied, it's derailed.

Such shocking delay creates other adverse consequences. The backlog gives unscrupulous lawyers an incentive to file frivolous appeals in which the immigrant has no valid argument. Even though they cannot win, they are able, using the system, to guarantee the client additional years within the borders of the United States. By exploiting this bottleneck in the system, such lawyers allow individuals who are here in violation of our laws to remain here even longer.

The languishing of cases before the Board allows many to become fugitives, exacerbating the problem of fugitives from final judgments. We have over 314,000 aliens who have been adjudicated as susceptible to deportation. They have completed and exhausted their legal rights and they have been ordered deported, and yet they have just merged into the American landscape. They have escaped from justice.

….

The Board's current procedures have also fostered bad decision-making. It's a well-settled principle of our judicial system that courts of appeals do not lightly reopen the factual findings -- factual findings of trial courts below. Reading a cold transcript long after the trial, appellate courts are too removed from the evidence accurately to evaluate the evidence. They don't observe the demeanor of witnesses, they don't observe their appearance in testifying and the wide variety of items that you are familiar with relating to the trials that are conducted. They can't look the witness in the eye and assess the credibility of the witness. Consequently, appellate courts normally disrupt the factual findings of trial courts only when the findings rise to the level of being clearly erroneous. However, the Board of Immigration Appeals routinely ignores this fundamental principle of appellate review.

In effect, the Board gives immigrants two bites at the apple, two opportunities to present their facts. And this is an advantage that our own citizens do not enjoy when they are confronted with an opportunity to adjudicate matters in the federal courts.

…..

The Immigration and Naturalization Service is currently laboring under a huge backlog of more than 4 million applications from those who wish to enter our country legally or adjust their immigration status. Applications to reunite husbands and wives are talking an average of two years to process. Reuniting parents and children takes an average of three years and eight months. When government incapacity causes a separation of families in such an extended and harmful way, we have a moral duty to act. The millions of dollars that we save each year by making the Board of Immigration Appeals more efficient will go a long way toward reuniting families sooner and making legal immigration less burdensome and the process more expeditious.

America is a nation built on immigration, and we welcome those who come here legally. At the same time, our nation's security demands that our immigration laws be enforced efficiently, fairly and without delay. In the wake of the September 11th occurrences of last year, such concerns rise to a new level of importance. Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process. We ask immigrants who come to America to respect our laws. However, we also need an immigration court system that commands our own respect, one that is fair, one that is prompt, one that is efficient.

POST-ORDER DETENTION UPHELD

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were set back last November when the Eleventh Circuit ruled that the government has unfettered discretion to detain him while it seeks to execute his deportation order.

Undeterred by the appeals court's clear mandate, petitioner returned to the district court arguing that the government's detention discretion was in fact fettered -- that it could only detain him if it could establish he was a flight risk or danger to the community or national security. He also challenged his conditions of custody as being unduly harsh. The district court rejected both challenges.

An alien may be detained for six months for the sole purpose of ensuring removal, regardless of whether the alien presents a danger to the community or a risk of flight."

Preliminarily, the district court found jurisdiction under 28 U.S.C. § 2241, but noted that in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2497-98 (2001), the Supreme Court said "'that the INA precludes judicial review of decisions 'specified . . . to be in the discretion of the Attorney General.' (citing 8 U.S.C. § 1252(a)(2)(B)(ii) (1994 ed., Supp. V))." *Id.* at *3. The district court therefore found no jurisdiction to "consider any challenge to decisions within the discretion of the Attorney General." *Id.*

The court then determined whether the government had statutory, regulatory, and constitutional authority to detain the petitioner. The applicable detention statute, the court held, was pre-IIRIRA INA § 242, rejecting the government's argument that new INA § 241 applied. In interpreting that old law, however, the court held that "the Attorney General has six 'unhampered' months from the date of the Eleventh Circuit's mandate in the deportation case within which to effectuate Petitioner's departure from the United States." *Id.* at *4. Further, the court held that "during the six-month period, the statute authorizes the Attorney General to exercise discretion in deciding whether Petitioner should be detained or released with or without bond. Under IIRIRA, the Court lacks jurisdiction to review the Attorney General's exercise of discretion." *Id.*

The applicable detention regulation, the court found, is 8 C.F.R. § 241.33, which provides "clear authority for Petitioner to be taken into custody immediately upon the Eleventh Circuit's issuance of the mandate." *Id* at *5. It also "creates a presumption of detention and requires an exercise of discretion by the district director for an alien subject to a final deportation order to avoid detention." *Id.* The regulation, in fact, requires the alien to satisfy the Section 212.5(a) parole standard before he may be considered for release.

