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Immigration Litigation Bulletin

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SUPREME COURT UNANIMOUSLY FINDS BORDER PATROL STOP REASONABLE

In a significant victory for the law enforcement community, the Supreme Court unanimously reversed the Ninth Circuit's findings that a vehicle stop by a Border Patrol Agent had violated the Fourth Amendment. ***United States v. Arvizu***, 2002 WL 46773 (Jan. 15, 2002). The Court rejected the Ninth Circuit's "divide and conquer analysis" to determine the reasonableness of a Border Patrol vehicle stop and reaffirmed the well-established "totality of circumstances" test. "We think that the approach taken by the Court of Appeals here departs sharply from the teachings of [our] cases," said the Court.

The Court rejected the Ninth Circuit's "divide and conquer analysis" to determine the reasonableness of a Border Patrol vehicle stop and reaffirmed the well-established "totality of circumstances" test.

A Border Patrol Agent had stopped Mr. Arvizu while he was driving a minivan on an unpaved road in a remote area of Arizona about 30 miles north of the Mexican border. A search of his vehicle turned up more than 128 pounds of marijuana. Mr. Arvizu was charged with possession with intent to distribute marijuana. At his trial he moved to suppress the marijuana, arguing among other things that the Border Patrol Agent did not have reasonable suspicion to stop the vehicle. After a hearing, the district court weighted a number of factors leading to the stop, and held that the agent had the necessary reasonable suspicion to stop the vehicle.

The Ninth Circuit (per Reinhardt, J.) reversed, holding that fact-specific weighing of the circumstances by the district court introduced "a troubling degree of uncertainty and unpredictability" into the Fourth Amendment analysis. 232 F.3d 1241 (9th Cir. 2000). It found that seven of the factors considered by the district court carried little or no weight in the reasonable-suspicion calculus, and that three other factors, such as the use of minivans by smugglers, were not enough to render the stop permissible.

In reversing the Ninth Circuit, the Supreme Court stated that its decisions "have said repeatedly that [reviewing courts] must look at the 'totality of the circum-

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DOJ LAUNCHES INITIATIVE TO LOCATE AND APPREHEND ALIEN ABSCONDERS

On January 25, 2002, the Deputy Attorney General issued a comprehensive guidance memorandum to the heads of the INS, FBI, U.S. Marshals Service, and U.S. Attorneys, outlining the steps that they should take to implement the Absconder Apprehension Initiative ("the Initiative"). The objective of this Initiative is "to locate, apprehend, interview, and deport a group of alien fugitives known as 'absconders.' These absconders are aliens who, though subject to a final order of removal, have failed to surrender for removal or to otherwise comply with the order."

The INS has determined that there are approximately 314,000 absconders. The Deputy Attorney General directs the law enforcement agencies to focus the initial efforts on absconders "who come from countries in which there has

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SIXTH ANNUAL IMMIGRATION LITIGATION CONFERENCE TO BE HELD MAY 6-10, 2002 WILL FOCUS ON NATIONAL SECURITY ISSUES

The Sixth Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation, will be held on May 6-10 in Scottsdale, Arizona. The theme of this year's conference is "Immigration and National Security: Enforcement and Litigation After September 11th." The program will focus on the consequences of the September 11 attacks and their impact on immigration litigation and legislation. There will also be various panels addressing a

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Highlights Inside

Supreme Court Upholds Border Patrol Stop

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stances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." This process, said the Court, "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" While a mere "hunch" is insufficient to justify a stop, noted the Court, the likelihood of criminal activity need not rise to the level required for probable cause, and "it falls considerably short of satisfying a preponderance of the evidence standard."

The Border Patrol Agent "was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants."

The Court said that the Ninth Circuit's approach "departs sharply from the teachings of these cases." In particular, the Court faulted the Ninth Circuit for evaluating the listed factors in isolation from each other, a process that the Court characterized as a "divide-and-conquer analysis." Such an approach, said the Court, "runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field." The Border Patrol Agent who made the stop here, said the Court, "was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants."

The Court then held that the Border Patrol Agent had reasonable suspicion to believe that Mr. Arvizu was engaged in illegal activity based upon the totality of the circumstances and giving "due weight to the factual inferences drawn by the law enforcement officer and District Court Judge." The Court rejected Mr. Avizu's contention that the facts suggested a family in a minivan on a holiday vacation, stating that "a determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct."

