



Immigration Litigation Bulletin

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Seventh Circuit Rejects "Social Visibility" Test Not all "Particular Social Groups" Have Social Visibility

The Seventh Circuit has rejected the BIA's application of the "social visibility" test to a former member of the Mungiki group in Kenya who sought asylum on the basis that he belonged to a particular social group. In *Gatimi v. Holder*, ___F.3d___, 2009 WL 2568952 (7th Cir. August 20, 2009), Judge Posner, writing for panel, said that the BIA's test "makes no sense" and faulted the BIA for its failure to "to explain the reasoning behind the criterion of social visibility."

The asylum applicant in *Gatimi* claimed that in 1995 he had joined Mungiki a group of the Kikuyu tribe which dominated Kenyan politics. Apparently, the Mungiki group has

obscure political aims and idiosyncratic religious observances, which may be a cover for extortion and other financially motivated criminal acts. According to some sources defectors from the group are at particular risk of violence. The group also compels women, including wives of members and defectors, to undergo clitoridectomy and excision. The Kenyan government has outlawed the group and these practices. "But there is a serious question, as the sources we have cited explain, whether the government is able or even willing to protect people targeted by the group, such as defectors, or to prevent such practices,

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Prevailing Party Requirement Under EAJA

For nearly a decade, the Supreme Court's *Buckhannon* standard has controlled inquiries into whether a party seeking attorneys' fees qualifies as a "prevailing party" for purposes of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412(d)(1)(A). See *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 F.3d 598 (2001). Under *Buckhannon*, to prove prevailing party status, an EAJA petitioner must establish (1) a "material alteration of the legal relationship of the parties," and (2) a "judicial imprimatur on the change." *Id.* at 604-05. It has long been settled that EAJA fees are available in immigration cases where, for example, the court remands a case to the Board of Immigration Appeals

for further consideration of a relief application, following a merits decision finding error in the underlying agency decision. See, e.g., *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997).

Thornier questions arise where the government voluntarily moves to remand a petition for review, or where the parties stipulate to dismissal of a petition for review or a district court action. In such cases, prevailing party status should turn on the nature of the legal relationship between the parties subsequent to the remand or dismissal, and whether the court has entered an enforceable order that in some way requires the agency to do something, or to refrain from doing

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Social Visibility Test Rejected by Seventh Circuit

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which are common in Kenya," said the court.

In 1999, Gatimi defected from the Mungiki. Afterwards a group of Mungiki broke into his home. When they could not locate him, they killed his servants. Gatimi said that he called the police, who refused to help. Gatimi also testified that the Mungiki later returned to his home looking for his wife, whom they wanted to circumcise. The wife then left for the United State with her newborn child. Gatimi again complained to the police and after receiving assurances of protection, his wife returned to Kenya. However, within a week the Mungiki told Gatimi that unless he produced his wife within two weeks he would be killed. She went into hiding and in 2001 returned to the United States, followed shortly by Gatimi. According to Gatimi, he returned to Kenya months later thinking conditions had been improved. He testified that the Mungiki then kidnapped and tortured him, releasing him only after he promised to produce his wife for circumcision. He then joined his wife in the United States and applied for asylum.

The IJ concluded that Gatimi had not been subject to persecution but only mistreatment, and that in any event defectors from the Mungiki group did not constitute a particular social group under U.S. asylum laws. The IJ also found that there was no objective basis for Mrs. Gatimi's fear of persecution based on female genital mutilation.

The BIA did not reach the question of whether Gatimi had been persecuted, but affirmed the IJ on the basis that the Mungiki are not a particular social group. The BIA also concluded that as far as Mrs. Gatimi's fear of FGM, that Gatimi had not presented sufficient evidence to establish that a reasonable person would fear persecution on that basis.

In reversing the BIA's finding that Gatimi did not belong to a particular social group, the court said that it was bound by its decision in *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006), a case "which the Board did not cite." In *Sepulveda*, the court held that former subordinates of the attorney general of Colombia, who had information about the insurgents plaguing that nation, were also a "particular social group." The court explained that these former employees had been targeted for assassination by the insurgents, and many had been assassinated. "While an employee could resign from the attorney general's office," said the court here, "he could not resign from a group defined as former employees of the office; once a former employee, always a former employee (unless one is reemployed by one's former employer)."

In its decision, the BIA had concluded that there was no evidence that Gatimi "possesses any characteristics that would cause others in Kenyan society to recognize him as a former member of Mungiki. There is no showing that membership in a larger body of persons resistant to Mungiki is of concern to anyone in Kenya or that such individuals are seen as a segment of the population in any meaningful respect."

The court found that the BIA's conclusion could not be "squared with *Sepulveda*" and that "it made no sense." Moreover, the court said that the BIA had failed to explain the reasoning behind the criterion of social visibility. The court explained that "women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homo-

sexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible."

The court acknowledged that the BIA's interpretation of "particular social group" was owed deference but found that in this instance the BIA has been inconsistent in its application of the "social visibility" criterion. "When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within

the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate . . . Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities," said the court.

The court also noted that a number of courts have generally approved the "social visibility" as a criterion in the particular social group analysis. In those cases, explained the court, where the particular social group classification was rejected, such as drug informants, the claimed group had flunked the basic "social group" test declared in cases such as *Acosta* and *Kasinga*. Here, however, the BIA took a position similar to one that the court had earlier rejected, namely that a person cannot complain of religious persecution if by concealing his religious practice he escapes the persecutor's notice. The court noted that the government's brief stated flatly that secrecy disqualifies a group from being deemed a particular social group.

The court found that like the debtors in *Sepulveda*, the Mungiki defectors constitute a group with "as much coherence as children of the

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The Mungiki defectors constitute a group with "as much coherence as children of the bourgeoisie, or of the aristocracy, had in the Soviet Union."

From *Li* to *Aronov*: Prevailing Party Requirement Under EAJA

Voluntary Stipulations And Remands

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something. Unfortunately, that has not been the case in all circuits.

This article focuses on the prevailing party analysis in two decisions – the Ninth Circuit’s decision in *Li v. Keisler*, 505 F.3d 913 (9th Cir. 2007), and the First Circuit’s recent en banc decision in *Aronov v. Chertoff*, 536 F.3d 30 (1st Cir. 2009), both of which involved situations where the government voluntarily took action which ended the federal court litigation. As discussed below, the Ninth Circuit in *Li* purported to apply the *Buckhannon* standard, but in fact strayed far from that standard, as well as from prior Ninth Circuit precedent addressing the standard. The First Circuit’s *Aronov* decision, however, shows a model application of the *Buckhannon* test, and provides a useful framework for formulating prevailing party arguments.

***Li v. Keisler* : The Ninth Circuit’s Abrogation Of The *Buckhannon* Standard**

Li v. Keisler considered motions for EAJA fees in three consolidated cases in which the government had voluntarily moved to remand, in two cases, to allow the Board to address arguments which the aliens had raised on appeal but were not mentioned in the Board decisions, and in the third case, for further explanation of the Board’s reasons for affirming a denial of protection under the Convention Against Torture. 505 F.3d at 915-17. The government did not concede error in any of the remand motions, and all three motions were granted by Circuit Mediators. *Id.* The Ninth Circuit held that the three EAJA petitioners qualified as prevailing parties because their cases had been remanded to the Board for further proceedings, pursuant to orders entered by Circuit Mediators who acted pursuant to authority delegated from the court. *Id.* at 917. The court reasoned that each alien had accom-

plished the objective of his petition for review, because each had sought remand, and remand had been granted. Yet the decision fails to mention how the legal relationship of the parties had been materially altered, as a result of any court order. At bottom, *Li* holds that a mere remand, without more, is enough to satisfy the *Buckhannon* standard.

This broad reading of *Buckhannon* went well beyond the Ninth Circuit’s prior decisions in cases where the government took voluntary action which ended the federal court litigation. For example, in *Carbonell v. INS*, 429 F.3d 894 (9th Cir. 2005), the Ninth Circuit held that prevailing party status was established where (1) the alien brought suit in district court seeking to compel the Board to rule on his pending motion for reconsideration of his final removal order, and a stay of removal, pending the Board’s decision; (2) the government stipulated to the requested stay of removal; and (3) the district court entered an order incorporating the terms of the parties’ stipulation. *Id.* at 896-97. The panel explained that the “legal relationship” element of the *Buckhannon* test was satisfied because the alien had received much of the relief he sought through his lawsuit, that is, an order preventing the government from removing him. *Id.* at 899-900. With respect to the “judicial imprimatur” requirement, it made no difference that the government had stipulated to the stay, because the district court’s order incorporated the stipulation, thus distinguishing it from a private settlement agreement. *Id.* at 901.