The court then rejected petitioner's argument that the constitution bars detention of aliens with final orders unless they represent a bail risk. After analyzing *Zadvydas*, the court found it clear that "once a final removal order has issued, the primary purpose of detention is to effectuate an alien's removal from the United States. . . . An alien may be detained for six months for the sole purpose of ensuring removal, regardless of whether the alien presents a danger to the community or a risk of flight." *Id.* at 6. This is also what the Eleventh Circuit had held in its November 2001, decision.

Finally, the court disposed of petitioner's conditions of custody claim. The petitioner alleged that he was detained unlawfully in solitary confinement, under 23-hour lockdown, with severe restrictions on his ability to read, have visitors, or make phone calls. The government did not dispute these allegations. The court first rejected petitioner's invocation of *Zadvydas*, finding the cited sections of that decision applicable only to cases involving indefinite detentions. The court then held that "[a]bsent a showing of intent to punish, a condition or restriction of pre-trial [or pre-deportation] detention is unconstitutional only if it is not 'reasonably related to a legitimate goal – if it is arbitrary or purposeless . . . .'" (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). *Id.* at *7. Applying this standard, the court found that "the Government's legitimate interests in civil detention are not limited to ensuring that a detainee is available for deportation and protecting the community and national security, as conceded by Petitioner. The government also has legitimate interests that stem from its need to manage the facility in which the individual is detained." *Id.* The court concluded that petitioner has neither "alleged an intent to punish him" nor that the alleged conditions or restraints . . . are 'arbitrary or purposeless' or not 'reasonably related' to legitimate government objectives."

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QUOTABLE

"I would like to offer some personal reflections on our national identity. Fear is something that we have always disdained. Courage is our signature. Taking risks on new people and new ideas fuels our drive to achieve and maintain a society that is the envy of all history. Practicing and protecting freedom has given wing to a reality about which men of yore could only have fantasized. If fear blinds our eyes to the new and the untried, and freedom is relegated to the ash heap of history, we will stumble into an abyss from which there is no return."

INS Commission Ziglar
February 1, 2002

OBTAINING AN INJUNCTION AND A SEDATION COURT ORDER TO EFFECT THE DEPORTATION OF AN ALIEN ORDERED REMOVED

Aliens subject to a final order of removal and in the custody of the INS sometimes attempt to interfere with their removal by making threats, offering physical resistance, or engaging in other unruly conduct. A resisting alien violates the law, and poses a serious danger to the public, government personnel, and himself. It is appropriate for INS to have the option of sedating the resisting alien for transit to his home country, especially when he is removed by means of a commercial airline flight. If the alien suffers from a mental condition, prescribed sedatives may be administered to him by contract medical personnel pursuant to INA § 241(f), which authorizes therapeutic care during the removal process. If the alien does not have a mental illness and is simply being difficult, the statute does not affirmatively authorize sedation. This article explains one way the INS can secure an injunction against the mentally healthy resisting alien, and an order approving his sedation. Some practical concerns and constitutional issues are briefly examined.

Aliens subject to a final order of removal and in the custody of the INS sometimes attempt to interfere with their removal by making threats, offering physical resistance, or engaging in other unruly conduct.

When a mentally healthy alien resists a final order of removal by "acting out" in some way, and the INS temporarily abandons the removal attempt, the government may file a complaint in district court under INA § 279. The statute confers jurisdiction on the district court to hear the government's complaint exclusively; it is not a vehicle for the alien to seek review of any issue. The statute reads that the "district courts of the United States shall have jurisdiction of all causes, civil and criminal, *brought by the United States* that arise under" the Act's provisions, including those concerning the removal of aliens. INA § 279. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (the statute makes "clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government"). The government should resist any effort by the alien or the district court to examine the merits of the removal order and the underlying administrative proceedings, because those things are not made reviewable simply because the government has filed a sedation complaint.

In its complaint, the government should seek an injunction against the alien resisting his removal. To avoid protracted litigation, the complaint should be accompanied by a motion for a temporary restraining order and preliminary injunction. The motion should explain that the government is likely to prevail, as an alien has no legal right to interfere with his deportation under a final order of removal, and is in fact committing a felony by conniving, conspiring, or taking any action intended to prevent or hamper his removal. INA § 243(a)(1)(C). It should further explain the harm that will follow if the government does not obtain the injunction, i.e., that is the INS may be unable to fulfill its legal duty of removing the alien, that the alien may remain in the United States in violation of law because of his illegal action, and that INS may be required to remove the resisting alien without benefit of sedation, which endangers the flying public, government personnel, and the alien himself. The government should argue that these dangers outweigh any harm to the alien, and that the alien's removal in conformity with immigration law is a benefit to the public.