In a concurring opinion, Justice Scalia stated that "deferring to the district court's factual inferences (as opposed to its findings of fact)" is not compatible with the de novo review standard adopted in *Ornelas v. United States*, 517 U.S. 690 (1996).

By Francesco Isgro, OIL

Litigation Guidance on St. Cyr - 212(c) Cases

On January 23, 2002, the Office of the Deputy Attorney General directed OIL attorneys and AUSAs to conform their litigation position with recent unpublished BIA decisions interpreting INA § 212(c) .

OIL attorneys and AUSA's had previously argued that aliens must have had seven years' lawful domicile at the time that they pleaded guilty to qualify for *St. Cyr* - § 212(c) relief. This conflicted with the BIA's recent decisions that aliens who otherwise qualified for INA § 212(c) relief could be considered for such relief so long as they had accrued seven years' lawful domicile at the time that their administrative orders became final.

OIL attorneys and AUSA's are now authorized to argue that aliens who otherwise qualify for § 212(c) relief can be considered for such relief so long as they had accrued seven years' lawful domicile at the time that their administrative orders became final.

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LAWSUITS FILED IN SECURITY CASES

A number of lawsuits have been filed recently in national security immigration cases. Among them are the following:

■The ACLU has filed suit in New Jersey State Court against officials in two counties for their refusal to disclose detainee names and related INS charging information. Plaintiff contends that New Jersey public records laws permit public inspection of such information with respect to anyone in custody in New Jersey – even those held under federal authority. ***ACLU v. County of Hudson***, No. L 463-02 (N.J. Super. Ct.) (filed Jan. 22, 2002).

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■A coalition of lawyers, clergy, and teachers has filed a suit in Los Angeles purportedly on behalf of the Guantanamo detainees claiming, *inter alia*, that the Government has violated their Fifth and Sixth Amendment rights, and deprived them of due process and liberty because "they have not been informed of the nature and cause of the accusations against them and have not been afforded the assistance of counsel." The suit demands that all the detainees be brought to a hearing in Los Angeles. **Coalition of *Clergy v. Bush***, No. CV 02-570 (C.D. CA) (filed Jan. 22, 2002).

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■The Detroit Free Press has filed suit against the Attorney General and other officials, seeking an injunction to permit the press to attend immigration hearings in the matter of Rabih Haddad, and to permit the press access to transcripts of and the documents filed in hearings already held. ***Detroit Free Press v. Ashcroft***, No. 02-70339 (E.D. Michigan) (filed Jan. 29, 2002).

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DISCOVERY IS NOT AUTOMATICALLY AVAILABLE IN HABEAS CORPUS CASES

INTRODUCTION

Discovery is not available in habeas corpus proceedings commenced in district court unless the proponent obtains the court's permission. Therefore, as a litigator you need not respond to discovery demands unless petitioner has obtained a court order permitting discovery.

Normally, OIL litigators and AUSAs should oppose any motion for a court order seeking leave to conduct discovery in a habeas case. Where habeas petitioners are seeking review of decisions of the BIA, government litigators should make the familiar argument that a district court's evaluation of the BIA's decision must be based solely on review of the administrative record. The limitation to "record review" makes discovery inappropriate.

The "record review" argument is not, however, the government litigator's only weapon against unwanted discovery. It can be supplemented with some arguments peculiar to habeas cases that are described below.

The Supreme Court has held that a habeas petitioner, "unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."

For those who are looking for a short argument with citations that can be used to block a discovery demand, everything you will need appears under the heading, "Argument In A Nutshell." For those seeking a more detailed understanding, refer to the "Explanation" section of this article as well.

ARGUMENT IN A NUTSHELL

The Supreme Court has held that a habeas petitioner, "unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Under the All Writs Act, 28 U.S.C. 1651, federal courts have the power to fashion appropriate modes of procedure, including discovery, to dispose of habeas petitions, but the broad discovery provisions of the Federal Rules of Civil Procedure do not apply. *Id.*; *Harris v. Nelson*, 394 U.S. 286, 295 (1969).