Although *Li* cited *Carbonell* with

approval, its conclusion that a remand to the agency, without more, will confer prevailing status finds no support in *Carbonell*, or the decisions of other courts addressing

In *Li* the Ninth Circuit held that the EAJA petitioners qualified as prevailing parties because their cases had been remanded to the Board for further proceedings, pursuant to orders entered by Circuit Mediators.

EAJA liability in the context of government stipulations. See, e.g., *Gurley v. Peake*, 528 F.3d 1322, 1327 (Fed. Cir. 2008) (in the context of a stipulated remand, holding that “[a] remand [the agency] does not confer prevailing party status where the remand is not predicated upon an administrative error”). In

Carbonell, the district court enjoined the agency from removing the alien, one of the central goals of the litigation; remand orders that do not resolve any aspect of the litigation have no comparable effect, and, contrary to *Li*’s holding, they do not satisfy the *Buckhannon* standard.

***Aronov v. Napolitano*: The First Circuit’s Model Application Of The *Buckhannon* Standard**

The First Circuit, sitting en banc, recently considered and rejected a claim that a stipulated order remanding a case to the agency, and terminating the federal court litigation, was enough to confer prevailing party status, where the order did not resolve any aspect of the dispute between the parties. See *Aronov*, 562 F.3d at 92. In *Aronov*, the alien brought suit in district court pursuant to 8 U.S.C. § 1447(b), to compel the U.S. Citizenship and Service (“USCIS”) to administer his oath of citizenship, where more than 120 days had elapsed since the alien’s naturalization interview. Before filing a responsive pleading, USCIS settled the case with the alien, and the parties jointly filed a motion for remand,

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EAJA Prevailing Party

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which the district court granted in a one-line order. *Id.* at 86. The First Circuit held that the district court's order, which "merely returned jurisdiction to the agency to allow the parties to carry out their agreement," did not satisfy the *Buckhannon* standard. *Id.* at 92.

The *Aronov* court distinguished the situation before it from a court-ordered consent decree, which would give rise to EAJA liability. *Id.* at 90-91. First, consent decrees must be approved by the court, and with that approval comes some appraisal of the merits of the litigation. *Id.* at 91. Second, consent decrees embody an agreement by the parties to be bound by a judicial decree, and contemplate continued judicial oversight of the matter. *Id.* at 91-92. In these respects, consent decrees differ from settlement agreements, which may create contractual obligations, but normally do not contemplate continued judicial involvement. *Id.* at 90 (observing that "a 'judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order'" (quoting *Buckhannon*, 511 U.S. at 381)). While a formal consent decree is not required for prevailing

party status – the "functional equivalent" of a consent decree will suffice, *id.* at 90 – the order still must have the basic characteristics of a consent decree to satisfy the *Buckhannon* standard.

Applying these principles, the court concluded that the district court's "order remanding to the agency alone is not enough to establish the needed imprimatur," and that *Aronov's* argument that he qualified for prevailing party status because his lawsuit induced USCIS to grant him citizenship was "simply an effort to revive the 'catalyst theory,' which the Supreme Court has rejected." *Id.* at 93-94.

Conclusion

Drawing upon the analysis in *Aronov*, government litigants should vigorously argue that a voluntary return of jurisdiction to the agency, without more, is insufficient to confer prevailing party status under the *Buckhannon* standard. Instead, the

EAJA petitioner must point to an order based on some appraisal of the merits of the parties' dispute, which binds the agency upon remand in some way. Outside the immigration context, recent Ninth Circuit decisions recognize the need for a formal order which constrains the agency in some way, upon its resumption of jurisdiction. See, e.g., *Citizens for Better Forestry v. U.S. Dept. Of Agriculture*, 567 F.3d 1128, 1133 (9th Cir. 2009) (holding that a litigant cannot claim prevailing party status absent a formal court order, regardless of whether the court signaled approval of the litigant's legal position: "[a] favorable determination on a

legal issue, even if it might have put the handwriting on the wall, is not enough by itself"). The government should encourage the Ninth Circuit to fully implement the *Buckhannon* standard, and hold that, in cases of voluntary stipulations and remands, the order must actually change the legal relationship between the parties, to give rise to prevailing party status.

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Government attorneys should encourage the Ninth Circuit to fully implement the *Buckhannon* standard.

Seventh Circuit Rejects "Social Visibility" Test

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bourgeoisie, or of the aristocracy, had in the Soviet Union: breakaway factions that were relentlessly persecuted." The court also found that the BIA overlooked the evidence of the Kenyan government's complicity in the actions of the Mungiki group.

Finally, the court held that Mrs. Gatimi's fear of FGM if returned to Kenya was a legitimate component of Mr. Gatimi's claim for asylum. "To send her back to Kenya to face female genital mutilation would be to enable persecution of him," said the

court. Although Mrs. Gatimi was a derivative claimant to asylum, the court found that she could advance reasons for why she should not be deported independent of her husband. Moreover, Mrs. Gatimi, as a derivative claimant to asylum, was not subject to the one-year deadline to file her claim, because her claim only became relevant when her husband sought asylum.

Accordingly, the court vacated the BIA's removal order and remanded the case to the BIA for further proceedings.

Contributions
to the
Immigration
Litigation
Bulletin
Are
Welcomed

The "State Created Danger" Doctrine and the United Nations Convention Against Transnational Organized Crime in the Context of United States Immigration Law

Recently, OIL has received several briefs from aliens who have asserted rights and protections under two novel legal theories which do not appear in the Immigration and Nationality Act ("INA"): the "state created danger" doctrine and the United Nations Convention Against Transnational Organized Crime ("UNTOC"). While at first glance these novel arguments appear to complicate the already crowded legal landscape of asylum, withholding of removal, and deferral of removal under the United Nations Convention Against Torture ("CAT"), in reality neither of them have any significant impact on the current immigration law. Nonetheless, it is important to be familiar with the arguments and how to respond to them.

The "State Created Danger" Doctrine. The State Created Danger Doctrine provides that state officials may be liable for injuries caused by a private actor where those officials created the danger that led to the harm. Under this doctrine, due process is violated when state actors: (1) "use [] their authority to create a dangerous environment for the plaintiff"; and (2) "act[] with deliberate indifference to the plight of the plaintiff." *Scanlan v. Tex. A & M Univ.*, 343 F.3d 533, 537, 538 (5th Cir. 2003) (setting forth the elements of the cause of action in analyzing a pleading's constitutional claim for relief, pursuant to 42 U.S.C. § 1983). Thus, the Supreme Court has held that the doctrine does not apply where the government neither creates, nor intensifies, the danger of which the plaintiff complains. *DeShaney v. Winnebago Dept. Of Social Services*, 489 U.S. 189, 201 (1989). A classic example of where the doctrine was found to apply is the Ninth Circuit case of *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), in which police officers impounded the plaintiff's car and abandoned her in a high crime area in the middle of the night, where she ac-

cepted a ride from a stranger who raped her.

In the immigration context, the doctrine may be raised in support of the argument that the government should not, with recklessness or deliberate indifference to an alien's safety, deport that alien to a foreign country where his or her life would be in danger. The doctrine has also been raised in arguments that an alien's attorney was ineffective for not raising the issue of the state created danger doctrine in the course of immigration proceedings.

Most Courts of Appeals have found that the doctrine does not apply in the immigration context. The First, Third, and Tenth Circuits have affirmatively determined the state created danger doctrine does not apply in the immigration context. *Enwonwu v. Gonzales*, 438 F.3d 22 (1st Cir. 2006) (a non-citizen trying to avoid removal from the country states no substantive due process claim on a state-created danger theory); *Kamara v. Attorney General*, 420 F.3d 202, 216-17 (3d Cir. 2005) (holding that the application of the doctrine "would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the [Convention Against Torture].") *Id.* at 217-18. See also *Vicente-Elias v. Mukasey*, 532 F.3d 1086 (9th Cir. 2008). Moreover, the Fifth Circuit has, in dicta, noted that it has never recognized application of the doctrine in the immigration context. See, e.g., *Reyes-Gomez v. Gonzales*, 163 Fed. Appx. 293 (5th Cir. 2006), and *Guerra v. Gonzales*, 138 Fed. Appx. 697 (5th Cir. 2005)

(unpublished).