The government should simultaneously request authorization to administer sedatives to execute the removal order in the event the alien fails to comply with the court's injunction against his resisting removal. The All Writs Act provides that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act further "provides authority for issuance of orders needed to 'prevent the frustration of orders it has previously issued in its exercise of *jurisdiction otherwise obtained*.'" *United States v. Tablie*, 166 F.3d 505, 507 (2d Cir. 1999) (citation omitted). Restated, the All Writs Act "does not confer an independent basis of jurisdiction; it merely provides a tool courts need in cases over which jurisdiction is conferred by some other source," in this case INA § 279. *Tablie*, 166 F.3d at 506-07. The district court may be interested in learning who will administer and the type and amount of sedatives, and what their effects will be. The government should be prepared to answer such questions by consulting with the contract medical personnel responsible for such duties.

If necessary, the government should explain to the district court that the alien's sedation does not violate his constitutional rights. In *U.S. v. Bechara*, 935 F. Supp. 892 (S.D. Tex. 1996), *aff'd*, 116 F.3d 478 (5th Cir.), *cert. denied*, 522 U.S. 843 (1997), a district court determined that an alien's due process rights and liberty interests were not violated by the administration of tranquilizers or sedatives to effect his deportation. The court noted that such medications were not comparable to the antipsychotic brain-altering drugs discussed by the Supreme Court in *Washington v. Harper*, 494 U.S. 210 (1990), and further, that medicating the alien for deportation would pass *Harper*'s balancing test, which examined government interests and the impact on the penal system, and whether there were ready alternatives to medication. *Bechara*, 935 F. Supp. at 893-94. *Bechara* also observed that sedation with noncontroversial drugs was safer

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SUMMARIES OF RECENT BIA DECISIONS

Deferred Adjudication

In ***Matter of Salazar-Regino***, 23 I&N Dec. 223 (BIA 2002), the *en banc* Board of Immigration Appeals considered whether a deferred adjudication for felony possession of marijuana under Texas law meets the definition of conviction in section 101(a)(48)(A) of the Immigration and Nationality Act, and whether it meets the definition of aggravated felony in section 101(a)(43)(B). In its opinion, the Board followed the precedent of the United States Court of Appeals for the Fifth Circuit, holding that a felony state drug conviction is an aggravated felony pursuant to section 101(a)(48)(A) even if it would only punishable as a misdemeanor in federal court. *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), and *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 305 (2001). However, it did note that such an interpretation would not be extended beyond cases arising in the Fifth Circuit. The Board analyzed the legal analysis of the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and its partial reversal of *Matter of Roldan*, Interim Decision 3377 (BIA 1999). However, the Board was not persuaded by the court's analysis and declined to extend *Lujan-Armendariz* to cases nationwide; rather, it will be limited to cases arising in the Ninth Circuit. Applying Fifth Circuit precedent, the Board found that the respondent's deferred adjudication is an aggravated felony.

The Board followed the precedent of the United States Court of Appeals for the Fifth Circuit, holding that a felony state drug conviction is an aggravated felony pursuant to section 101(a)(48)(A) even if it would only punishable as a misdemeanor in federal court.

Board Member Holmes, joined by Guendelsberger, Miller and Osuna, filed a concurring opinion. Board Member Holmes agreed that the Board was bound by *United States v. Hernandez-Avalos* and *United States v. Hinojosa-Lopez* and by *Lujan-Armnendariz v. INS*. He was critical, however, of the *Lujan-Armendariz* decision for its failure to address the sentences actually received by the petitioners and its extrapolation that "a respondent required to serve a period of confinement as a result of a state drug possession conviction, followed by a lengthy period of probation that *might* eventually lead to an expungement of the conviction, could not be subjected to removal proceedings until the term of probation was completed." Board Member Brennan filed a separate opinion, concurring in the result without explanation.

There was a concurring and dissenting opinion filed by Board Member Schmidt. He agreed that the Board was bound by *United States v. Hernandez-Avalos* and *United States v. Hinojosa-Lopez*, but joined with Board Rosenberg's opinion that *Matter of Manrique* ought to represent the national rule.

There were two separate dissenting opinions. Board Member Rosenberg, joined by Board Members Villageliu and Espenoza filed a dissenting opinion. Board Member Rosenberg objected to the majority's "abrogat[ion of] well-established federal policy that individuals with first-time possession of controlled substance offenses should not be considered to have been convicted for any purpose." She also objected to the continuation of disparate treatment of aliens in different federal circuits by not extending the reasoning of *Lujan-Armendariz* to other circuits. Reading section 101(a)(48)(A) narrowly and the 18 U.S.C. § 3607(b) literally, Board Member Rosenberg would find that the adoption of section 101(a)(48)(A) did not supercede Board precedent relating to FFOA dispositions.