Consequently, in the absence of a court order requiring discovery, no litigator is required to respond to a discovery demand made under the Federal Rules of Civil Procedure or otherwise in any habeas corpus proceeding. In the event that a motion for discovery is filed, litigators should generally oppose discovery by presenting, in addition to the "limited to record review" argument, the contention that petitioner is required to show "good cause" for discovery and has not done so. *Bracy v. Gramley*, 520 U.S. at 904.

EXPLANATION

A. The Federal Rules of Civil Procedure - General Inapplicability of Discovery Provisions to Habeas Corpus Proceedings.

The federal rules of civil procedure "are applicable to * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Fed. R. Civ. P. 81(a)(2). Without knowing what is provided in other "statutes of the United States," and to what extent habeas practice has heretofore "conformed to the practice in civil actions," it is unclear whether Rule 81 permits discovery in habeas proceedings.

In *Wilson v. Harris*, 378 F.2d 141, 143 (9th Cir. 1967), *rev'd on other grounds sub nom. Harris v. Nelson*, 394 U.S. 286 (1969), the Ninth Circuit found with respect to discovery that habeas proceedings had not "heretofore conformed to the practice in civil actions" within the meaning of Rule 81(a)(2), because the court was unable to find a single instance in which the discovery procedure was employed prior to September 16, 1938, when the Federal Rules of Civil Procedure became effective. 378 F.2d at 143. It therefore concluded that the discovery procedures set forth in Fed. R. Civ. P. 26-33 are not available in habeas proceedings. The Supreme Court subsequently agreed. *Harris v. Nelson*, 394 U.S. 286, 293 (1969).

In *Wilson v. Weigel*, 387 F.2d 632 (9th Cir. 1967), *cert. denied sub nom. Roberts v. Nelson*, 394 U.S. 961 (1969), the Ninth Circuit reasoned that to "deny criminal discovery at the time of trial only to grant it in post-conviction proceedings seems to us to make little sense." 387 F.2d 632, 634. Like criminal cases, there is no discovery in immigration removal or detention proceedings and it would "make little sense" to permit it for the first time during the judicial review of those proceedings.

The argument that discovery under the Federal Rules of Civil Procedure should be allowed because habeas proceedings are civil rather than criminal proceedings did not persuade either the Ninth Circuit or the Supreme Court, which found that the "civil" label is gross and inexact, and that habeas proceedings are unique. *Harris v. Nelson*, 394 U.S. 286, 293-294 (1969).

B. Federal Rules of Civil Procedure - Specific Inapplicability of Initial Mandatory Disclosure to Habeas Corpus Proceedings.

In addition to the authority cited

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Discovery In Habeas Proceedings

(Continued from page 3)

above in support of the argument that the discovery provisions of the Federal Rules of Civil Procedure are generally inapplicable, there is one additional argument that can be made in opposition to any request for initial mandatory disclosure.

If a petitioner seeks mandatory initial disclosure under Rule 26, litigators can oppose it by citing Fed. R. Civ. P. 26(a)(1)(E). Rule 26(a)(1)(E) specifically exempts from initial disclosure a number of categories of cases, including: (i) an action for review on an administrative record (many immigration habeas cases); (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence (arguably includes some immigration habeas cases, but more likely applies only to "criminal" habeas cases); (iii) an action brought without counsel by a person in custody (many immigration habeas cases); and (vii) a proceeding ancillary to proceedings in other courts (arguably includes all immigration detention habeas cases).

C. Other Rules Dealing With Depositions, Interrogatories, and Document Production In Habeas Cases.

There are other rules governing litigation which deal specifically with interrogatories and depositions in habeas corpus cases. None of these other rules gives aliens the right to conduct discovery absent a court order.

1. 28 U.S.C. 2246.

One such rule appears in a habeas statute dealing with depositions and interrogatories. 28 U.S.C. 2246, entitled "Evidence; depositions; affidavits", provides:

> On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

Despite the references to depositions and interrogatories, this is not a statute authorizing discovery. It refers to depositions only for the purpose of obtaining and preserving evidence, and not for general discovery purposes. *Harris v. Nelson*, 394 U.S. 286, 290 (1969); *Wilson v. Harris*, 378 F.2d 141, 144 (9th Cir. 1967), *rev'd on other grounds sub nom. Harris v. Nelson*, 394 U. S. 286 (1969); *Wilson v. Weigel*, 387 F.2d 632, 635 (9th Cir. 1967), *cert. denied sub nom. Roberts v. Nelson*, 394 U.S. 961 (1969).