An exception to the majority rule is the Ninth Circuit which has applied the doctrine in the immigration context. *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996). In *Wang*, U.S. officials arranged, by making misrepresentations to Wang and the Chinese government, to bring him to the United States to testify in a heroin case. *Id.* at 811-12. Wang had previously been tortured by Chinese officials in order to get him to falsely implicate another suspect for which they generously promised Wang leniency on charges stemming from his own involvement in the drug transaction. *Id.* at 811. When Wang came here, however, after U.S. officials had misled both him and the Chinese, he was forced into the Hobson's choice of testifying truthfully under oath here and losing his Chinese leniency and risking further torture upon his return, or perjuring himself here. *Id.* at 813. After U.S. officials created this situation and forced Wang into this choice, they then sought to return him to China where there was a high likelihood he would be tortured for his truthful testimony here. *Id.* at 819. The district court found that the government's behavior shocked the conscience, and also that the government had created the dangerous predicament Wang was in. *Id.* at 819. Accordingly, the district Court enjoined the United States from removing Wang to China, and the Ninth Circuit affirmed.

The United Nations Convention Against Transnational Organized Crime. The United Nations Convention Against Organized Crime is a treaty intended to foster mutual co-

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Most Courts of Appeals have found that the "state created danger" doctrine does not apply in the immigration context.

The "State Created Danger Doctrine" and UNTOC

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operation and assistance in combating money laundering, corruption, and other forms in international organized crime. The UNTOC, including its Protocols, was signed by the United States in 2000, entered into force generally in 2003, was ratified by the Senate as Treaty 108-16 on October 7, 2005, and entered into force for the United States forty days later under the terms of the Convention on December 3, 2005. See United States Dept. of State, Treaties in Force 488 (2006); Senate Executive Rept. 109-4, October 7, 2005.

Among its many provisions, the UNTOC contains an obligation on the part of the contracting parties to protect witnesses who testify in the prosecution of crimes covered under the treaty. The UNTOC grants no form of relief to individuals, but instead obligates the United States to take "appropriate measures" to protect witnesses. Under the terms of Article 24 of the UNTOC, each party agreed to "take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offenses covered by this Convention." S. Treaty Doc. 108-16 (2000). In the letter of transmittal accompanying the Convention to the Senate, dated February 23, 2004, the Secretary of State noted in reference to Article 24 that "[t]his article permits the exercise of discretion, in particular cases, and therefore can be implemented by the United States under current statutes and regulations governing the protection of wit-

nesses." *Id.* Thus, by ratifying the UNTOC, the United States assumed no specific witness protection obligations that would inure to individuals. Congress and the President have determined that:

The UNTOC contains an obligation on the part of the contracting parties to protect witnesses who testify in the prosecution of crimes covered under the treaty.

current United States law . . . fulfills the obligations of the [Convention and Protocols] for the United States. Accordingly, the United States does not intend to enact new legislation to fulfill its obligations under the [Convention and Protocols]. S. Exec. Rept. 109-4, §§ 1(c), 2(c) & 3 (c), October 7, 2005.

Thus, for the purposes of protecting witnesses, including deportable aliens, relief is properly sought in the existing framework under the INA and the CAT, rather than under the UNTOC.

Litigating Issues Raised Under the State-Created Danger Doctrine and the UNTOC. When confronted with the State Created Danger Doctrine outside the Ninth Circuit, OIL attorneys should argue that the doctrine has no application in the immigration context and that the existing statutory framework for asylum,

withholding of removal and CAT provide adequate protection. Cite to the case law from the First, Third and Tenth Circuits noted above. In the Ninth Circuit, it is necessary to distinguish the facts of your case from *Wang, supra*. The facts of *Wang* are unusual and are quite unlikely to be found among the common asylum/withholding of removal/CAT cases that OIL attorneys handle.

Likewise, with the UNTOC, OIL attorneys should argue that the Convention itself affords an alien in U.S. immigration proceedings no additional rights or protection beyond those already contained in the Immigration and Nationality Act. Before filing the brief, however, the OIL attorney should have the brief reviewed by Mr. Thomas Burrows, of the Department of Justice Office of International Affairs, thomas.burrows@usdoj.gov, and Ms. Virginia Prugh of the State Department, PrughVP@state.gov. Prior to contacting either Mr. Burrows or Ms. Prugh, the OIL attorney should notify Thom Hussey and Dave McConnell of his or her intention to do so.

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Operation Honeymoon's Over Nets 50

The Department of Justice, with the support of ICE, recently announced the indictment of 50 people charged with participating in a Cincinnati-based scheme to arrange sham marriages in order to evade U.S. immigration laws.

"The investigation has unraveled a scheme to arrange marriages between Eastern European aliens and U.S. citizens," said Gregory Lockhart, the U.S. Attorney for the South-

ern district of Ohio. "The Eastern Europeans paid a fee to the U.S. citizens and the leaders of the conspiracy to arrange the marriage. They created false documents indicating that the marriages were legal and presented the false documents to immigration officials."

These indictments and arrests are part of an ongoing investigation dubbed Operation Honeymoon's Over.

FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction—Motion to Reopen

On July 13, 2009, the Solicitor General filed in the Supreme Court the government's top-side merits brief in *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), cert. granted, 129 S. Ct. 2075 (2009). The Supreme Court granted the petitioner's request for certiorari on whether INA §§ 242 (a)(2)(B)(ii) & (D), 8 U.S.C. §§ 1252(a)(2)(B)(ii) & (D), bar review of a denial of a motion to reopen. The Seventh Circuit dismissed the case, holding that 8 U.S.C. § 1252(a)(2)(B)(ii), which bars courts' review of discretionary actions or decisions of the Attorney General "the authority for which is specified under" Subchapter II of the INA, precludes its review of motions to reopen.

In its response to the petition, the government stated "after reexamining its prior filings on this issue," that the majority position—namely the majority of the courts holding that judicial review is available, "represents the better reading of the statute." The government's brief agrees with petitioner that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar a court's review of the denial of a motion to reopen. The case is set for argument on November 10, 2009.

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Motion to Reopen — Ineffective Assistance of Counsel

On August 26, 2009, the Solicitor General filed in the Supreme Court the government's response to the petition for certiorari of the judgment in *Afanwi v. Mukasey*, 526 F.3d 788 (4th Cir. 2008). The court of appeals ruled that an alien has no right to the effective assistance of counsel in a removal proceeding and affirmed the Board's holding that it lacked authority to grant an

administrative remedy for a claim that an alien's counsel was incompetent in failing to file a petition for judicial review of an agency decision. In its response to the petition, the government stated that the Attorney General subsequently made clear, in *Matter of Compean*, 25 I. & N. Dec. 1 (2009), that the Board does possess authority to grant a remedy for such claims, and that the judgment should be vacated and the case remanded for further consideration in the light of the Attorney General's decision.

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Aggravated Felony— Loss to Victim(s) Exceeding \$10,000

On September 15, 2008, the government filed a petition for rehearing en banc in *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007), challenging the court's holding that to sustain a charge of removability for the aggravated felony of fraud or deceit with a loss exceeding \$10,000 (8 U.S.C. § 1101(a)(43) (M)(i)) based on conviction for signing a false tax return, must the government prove, using only the categorical approach, not the modified categorical approach, that the alien was convicted of an offense with the elements of fraud or deceit and loss over \$10,000. In August 2009 the parties filed supplemental briefs regarding the impact of *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), on this case and *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc).

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VWP — Waiver, Due Process

On January 30, 2009, the Seventh Circuit granted the government's petition for rehearing en banc in *Bayo v. Chertoff*, 535 F.3d 749 (7th Cir. 2008). The questions

presented are whether a waiver of the right to contest removal proceedings under the visa waiver program (VWP) is valid only if entered into knowingly and voluntarily, and is the alien entitled to a hearing on whether the waiver was knowing and voluntary? The case was argued on May 13, and the parties have filed supplemental briefs on four issues identified by the court at argument.

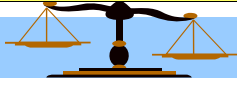
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Particularly Serious Crimes

In June 2009, the government filed a petition for panel rehearing and opposed petitioner's petition for rehearing and rehearing en banc in *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) May the Board determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal?