Board Member Moscato, joined by Board Member Villageliu, also dissented. His opinion is that the majority's opinion did not properly address "the congressional policy choice that supports and animates the Federal First Offender Act." He complains that aliens have been unfairly singled out and excluded from FFOA relief. "If the Congress has been willing to maintain the relief inherent in the FFOA for citizens of the United States, even in the face of its own extraordinary counternarcotic and anti-drug efforts, it seems reasonable to conclude that it also intended to maintain that relief for those granted lawful permanent resident status in the United States, notwithstanding the increases in severity contained within the IIRIRA's provisions."

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SEDATION

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and more humane than placing physical restraints on the alien. *Id*. at 894. It should be added, however, that the Federal Aviation Administration now requires hand restraints for violent INS detainees traveling with an armed law enforcement officer. 14 C.F.R. §§ 108.211(a)(3), (g) (2002).

Government attorneys are reminded that obtaining a sedation order is affirmative litigation and requires appropriate authorization.

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Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit Denies Rehearing En Banc Where INS Challenged Court's Practice Of Refusing To Remand Asylum Cases.

On February 4, 2002, the Ninth Circuit denied the INS's petition for rehearing and rehearing *en banc* in ***Ventura v. INS***, 264 F.3d 1150 (9th Cir. 2001) (Schroeder, *D.R. Thompson*, Lay (by designation)). The petition had sought to challenge the court's increasingly common practice of refusing to remand in asylum cases and instead deciding for itself issues of fact and entitlement to relief that the government believes properly lie within the jurisdiction of the BIA in the first instance. Here, the court reversed the BIA and found that the petitioner had suffered "past persecution" on account of his political opinion while he lived in Guatemala. The court acknowledged that the BIA had not reached the issue of whether the petitioner had a well-founded fear of renewed persecution, but, instead of remanding, proceeded to decide that issue in petitioner's favor and found that he was eligible for asylum and entitled to withholding of deportation.

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Ed. Note: The government's petition for rehearing *en banc* is available on the OIL Web site.

■Seventh Circuit Holds That Romanian Who Claimed Persecution By Communist Government and its Successor Is Not Eligible For Asylum

In ***Pop v. INS,*** __F.3d__, 2002 WL 100690 (7th Cir. January 28, 2002) (*Kanne*, Easterbrook, Manion), the Seventh Circuit affirmed the BIA's denial of asylum to an applicant from Romania who claimed persecution by the former Communist regime and by the successive government. An IJ initially denied the asylum application. While the case was pending on appeal to the BIA, the petitioner, with the assistance of new counsel, filed a motion to reopen and remand supported by numerous documents, including an affidavit from his ex-wife stating that she had been granted asylum allegedly based on the same factual background. The BIA dismissed the appeal and denied the motion to remand because it did not show that he was prejudiced by his prior counsel's "deficient" performance.

The Seventh Circuit agreed with the BIA that petitioner had failed to establish actual prejudice and therefore the BIA had not abused its discretion in denying the motion to remand. Specifically, the court found that the omission of the newspaper articles on conditions in Romania, and an affidavit from his ex-wife did not prejudice the outcome of his asylum claim. Moreover, it further found that the affidavit from the ex-wife was not probative of any persecution petitioner would face upon his return to Romania; and that she had relied on materially different facts to support her claim of asylum.

"The BIA's decision did not represent the kind of individualized analysis this court has required to refute a presumption of a well-founded fear."

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■Ninth Circuit Reverses Adverse Credibility Finding And Finds That Asylum Applicant From Romania Established Persecution by the Communists

In ***Gui v. INS***, __ F.3d__, 2002 WL 193081 (9th Cir. February 8, 2002) (*Fletcher*, Nelson, Berzon), the Ninth Circuit reversed the BIA's adverse credibility finding of an asylum applicant who claimed persecution in Romania by the Communists.

The petitioner, a doctor and former Communist Party member, left Romania about a year after the overthrow of the Communist government. When placed in proceedings he sought asylum claiming that he had been persecuted for years. He claimed his phone had been tapped since 1976, he and his family had been questioned repeatedly, and several attempts had been made on his life by the police who, he claimed were still controlled by communists. He also claimed he had been politically active against the communists after the overthrow. The IJ found petitioner's testimony incredible largely because of his wealth, the contrast between his claim of persecution and the fact that he had received a state-funded education and that he had a lucrative employment as a surgeon. The BIA affirmed.

The court held that the IJ had not demonstrated a "legitimate articulable" basis to question petitioner's credibility and had not provided any "specific, cogent reason" for his disbelief other than reasons which were insubstantial and did not bear a "legitimate nexus" to the finding. The court also held that petitioner had suffered past persecution because "the staged car crashes" put him "at serious risk of injury or death." It then found that the resultant presumption of a well-founded fear of persecution was not sufficiently rebutted by the BIA's conclusory finding of changed country conditions. The court said that "the BIA's decision did not represent the kind of individualized analysis this court has required to refute a presumption of a well-founded fear." The court, however, found the petitioner ineligible for withholding of deportation due to the long passage of time and changed country conditions since his departure from Romania. Finally, the court found that

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Summaries Of Recent Federal Court Decisions

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the BIA did not abuse its discretion in denying petitioner's motion to reopen under the Convention Against Torture because the wiretapping, hit-and-run attempts to injure or kill him, detention, interrogation, and warrantless searches did not amount to torture.

