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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

■ **Asylum**

►Social visibility is a relevant criterion in defining a particular social group (1st Cir.) **7**

►No automatic spousal eligibility in population control cases (3d Cir.) **8**

►"Disfavored group" analysis applies especially to Indo-Fijans seeking asylum (9th Cir.) **11**

■ **Crimes**

►Drug paraphernalia conviction which is expunged under California code is no longer a conviction for immigration purposes (9th Cir.) **12**

►"Maximum penalty possible" under petty offense exception, is the maximum set by statute (1st Cir.) **10**

■ **Jurisdiction**

►Court lacks jurisdiction to review "extreme cruelty" determination for cancellation for battered spouses (7th Cir.) **9**

►Fugitive disentitlement doctrine only applies when alien is a fugitive while appeal is pending (9th Cir.) **10**

►Court lacks jurisdiction to review application of the facts to "exceptional and extremely unusual standard" (9th Cir.) **11**

■ **Visas—Adjustment**

►Conditional permanent resident aliens are not eligible for naturalization (C.D. Cal.) **12**

Inside

The REAL ID Act's Effect On Habeas Review Of Immigration Claims

In the REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) ("REAL ID Act"), Congress made sweeping changes to the jurisdictional statutes in the Immigration and Nationality Act ("INA") in an effort to eliminate district court review of all claims relating to removal proceedings and to channel such claims to the courts of appeals.

How successful has the REAL ID Act been in precluding habeas corpus review of removal-related claims? This article provides an assessment of the litigation relating to this issue. As discussed below, the government has generally prevailed in its jurisdictional arguments. There are, however, a few exceptions where courts have found habeas jurisdiction to remain available over claims implicating removal. Review of the case law since REAL ID reveals that courts are more likely to strictly apply REAL ID Act's bar on habeas review where the alien has an alternative remedy through a petition for review. On the other hand, where no alternative judicial forum is available, courts are more likely to interpret jurisdictional statutes to allow for habeas review as a safety valve. *See INS v. St. Cyr,* 533 U.S. 289, 300 (2001).

Background

In May of 2005, the REAL ID Act was enacted, which included several amendments to the jurisdictional provisions of INA. The primary purpose of these amendments was

(Continued on page 3)

Supreme Court Returns Persecutor Bar Issue To BIA

An alien who has persecuted others on account of a protected ground is ineligible for asylum and withholding under the so called "persecutor bar." INA §§ 101(a)(42), 208 (b)(2)(A)(i), 241(b)(3)(B)(i). The question of whether an alien who was compelled to assist in persecution can be eligible for asylum and withholding was before the Supreme court in ***Negusie v. Holder,*** 2009 WL 509407, __U.S.__ (March 3, 2009). However, the Supreme Court did not decide the issue, holding instead that the Fifth Circuit and the BIA had misapplied *Fedorenko v. United States*, 449 U.S. 490 (1981), and therefore the case had to be remanded to BIA to reinterpret the statute in the first instance free from its original error.

Negusie, a dual national of Eritrea and Ethiopia, was conscripted by the Eritrean Army. When he refused to fight against Ethiopia, his other homeland, the Eritrean Government incarcerated him. When he was released he was forced to work as a prison guard. It is undisputed that the prisoners he guarded were being persecuted on account of a protected ground— *i.e.*, "race, religion, national-

(Continued on page 2)

Persecutor Bar Issue Remanded To BIA

(Continued from page 1)

ity, membership in a particular social group, or political opinion." Negusie carried a gun, guarded the gate to prevent escape, and kept prisoners from taking showers and obtaining fresh air. He also guarded prisoners to make sure they stayed in the sun, which he knew was a form of punishment. He saw at least one man die after being in the sun for more than two hours. Negusie testified that he had not shot at or directly punished any prisoner and that he helped prisoners on various occasions. Petitioner escaped from the prison and hid in a container, which was loaded on board a ship heading to the United States. Once here he applied for asylum and withholding of removal.

"Fedorenko, which addresses a different statute enacted for a different purpose, does not control the BIA's interpretation of the persecutor bar."

The BIA and subsequently the Fifth Circuit held that under *Fedorenko*, the persecutor bar applied to Negusie even if his assistance in the persecution was coerced or otherwise the product of duress. In *Federonko* the Court had held there that voluntariness was not required with respect to another persecutor bar.

The Court, in an opinion delivered by Justice Kennedy, disagreed with the government, and the decisions below, that *Fedorenko* was controlling. The Court explained that the persecutor bar interpreted in *Fedoreko,* involved a different statute, the Displaced persons Act of 1948, and it reflected different principles than those set forth in the Refugee Act of 1980. "*Fedorenko*, which addresses a different statute enacted for a different purpose, does not control the BIA's interpretation of the persecutor bar," said the Court.

The Court declined the invitation of the government to decide the merits of the case and to give *Chevron* deference to the BIA's interpretation because it explained that the BIA's error of reading *Fedorenko* as controlling "prevented it from a full consideration of the statutory question here presented." "The BIA is not bound to apply the *Federonko* rule that motive and intent are irrelevant to the persecutor bar at issues in this case," said the Court. "Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the fist instance by the agency," it added.

Accordingly, the Court applied its *Ventura* remand rule and sent the case back to the BIA to decide the issue in the first instance free from the constraints of *Fedorenko*.

In a concurring opinion, Justice Scalia, joined by Justice Alito, while agreeing that a remand was appropriate, wanted to be sure that the BIA understood that it had "the option of adhering to its decision." "It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute. They deserve to be told clearly whether we are serious about allowing them to exercise that discretion, or are rather firing a warning shot across the bow," wrote Justice Scalia.

Justice Stevens, joined by Justice Breyers, concurred with the majority's interpretation that *Fedronko* did not apply, but disagreed with the majority's view that the issue should be decided by the BIA in the fist instance. "I would provide a definite answer to the question presented and then remand for further proceedings," said Justice Stevens. In his view, the question presented by *Negusie* was a "pure question of statutory construction" similar to the one presented in *Cardoza-Fonseca.* These types of questions, wrote Justice Stevens "remain within the purview of the courts, even when the statute is not entirely clear." In his view, "*Chevron* deference need not be an all-or-nothing venture," in his view.

In a dissenting opinion, Justice Thomas would have affirmed the decision below because "the INA unambiguously precludes any inquiry into whether the persecutor acted voluntarily, *i.e.* free from coercion or duress."

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OLC issues opinion on meaning of "temporary" in new H-2B regs

The Office of Legal Counsel (OLC) released an opinion dated December 18, 2008, regarding the meaning of "temporary" under the new H-2B regulation. *See* 73 *Fed. Reg.* 78,104 (Dec. 19, 2008). OLC provided the opinion to the Secretary of DHS.