No discovery can be obtained without a court order in immigration habeas corpus proceedings.

2. Rule 6(a) of the Rules Governing Section 2254 Cases.

Another relevant habeas rule is Rule 6(a) of the Rules Governing Section 2254 Cases. In 1976, Congress adopted Rules Governing [28 U.S.C.] 2254 Cases. Habeas petitions are brought under 28 U.S.C. 2254 by persons in state, not federal, custody. But the Rules Governing Section 2254 Proceedings are applicable to non-section 2254 habeas cases at the discretion of the court. Rule 1(b), Rules Governing Section 2254 Cases; *Humphreys v. U.S. Parole Commission*, 977 F.2d 595 (10th Cir. 1991)(unpublished opinion, 1991 WL 423974). Therefore, courts may apply these rules to requests for discovery in immigration habeas cases, although they are generally brought under 28 U.S.C. 2241 rather than 2254.

Rule 6 of the Rules Governing 2254 Cases is entitled "Discovery" and provides in part:

> (a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise* * *.

The Rules Governing 2254 Cases were promulgated in response to the Supreme Court's 1969 ruling that the All Writs Act, 28 U.S.C. 1651, gave federal courts the power to fashion appropriate modes of procedure, including discovery, to dispose of habeas petitions, and its recommendation that "the rule-making machinery * * * be invoked to formulate the rules of practice with respect to federal habeas corpus proceedings." *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969). *See also Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Thus, while the Federal Rules of Civil Procedure do not apply to habeas cases by their own force, they can be applied at the discretion of the court for good cause shown. Presumably, under the All Writs Act and Supreme Court precedent, a district court could fashion alternatively its own discovery rules in a specific habeas case that would not necessarily follow the Federal Rules of Civil Procedure.

CONCLUSION

No discovery can be obtained without a court order in immigration habeas corpus proceedings. This remains true whether the proponent asks the Court to invoke Rule 6(a) of the Rules Governing 2254 Cases, demands discovery under the Federal Rules of Civil Procedure, or attempts to invoke any other rule dealing with depositions, interrogatories, and document production requests. Govern-

Discovery in Habeas

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ment litigators in immigration cases should therefore protect the limited resources of the INS and other government agencies and offices from the burden of responding to discovery by refusing to answer it in most habeas cases unless the petitioner first seeks the court's permission to engage in discovery, and in that event litigators should generally argue that discovery is not appropriate at all in immigration cases and, alternatively, that good cause has not been shown in the particular case that is pending.

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T VISA RULE PUBLISHED

On January 31, 2002, the Attorney General published the "T" visa regulation. 67 *Fed. Reg.* 4784. The T visa was created by the Trafficking Victims Protection Act of 2000 (TVPA) to protect women, children, and men who are the victims of human trafficking. The T visa will allow victims of severe forms of trafficking in persons to remain in the United States and assist federal authorities in the investigation and prosecution of human trafficking cases. According to U.S. government estimates, 45,000 to 50,000 women and children are trafficked into the United States annually, and are trapped in modern-day slavery-like situations such as forced prostitution. The T visa is specifically designed for certain human trafficking victims who cooperate with law enforcement against those responsible for their enslavement. The statute allows victims to remain in the United States if it is determined that such victims could suffer, "extreme hardship involving unusual and severe harm" if returned to their home countries. After three years in T status, victims of human trafficking may apply for permanent residency. In addition, subject to some limitations, the regulation allows victims to apply for non-immigrant status for their spouses and children.

ABSCONDER APPREHENSION INITIATIVE

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been Al Qaeda terrorist presence or activity," because "some of them may have information that could assist our campaign against terrorism." The first group to be investigated among these "priority absconders" will be convicted felons.

The Deputy Attorney General outlined the following eight-steps for apprehending and interviewing the priority absconders:

1. Entry of the absconders into the National Crime Information Center database (NCIC);

2. Assignment of the absconders by judicial district, based on the most current address information;

3. Transmission of the relevant portions of each absconder's INS file to the INS Field Office in the assigned district;

4. Assignment of the absconder fugitive investigations to apprehension teams consisting of INS, FBI and other federal agents and, where appropriate, members of the Anti-Terrorism Task Forces (ATTFs);

5. Apprehension of the absconders;

6. Interview of the absconders by the apprehension teams;

7. Entry of the results of the interviews into the database; and,

8. Prosecution or removal of the absconders.

The Deputy Attorney General has designated the INS as the lead agency in all phases of the Initiative. The U.S. Attorneys will be responsible for assigning ATTF members to the apprehension teams and for handling any prosecutions arising out of this Initiative. The FBI Field Offices will actively participate in the apprehension efforts and will assess whether the FBI has an interest in that absconder as "a criminal suspect or as a source of information." The USMS will also play a significant role in the apprehension effort.