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■Fifth Circuit Affirms Denial Of Asylum In Mixed-Motive Case Involving Ethiopian Woman Who Was Assaulted By Masked Men

In ***Girma v. INS***, __F.3d__, 2002 WL 243205 (5th Cir. Feb. 20, 2002) (Jones, Wiener, Parker) (*per curiam*), the Fifth Circuit held that the BIA properly applied the mixed motive standard to an asylum applicant who claimed persecution on account of membership in a particular social group and political opinion.

Under Elias-Zacarias, to reverse the BIA, it is not sufficient to show that a reasonable fact-finder would have found that petitioner presented evidence to establish past persecution or a well-founded fear of future persecution.

The petitioner, an Ethiopian citizen of Amharic ethnicity, entered the United States in 1991 as a visitor. When her visa expired, she failed to depart. At a deportation hearing held in 1996, she claimed that prior to coming to the United States she had been abducted from her home/restaurant in Ethiopia by five masked men. These individuals questioned her about her involvement with the All Ahmara People's Organization (AAPO). After she admitted her affiliation with AAPO they demanded a ransom for her release. When she refused their demand, they assaulted and raped her. When she reported the incident to the local police they did not believe her story and told her to stop telling lies.

The IJ and subsequently the BIA, denied petitioner's application. The BIA after reviewing the record under a mixed motive analysis found that petitioner did not present adequate evidence from which one would reasonably conclude that the harm she suffered was motivated, at least in part, on account of her membership in a particular social group, her actual or imputed political opinions, or any other protected ground. In reaching its decision, the BIA found that petitioner failed to adequately establish who attacked her and that they were motivated on account of a protected ground rather than an unprotected one.

In affirming the BIA, the Fifth Circuit noted that it had not decided a case involving a mixed motive analysis in the context of asylum law. Nonetheless, the court relied on the BIA's decision in *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), and two court of appeals' decisions to find that in this case the BIA had properly performed the mixed motive analysis. The court also held that under *Elias-Zacarias*, to reverse the BIA, it is not sufficient to show that a reasonable fact-finder would have found that petitioner presented evidence to establish past persecution or a well-founded fear of future persecution. Rather, "the test is whether that evidence would compel a fact finder to do so." Here, although petitioner presented "some" evidence her persecutors were motivated by a protected ground, the evidence was not so compelling to warrant a reversal of the BIA's decision.

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■Ninth Circuit Upholds Denial Of Asylum For Lack of Jurisdiction,

In ***Molina-Estrada v. INS,*** __F.3d__, 2002 WL 215597 (9th Cir. February 13, 2002) (*Graber*, Sneed, Paez), the Ninth Circuit upheld the BIA's denial of asylum, cancellation of removal, and withholding of removal to petitioner from Guatemala who had entered the United States illegally in 1983 when he was 13 years old. The BIA had adopted the IJ's findings that the asylum application was untimely filed, that petitioner was ineligible for cancellation, and that he had not shown eligibility for withholding of removal.

The court held that it lacked jurisdiction under INA § 208(a)(3) to review the BIA's determination that no "extraordinary circumstances" existed to excuse the alien's untimely filing of his application for asylum. The court also held the BIA was correct as a matter of law its finding that petitioner was statutorily ineligible for cancellation because he lacked a qualifying relative. Finally, the court held that substantial evidence supported findings that petitioner was ineligible for withholding of removal.

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CRIMES

■Eleventh Circuit Holds That "Conviction" For Immigration Purposes Is Proven By Alien's Admission Under Oath

In ***Fequierre v. INS***, __F.3d__, 2002 WL 99443 (11th Cir. Jan. 25, 2002) (Anderson, *Tjoflat*, Birch), the Eleventh Circuit affirmed the BIA's decision that petitioner's admission that in 1986 he had been convicted of a drug offense was sufficient to establish a "criminal conviction." The petitioner, a native of Haiti and a lawful permanent resident, admitted that he had been convicted of an aggravated felony as alleged by the INS in the order to show cause. On the basis of that admission, an IJ found him deportable as charged and denied his applications for waivers under INA §§ 212(c) and 212(h). The BIA affirmed.

Before the Eleventh Circuit, the peti-

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tioner argued, *inter alia*, that the INS had not proved that he had been convicted of a drug offense because the INS had not introduced into evidence a form enumerated under INA § 240a(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B). That provision lists seven forms, any of which when introduced, "shall constitute proof of criminal conviction." The court found that the provision "does not state that the forms of proof it lists constitute the sole means of establishing criminal conviction; rather, the statute merely says that such forms 'shall constitute proof of a criminal conviction.'" Other proof will suffice if "probative," said the court. Accordingly, an alien's admission under oath that he had been convicted, would constitute the "reasonable, substantial, and probative evidence" required to sustain the IJ's decision.