Proceedings are currently stayed pending the Supreme Court's decision in *Kucana v. Holder*, because its decision on the scope of the jurisdictional stripping provision of 8 U.S.C. § 1252 (a)(2)(B)(ii) may affect the Ninth Circuit's decision on the rehearing petitions.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That Terrorists' Extortion Threats Are Not Necessarily On Account Of Political Opinion

In *Amouri v. Holder*, 572 F.3d 29 (1st Cir. 2009) (Selya, Boudin, Lipez), the First Circuit held that extortion threats made by "Muslim extremists" to a shop owner in Algeria were not necessarily made on account of the shop owner's political opinion for purposes of his asylum claim. "After all, fanaticism and a love of money are not mutually exclusive," said the court.

Amouri had entered the United States illegally in 2001. In 2005 he won a visa under the Diversity Visa Program but subsequently was deemed ineligible for immigrant status. Amouri was then placed in removal proceedings where he sought to find an alternative way to adjust his status. At a rescheduled hearing, the IJ proceeded on the merits of the asylum claim with the reluctant agreement of Amouri's counsel. Although the IJ allowed the asylum claim to proceed, finding "extraordinary circumstances" for the untimely filing, the claim was denied because Amouri had no political affiliations and the IJ found that the extortion was a case of unmitigated greed.

The court affirmed the denial of asylum finding that Amouri had failed to show a nexus between the attempted extortion and a statutorily protected ground. It found that there was "no meaningful ties between political affiliation and the demand for funds." The court also rejected Amouri's claim that he was prejudiced by the denial of a continuance. The court noted that "even an arbitrary denial of continuance cannot sink to the level of a due process violation unless it results in actual prejudice." The court found that Amouri had not suggested any witnesses or evidence he would have submitted if the IJ had

granted the continuance and thus could not show any prejudice.

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■ First Circuit Holds It Lacks Jurisdiction To Review Denial Of Untimely Asylum Application And Affirms Denial Of Withholding Of Removal

In *Makieh v. Holder*, 572 F.3d 37 (1st Cir. 2009) (Lynch, Ebel, Lipez), the First Circuit held that it lacked jurisdiction to review petitioner's untimely asylum application where petitioner argued that the IJ had failed to consider whether petitioner's reliance on two previously filed visa petitions constituted an "extraordinary circumstance."

The petitioner entered the United States in 1992 on a non-immigrant (F-1) student visa. He was twenty-one years old and facing conscription into the Syrian military. His father and brother, who became U.S. citizens, had left Syria in the 1980s. Apparently petitioner never enrolled in the educational program for which he had been approved, and remained undetected until his father filed and I-130 on his behalf. On January 30, 2003, the INS initiated removal proceedings against the petitioner but six months later he married a U.S. citizen, who also filed a visa petition on his behalf. Before that petition could be adjudicated, however, the couple formally separated, and they divorced in December of 2005. Petitioner's father then filed a second visa petition on his behalf. During the removal proceedings petitioner applied for asylum claiming fear of persecution by Syrians—especially Islamic-extremists—because he had become "like Americans," and thus "like a traitor or something." However, petitioner's returns to Syria on a regular

basis for holy days where he spent several months at a time before returning to the United States undermined his fear of harm. Accordingly, the IJ denied the asylum claim because it was untimely and denied withholding because petitioner had failed to demonstrate a clear probability of persecution.

The court concluded that the IJ explicitly considered the "timeliness" argument, and that petitioner had not otherwise shown a colorable constitutional claim or question of law to overcome the jurisdictional bar. Moreover, the court held that the administrative record did not support, let alone compel, the conclusion that a Syrian national who had lived in the United States for seventeen years would face a clear probability of persecution or torture in Syria.

"Even an arbitrary denial of continuance cannot sink to the level of a due process violation unless it results in actual prejudice."

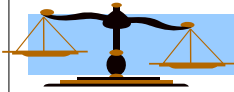
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■ First Circuit Upholds BIA's Ruling That Petitioner Failed To Demonstrate Due Diligence In Filing Untimely Motion To Reopen

In *Chedid v. Holder*, 573 F.3d 33 (1st Cir. 2009) (Lynch, Torruella, Lipez), the First Circuit held that the BIA properly exercised its discretion in finding that Chedid had not demonstrated due diligence in filing an untimely second motion to reopen, where he claimed that the filing was delayed because he "searched for several months for an attorney willing to take his case and file a new motion to reopen."

Chedid, a Lebanese citizen, entered the United States on February 9, 2001, as a nonimmigrant visitor with authorization to remain for 90 days. He never departed. On January 6, 2003, the former INS charged Chedid

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as an overstay and sought his removal. The IJ denied Chedid's application for asylum and the BIA affirmed. Chedid then filed a motion to reopen and remand based on his marriage to a U.S. citizen. The BIA denied the motion. A year later Chedid filed another motion claiming ineffective assistance of counsel and sought equitable tolling. On April 3, 2008, the BIA denied Chedid's second motion to reopen on the grounds that it was untimely and exceeded the numerical limitations for such motions. The BIA also found that Chedid had not acted with the "due diligence" required to invoke the equitable tolling doctrine.

The court, without deciding the issue of equitable tolling, found that even if it were available, it would only reach the merits of Chedid's ineffective assistance of counsel claim if the BIA had abused its discretion in finding that he had not exercised the "due diligence" required by our case law. Here, the court found that the BIA did not abuse its discretion because Chedid provided no details regarding the actions he took during the period he sought to equitably toll.

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■ First Circuit Upholds Agency's Denial Of Asylum And Withholding To Applicant from Indonesia

In *Banturino v. Holder*, 576 F.3d 10 (1st Cir. 2009) (Lynch, Torruella, Howard) (*per curiam*), the First Circuit ruled that it lacked jurisdiction to consider Banturino's untimely asylum application. Banturino entered the United States in July 1996 on a six-month visitor's visa, but did not depart when his visa expired. In early 2003, he filed an application for asylum and was soon thereafter placed in removal proceedings. He claimed that as a Christian he feared returning to Indonesia because of attacks by Islamic terrorists. The IJ denied the asylum claim as untimely filed and denied

withholding on the merits. The BIA affirmed.

The court affirmed the agency's finding that the alien failed to demonstrate eligibility for withholding of removal where Banturino was unharmed during an incident in which his family's house was burned, and his brother had lived in Indonesia since 2002 without harm. The court further held that Banturino had failed to establish a nexus to a qualifying statutory ground, and declined to reach the question of whether a "sliding scale" or "disfavored group" approach used by other circuits was consistent with its law.

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■ Petitioner's Ineffective Assistance Of Counsel Claim Failed To Comply With *Matter Of Lozada*

In *Punzalan v. Holder*, 575 F.3d 107 (1st Cir. 2009) (Lynch, Boudin, Lipez), the First Circuit held that the BIA did not abuse its discretion in denying petitioner's untimely and numerically barred motion to reopen premised on ineffective assistance of counsel. The court affirmed the BIA's determination that petitioner had failed to satisfy the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1998).

The court also held that the BIA "rightfully was skeptical as to whether the [petitioner] 'registered a meaningful complaint about his former counsel,'" as former counsel had filed both the first motion to reopen and the second motion to reopen alleging that the first motion was ineffective. Lastly, the court sent copies of its decision to the California disciplinary

authorities so that they could review the conduct of the law firm in question.

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■ First Circuit Upholds Denial Of Pakistani Political Persecution Claim Where Local Political Rivals Engaged In Personal Dispute

The BIA "rightfully was skeptical as to whether the [petitioner] 'registered a meaningful complaint about his former counsel,'" as he had filed both the first and the second motion to reopen alleging that the first motion was ineffective.

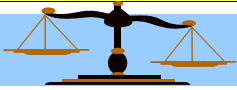
In *Hussain v. Holder*, 576 F.3d 54 (1st Cir. 2009) (Lynch, Selya, Boudin), the First Circuit held that petitioner's broken arm, which resulted from a shoe thrown by the father of a local political rival, and rumors that

the father sought petitioner with a gun after he moved away, did not constitute political persecution. The petitioner, a Pakistani national illegally entered the United States on June 1, 2001, and was placed in removal proceedings on October 31, 2004, where he applied for asylum. He claimed that when he served as a secretary general of the Pakistan Muslim League in his village, during a dispute over his handling of a drainage project, (which he admitted was a personal matter), the father of a political rival threw a shoe at him and broke his arm. Finding no persecution, the IJ denied asylum, withholding, and CAT and the BIA affirmed.

The court concluded that petitioner's conflict was the result of a personal dispute with his political rival over a drainage project, and that any harm or threats were thus not due to his political views.