According to the opinion, the regulation providing that "temporary" work under the H-2B visa program "[g]enerally . . . will be limited to one year or less, but . . . could last up to 3 years" is based on a permissible reading of INA 101 (a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and is consistent with the 1987 OLC opinion addressing the meaning of "temporary" work under 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

REAL ID Act On Habeas Review Of Immigration Claims

(Continued from page 1)

to eliminate habeas jurisdiction over removal orders and removal-related claims and channel review to the courts of appeals. *See* 8 U.S.C. § 1252(a)(5), (b)(9), as amended by the REAL ID Act. Congress was particularly concerned about aliens raising these types of claims collaterally in district court and thereby circumventing the statutorily prescribed avenue for judicial review.

Specifically, in REAL ID Act § 106(a), Congress enacted new Section 242(a)(5) of the INA, which is entitled "Exclusive Means of Review," and provides that review of removal orders is available only in the courts of appeals through petitions for review, notwithstanding any other provision of law "including section 2241 of title 28, United States Code, or any other habeas corpus provision." Congress also amended 8 U.S.C. § 1252(b)(9) to preclude district court review, including habeas review, over claims "arising from any action taken or proceedings brought to remove an alien . . . ." "In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings." *Aguilar v. U.S. ICE*, 510 F.3d 1, 9 (1st Cir. 2007).

Passage of the REAL ID Act's jurisdictional amendments was a direct response to the Supreme Court's decision *St. Cyr,* 533 U.S. 289, which held that aliens who were barred from raising legal questions through petitions for review could raise such claims in habeas. "In the REAL ID Act, Congress provided precisely what had been lacking in the statutory provisions at issue in *St. Cyr* - a clear statement within the legislation itself explicitly depriving the judiciary of habeas jurisdiction." *Khouzam v. Att'y General of United States*, 549 F.3d 235, 245 (3d Cir. 2008); *see also* H.R. Rep. No. 109-72, at 173-75 (May 3, 2005) (Conf. Rep.), 2005 U.S. Code Cong. & Admin. News 240, 298-300 (legislative history of REAL ID clear that Congress was responding to anomalous result created by *St. Cyr* decision).

In enacting the REAL ID Act, "Congress did not intend to eliminate all district court review of immigration matters.

In enacting these reforms, however, Congress did not intend to eliminate all district court review of immigration matters. For example, the legislative history of the REAL ID Act is clear that Congress did not intend to "'preclude habeas review over challenges to detention that are independent of challenges to removal orders.'" *Hernandez v. Gonzales*, 424 F.3d 42, 42-43 (1st Cir. 2005) (quoting H.R. Cong. Rep. No. 109-72, at *43).

Other immigration-related claims which cannot be raised in removal proceedings, such as a challenge to the non-discretionary denial of a visa petition, continue to be properly raised in district court under the court's federal question jurisdiction and the Administrative Procedures Act ("APA"). *See Ayanbadejo v. Chertoff*, 517 F.3d 273, 277-78 (5th Cir. 2008) (finding that district court had jurisdiction to review non-discretionary denial of I-130 petition). Additionally, Congress has specifically provided for district court jurisdiction over certain immigration matters, such as naturalization. 8 U.S.C. §§ 1421(c), 1447(b).

This article focuses specifically on Congress' efforts to eliminate district court review of *removal-related claims*, and assesses the success of those efforts.

Post-REAL ID Act Litigation

In the litigation following the REAL ID Act, the government has largely been successful in applying the Act's jurisdictional provisions to accomplish Congress' goals. In fact, every court to address the issue has found that district courts lack jurisdiction to review removal orders. *See, e.g., Iasu v. Smith*, 511 F.3d 881, 887 (9th Cir. 2007); *Mohamed v. Gonzales*, 477 F.3d 522, 525-26 (8th Cir. 2007); *Alexandre v. United States Att'y General*, 452 F.3d 1204, 1206 (11th Cir. 2006); *Ishak v. Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005). Courts have further held that the repeal of habeas jurisdiction does not violate the Suspension Clause of the Constitution because there is an adequate and effective remedy available for aliens through the statutorily prescribed petition-for-review process in the courts of appeals. *See, e.g., Khouzam*, *supra*, at 245; *Mohamed*, *supra*, at 526; *Alexandre, supra,* at 1206; *see also Morgan v. Gonzales*, 495 F.3d 1084, 1090 (9th Cir. 2007) (suggesting that appellate court could transfer case to the district court for limited purpose of fact-finding under 28 U.S.C. § 2347(b)(3) where such factual development was not possible in administrative proceeding).

Exceptions to Application of REAL ID's Jurisdictional Provisions

Notwithstanding the courts' dismissal of habeas petitions challenging removal orders , some courts have reasoned that habeas review remains available over certain removal-related claims because those claims are not covered by the language of the REAL ID Act's jurisdic-

(Continued on page 4)

REAL ID Act effect on habeas

(Continued from page 3)
tional bars. Below are three examples of claims arguably implicating removal that courts have found to be cognizable in habeas even after REAL ID.

1. Claims of Deficient Performance of Counsel Where the Alleged Deficient Conduct Occurred Outside of Removal Proceedings.

In some cases, aliens have claimed that their former attorneys provided deficient representation *outside* of their immigration proceedings. The primary example of this is an alien's claim of deficient performance based on counsel's failure to file a timely petition for review in the court of appeals. In *Amarjeet Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), the Ninth Circuit held that habeas jurisdiction remained available for such post-order deficient performance claims because these claims "cannot be construed as seeking judicial review of [a] final order of removal, notwithstanding [the alien's] ultimate goal or desire to overturn that final order of removal." *Id.* at 979. Thus, the court concluded that the REAL ID's jurisdictional-divesting provisions do not apply. The government disagrees with the Ninth Circuit's reasoning that this type of deficient performance claim does not challenge a removal order.

Although not explicit in its opinion, a significant concern of the court was whether an alien could raise this type of claim with the BIA, and through a petition for review directly with the court of appeals. *See Afanwi v. Mukasey*, 526 F.3d 788, 795-96 (4th Cir. 2008) (holding that the Board "does not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals"); *Singh*, *supra* at 979 (expressing uncertainty as to what remedy Singh has with the BIA); *but see Matter of Compean, Bangaly & J-E-C-*, 24 I.&N. Dec. 710 (A.G. 2009) (clarifying that the BIA can consider post-order deficient performance claims). The uncertainly of whether the alien could obtain review with the BIA and ultimately the court of appeals was a significant factor underlying the court's interpretation and application of the REAL ID Act's jurisdictional provisions, and its ultimate finding that habeas review was available. It should be noted that the Attorney General's recent decision in *Compean* finding that the BIA does have jurisdiction over such claims may provide a basis to revisit the habeas issue in the Ninth Circuit. If you are litigating such a claim in a district court in the Ninth Circuit, you can contact Papu Sandhu at OIL (202-616-9357) to obtain further guidance on this issue.