An alien's admission under oath that he had been convicted, would constitute the "reasonable, substantial, and probative evidence" required to sustain the IJ's decision.

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■Third Circuit Finds That A State Drug Conviction Constitutes An Aggravated Felony If It Contains A Trafficking Element

In ***Gerbier v. Holmes***,__F.3d___, (3rd Cir. Feb. 8, 2002) (*Becker*, Nygaard, Reavley (Fifth Circuit)), the Third Circuit held that a state drug conviction constitutes an aggravated felony for deportation purposes "if it is either a felony under state law and contains a trafficking element, or would be punishable as a felony under the federal Controlled Substances Act."

The petitioner, in August 1997, pleaded guilty under Delaware law, to "trafficking in cocaine" even though the factual basis for the plea was mere possession. On May 11, 1999, the INS instituted removal proceedings alleging that petitioner was deportable because he had been convicted of an aggravated felony. The INS then lodged an additional charge, claiming that petitioner was also deportable because he has been convicted of a controlled substance violations. An IJ found that petitioner was not removable as an aggravated felon, but sustained the charge that he was removable for his convictions for controlled substance violations. The IJ granted petitioner's application for cancellation of removal. The INS appealed. The BIA reversed the IJ finding that petitioner's conviction for "trafficking in cocaine" was an aggravated felony. The petitioner then filed a habeas petition. The district court denied the writ, finding that the BIA had properly determined that petitioner was an aggravated felon and, thus, statutorily ineligible for cancellation of removal.

The Third Circuit reversed. The court adopted the BIA's *Davis/Barrett* analysis to determine whether a state drug conviction constitutes an aggravated felony. *See Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990) and *Matter of Davis*, 20 I&N 536 (BIA 1992). Under the BIA's rulings, a felony state drug conviction is if it contains a trafficking element. A state drug conviction, either a felony or a misdemeanor, can also be an aggravated felony if it would be punishable as a felony under the federal Controlled Substances Act. Here, the court found that petitioner's conviction was not an aggravated felony under 18 U.S.C. § 924(c)(2) because it did not contain an element or presumption of trafficking even though the statute itself was entitled "Trafficking . . . in illegal drugs." The court also found that petitioner's conviction was not a aggravated felony because it would not be punishable as a felony under federal law.

In a dissenting opinion, Judge Reavley noted that too many circuits "have chosen the other way and I would follow them in the interest of consistency and uniformity of federal law."

■Third Circuit Holds That Embezzlement Conviction Is Not Aggravated Felony

In ***Valansi v. Ashcroft***, __F.3d__, 2002 WL 87007 (3d Cir. January 23, 2002) (*Ambro*, Gibson, Scirica, dissenting), the Third Circuit reversed the final order of removal against the petitioner who had been convicted under 18 U.S.C. § 656 of embezzling in excess of $400,000 from her employer. The petitioner, a bank teller, embezzled the money in 1997. She subsequently pled guilty to a six-count indictment and was sentenced to six month imprisonment followed by five years of supervised release. An IJ and later the BIA held that the conviction was an aggravated felony under INA § 101(a)(43)(M)(i). That provision states that an aggravated felony includes "an offense that - - involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."

On appeal, the petitioner did not dispute that her conviction satisfied the monetary requirement. Instead she argued that her conviction was not an offense "that involves fraud or deceit." The Third Circuit agreed with her argument. It held that for embezzlement to be an aggravated felony under of the INA, it must have a "fraud or deceit" component. Petitioner's plea colloquy, cited by the court, did not establish that she acted with an intent to defraud. "It appears," said the court, that petitioner was "counseled to avoid admitting to that intent, and the plea colloquy fails to pin down the *mens rea* element sufficiently for us to conclude that [petitioner] acted with intent to defraud rather than to injure her employer."

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JURISDICTION

■Seventh Circuit Affirms Dismissal Of Suit To Compel INS To Adjudicate Applications For Adjustment Of Status

In ***Chapinski v. Ziglar***, __F.3d__, 2002 WL 101962 (7th Cir. January 28, 2002) (*Bauer*, Wood, Manion), the Seventh Circuit upheld the district court's dismissal of a mandamus petition to compel the INS to adjudicate petitioners' applications for adjustment of status under NACARA for lack of jurisdiction under INA § 242(g). The petitioners were nationals of former Soviet bloc countries who sought benefits as the spouses of applicants who had been granted suspension of deportation and lawful permanent resident status under NACARA.