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SECOND CIRCUIT

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■ Second Circuit Holds That IJ Properly Denied Withholding Claim Based On Lack of Corroboration

In *Liu v. Holder*, 575 F.3d 193 (2d Cir. 2009) (Jacobs, Parker, Wesley), the Second Circuit held that the IJ properly denied withholding of removal where Liu did not adequately corroborate material aspects of his claim. The court observed that the IJ was permitted to require corroboration where such evidence would be expected. The court held that it reviews with substantial deference an IJ's determination that corroborating evidence was reasonably available to the asylum applicant. Further, the court stated that the IJ was not required to identify the points of testimony that required corroboration prior to the disposition of the claim, as "the alien bears the ultimate burden of introducing such evidence without prompting from the [Immigration Judge]."

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■ Second Circuit Remands To BIA For Decision On Divisibility Of N.Y. Penal Law Section 120.14 Under The Modified Categorical Approach

In *Lanferman v. BIA*, 576 F.3d 84 (2d Cir. Aug. 5, 2009) (Straub, Pooler, Kearse) (*per curiam*), the Second Circuit granted the petition, vacated the removal order, and remanded the case to the BIA in light of *James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008). In *James* the court decided that "the wiser and more prudent course" was to give the BIA an opportunity to consider, in the first instance when statutes are divisible. As such, the court

requested that the BIA decide the initial issue of whether Section 120.14 of New York Penal Law is divisible under the modified categorical approach.

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■ BIA's Interpretation Of "Lawfully Resided Continuously" For Purposes Of § 212(h) Waiver Is Reasonable.

The IJ was not required to identify the points of testimony that required corroboration prior to the disposition of the claim, as "the alien bears the ultimate burden of introducing such evidence without prompting from the [IJ]."

In *Rotimi v. Holder*, ___ F.3d ___, 2009 WL 2476648 (2d Cir. Aug. 14, 2009) (Feinberg, Newman, Katzmann) (*per curiam*), the Second Circuit held that the BIA's interpretation of the phrase "lawfully resided continuously," for the purposes of eligibility for section 212(h) relief, is reasonable.

Rotimi argued that he had "lawfully resided continuously" in the United States for the seven years immediately preceding June 13, 2003, when he was placed in removal proceedings, because previously he had been a nonimmigrant visitor, an applicant for asylum and adjustment of status, and a lawful permanent resident during that period. Initially, the BIA rejected Rotimi's claim in an unpublished opinion. However, following a remand from the Second Circuit, the BIA again denied Rotimi's claim in a precedent decision, *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008).

In *Rotimi*, the BIA concluded that Rotimi's lawful residence ended when his nonimmigrant visa expired, and that neither his filing of an asylum application prior to his visa's expiration or his subsequent adjustment of status application conferred him any lawful status. The BIA reasoned that the time period covering the pendency of those applications should not count for the purposes of the "lawfully resided continuously" requirement because, for an alien's residence to be lawful, "it must be authorized or in harmony with the law,

which requires some formal action beyond a mere request for authorization or the existence of some impediment to actual physical removal."

The Second Circuit, applying *Chevron*, found that the statutory term "lawfully resided continuously," was ambiguous and that the BIA's interpretation was reasonable. Accordingly, the court denied the petition for review. In a concurring opinion, Judge Newman found Rotimi's case "not an unsympathetic one" but felt constrained to accept the BIA's reasonable statutory interpretation. Judges Katmann and Feinberg also wrote a concurring opinion, noting *inter alia*, that on a clean slate they would have found that Rotimi "lawfully resided" in the United States while his applications for asylum and (later) adjustment of status were pending.

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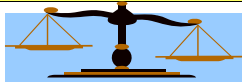
SIXTH CIRCUIT

■ Sixth Circuit Holds That The Agency Properly Denied Voluntary Departure Where Alien Failed To Produce Travel Documents To Enter Another Country

In *Alhaj v. Holder*, ___ F.3d ___, 2009 WL 2017934 (6th Cir. July 10, 2009) (*Daughtrey*, Rogers, Kethledge), the Sixth Circuit held that it was not legal error to deny voluntary departure, where petitioner declined to return to his own country, and failed to produce a travel document allowing him permanent entry elsewhere. The court explained that, for an alien to be permitted to voluntarily depart the United States in lieu of removal, the regulation requires the alien to produce sufficient documentation to establish that he is authorized to enter another country.

The court agreed with the IJ that petitioner's presentation of the passport alone was insufficient to assure

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he would allowed permanent entry into another country, Yemen, in his case.

The court additionally held that the BIA did not err, by declining to withhold petitioner's removal, where the alleged harm was solely the result of a personal dispute, and not on account of a statutorily protected ground.

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■ Sixth Circuit Denies Panel Rehearing Of Published Decision Holding That Alien's Removal During Pendency Of Administrative Appeal Does Not Effect A Withdrawal Of Appeal

In *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009) (*Daughtrey*, Rogers, Kethledge), the Sixth Circuit denied the government's petition for panel rehearing of the court's published decision, holding that an alien's administrative appeal was not automatically withdrawn, by operation of 8 C.F.R. § 1003.4, upon her removal from the United States. On rehearing, the government sought to have the court remand to allow the BIA to determine in the first instance whether 8 C.F.R. § 1003.4 applied to non-volitional departures. Although the court had held that this regulation does not contain a distinction between volitional and non-volitional departures during the pendency of an administrative appeal, it summarily denied the petition.

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SEVENTH CIRCUIT

■ Seventh Circuit Upholds Denial Of Asylum Based On Imputed Political Opinion For Spouse Of Woman Subjected To Coercive Abortion

In *Jin v. Holder*, 572 F.3d 392 (7th Cir. 2009) (*Cudahy*, Kanne, Tin-

der), the Seventh Circuit upheld the BIA's denial of asylum and withholding of removal to an asylum applicant from China, whose spouse from a traditional marriage had undergone a forced abortion. Jin claimed imputed persecution, but he himself offered no opposition or resistance. The court relied on *Matter of J-S-*, 24 I & N Dec. 520 (A.G. 2008), which was issued while the petition for review was pending, where the BIA held that spouses are not entitled to the same per se refugee status that INA § 101(a)(42)(B) expressly accords persons who have physically undergone forced abortion or sterilization procedures. The court noted that the BIA's view was a permissible construction of the statute, particularly considering that three other circuits have upheld the Attorney General's statutory interpretation as reasonable.

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■ Seventh Circuit Upholds Denial Of Asylum And Withholding Of Removal Based On Particular Social Group Claim

In *Jan v. Holder*, 576 F.3d 455 (7th Cir. 2009) (Posner, Kanne, Sykes) (*per curiam*), the Seventh Circuit upheld the denial of petitioner's asylum and withholding of removal claims because his proposed particular social group of "persons threatened by corrupt officials of the [FIA] in Pakistan" is not cognizable under the Immigration and Nationality Act. The court reasoned that petitioners' indebtedness, which was why he allegedly feared the FIA officials, "is not an immutable characteristic because it is not innate or fundamental to his identity." The court also held that the record evidence did not compel the conclusion that petitioner would be tortured if he returned to Pakistan be-

cause there was no evidence that any government officials contacted him or his family during the past ten years, and the objective record evidence concerning police corruption was too general and vague to suggest that he would be at risk of torture.

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The court reasoned that petitioners' indebtedness, which was why he allegedly feared the FIA officials, "is not an immutable characteristic because it is not innate or fundamental to his identity."

■ Seventh Circuit Applies Supreme Court's *Nijhawan* Decision To A Criminal Case

In *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009) (Kanne, Wood, Sykes), the Seventh Circuit held that a conviction for involuntary manslaughter does not qualify as a crime of violence for

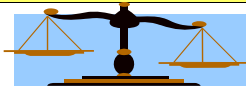
purposes of a "career offender" enhancement under the sentencing guidelines because involuntary manslaughter requires a finding of recklessness only. The court provided an extended analysis and application of the Supreme Court's reasoning in *Nijhawan v. Holder*, 129 S. Ct. 687 (2009), to this criminal case.

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■ Seventh Circuit Holds That Aliens Inadmissible Under 8 U.S.C. § 1182(a)(9)(B)(i)(II) Are Still Eligible To Adjust Status.

In *Lemus-Losa v. Holder*, ___ F.3d ___, 2009 WL 2461353 (7th Cir. Aug. 13, 2009) (Flaum, Williams, Wood), the Seventh Circuit held that the BIA failed to take into account the difference in the statutory language between 8 U.S.C. § 1182(a)(9)(B)(i)(II) and (a)(9)(C)(i)(I) in determining whether aliens inadmissible under the

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former provision are eligible for adjustment of status under the LIFE Act. The court reasoned that aliens who seek admission from within the United States after a prior period of unauthorized presence are equivalent to those physically present without inspection, and therefore are eligible to adjust status. The court remanded to the BIA for further proceedings.