"Another exception where courts have found habeas review is when aliens challenge the *existence* of a removal order rather than the merits of the order."

2. Claims Challenging the Existence of a Removal Order

Another exception where courts have found habeas review is when aliens challenge the *existence* of a removal order rather than the merits of the order. *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006); *Kumarasamy v. Att'y Gen.*, 453 F.3d 169, 172 (3d Cir. 2006).

This issue has usually arisen in the following context: an alien is granted voluntary departure, the time to voluntarily depart passes, and DHS then attempts to remove the alien claiming that the alien never left the country, and thus there is an outstanding order of removal. The alien argues that he or she did leave the country and illegally reentered, and there is thus no immigration order that DHS can execute. The alien's claim is that DHS must first reinstate the prior order or place the alien in a new round of removal proceedings in order to effect remove.

In these circumstances, the Eleventh Circuit reasoned, "the question presented . . . is whether there is a removal order at all, which, . . . is a different question than whether an extant removal order is lawful." *Madu, supra* at 1367. Because the alien did not challenge a final order of removal, the court found that the REAL ID Act's jurisdictional bars did not apply.

The court rejected the government's argument that the district court lacked jurisdiction pursuant to 8 U.S.C. § 1252(b)(9), which precludes district court review, including habeas review, over claims "arising from any action taken or proceedings brought to remove an alien . . . ." The court reached this conclusion even though the alien's petition asked for the court to enjoin his removal. *Id.*

In *Madu*, the alien had no remedy directly with the court of appeals because his time for petitioning for review had long past and, in any event, he was not seeking to challenge the merits of the removal order, but rather was claiming that no such order existed.

Accordingly, if the court had determined that habeas review was unavailable, the alien would have been foreclosed entirely from a judicial forum. It is undeniable that this consideration was a significant factor in the courts' determination that habeas review was available as a safety valve for the alien to bring his claim.

(Continued on page 5)

REAL ID Act effect on habeas review

(Continued from page 4)

3. Claims Wholly Collateral to Removal Proceedings

Some courts have also found that Congress did not intend to exclude from district court review claims that cannot be adjudicated in the context of removal proceedings. In *Aguilar*, 510 F.3d 1, for example, illegal aliens brought suit in district court claiming that DHS violated their statutory and constitutional rights in connection with detaining, and then transferring them following a workplace raid. The First Circuit concluded that the district court had properly dismissed most of the aliens' claims based on the REAL ID Act's jurisdictional provisions, particularly focusing on 8 U.S.C. § 1252(b)(9). *Id.* at 9-19.

"Courts are more likely to find an exception to the REAL ID Act's bar on habeas jurisdiction where they conclude that jurisdiction is unavailable directly in the court of appeals."

The court found, however, that the district court retained jurisdiction over the aliens' claim that ICE's actions violated their Fifth Amendment right as parents to make decisions regarding the care, custody and control of their children. *Id.* at 19. Specifically, the aliens' claimed that their immediate detention, and string of transfers to far away detention facilities without the opportunity to make arrangements for their families violated due process. *Id.*

While the court ultimately rejected the claim on the merits, it found that this was not the type of claim that Congress intended to preclude from district court review. *Id.* at 19-20. The court found that the link between this claim and the aliens' removal was "tenuous." *Id.* ("the right to family integrity is only marginally related to removal, the harm from continuing disruption may be irretrievable, and the issue is not one with which the immigration court ordinarily would grapple"); *id.* ("The issue of family integrity is completely irrelevant to the mine-run of issues that will be litigated in removal proceedings, and the claims have no bearing on the aliens' immigration status."). Therefore, the court found that the jurisdictional bar at 8 U.S.C. § 1252(b)(9) did not apply.

As in other instances described above, the court's conclusion was driven by the fact that the aliens had no other forum to present this claim. *Id.* ("To cinch matters, the petitioners have no other means within their control through which to protect or enforce the asserted right."). The court reasoned that because this type of claim could not be adequately adjudicated in removal proceedings, and therefore could not be raised in a petition for review, precluding district court review "would sound the death knell for meaningful judicial review." *Id.*

In contrast to the examples above, where a court concludes that judicial review is available over the alien's claim through a petition for review in the courts of appeals, the court is more likely to strictly apply the limitations on habeas review. In *Khouzam*, 549 F.3d 235, for example, the Third Circuit held that an alien's challenge to the Attorney General's termination of deferral of removal based on diplomatic assurances constituted a removal order that was reviewable through a petition for review under 8 U.S.C. § 1252(a). *Id.* at 245-48. The court then reasoned that because the alien had an avenue for review in the court of appeals, its application of the REAL ID's jurisdictional provisions to preclude habeas review of the alien's claim raised no Suspension Clause concerns. *Id.* at 245 ("Because . . . Khouzam's petition for review affords an alternative avenue for review, we need not consider whether the provision violates the Suspension Clause."); *see also Aguilar*, 510 F.3d at 18 (holding that the district lacked jurisdiction to review petitioners' procedural due process claims because they "'arise from' removal in that they are part of the fabric of the removal proceedings themselves.").

Conclusion

Courts are more likely to find an exception to the REAL ID Act's bar on habeas jurisdiction where they conclude that jurisdiction is unavailable directly in the court of appeals through a petition for review. Accordingly, in litigating REAL ID Act jurisdictional issues, attorneys should not only vigorously argue the applicability of the jurisdictional bars to removal-related claims raised in district court, but should also explain what alternative remedies are available to the alien, *i.e.*, filing a petition for review in the court of appeals or a motion to reopen before the Board of Immigration Appeals.

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Contributions to the Immigration Litigation Bulletin

Are Welcomed!

FURTHER REVIEW PENDING: Update on Cases & Issues

GMC - Family Unity Waiver

On December 18, 2008, the government argued before the en banc Ninth Circuit ***Sanchez v. Mukasey***, 521 F.3d 1106 (9th Cir. 2008). The issue in the case is whether the "family unity" alien-smuggling waiver of inadmissibility under INA § 212(d)(11), 8 U.S.C. § 1182(d)(11) may also be applied to waive the good moral character requirement for cancellation of removal, where the alien would otherwise be barred from cancellation because of alien smuggling involving a spouse, child, or parent.

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Stay of Removal — Standard

On November 25, 2008, the Supreme Court granted petitioner's application for a stay of removal in ***Nken v. Mukasey***, __S. Ct.__, No. 08 -681. The question before the Court is "whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in INA § 242 (f)(2), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief." Acting Solicitor General Edwin Kneedler argued the case on January 21, 2009.