The court held that INA § 242(g) explicitly precluded jurisdiction over the action, because the relief sought would compel the Attorney General to commence removal proceedings in order to consider their applications under NACARA. The court also noted that an exception to INA § 242(g)'s "clear mandate . . . is permitted only in rare cases that present substantial constitutional issues or bizarre miscarriages of justice," but that such was not the case here.

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■Eighth Circuit Finds That It Lacks Jurisdiction To Decide Matters Outside Administrative Record And That INA § 212(h) Does Not Violate Equal Protection

In ***Lukowski v. INS***, __F.3d__, 2002 WL 63380 (8th Cir. January 18, 2002) (*Loken*, Bye, Bogue), the Eighth Circuit held that it lacked statutory jurisdiction under INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), to review the BIA's removal order because the petitioner conceded on appeal that he had been convicted of an aggravated felony and of two crimes involving moral turpitude.

The petitioner entered the United States as a child and subsequently obtained lawful permanent resident alien status. In September 1996, he pleaded guilty to aiding and abetting auto theft. In April 1997, he pleaded guilty to felony auto theft. The INS charged him with removability as an aggravated felon and as an alien who had been convicted of two crimes involving moral turpitude. An IJ found him removable and the BIA summarily affirmed that decision. On the eve of oral argument, the petitioner advised the Eight Circuit that the state trial court had amended its sentence of felony auto theft to a misdemeanor subject to petitioner's completion of probation.

The court declined to consider the consequence of the amendment, because petitioner had not first raised the issue at the administrative level. The court then considered whether petitioner's appeal raised "substantial constitutional challenges" to the INA, even though it questioned its own jurisdiction to do so under INA § 242(a)(2)(C). The court the agreed with the decisions from the Seventh, Ninth, and Eleventh Circuits finding that equal protection guarantees were not violated by INA § 212 (h) (granting waiver of deportation to certain aliens but not to lawful permanent resident aliens who have been convicted of an aggravated felony).

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Seventh Circuit Affirms District Court's Dismissal Of Habeas Petition

In ***Sharif v. Ashcroft***, __F.3d__, 2002 WL 202463 (7th Cir. February 11, 2002) (*Easterbrook*, Flaum, Manion), the Seventh Circuit affirmed the district court's dismissal of petitioners' habeas petition. The petitioners, two sisters, were ordered removed to Pakistan when they failed to appear for hearings. They did not seek judicial review in the court of appeals under 8 U.S.C. § 1252(a). The INS issued a bag-and- baggage letter which was ignored. Later the petitioners asked the district court to issue a writ of habeas corpus that would stop the INS from implementing the removal orders. The district court held that it lacked jurisdiction

The Seventh Circuit held that INA § 242(g) precluded habeas review because petitioners were seeking to stay the execution of their removal orders pending a determination by the BIA on their motion to reopen.. The court also found that § 242(g) would apply to any attempt by petitioners to compel the Attorney General to adjudicate their claims under the Legal Immigration Family Equity Act. "Section 242(g) does not differentiate among kinds of relief. It names three administrative actions--decisions to 'commence proceedings, adjudicate cases, or execute removal orders' – and interdicts all judicial review 'arising from' those actions," said the court.

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ENTRY

■Eighth Circuit Holds That Alien Made An "Entry" When She Did Not Stop At Checkpoint

In ***Nyirenda v. INS***, __F.3d__, 2002 WL 181265 (8th Cir. February 6, 2002) (*Murphy*, Hansen, Heaney), the Eighth Circuit upheld the BIA's decision that the petitioner had illegally entered the country without inspection. The petitioner became a lawful permanent resident in 1990 under the special agricultural workers program. Her children visited her on visitor's visas but left to study abroad. She then made arrange-

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ments to bring them back but their visa applications were denied. Petitioner then developed a plan to smuggle them into the United States from Canada. The plan did not quite work as she had planned. Petitioner drove to Canada to pick up her children. On her return she did not stop her car at a clearly marked immigration checkpoint. Inspection officials saw her and activated a warning siren which she did not heed. She was apprehended two miles inland and charged with alien smuggling. At a deportation hearing petitioner was ordered deported, admitting to the charges of alien smuggling and entry without inspection. The BIA upheld the final order but granted petitioner voluntary departure.

Before the Eight Circuit, petitioner argued that she had not made an illegal entry because she had crossed the border accidentally and had not intended to evade inspection. The court held that substantial evidence supported the finding that she had made an entry. It found not credible petitioner's claim that she had not seen the border checkpoint and therefore did not intentionally evade inspection. The court noted that there were signs, sirens, and inspection booths at the border checkpoint. Moreover, petitioner had been free from official restraint because she had traveled approximately two miles into the United States while out of sight of immigration officials.

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EAJA

■Ninth Circuit Holds That When INS Voluntarily Approves Application, Alien Is Not A "Prevailing Party" In An Application For EAJA Fees.