"This Initiative is directed at persons who have violated the law by remaining in the country after issuance of a deportation order and, in some cases by committing other criminal offenses."

The memorandum indicates that "every absconder who is located will be apprehended and taken into custody." If the INS is represented on the apprehension team, the absconder would be arrested under INA § 287, 8 U.S.C. 1357 on the basis of a civil warrant of deportation or removal. However, if an INS agent is not the team, the absconder can be arrested on the basis of probable cause that the absconder has committed a federal felony violation of the Failure to Depart provisions under INA § 243, 8 U.S.C. 1253. The probable cause would be based on the existence of a final deportation order and the absconder's presence on American soil.

The Deputy Attorney General has directed the INS to distribute the list of the first group of priority absconders on or before February 1, 2002.

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Ed. Note: The Deputy Attorney General's Memorandum is posted on the OIL web site.

Contributions To The ILB Are Welcomed!

SUMMARIES OF RECENT BIA DECISIONS

Board Finds That Conviction For Possession Of A Firearm By A Felon Is Aggravated Felony

In ***Matter of Vasquez-Muniz***, 23 I&N Dec. 207 (BIA 2002), the *en banc* Board of Immigration Appeals reconsidered on its own motion and overruled its prior decision in *Matter of Vasquez-Muniz*, Interim Decision 3440 (BIA 2000). In its original opinion, the Board had held that a conviction for possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code was not an aggravated felony under section 101(a)(43)(E) of the Immigration and Nationality Act (INA or Act). The Board's decision was based on its finding that the California statute did not include the jurisdictional element of 18 U.S.C. § 922(g)(1), the "affecting interstate or foreign commerce" clause.

The Board noted that the language of section 101(a)(43) was "clear and sufficient to conclude that a violation of the California statute at issue here is an aggravated felony under the Act."

In its new opinion, the Board followed the precedent of the United States Court of Appeals for the Ninth Circuit, decided since the original opinion, that felony possession of a firearm in violation of the California statute was an aggravated felony under section 101(a)(43)(E) of the INA. *United States v. Castillo-Rivera*, 244 F.3d 1020, 1025 (9th Cir.), *cert. denied*, 122 S.Ct. 294 (2001). The Board observed that "the penultimate sentence [of section 101(a)(43)] provides a guide for interpreting the significance of the list of enumerated crimes in subparagraph (e): namely, the crimes specified are aggravated felonies regardless of whether they fall within the jurisdiction of the federal government, a state, or, in certain cases, a foreign country." 23 I&N Dec. at 211. The Board noted that the language of section 101(a)(43) was "clear and sufficient to conclude that a violation of the California statute at issue here is an aggravated felony under the Act." 23 I&N Dec. at 213.

Board Member Holmes filed a concurring opinion. He was persuaded both by the Board's interpretations of the penultimate sentence of section 101 (a)(43) and its reference to section 241 (a)(4)(B)(ii) of the Act, and the fact that section 101(a)(43)(E) would be rendered meaningless unless it is read "without regard to the federal jurisdictional element." 23 I&N Dec. at 215.

There was a concurring and dissenting opinion filed by Board Member Rosenberg, joined by Board Members Miller, Brennan, Espenoza, and Osuna. These Members concurred with the result reached by the majority, but disagreed with the analysis. They would have limited the decision to cases arising in the Ninth Circuit where circuit precedent dictated the result. Board Member Rosenberg noted that "it has not been our practice to simply follow the decision of one circuit court that has overruled our prior precedent." She also stated that "[t]o the extent that the majority relies on the text of section 101(a)(43) of the Act, I believe it has misread the statutory language and, in any event, I would not find the language in question to resolve the substantive question presented here." 23 I&N Dec. at 217.