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■ Seventh Circuit Affirms Judgment of District Court Holding that Department of Labor Had Authority to Promulgate Regulations Pertaining to Labor Certification Process

In *Durable Mfg. Co. v. United States Department of Labor*, ___ F.3d ___, 2009 WL 2501770 (7th Cir. Aug. 18, 2009) (*Manion*, Rovner, and Tinder), the Seventh Circuit affirmed the district court's entry of summary judgment in favor of the Department of Labor and the Department of Homeland Security. Plaintiffs challenged 20 C.F.R. § 656.30(b)(1)-(2), a DOL regulation that imposed a time limitation for the validity of labor certifications. Under the amended regulation, labor certifications expired, if not filed in support of a visa application, within 180 days of the certification's approval.

The Seventh Circuit held that the amended regulation was within the scope of DOL's authority because it comports with the textual mandate of INA to ascertain the sufficiency of workers at the time an application for a visa is made, and it furthers one of the congressional purposes behind the labor certification requirement. The Seventh Circuit also held that the application of the new regulation has no retroactive effect in this case be-

cause plaintiffs had no vested right that the amended regulation could impair.

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EIGHTH CIRCUIT

■ Eighth Circuit Upholds Determinations That The Government Rebutted Presumed Well-Founded Fear Of Persecution And That Petitioner Was Not Entitled To Humanitarian Asylum

In *Mambwe v. Holder*, 572 F.3d 540 (8th Cir. 2009) (*Bye*, Gibson, *Gruender*), the Eighth Circuit upheld the agency's determination that, while a 1984 attack in Angola by the MPLA constituted past persecution, the government had rebutted the presumption of a well founded fear of future persecution where the MPLA surrendered its weapons and became a legitimate political party. The court further held that petitioner was not entitled to humanitarian asylum where the 1997 harm she suffered in Zambia was not on account of a protected ground. Finally, the court rejected petitioner's generic claim that her due process rights had been violated by the IJ and the BIA.

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■ Eighth Circuit Affirms Agency's Determination That Guatemalan Alien Failed To Establish The requisite Nexus To Be Eligible For Asylum

In *Marroquin-Ochoma v. Holder*, 574 F.3d 574 (8th Cir. July 28, 2009) (*Murphy*, *Melloy*, *Shepherd*), the Eighth Circuit held that the record did not compel the conclusion that the petitioner, who received threats from a gang while working in a payroll office, was threatened on account of an imputed political opinion. The court

further held that substantial evidence supported the BIA's determination that the Guatemalan government did not acquiesce in the gang members' threats despite evidence of uncontrolled gang activity, because the police attempted to protect petitioner but she declined to pursue the law enforcement avenues available to her.

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■ Eighth Circuit Remands Case For Agency To Consider Whether Alien Remains Eligible For Relief Under Former Section 212(c).

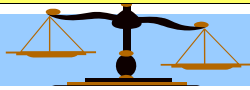
In *Lovan v. Holder*, 574 F.3d 990 (8th Cir. 2009) (*Loken*, *Melloy*, *Benton*), the Eighth Circuit joined the Third Circuit in holding that an alien's eligibility for a waiver of deportation under INA § 212(c) was not precluded where the alien had been convicted pursuant to a jury trial. The court found remand was necessary for the BIA to reconcile its holding in *Matter of Blake* (concluding that aggravated felony conviction for sexual abuse of a minor does not have the requisite statutory inadmissibility counterpart for 212(c) relief) with *Matter of L-* and *Matter of G-A-* (granting *nunc pro tunc* 212(c) relief to lawful permanent residents returning from abroad).

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■ Eighth Circuit Adopts BIA's Definition Of "In An Official Capacity" To Mean "Under Color of Law" For Convention Against Torture Protection

In *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009) (*Murphy*, *Melloy*, *Shepherd*), the Eighth Circuit adopted as reasonable the BIA's interpretation of the regulatory requirement that torture be inflicted by, or at the acquiescence of, a public official acting "in an official capacity" as the equivalent of the civil rights concept of "under color of law." The court,

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however, concluded that in the instant case, the BIA construed the concept too narrowly and misapplied the standard based on improper factfinding and a misstatement of the IJ's factual findings.

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NINTH CIRCUIT

■ Ninth Circuit Holds That Owning And Operating A "Chop Shop" Is Not Categorically A Theft Offense Under 8 U.S.C. § 101(a)(43)(G)

In *Carrillo-Jaime v. Holder*, 572 F.3d 747 (9th Cir. 2009) (D.W. Nelson, W.A. Fletcher, Tallman), the Ninth Circuit held that the alien's conviction for operation of a "chop shop" in violation of Cal. Veh. Code § 10801 was not categorically an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G). Noting that the state Vehicle Code did not define "theft," the court looked to California's general theft statute and concluded that under Cal. Penal Code § 484(a) one could obtain property through theft, fraud, or conspiracy to defraud with the valid consent of the property's owner. The court then concluded that the government had "presented no evidence that any motor vehicle or motor vehicle part over which petitioner exercised control while owning or operating a chop shop was obtained without the owner's consent" under the modified categorical approach.

In a concurring opinion, Judge Tallman opined that, while the court faithfully applied the *Taylor* framework, he believed that various federal statutes, together with the holding in *United States v. Turley*, 352 U.S. 407 (1957), "underscored that the federal understanding of theft offenses, and in particular vehicle theft offenses, has for at least fifty years included theft by false pretenses and fraud."

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■ Ninth Circuit Holds That An Unsigned Check For The Proper Filing Fee Amount Is Not Per Se Invalid

In *Blanco v. Holder*, 572 F.3d 780 (9th Cir. 2009) (Noonan, O'Scannlain, Graber), the Ninth Circuit held that an otherwise complete and timely application for adjustment of status is not properly rejected as untimely for the sole reason that the applicant's lawyer's accompanying check for the proper amount of the filing fee was inadvertently unsigned, noting that the processing fee is not a statutory requirement. The court reviewed the governing regulations, 8 C.F.R. §§103.2(a)(7), 103.7(a)(3) indicating that an application is to be rejected if (1) the application is not properly signed, or (2) the wrong filing fee is submitted, but noted that the they did not address the situation of a signed application accompanied by an unsigned check for the correct amount of the filing fee. The court also distinguished between a check for the incorrect amount, which could never result in the proper filing fee, and an unsigned check for the correct amount, which, if honored by a bank, could result in receipt of the proper filing fee.

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■ Ninth Circuit Holds That Stay-Away Provision Of Restraining Order Supports Removability For Violating A Protection Order

In *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009) (Tashima, M.D. Smith, Wu) (*per curiam*), the Ninth Circuit held that a contempt judgment for disobeying the "stay away" portion of a restraining order, issued pursuant to Oregon's Family Abuse Prevention Act, qualifies as a violation of a "protection order" under 8 U.S.C. § 1227(a)(2)(E)

(ii). A concurring opinion concluded that the categorical/modified categorical approaches developed in the *Taylor/Shephard* line of decisions do not apply to § 1227(a)(2)(E)(ii), based in part on the Supreme Court's recent decision in *Nijhawan v. Holder*, __ U.S. __, 129 S. Ct. 2294 (2009).

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An otherwise complete and timely application for adjustment of status is not properly rejected as untimely for the sole reason that the applicant's lawyer's accompanying check for the proper amount of the filing fee was inadvertently unsigned.

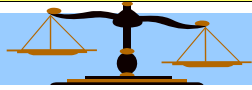
■ Ninth Circuit Remands To Allow BIA To Apply The REAL ID Act

In *Owino v. Holder*, 575 F.3d 956 (9th Cir. 2009) (B. Fletcher, Fisher, Gould) (*per curiam*), the Ninth Circuit held, and the government conceded, that it had jurisdiction, pursuant to *Lemus-Galvan v. Mukasey*, 518 F.3d 1081 (9th Cir. 2008), to review the CAT denial of an alien convicted of an aggravated felony.

Owino a citizen of Kenya, entered the United States in 1998 on a student visa. He was convicted of second degree robbery in California in 2003. After serving his three-year sentence, he was detained by the DHS and served with a notice to appear alleging he was subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony.