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EAJA – Prevailing Party

On November 14, 2008, the First Circuit granted granted the government's petition for rehearing en banc in ***Aronov v. Chertoff***, 536 F.3d 30 (1st Cir. 2008), and vacated its panel opinion. The question before the court is whether an alien who filed suit under INA § 336 (b), 8 U.S.C. § 1447(b) to compel Citizenship and Immigration Services ("CIS") to adjudicate his application for naturalization is entitled to EAJA fees, where the district court merely entered a brief electronic order granting, the parties' joint motion for remand and where the delay in adjudicating the application was the result of CIS's practice of awaiting the results of an FBI name check. The case was argued on January 7, 2009.

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Fourth Amendment Exclusionary Rule

On October 22, 2008, the government filed a petition for rehearing en banc in ***Lopez-Rodriguez v. Mukasey***, 536 F.3d 1012 (9th Cir. 2008). The question presented is: Must the exclusionary rule be applied in removal proceedings if the agents committed violations of the 4th Amendment deliberately or by conduct that a reasonable person should have known would violate the Constitution? The court has ordered the petitioner to respond.

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Aggravated Felony—$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). 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? (The statute of conviction did not require proof of amount of loss.) To be used as grounds of removal, must criminal convictions include conviction of each element specified in the removal ground (e.g., here, the $10,000 loss element)?

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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 question presented is 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?

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Aggravated Felony—Conspiracy

The Supreme Court has granted a petition for certiorari filed in ***Nijhawan v. Mukasey***, __U.S.__, 2009 WL 104300 (U.S. Jan. 16, 2009). The question presented is presented is "whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,' 8 U.S.C. § 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million."

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds That "Maximum Penalty Possible" Is The Maximum Set By Statute

In ***Mejia-Rodriguez v. Holder***, __F.3d__, 2009 WL 456386 (1st Cir. February 25, 2009) (*Lynch*, Selya, and Boudin), the First Circuit held that the term "maximum penalty possible," as used in the "petty offense exception," 8 U.S.C. § 1182 (a)(2)(A)(i)(I), refers to the statutory maximum, not the maximum suggested by the sentencing guidelines. The court also rejected an equal protection challenge to 8 U.S.C. § 1101(a)(13)(C)(v), which rendered the alien an "arriving alien" by virtue of his conviction, holding that the alien was not similarly situated to convicted aliens who never departed the United States. Finally, the court held that the alien failed to exhaust an argument that he was eligible for a waiver under 8 U.S.C. § 1182(h).

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First Circuit Holds Social Visibility To Be A Relevant Criterion In Defining A Particular Social Group

In ***Scatambuli v. Holder***, __F.3d__, 2009 WL 4924065 (1st Cir. February 25, 2009) (*Lynch*, Selya, Boudin), the First Circuit held that the BIA properly determined that petitioners, a Brazilian couple, who sought asylum for their claimed fear of persecution as "government informants" did not have the requisite social visibility to qualify as a particular social group. The principal petitioner claimed that during his detention by DHS he provided information to a Special Agent regarding the individual who had provided them with fraudulent visas. The IJ denied asylum finding that the only people who know that petitioner had become an informant were family members and possibly their Brazilian contact. On appeal the BIA affirmed, finding that under the social visibility test, informants against a Brazilian smuggling ring are not a particular social group.

In affirming the ruling below, the court found that the petitioners' fear were based on their personal interactions with two individuals, and "[t]he INA is not intended to protect aliens from violence based on personal animosity." The BIA also properly concluded that the petitioner provided insufficient evidence that they would suffer mistreatment by the Brazilian police based on their informant activities in the United States.

"The INA is not intended to protect aliens from violence based on personal animosity."

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SECOND CIRCUIT

Second Circuit Remands For A Precedential Decision On The Designation Of An Additional Country Of Removal

In ***Mendis v. Filip***, 554 F.3d 335 (8th Cir. January 30, 2009) (Jacobs, Miner, *Sotomayor*), the Second Circuit held that the decision issued by the BIA was inappropriate for appellate review because it did not sufficiently explain why it designated the United Kingdom as a country of removal for a Sri Lankan national.

The petitioner, a citizen of Sri Lanka, entered the United States in July 2002 on a tourist visa. When his visa expired, petitioner failed to depart. DHS placed petitioner in removal proceedings and he applied for asylum, withholding, and CAT protection. The IJ denied asylum because petitioner filed his application after the one-year statutory deadline, and CAT protection. However, the IJ granted withholding to Sri Lanka and ordered petitioner removed to the United Kingdom, "as that is the country of the respondent's last transit to the United States." On appeal to the BIA, petitioner challenged the designation of the UK as the country of removal. The BIA affirmed the IJ order, observing that petitioner had stopped in London, while en route to the United States.

Before the Second Circuit, the government argued that DHS had the authority to remove petitioner to the UK under either 8 U.S.C. § 1231(b)(2)(E)(i) (designating the "country from which the alien was admitted to the United States") or § 1231(b)(2)(E)(ii) (designating the "country in which is located the foreign port from which the alien left for the United States"). The court noted that neither the government nor petitioner had cited to any case or BIA precedential opinions supporting their interpretations. Accordingly, the court remanded the case to the BIA so that it may issue a precedential opinion identifying the statutory basis for the designation of a country of removal and give reasons for its statutory interpretation of 8 U.S.C. § 1231(b)(2)(E).

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Second Circuit Holds That The IJ's Adverse Credibility Findings Were Improper And That The Petitioner's Statement Should Have Been Suppressed

In ***Singh v. Mukasey***, __F.3d__, 2009 WL 129913 (2d Cir. January 21, 2009) (Kearse, Sack, *Kelly*), the

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

Second Circuit held that the government failed to demonstrate that petitioner knowingly assisted, abetted, or aided another alien to try to enter the United States.

The court determined that, under the totality of the circumstances, the IJ's adverse credibility determination regarding the alien's testimony was improper. The court also concluded that the alien's signed statement, made to border officials, should have been suppressed due to its unreliability.

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THIRD CIRCUIT

En Banc Third Circuit Overrules Its Prior Holding And Determines There Is No Automatic Spousal Eligibility For Asylum Based On China's Coercive Population Control Policy

In ***Lin-Zheng v. Attorney General***, __F.3d__, 2009 WL 398257 (Scirica, Chief Judge, Sloviter, *McKee*, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman, Weis, Garth) (3d Cir. February 19, 2009)(*en banc*), the Third Circuit held that there is no per se asylum eligibility under INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), for spouses of persons forcibly sterilized or aborted. The Third Circuit reversed its prior ruling in *Sun Wen Chen v. Attorney General*, 491 F.3d 100 (3d Cir. 2007), where it had upheld the BIA's decision in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). *Matter of C-Y-Z-* and its progeny were overruled by the Attorney General in *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008). However, the Third Circuit found *J-S-* "not relevant" to its analysis.