Four Board Decisions Involving Criminal Aliens Certified To Attorney General

The Attorney General has vacated four recent, unpublished decisions of the Board of Immigration Appeals and referred them to himself under 8 C.F.R. § 3.1(h)(i) (2001). Though the INS had filed motions for *en banc* reconsideration in the cases, the Attorney General ordered that any outstanding motions be held in abeyance, pending his decision.

In each case, the Board panel found that a criminal conviction was either not an aggravated felony or was not a particularly serious crime. In one case that attracted media attention, the alien had been convicted in New York of second degree manslaughter and sentenced to incarceration for a period of two to six years, based on an admission to killing an infant by striking and causing blunt trauma to its head. The Board issued 2 decisions in the case. In its first decision, the BIA found that the conviction was a crime involving moral turpitude, but was not a crime of violence under 18 U.S.C. § 16(b) because there was no "substantial risk that physical force" would be used in the commission of the crime. The BIA remanded the case to the immigration judge.

On remand, the immigration judge "disregarded" the BIA's decision and determined again that the respondent's crime was a crime of violence. The BIA vacated the immigration judge's decision, noting that its first decision was binding on the judge. The BIA reiterated its finding that the alien's conviction was not a crime of violence and further granted her a section 212(h) waiver of inadmissibility and adjustment of status under section INA § 245. The Board weighed the equities of the respondent's lawful permanent resident husband and five young lawful permanent resident children against her criminal conviction and found that she warranted relief as a matter of discretion.

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Summaries Of Recent Federal Court Decisions

ASYLUM

■Second Circuit Remands Asylum Case To BIA For Consideration Of Alien's Motion To Consider Changed Country Conditions In China Since 1993

In ***Yang v. McElroy***, __F.3d__, 2001 WL 1678885 (2d Cir. Jan. 7, 2002) (McLaughlin, Pooler, Sand (by designation) (*per curiam*)), the Second Circuit remanded a Chinese alien's asylum case to the BIA for its consideration of whether the country conditions in China had changed since 1993 when the immigration judge determined that he did not have a well-founded fear of returning there.

"We give due deference to the Board's strict, no tolerance statutory interpretation, that applicants must tell the truth or be removed."

The court held that in asylum cases where there has been a significant lapse of time between the immigration judge's decision and appellate review, the appropriate procedure for addressing an alien's claim that country conditions have changed is to remand to the BIA, recognizing that the BIA is the adjudicative body with primary responsibility and experience in asylum matters.

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■Eleventh Circuit Holds That Alien Filed Frivolous Asylum Application Where He Amended His Materially False Application Prior To His Deportation Hearing

In a case raising an issue of first impression, the Eleventh Circuit affirmed the BIA's denial of asylum finding that the alien had filed a frivolous application under INA § 208(d)(6) and 8 C.F.R. § 208.18. ***Barreto-Claro v. INS***, __F.3d__, 2001 WL 162899 (11th Cir. December 19, 2001) (*Hill*, Kravitch, Barkett). The petitioner, a native of Cuba, traveled to Costa Rica in February 1988. Six months later he took a flight to the United States and presented himself for admission. He was detained by the INS and placed in removal proceedings because he lacked proper documentation. During the removal proceedings, he submitted two asylum applications containing contradictory information regarding his journey from Cuba to the United States. An immigration judge denied the asylum application as frivolous, finding that petitioner had not been sincere, and also denied it on the merits. The BIA affirmed both findings.

The Eleventh Circuit reviewed *de novo* the BIA's statutory interpretation finding that petitioner had filed a frivolous application. Preliminarily, the court agreed with the BIA's interpretation that "a finding of frivolous shall only be made if the IJ or the Board is satisfied that [the applicant] had sufficient opportunity to account for any discrepancies or implausible aspects of his claim for asylum." Here, the court agreed with the BIA's finding that the petitioner failed to account for the discrepancies and that the material fabrications were knowingly made. "We give due deference to the Board's strict, no tolerance statutory interpretation, that applicants must tell the truth or be removed," said the court. Accordingly, it affirmed the BIA's finding that petitioner had filed a frivolous asylum application.

On the merits, the court found that the Cuban government did not persecute the petitioner on account of his falling out of favor with the Communist Party because he was not physically harmed, arrested, or detained, and because doing only menial labor did not deprive him of a means of earning a living.