In ***Perez-Arellano v. Smith***, 279 F.3d 791 (9th Cir. February 1, 2002), (*Gould*, Thomas, Graber) the Ninth Circuit in an amended decision denied plaintiff's application for attorney's fees and costs under the Equal Access to Justice Act. The court held that the INS had voluntarily granted plaintiff's application for naturalization while the district court action was stayed and that plaintiff's action was not the catalyst for the INS action. The court explained that an alien who achieves a positive result by the voluntary action of the INS, and not under the compulsion of a court order, is not a prevailing party and is therefore not eligible for EAJA fees.

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REINSTATEMENT

■Eighth Circuit Vacates Reinstatement Order To Allow Alien To Apply For Adjustment Of Status Based On His Pre-April 1, 1997 Marriage.

In ***Alvarez-Portillo v. Ashcroft,*** __F.3d__, 2002 WL 215345 (8th Cir. February 13, 2002)(*Loken*, Fagg, Bogue), the Eighth Circuit granted the petition for review and vacated petitioner's reinstatement order after concluding that he should be provided with an opportunity to apply for adjustment of status. The court held that the Attorney General has the authority to apply the reinstatement statute to aliens who illegally reentered the country prior to April 1, 1997. However, aliens who illegally reentered the country prior to April 1, 1997, and are who subject to reinstatement may apply for immigration relief if that form of relief was a substantive defense to removal prior to the enactment of the reinstatement statute.

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■Ninth Circuit Finds That Statute Authorizing The Denial Of Passport To Applicant Who Is In Arrears For Child Support Does Not Violate Fifth Amendment

In ***Eunique v. Powell***, __F.3d__ 2002 WL 253793 (9th Cir. Feb. 22, 2002) (*Fernandez*, McKeown, and Kleinfeld, dissenting), the Ninth Circuit held that the denial of a passport did not violate the applicant's Fifth Amendment freedom to travel internationally. The applicant was denied a passport because she was severely in arrears on her child support payments (over $20,000). She then sued the Secretary of State on the theory that the statute and regulation authorizing that denial were unconstitutional. The district granted summary judgment against her, and she appealed.

"She is free to be a worker in the vineyards of the law, or to be a worker in another field, or, if she likes, to be a faniente, but the Constitution does not require that she be given a passport at this time."

The court, applying the rational basis test, held that 48 U.S.C. § 652(k), which authorizes the denial of a passport to a person certified by a state as being in child support arrears for more than $5,000, was not unconstitutional. Congress and the State Department can refuse to let her have a passport as long as she remains in substantial arrears on her child support obligations. "She is free to be a worker in the vineyards of the law, or to be a worker in another field, or, if she likes, to be a faniente, but the Constitution does not require that she be given a passport at this time," said the court.

In a dissenting opinion, Judge Kleinfeld would have held that the travel restriction in question should not be reviewed under a permissive "rational basis review" but should be justified under a compelling government interest.

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CASES SUMMARIZED IN THIS ISSUE

INSIDE OIL

OIL welcomes **Willie ("Will") Hanna**, a new Legal Assistant who previously worked for the INS District Office in Atlanta.

OIL attorneys will be teaching a four-hour habeas litigation course to the U.S. Attorneys' Office in Baltimore on March 8, 2002.

REGISTRATION OPENED FOR SIXTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

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Chief United States District Court Judge for the District of Arizona.

The Conference, sponsored by the Civil Division's Office of Immigration Litigation, will be held May 6-9 in Scottsdale, Arizona. The theme of this year's conference is "Immigration and National Security: Enforcement and Litigation After September 11th." The program will focus on the consequences of the September 11 attacks and their impact on immigration litigation and legislation. There will also be various panels addressing a variety of related topics, including the detention and removal of criminal aliens, asylum and withholding of removal, revocation of naturalization, and relief under the Convention Against Torture, and other international law issues. A copy of the Conference's Program has been enclosed with this issue of the Immigration Litigation Bulletin.

The Conference is designed for government attorneys, including Assistant and Special Assistant United States Attorneys, INS attorneys, and attorneys from the Executive Office of Immigration Review 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 recently established to locate, apprehend, and prosecute or remove aliens subject to final orders of deportation.

Government attorneys who wish to attend should register for the Conference by calling Francesco Isgrò at 202-616-4877, before April 1, 2002. To receive the government's *per diem* rate, registrants must make their own hotel reservations before April 1, 2002, by calling the Radisson Resort at 480-991-3800 or 800-333-3333. Please request the group rate for USDOJ.

Participants are responsible for hotel, travel, and *per diem* cost. Registration and training materials are provided at no cost to the participants. Questions regarding hotel accommodations and requests for any special needs should be directed to Julia K. Doig at 202-616-4893.

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 Isgrò 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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