The *en banc* court concluded that the plain language of the statute was "clear and unambiguous" that Congress did not intend to extend refugee status to anyone other than the individual who had either been forced to submit to an involuntary abortion or sterilization, had been persecuted for failure or refusal to undergo such a procedure, or had a well-founded fear of that occurring in the future. "Had Congress wished to extend protection to that person's spouse, it could easily have defined 'refugee' to include the person persecuted as well as his or her spouse," said the court.

"There is nothing constitutionally special about immigration judges; they are wholly a creature of statute."

The court noted that spouses of individuals subjected to coercive family planning remained eligible for derivative asylum under INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A), or for relief in their own right under § 101(a)(42), provided that they qualified as a "refugee" based upon their own persecution. Accordingly, the court denied the petition, noting that this was not a case where the applicant had testified credibly about "harassment by family planning authorities."

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Third Circuit Upholds Reinstatement Regulations But Remands To ICE For Further Fact-Finding

In ***Ponta-Garcia v. Attorney General,*** __F.3d__, 2009 WL 415560 (3d Cir. February 20, 2009) (Sloviter, *Barry*, Siler), the Third Circuit held that the reinstatement regulations were a reasonable construction of 8 U.S.C. § 1231(a)(5).

The petitioner, a citizen of Portugal, first entered the United States in 1978, at age nine, as an LPR. He then left with his family for Bermuda where he remained until 1983 when he returned to the U.S. as a visitor. In 1987, an IJ found petitioner and his family deportable as overstays and ordered their voluntary departure by July 31, 1987. Petitioner and his family did not depart, but claimed that the order of removal was judicially invalidated. In 1990, petitioner applied for a new green card and his application was granted in early 1991. In 1992 petitioner went to Canada and reentered the U.S. using his green card. In April 2007, DHS reinstated the 1987 order of removal on the basis that petitioner had voluntarily departed to Canada under a removal order and then reentered the U.S. illegally.

The Seventh Circuit first rejected petitioner's contention that 8 C.F.R. § 241.8(a), the regulation implementing the reinstatement statute was unreasonable because it did not provide for a hearing before an immigration judge. Second, the court held that the regulation did not violate due process because "the delegation of authority to immigration officers, as opposed to immigration judges, is not of constitutional import." Indeed, "there is nothing constitutionally special about immigration judges; they are wholly a creature of statute," said the court. Moreover, "the regulation does, in fact, provide more than just minimal procedural protection."

Finally, on the merits, the court held that petitioner had raised concerns as to the validity of his reinstatement order. "Where the alien claims that he contested the bases for reinstatement and offered some support for why he may be correct, the regulation requires that he immigration officer 'consider [the alien's] evidence' and 'attempt to verify an alien's claim," said the court. Accordingly, the court remanded the case to ICE for further fact-finding with respect to those claims, on the assumption that petitioner raised such claims

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)
to ICE during the original reinstatement proceeding.

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SEVENTH CIRCUIT

Seventh Circuit Holds That The BIA's Decision Lacked A Reasoned Analysis Because It Did Not Address The IJ's Adverse Credibility Determination

In ***Kadia v. Holder***, __F.3d__, 2009 WL 414674 (Manion, Wood, *Tinder*) (7th Cir. February 20, 2009), the Seventh Circuit held that the BIA's conclusion that it did not need to address the IJ's adverse credibility determination was inconsistent with its finding that the alien failed to establish persecution on account of a protected ground.

The petitioner, a citizen from Cameroon and a police officer, claimed that she had suffered persecution by the Cameroon anti-gang police who believed she held subversive political opinions. She testified that the police told her she was a spy and was going to America to give away their country's military secrets. They also mentioned to a tribal chieftaincy problem between her uncle and her brother. She said that she was locked in a room for eighteen days, given only bread, bananas, and water. During that time petitioner testified that she was beaten and raped.

The IJ did not find petitioner's story "entirely credible." Alternatively, the IJ denied asylum because petitioner had not shown that she had been persecuted on account of a protected ground. The BIA adopted and affirmed the IJ decision and added that petitioner had failed to meet her burden because the evidence did not show that her persecution would be on account of a protected ground, The BIA also indicated that it did not need to address the credibility finding.

The Seventh Circuit found that the BIA's order was insufficient "because it lacks a reasoned analysis." "The BIA's conclusion that it need not address the IJ's credibility determination cannot be squared with its finding that [petitioner] failed to establish persecution on account of a protected ground," said the court. The court reasoned that if petitioner's story is credited, her alleged detention and abuse by Cameroon anti-gang police who believed she held subversive political opinions appears to constitute past persecution on account of an imputed political opinion. Thus, the court ruled that the BIA could not have found that the alien failed to show a nexus to a protected ground without at least implicitly adopting the adverse credibility determination. Accordingly, the court remanded the case to the BIA for clarification of the reasons for its decision.

"The BIA's conclusion that it need not address the IJ's credibility determination cannot be squared with its finding that [petitioner] failed to establish persecution on account of a protected ground."

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Seventh Circuit Holds That It Lacks Jurisdiction To Review The BIA's Determination That The Alien Failed To Establish "Extreme Cruelty"

In ***Stepanovic v. Filip***, 554 F.3d 673 (Bauer, *Kanne*, Williams) (7th Cir. 2009), the Seventh Circuit held that it lacked jurisdiction to review the agency's determination that the petitioner did not establish that he was subjected to extreme cruelty for purposes of cancellation of removal under the special rule for battered spouses. The court concluded that such a determination is discretionary because an IJ must "determine the facts of a particular case, make a judgment call as to whether those facts constitute cruelty, and, if so, whether the cruelty rises to such a level that it can rightly be described as extreme." The court ruled that petitioner's attempt to challenge the BIA's observation about his failure to submit medical documentation was not a question of law.

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Seventh Circuit Holds That It Lacks Jurisdiction To Review The IJ's Determination That The Asylum Application Was Untimely Filed

In ***Khan v. Filip***, 554 F.3d 681 (7th Cir. 2009) (*Sykes*, Bauer; Williams *recused*) , the Seventh Circuit held that it lacked jurisdiction to review the IJ's discretionary determination regarding the untimeliness of an asylum application, expressly rejecting the Ninth Circuit's approach in *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007).