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■Seventh Circuit Holds That Asylum Applicant Granted Advance Parole Is Subject To Exclusion Upon His Readmission To The United States

In ***Dimenski v. INS***, __ F.3d__, 2001 WL 1620455 (7th Cir. December 19, 2001) (Bauer, Posner, *Easterbrook*), the Seventh Circuit affirmed the BIA's decision to uphold an order of exclusion.

The petitioner entered the United States as a visitor in 1987. He overstayed his visa and, when apprehended by the INS, he sought asylum. While his application was pending, he received advance parole to visit a sick relative. Subsequently, his asylum application was rejected and he did not seek review. The petitioner was initially placed in deportation proceedings. At the INS's request the immigration judge dismissed those proceedings. Petitioner appealed that ruling but the BIA dismissed it because he had not been aggrieved by the termination of the proceedings. Subsequently, the INS instituted exclusion proceedings against the petitioner. Petitioner did not seek any relief and the immigration judge ordered him excluded. The BIA again dismissed his appeal for failure to raise the issue of entitlement to a deportation proceeding in the original action.

Preliminarily, the Seventh Circuit rejected the government's argument that the court lacked jurisdiction because petitioner had not exhausted his administrative remedies. "Failure to make the right argument at the right time before an immigration judge may work a forfeiture," said the court, "but is does not divest this court of jurisdiction when an alien has filed a timely petition to review a final administrative order." The court then found that petitioner was not

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Summaries Of Recent Federal Court Decisions

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entitled to a deportation hearing because his advance parole made him an unadmitted alien subject to exclusion under the prior law. The court deferred to the BIA's interpretation that the adjustment of status regulations under 8 C.F.R. § 245.2(a)(4)(ii), which provide *inter alia* that "No alien granted advance parole and inspected upon return shall be entitled to a deportation hearing," also applied to asylum applicants.

Finally, the court rejected petitioner's argument that he was entitled to a deportation hearing because the form granting advance parole did not advise him of the consequences. The court found the INS was not required to render legal advice in its forms. "Nothing in the immigration statutes requires the INS to give legal advice, let alone to put that advice in a tiny type on forms," observed the court. The court rejected the validity of Ninth Circuit precedents to the contrary, and noted that the Supreme Court rejected that line of reasoning in *West Covina v. Perkins*, 525 U.S. 234 (1999). Any other position would have "astonishing sweep," noting for example that it would be absurd to require the IRS to explain legal remedies in its forms. "Where knowledge of the law is presumed," said the court, "the Constitution permits the government to leave people to their own research."

"Nothing in the immigration statutes requires the INS to give legal advice, let alone to put that advice in a tiny type on forms."

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■Seventh Circuit Holds That Alien's Mistreatment By Yugoslavian Army Constitutes Persecution

In ***Begzatowski v. INS,*** __F.3d__, 2002 WL 27535 (7th Cir. January 11, 2002) (*Ripple*, Coffee, Easterbrook), the Seventh Circuit reversed a BIA's finding that petitioner was ineligible for asylum. The petitioner, an ethnic Albanian, born in the former Yugoslav Republic of Macedonia, claimed that while serving in the Yugoslavian Army he had been persecuted on account of his ethnic background. Specifically, he testified that Albanian soldiers received inadequate facilities and training, and further that Serbian officers would wake the Albanian soldiers in the middle of the night, threaten them, and physically assault them if they did not follow orders. He further testified that the Yugoslavian army did not issue bullets to the Albanian soldiers for use in battle, they were deprived of shovels to dig themselves in and get out of harm's way and that the Albanians were forced to precede the Serbian soldiers into battle.

An IJ denied petitioner's asylum and withholding applications and the BIA, in a split decision, dismissed his appeal. The BIA concluded that petitioner's mistreatment, however unpleasant, did not rise to the level of persecution.

The Seventh Circuit reversed the BIA's finding of no persecution. The court found that the mistreatment endured by the petitioner was "punishment" and "infliction of harm" and thus falling within the court's definition of persecution. The evidence was undisputed, noted the court, that the Yugoslavian government singled out an ethnic group for abuse. Because the BIA had found no past persecution, it had not considered whether the petitioner had a well-founded fear of future persecution. Accordingly, the court remanded for consideration of that issue.