The IJ found that Owino's aggravated felony conviction barred him from asylum and CAT, and that his crime was "particularly serious," barring him from withholding of removal. These denials were not before the court. The IJ also denied deferral of removal under CAT finding Owino not credible and also denied it on the merits for failure to show a nexus. The BIA affirmed based only on the latter ground.

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Because neither the IJ nor the BIA applied the REAL ID Act, the court remanded the case to the BIA, with an open record, to determine the merits of Owino's claim under the REAL ID Act's credibility and corroboration standards.

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■ Ninth Circuit Holds That Alien's Conviction For Offering To Transport Heroin Constitutes A Crime Relating To A Controlled Substance

In *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009) (*Wardlaw*, Pregerson, Graber), the Ninth Circuit held, applying the modified categorical approach, that an alien's conviction for offering to transport heroin was a removable offense under 8 U.S.C. § 1227(a)(2)(B)(i), as a conviction under a law or regulation relating to controlled substances.

The court found that Mielewczyk's charging documents and plea agreement indicated that his offense involved heroin, a federally controlled substance. The court distinguished section 11352(a) of the California Health and Safety Code from generic solicitation statutes on the grounds that, unlike generic solicitation statutes, section 11352(a) pertains specifically and exclusively to the solicitation of controlled-substance-related criminal activities.

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■ Ninth Circuit Holds That Aggravated Assault Under Section 268 Of The Canada Criminal Code Is A Crime Involving Moral Turpitude

In *Uppal v. Holder*, ___ F.3d ___, 2009 WL 2434495 (9th Cir. Aug. 11, 2009) (*Thompson*, Berzon, N.R. Smith), the Ninth Circuit held that the

offense of aggravated assault under section 268 of the Canada Criminal Code, which requires that the perpetrator "wound[], maim[], disfigure[], or endanger[] the life of" another, is a crime involving moral turpitude. The court concluded the BIA correctly identified and interpreted the statutory elements and thus accorded *Skidmore* deference to its determination that a conviction under section 268 is a crime involving moral turpitude.

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A conviction for misdemeanor child endangerment under section 273a(b) of the California Penal Code is not categorically a "crime of child abuse."

■ Ninth Circuit Holds That Conviction Under Section 273a(b) Of The California Penal Code Is Not Categorically A Crime Of Child Abuse

In *Fregozo v. Holder*, ___ F.3d ___, 2009 WL 2449673 (9th Cir. Aug. 12, 2009) (*Berzon*, Thompson, N.R. Smith), the Ninth Circuit held that a conviction for misdemeanor child endangerment under section 273a(b) of the California Penal Code is not categorically a "crime of child abuse" as that term is used in the Immigration and Nationality Act.

The court then agreed with the government's argument that the case should be remanded to the BIA to conduct, in the first instance, a modified categorical analysis to determine the nature of the offense.

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■ Ninth Circuit Holds That Class of Immigration Habeas Petitioners Should Be Certified to Allow Challenge Their Detention

In *Rodriguez v. Hayes*, ___ F.3d ___, 2009 WL 2526622 (9th Cir. Aug. 20, 2009) (*Fletcher*, Fisher, Gould),

the Ninth Circuit reversed the District Court and held, *inter alia*, that release on an "ankle bracelet" is custody enough to warrant habeas proceedings. It further held that the INA does not preclude certification of a class because the habeas petitioner sought relief from "violations" of various immigration detention statutes rather than seeking to enjoin or restrain the lawful operation of the statutes. The court added that the district court's denial of class certification was entitled to no deference because no reasoning had been provided for its decision.

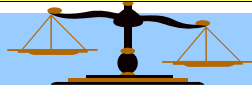
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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds That BIA Failed To Give Reasoned Consideration To Iranian Christian's Religious Persecution Claim

In *Kazemzadeh v. United States Att'y Gen.*, ___ F.3d ___, 2009 WL 2391397 (11th Cir. Aug. 6, 2009) (*Marcus*, Pryor, Edenfield), the Eleventh Circuit held that the record evidence did not compel the finding that the Iranian Christian asylum applicant suffered political persecution in the past or had a well-founded fear of future political persecution. The court, however, concluded that the BIA failed to give a reasoned consideration of Kazemzadeh's claim of a well-founded fear of religious persecution if returned to Iran based on his *conversio* from Islam to Christianity. The court determined that the BIA failed to consider: (1) Kazemzadeh's testimony that Iranians who convert from Islam to Christianity have to "practice underground" to avoid punishment, which the court stated is itself a form of persecution; and (2) whether Kazemzadeh is a person about whom the Iranian regime already had a heightened interest in, as he and his father were both previ-

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Summaries Of Recent Federal Court Decisions

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ously convicted in absentia for their anti-government activities and as he was expelled from the university for not following the Islamic tradition.

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■ Eleventh Circuit Reverses Adverse Credibility Determination In Chinese House Church Case

In *Tang v. Holder*, ___ F.3d ___, 2009 WL 2432054 (11th Cir. Aug. 11, 2009) (*Wilson*, Kravitch, Anderson), the Eleventh Circuit reversed the BIA's affirmance of the IJ's adverse credibility determination. The court held that the apparent inconsistencies between the Tang's airport interview and her hearing testimony were explainable. The court also rejected the IJ's finding that it was implausible that Tang's mother, who was a government official, would flagrantly violate Chinese law to help her daughter flee from China because this finding was based solely on speculation and conjecture. Finally, the court concluded that the BIA erroneously believed that the IJ excluded Tang's corroborating medical records, when in fact they were part of the record.

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DISTRICT COURTS

■ California District Court Certifies Nationwide Class Seeking Broad Application Of Child Status Protection Act Provision

In *Costelo v. Chertoff*, No. 08-cv-688 (C.D. Cal. July 16, 2009) (*Selna*), the Central District of California, granted plaintiffs' motion for class certification of individuals seeking to benefit from the "automatic conversion" and priority date "retention" provision of 8 U.S.C. § 1153(h)(3). The court limited the class to individuals who had obtained lawful permanent residence through F3 visas (i.e., mar-

ried sons or daughters of United States citizens) and F4 visas (i.e., siblings of United States citizens). The court rejected plaintiffs' request to include all family- and employment-based beneficiaries as well as aged-out derivative beneficiaries of all original petitions, and also denied defendants' request to limit any class to the Ninth Circuit.

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■ Despite Approval of Initial Application and New Evidence in Motion to Reopen, Central District of California Affirms Denial of Visa Petition Based on Lack of Managerial or Executive Duties and Foreign Ownership and Control

In *Tri-V's Homes, Inc. v. DHS*, 08-cv-6954 (C.D. Cal. July 29, 2009) (*Klausner*, J.), Judge Klausner ruled it was not an abuse of discretion for USCIS to deny a managerial visa where the applicant did not provide sufficient evidence that the beneficiary's duties would be managerial or executive. Plaintiffs also failed to establish a qualifying relationship with the foreign company because more than stock certificates and bank statements are needed for ownership and control.

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■ Northern District of California Grants Defendants' Motion to Dismiss Counts of Complaint Attacking DHS Detainer Regulation

In *Committee for Immigrant Rights of Sonoma County et al. v. County of Sonoma, ICE, et al.*, 08-cv-4220 (N.D. Cal. July 31, 2009) (*Hamilton*, J.), Judge Hamilton partly granted a motion to dismiss an action presenting a facial challenge to the regulation that authorizes ICE to issue detainers to local law enforcement agencies to maintain custody of illegal aliens. Plaintiffs are three aliens and, in a representative capacity, the Com-

mittee for Immigrant Rights of Sonoma County. Among seventeen other causes of action – including *Bivens* claims and state law tort claims – the complaint alleges that the detainer regulation is *ultra vires* because it is unauthorized by the Immigration and Nationality Act.

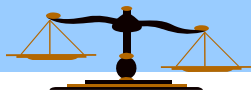
The court dismissed, with prejudice, plaintiffs' *ultra vires* and improper promulgation claims. Terming the entirety of the complaint "vague and difficult to decipher," the court also dismissed, with leave to amend, *Bivens* and other claims against ICE and its agents, and it granted the county defendants' motion for a more definite statement.

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■ Southern District of Texas Approves Settlement in Class Action Challenging Passport Application Closures Where Birth Certificates Were Registered By Midwives

In *Castelan v. Clinton*, No. CA M-08-057 (S.D. Tex. Aug. 14, 2009), Judge Randy Crane issued a judgment and entered final approval of the *Castelano* class action settlement following a fairness hearing. The settlement provides for fee-free re-adjudication and implements a set of revised procedures for adjudicating passport applications from those applicants whose previous passport applications were administratively closed where they failed to establish that they were born in the United States, where the U.S. birth certificate was filed by a midwife, and where the Department of State had reason to believe that the midwife was engaged in fraudulent birth registrations.