The petitioner, a citizen of Pakistan, entered the United States as a visitor with his family in 1998. He failed to depart when the visa expired and in 2003 applied for asylum, withholding, and protection under CAT. The IJ denied asylum based on failure to timely file, and denied withholding because petitioner failed to show he had suffered politically motivated persecution as a result of his membership and subsequent resignation from the Mohajir Quami Movement (MQM), and a clear probability of persecution if removed to Pakistan. The BIA affirmed that decision and also subsequently denied petitioner's motion to reopen.

The court preliminarily declined on jurisdictional grounds to consider the issue of timeliness of the asylum application, rejecting the Ninth Circuit's view in *Ramadan*. On the merits, the court also concluded that the treatment suffered by the petitioner at the hands of the MQM movement

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

in Pakistan was not on account of a protected ground. The court explained that the record suggested that the MQM was motivated more by financial gain rather than political philosophy and that it demanded money from everyone including those who had joined the organization.

The court also found that the BIA appropriately denied a motion to reopen where the underlying "new" evidence could have been obtained prior to petitioner's hearing and was repetitive of evidence already in the record.

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EIGHTH CIRCUIT

Eighth Circuit Remands For The BIA To Determine Whether Changed Country Conditions In Lebanon Warrant Reopening

In ***Habchy v. Filip,*** __F.3d__, 2009 WL 160953 (8th Cir. January 26, 2009) (Riley, Bright, *Melloy*), the Eighth Circuit held that the BIA abused its discretion when it denied petitioner's motion to reopen without having considered and addressed his claim of changed country conditions in Lebanon as it related to his particular claim of political persecution. The court explained that, while the BIA considered the evidence of a 2006 summer conflict in Lebanon between Israeli and Hizballah forces in relation to petitioner's religious persecution claim, it did not consider this evidence with respect to his claim of persecution on account of his political opinion.

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Eighth Circuit Rejects Asylum Applicant's FGM and HIV Social Group Claims

In ***Manani v. Filip***, 552 F.3d 894 (Wollman, Smith, *Gruender*) (8th Cir. 2009), the Eighth Circuit held that substantial evidence supported the BIA's denial of restriction on removal (withholding) based on petitioner's claimed membership in two social groups: (1) Kenyan Mkisii widows opposed to wife inheritance and to the performance of FGM on their daughters, and (2) Kenyans who are HIV-positive.

The petitioner entered the United States in 2001 as a visitor and did not depart when her visa expired. In 2004 she filed an affirmative application for asylum and when it was not granted because it was untimely, she was placed in removal proceedings.

The fugitive disentitlement doctrine has been applied to the immigration context when an alien has fled custody and cannot be located while the appeal is pending before the court.

The IJ denied petitioner's asylum application as untimely filed, and in the alternative as a matter of discretion because she had submitted a fraudulent document. The IJ also denied withholding, finding that petitioner had exaggerated her fear of future harm. The BIA affirmed that decision further explaining that petitioner had not met her burden of showing past persecution or clear probability of persecution based on her status as a Kenyan widow opposed to wife inheritance and to the performance of FGM on her daughters.

In dismissing the petition, the court explained that petitioner was able to avoid wife inheritance for nearly two years, and that her daughters were able to avoid FGM. The court also found that the petitioner also failed to show that it was more likely than not that she would be persecuted based on her HIV-positive status because treatment is available in Kenya, and any inadequacies in the health care system did not result from an effort to persecute HIV-positive persons.

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NINTH CIRCUIT

Ninth Circuit Holds That Fugitive Disentitlement Doctrine Applies Only When Alien Is A Fugitive During the Pendency Of The Appeal

In ***Sun v. Mukasey***, __F.3d__, 2009 WL 292561 (9th Cir. February 9, 2009) (Schroeder, Nelson, Reinhardt), the Ninth Circuit held that the fugitive disentitlement doctrine could not be applied because petitioner's whereabouts were known to her counsel, DHS, and the court during the pendency of her petition for review.

The petitioner, a citizen of China and a battered spouse, was denied asylum in 2004. She subsequently sought to reopen her case before the BIA on the basis of her successful application to qualify for adjustment under VAWA. However, the motion was denied because it was not filed within the year as provided under INA § 240 (c)(7)(C)(iv)(III), 8 U.S.C. § 1229a(c)(7)(C)(iv)(III). The BIA also found that petitioner's claim of ineffective assistance counsel fell short under *Matter of Lozada*. The BIA also denied petitioner's motion for reconsideration.

Before the Ninth Circuit, the government argued that petitioner's case should not be heard under the fugitive disentitlement doctrine because she did not report for removal in August 2004. The court found that historically the doctrine has been applied to convicted criminals who flee during the pendency of their appeals. The court noted that it has applied the doctrine to the immigration context when an alien has fled custody and cannot be located while the appeal is pending before the court. Other courts of appeals have applied the doctrine under similar circumstances. However, "no

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

court has ever applied the doctrine to an alien whose whereabouts are known and who has not fled from custody," said the court. Here, given the historic basis for the doctrine, the court held that petitioner was not a fugitive because counsel, DHS, and the court knew her whereabouts and therefore the doctrine of fugitive disentitlement did not apply to her case.

The court then held that it had jurisdiction over the denial of the motion to reopen because the BIA's determination that petitioner had failed to provide sufficient justification for reopening presented a mixed question of fact and law rather than a discretionary determination.

On the merits, the Ninth Circuit held that it was not necessary to reach the ineffective assistance of counsel issue because the BIA in denying relief on the alternative ground of equitable tolling, made an erroneous factual assumption, namely that petitioner had received her VAWA interview notice in 2005 and not on January 26, 2006. The court found that petitioner acted with "admirable diligence" because new counsel filed the motion to reopen in February 2006.

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Ninth Circuit Remands For Determination Of Whether Past Harm Suffered By Asylum Applicant On Account Of His Race Rose To The Level Of Persecution

In ***Sinha v. Holder***, __F.3d__, 2009 WL 311075 (9th Cir. February 10, 2009) (Tashima, *Berzon*, Smith), the Ninth Circuit held that the IJ and the BIA erred by concluding that the asylum applicant failed to establish a causal connection between the harm he suffered and racial animus.

The petitioner and his wife, ethnic Indians and citizens of Fiji, entered the U.S. as visitors and while on that status, affirmatively applied for asylum. That request was not granted and their case was referred to immigration court. The petitioners testified to a number of incidents they had personally experienced, as well as their families, when they were attacked and harassed by native Fijians. The IJ denied asylum finding that the incidents were the result of random violence and not on account of a particular protected ground. The BIA adopted and affirmed the IJ's decision and also subsequently denied petitioners' motion to reopen.

"We have repeatedly applied what has come to be called 'disfavored group' analysis in cases involving, among other groups, Indo-Fijian petitioners."

In finding "unsupportable" the IJ's conclusion that petitioners were the subjects of "random violence," the noted in particular that the fact that some of the attackers were motivated to steal petitioners' money did not "undercut the role that racial animus placed in their motivation." "In a pre-REAL ID case such as this one," said the court, "so long as the petitioner shows that his attackers were motivated, at least in part, by a protected ground, that is sufficient to establish the nexus requirement." Moreover, the court also found that "where members of an ethnic majority view an ethnic minority as 'economically powerful,' and where that perceived economic inequality serves a 'justification' for acts of hatred or violence against the minority, their acts may be cognizable as a persecution 'on account' of race under the INA."

The court further held that existence of random violent acts against all Indo-Fijians did not raise the alien's burden of proving nexus. "On the contrary," said the court, "we have repeatedly applied what has come to be called 'disfavored group' analysis in cases involving, among other groups, Indo-Fijian petitioners. We have explained that evidence of the pervasive mistreatment of an oppressed ethnic group makes it easier, not harder, for an individual member of that group to meet the burden of showing that there is a least ten percent chance that he will be individually targeted in the future."

The court remanded the case to the BIA to determine whether the harm the alien experienced rose to the level of past persecution, or, if not, whether he nevertheless possessed a well-founded fear of future persecution.

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Court Lacks Jurisdiction To Review The Application Of The Facts To The "Exceptional and Extremely Unusual Hardship" Standard

In ***Mendez-Castro v. Mukasey***, 552 F.3d 975 (9th Cir. 2009) (Kozinski, *O'Scannlain,* W. Fletcher), the Ninth Circuit held that it lacked jurisdiction to review an IJ's determination that the aliens failed to establish the requisite "exceptional and extremely unusual hardship" to be eligible for cancellation of removal. The court ruled that even a cursory review of the IJ's decision reveals that the he applied the proper legal standard.

The court concluded that because the IJ applied the correct legal standard and because it could not proceed further to examine the application of the facts of the case to the hardship standard, the aliens' claims were "so insubstantial and frivolous" as to preclude its jurisdiction over them. The court also held that it lacked jurisdiction to address the aliens' claim that the IJ's hardship determination was inconsistent with prior agency hardship determinations.

(Continued on page 12)

Summaries Court Decisions

(Continued from page 11)

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Conviction For Possession Of Drug Paraphernalia Expunged Under California Penal Code Is Not A Conviction For Immigration Purposes

In ***Ramirez-Altamirano v. Mukasey***, 554 F.3d 786 (9th Cir. 2009) (*Wardlaw*, Fogel; Ikuta (dissenting)), the Ninth Circuit found that an alien's expungement of his conviction for possession of drug paraphernalia was similar to the expungement of a drug conviction under the Federal First Offenders Act (FFOA). Accordingly, the court held that under the Equal Protection Clause and pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the expunged conviction did not exist for immigration purposes.

The petitioner, who first entered illegally from Mexico in 1985 and last in 2000, was convicted in 1993 of misdemeanor possession of drug paraphernalia under California law. During the pendency of his removal proceedings, petitioner obtained expungement of that conviction and applied for cancellation of removal. Petitioner argued that under *Lujan-Armendariz* he no longer had a conviction for immigration purposes. The IJ rejected that argument finding that even though the conviction had been set aside, it retained certain consequences, namely the requirement to disclose the conviction under certain circumstances. The IJ also determined that petitioner's reliance on *Lujan-Armendariz* was misplaced because in that case the alien was eligible for relief under the FFOA. Additionally, the IJ determined that the conviction was a "stop-time event" terminating petitioner's accrual of physical presence for purpose of cancellation. Accordingly petitioner's application was denied. The BIA agreed with the IJ's finding on both issues and affirmed the decision.

The Ninth held that because *Lujan-Armendariz* held that the FFOA provides immigration relief for first-time defendant found guilty of drug possession in federal court, "the Equal Protection Clause requires a parallel exception for similarly situated defendants prosecuted in state courts." Therefore, because the petitioner would have qualified for and received expungement of this drug offense under the FFOA had it been persecuted as a federal crime, petitioner no longer had a "conviction." Consequently, petitioner was statutorily eligible for cancellation of removal.

In a dissent, Judge Ikuta disagreed with the majority's application of the Equal Protection Clause to invalidate the distinction between aliens who receive relief under the FFOA and aliens who receive relief under state law. He would have found that there was rational reason for the distinction and upheld the distinction.

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ELEVENTH CIRCUIT

Eleventh Circuit Affirms The Denial Of A Continuance To Await A Visa Petition Where The Alien Lacks An Immediately Available Visa Number

In ***Chacku v. U.S. Att'y Gen.***, __F.3d__, 2008 WL 5550769 (11th Cir. January 29, 2009) (Tjoflat, Marcus, Wilson)(*per curiam*), the Eleventh Circuit determined that the IJ properly denied a continuance request to await the processing of an employment-based visa petition where the alien did not have a visa number immediately available to him. The court held that the relevant date for determining whether a visa was available is the date on which the alien filed his adjustment of status application. Finally, the court concluded that BIA did not abuse its discretion by denying the alien's motion to remand following the visa approval.

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District Courts

Central District Of California Concludes That Conditional Permanent Resident Aliens Are Not Eligible For Naturalization

In ***Abghari v. Gonzales***, __F. Supp.2d__, 2009 WL 297714 (C.D. Cal. February 6, 2009) (*Cooper*), the Central District of California granted the government's motion for summary judgment. The plaintiffs entered the United States in 1997, as conditional permanent residents, on the basis of an employment–based visa, EB-5, as an investor and as the spouse of the investor. In 1999, they applied to have their conditions removed. That application remained unadjudicated during the pendency of the lawsuit.

On February 21, 2003, plaintiffs filed applications for naturalization (N-400). Those applications were pending at the time the plaintiffs sought judicial intervention. The USCIS subsequently denied the applications on the basis that "a person may only be naturalized if the grant of permanent residence was lawful."

The court, agreeing with the USCIS's interpretation, held that, as a matter of law, a conditional permanent resident is not eligible for naturalization. However, noting the plaintiffs' applications to remove their conditions have been pending for more than a decade, the court observed that "USCIS requires strict compliance with the filing deadlines and substantive requirements for the receipt and maintenance of immigration benefits, and USCIS is similarly obliged to comply with the existing statutory requirements for timely adjudication of the applications and petitions submitted to it."

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FBI name check backlogs: checks pending more than six months now completed

U.S. Citizenship and Immigration Services (USCIS) announced on March 4, 2009, that, working in close partnership with the Federal Bureau of Investigation (FBI), the backlog for FBI name checks pending more than six months has been eliminated. This is the fourth milestone met by the agency as part of its joint plan with the FBI to completely eliminate the backlog of pending name checks.