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Summaries Of Recent Federal Court Decisions

■ Eastern District of Texas Concludes That State Department Properly Denied Passport to Alien With Birth Certificate Registered By Midwife

In *Escalante v. Clinton*, 08-cv-00096-TH (E.D. Tex. Aug. 19, 2009) (Heartfield, J.), the Eastern District of Texas District Court issued a judgment following a bench trial, finding that an alien failed to prove he is a United States citizen and, thus, the State Department should not be compelled to issue him a passport.

The court concluded that the only plausible location of the alien's 1966 birth was proffered by the State Department, which contended that the U.S. birth certificate was fraudulently filed by a midwife after his birth in Mexico. The midwife and her daughter were convicted of filing numerous fraudulent birth documents, and the now-deceased daughter subsequently said in a 1971 affidavit that his birth certificate was fraudulently filed by her mother. The affidavit was admitted under the "ancient document" hearsay exception. It was corroborated by a Mexican birth registration and baptismal certificate, and by the alien's 1984 confession of events while detained at the border.

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■ Western District of Washington Denies Alien's Habeas Petition and Concludes DHS Post-Order Custody Review Process Satisfies Due Process

In *Atanda v. Clark*, 09-cv-157 (Lasnik, J.) (W.D. Wash. July 31, 2009) Judge Lasnik denied petitioner's habeas petition and granted defendants' motion to dismiss with prejudice. Petitioner filed a petition for a writ of habeas corpus, alleging that his detention was unlawful and that he was entitled to a bond hearing. The court held that, because petitioner's current

appeal does not concern his removal order but the denial of his motion to reopen, he is not eligible for a bond hearing before an immigration judge. The court also upheld DHS's post-order custody review process, indicating it satisfies due process.

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■ District of Oregon Grants Government's Motion to Dismiss Employer's Challenge to Denial of Temporary Visa Petition for Lack of Standing

In *Asian/Pacific American Consortium on Substance Abuse v. Dept. of Homeland Security*, 09-cv-132 (Stewart, J.) (D. Or. August 5,

2009), in an unpublished decision, a magistrate judge granted, with prejudice, the government's motion to dismiss the Asian/Pacific American Consortium on Substance Abuse's (APACSA's) challenge to the denial of APACSA's petition for a temporary employment visa. The court concluded that APACSA failed to allege an injury-in-fact because, more than five years after the petition originally was denied, the employee no longer worked for APACSA or claimed an intention to return to APACSA. Summary judgment motions regarding the denial of the employee's application for adjustment of status are due September 18, 2009.

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NEWS FROM USCIS

Alejandro Mayorkas New USCIS Director

Alejandro Mayorkas has been sworn as the new Director of U.S. Citizenship and Immigration Services (USCIS).

Mr. Mayorkas is a former United States Attorney for the Central District of California, and most recently was a partner in the law firm of O'Melveny and Myers. He holds a J.D. from Loyola Law School and a B.A. from the University of California at Berkeley. Last year, he was named one of the 50 Most Influential Minority Lawyers in America by the National Law Journal.

Mr. Mayorkas, a Cuban immigrant to the United States, said at the swearing ceremony that "my family, like millions of others, came to this country to pursue our dreams in a land of liberty and opportunity. I am committed to administering our country's immigration and naturalization laws efficiently and with fairness, honesty, and integrity."

New E-Verify Federal Contractor Rule

USCIS is reminding federal contractors and subcontractors that they may be required to use the E-Verify system to verify their employees' eligibility to work in the United States if their contract includes the Federal Acquisition Regulation (FAR) E-Verify clause.

Companies awarded a contract with the E-Verify clause on or after September 8, 2009, will be required to enroll in E-Verify within 30 days of the contract award date. With certain exceptions, E-Verify must be used to confirm that all new hires, whether employed on a federal contract or not, and existing employees directly working on these contracts are legally authorized to work in the United States.

More information on the program is available on the E-Verify Web site at www.dhs.gov/e-verify.

INSIDE EOIR

The Attorney General has appointed **John H. Guendelsberger** as a new member of the BIA.

Mr. Guendelsberger has served as senior counsel to the Board Chairman since October 2003. During this time, from May 2007 to July 2009, he served as a temporary board member. He previously served as a board member from September 1995 to October 2003. From 1980 to 1995, he was a professor of law at Ohio Northern University College of Law.

He received his juris doctorate from Ohio State University College of Law in 1977. Mr. Guendelsberger also earned a number of advanced degrees in law including a master of laws degree and a doctor of science of law degree from Columbia University School of Law, and a diploma of advanced studies from the University of Paris (Pantheon-Sorbonne).

Robin M. Stutman has been appointed as General Counsel for EOIR.

From August 1987 to August 2009, she served in the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, DOJ, as a special litigation counsel. From March 1986 to July 1987, she was in private practice. From October 1982 to January 1986, Ms. Stutman worked as a trial attorney in the Federal Programs Branch, Civil Division, DOJ, entering on duty through the Attorney General's Honors Program. From January to May 1981, she served as an intern to the Honorable Joyce Hens Green, U.S. District Court for the District of Columbia.

Ms. Stutman received a bachelor of arts degree from the State University of New York at Stony Brook and a juris doctorate in 1982 from the University of California, Los Angeles, School of Law.

INSIDE OIL

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Lana Lunskaya received her B.A. in Political Economies of Industrial Societies with a minor in Spanish Language and Literature from the University of California, Berkeley. Lana's J.D. is also from UC Berkeley Boalt Hall School of Law, where she participated in two immigration clinics. After graduating from law school, Lana practiced litigation at O'Melveny & Myers as well as Cooley Godward, where she had a diverse practice and handled a number of pro bono immigration matters.

Kimberly E. Wiggans received her J.D. from the University of Kansas and her B.A. and M.A. from Kansas State University. Prior to joining OIL, Kimberly worked at the USCIS Nebraska Service Center, where she was Service Center Counsel. She also worked as a solo practitioner.

Kerry Monaco comes to OIL directly from practicing corporate immigration law at Gibney, Anthony & Flaherty, LLP, a mid-size law firm in New York, NY. Prior to her employment at Gibney, she completed a two-year clerkship in the Immigration Unit of the Staff Attorneys' Office at the U.S. Court of Appeals for the Second Circuit. She earned her J.D. from the University of Pittsburgh School of Law and received B.A. degrees in International Studies and French from Michigan State University.

Contributions to the
Immigration
Litigation Bulletin
Are Welcomed

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15TH ANNUAL IMMIGRATION LAW SEMINAR

The Office of Immigration Litigation will be holding its 15th Annual Immigration Law Seminar on October 5-9, 2009, in Washington, D.C. This is a basic immigration law course and is intended for government attorneys who are new to immigration law.

Contact: Fancesco Isgro, OIL
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INSIDE OIL

OIL welcomes the following new Trial Attorneys.

Pegah Vakili received her B.A. from York University in Toronto, Canada, majoring in Political Science and French Linguistics, and her J.D. from Southwestern Law School in Los Angeles, California. Before attending law school, Pegah worked as a reporter and an assistant editor for a local Los Angeles weekly newspaper and freelanced for other newspapers and magazines. During law school she interned at the United Nations High Commissioner for Refugees where she focused on the Iraqi refugee portfolio.

Lisa M. Damiano received her B.A. from Indiana University, majoring in History and Sociology, and her J.D., magna cum laude, from The Catholic University of America Columbus School of Law. Prior to joining OIL, Lisa worked at two immigration firms in Chicago, initially handling general immigration law including removal defense and immigration litigation in federal court, and later practicing employment-based and business immigration.

Kirsten (Keri) Daeubler joined OIL on August 31st. Keri received her B.A. from Brown University in 2003, with a concentration in Political Science, and her J.D. from The George Washington University Law School in

2006. Following law school, Keri joined the Corporate & Securities group of Reed Smith LLP in Philadelphia, PA, where she worked as an associate prior to joining the DOJ.

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Front: Lisa Damiano, Jessica Cusick, Pegah Vakili
Back: Kerry Monaco, Kirsten (Keri) Daeubler, Kimberly Wiggans, Lana Lunskeya

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

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

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



*“To defend and preserve
the Executive’s
authority to administer the
Immigration and Nationality
laws of the United States”*

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