Just 16 months ago, more than 349,000 name checks were pending; of that, nearly 150,000 had been pending for more than six months. All USCIS requests pending for six months or more as of February 28, 2009, have now been responded to by the FBI's National Name Check Program (NNCP).

In April 2008, USCIS and the FBI established milestones prioritizing work based on the age of the pending name check. Priorities included processing all name checks pending more than three years by May 2008 (the FBI had already eliminated all cases pending more than four years); those pending more than two years by July 2008; and those pending more than one year by November 2008.

USCIS and FBI are on schedule to meet the next two goals: all name checks requests pending longer than 90 days to be completed by May 30, 2009 and, by the end of June 2009, the FBI will complete 98 percent of USCIS name check requests within 30 days and process the remaining two percent within three months. USCIS and the FBI will continue to focus on sustaining a rigorous and efficient screening of each name check request.

INSIDE EOIR

Michael C. McGoings was named Acting Chief Immigration Judge in February 2009.

From March 1995 to February 2009, Mr. McGoings served as an Assistant Chief Immigration Judge (ACIJ). From 1994 to 1995, he was an associate general counsel serving as Chief of the Enforcement Legal Program and from 1991 to 1994, he was an associate general counsel for the Employer Sanctions and Civil Document Fraud Legal Program at the former Immigration and Naturalization Service (INS). From 1987 to 1990, he worked as assistant general counsel for the former INS.

Acting Chief Immigration Judge ***Thomas Snow*** administered the oath of office to three new Immigration Judges: ***Thomas W. Janas***, Cleveland Immigration Court; ***John R. O'Malley***, Kansas City Immigration Court; and ***Rene D. Mateo***, Miami Immigration Court.

IJ Thomas Janas is a graduate of the Baldwin-Wallace College and the University of Toledo, Colege of Law. Prior to his appointment he was in private practice.

IJ John O'Malley is a graduate from St. Louis University whe he also received his law degree. Prior to his appointment he served as a circuit judge for the 16th Judicial Circuit of Missouri.

IJ Rene Mateo, is a graduate of the Florida International University and from the University of Miami School of Law. Prior to his appointment, he served as the Deputy Chief counsel with ICE, having served earlier as an Assistant United States Attorney.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

2008 Country Report on Human Rights Practices

On February 29, 2009, Secretary of State Hillary Clinton released the Department of State 2008 Report on Human Rights Practices

In releasing the Report, Secretary Clinton said that "the promotion of human rights is an essential piece of our foreign policy. Not only will we seek to live up to our ideals on American soil, we will pursue greater respect for human rights as we engage other nations and people around the world.

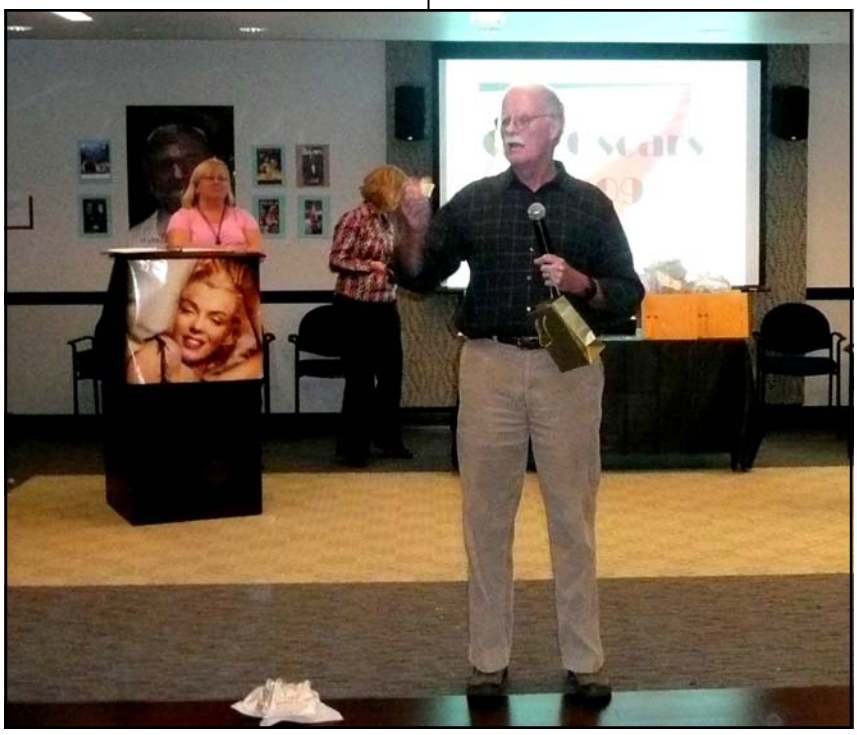
Some of our work will be conducted in government meetings and official dialogues, which is important to advancing this cause. But we will not rely on a single approach to overcome tyranny and subjugation that weaken the human spirit, limit human possibility, and undermine human progress."

The 2008 report is available online at http://www.state.gov/g/drl/rls/hrrpt/2008/index.htm.

INSIDE OIL

On February 20, 2009, the Second Annual OIL Oscar® Party was hosted by The Candaux, McIntyre, and Pettinato Teams. The following winners were lected by secret ballot:

1. Best "War Story" from Work-Related Travel
Sarah Maloney for *Lost Luggage is No Obstacle, Just Wear the Hotel Clerk's Suit to Your Oral Argument*
2. Best Office Design
Ted Hirt, the Taxidermist
3. Best ISO
Nannette Anderson for her *February 10, 2009 ISO (Importance: High)-2d PINK CHAIR ISO*
4. Best Foreign Visitor -
David McConnell *as the Nutty Irish Professor*
5. Best Mustache
Mike Lindemann
6. Best Pick-up Line
Ernie Molina with the Attorney General
7. Best Costume Design
Thom Hussey for Business Attire, Vast Array of White Shirts, Business-casual Attire, Blue-shirt Fridays, Casual Attire, Dungarees & Shower Shoes
8. BEST SUPER HERO
Stacy Paddack for The Spider Bite Scandal
9. Best Actor for her Role of "Second Best Scare of the Secret Service" –the first being when the President and Mrs. Obama got out of the limo during the inaugural parade
Karen Drummond for her performance in "Mrs. Obama's New BFF"
10. Best Actor for his Role as "The Emperor Has No Clothes"
Mark Walters for his February 6, 2009 *ISO-- 9th Cir. brief, Sri Lanka, changed conditions, persecution of Tamils by govt.*



Mary Jane Candaux and Frank Fraser mesmerize the crowd at the Oscar® Party.

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

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

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

Office of Immigration Litigation

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

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