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■Eleventh Circuit Holds That Attorney General's Decision Regarding One-Year Time Limit To File Asylum Application Is Not Subject To Judicial Review

In ***Fahim v. INS***, __F.3d__, 2001 WL 23808 (11th Cir. January 9, 2002) (Tjoflat, Birch, Roney), the Eleventh Circuit in a per curiam decision affirmed the BIA's finding that petitioner's asylum application was untimely and that he failed to prove eligibility for withholding of removal. The petitioner, a citizen of Egypt, entered the United States in 1990 as a student. He stopped attending school in 1996. In 1999, the INS instituted removal proceedings charging him with failure to comply with his student status. During the hearing he sought asylum but the IJ denied the request because it was untimely. The IJ also denied petitioner's application for withholding and Torture Convention relief.

The Eleventh Circuit held that under INA § 208(a)(3), a court lacks jurisdiction to review a determination by the Attorney General that an asylum application was filed out of time, or that an applicant failed to establish extraordinary circumstances, such that the time limit would be waived. The court also held that the petitioner failed to prove that it was more likely than not that he would be persecuted or tortured upon his return to Egypt.

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CRIMES

■Fifth Circuit Finds That A State Conviction For Assault Is An Aggravated Felony .

In ***United States v. Urias Escobar***, __F3d__, 2002 WL 87572 (5th Cir. 2002), the Fifth Circuit held that a state conviction for misdemeanor assault was an aggravated felony under the INA § 101 (a)(43)(F), warranting an enhanced sentence. The court noted that although it

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was an issue of first impression in that circuit, five other circuits had addressed the issue and also had concluded that a misdemeanor can be an "aggravated felony." The court found that in defining "aggravated felony," Congress was "defining a term of art, one that includes all violent crimes punishable by one year's imprisonment including certain violent misdemeanors." Accordingly, the alien's conviction of assault with bodily injury fell within that definition.

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■Ninth Circuit Holds That Driving Under The Influence With Priors Is Not An Aggravated Felony.

In ***Montiel-Barraza v. INS***, __F.3d__, 2002 WL 54638 (9th Cir. Jan.16, 2002) (Beezer, Wardlaw, Schwarzer), the Ninth Circuit in a *per curiam* decision reversed the BIA's finding that petitioner was convicted of an aggravated felony. On December 4, 1998, the petitioner had been convicted of DUI with multiple, namely four, prior convictions. The trail court elevated petitioner's conviction to a felony and sentenced him to sixteen months imprisonment. The court determined that under United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001), petitioner's conviction was not a crime of violence and thus was not an aggravated felony.

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DETENTION

■Government Seeks Rehearing Of Holding That Attorney General Does Not Have Authority To Detain Or Supervise Aliens Whose Removal Orders Are Stayed Pending Judicial Review

On December 28, 2001, the Government filed a petition for panel rehearing in ***Bejjani v. Ashcroft***, 271 F.3d 670 (6th Cir. Nov. 14, 2001) (*Holschuh*, Norris, Cole), requesting that the Sixth Circuit reconsider its ruling limiting the Attorney General's detention and supervision authority. The court had held *inter alia*, that the Attorney General has no authority to detain or even supervise dangerous criminals or terrorist aliens who have been ordered deported if those aliens receive stays of deportation pending judicial review of their deportation orders. The Government argues that the issue was moot because the court vacated the petitioner's order of deportation, and that the interpretation of INA § 241(a) involves complex issues regarding the Attorney General's authority to detain and supervise dangerous criminal and terrorist aliens that should be decided when they are fully briefed and argued, which they had not been in this case. The petition does not seek rehearing of the court's interpretation of the reinstatement provision.

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Ed. Note: The Petition for Panel Rehearing is available on the OIL web site.

JURISDICTION

■D.C. Circuit Dismisses As Moot Case Where Alien Seeking One Type Of Visa Is Granted Another

In ***Liu v. INS,*** __F.3d__, 2001 WL 1657298 (D.C. Cir. Dec. 28, 2001) (Sentelle, *Randolph*, Garland), the District of Columbia Circuit affirmed the district court's dismissal of petitioner's complaint for lack of jurisdiction. The petitioner, a Chinese citizen engaged in medical research, asked the district court to order the INS to renew his employment visa. The INS had denied his request because it would not be in the national interest. The district court held that it lacked jurisdiction under INA § 242(a)(2)(B)(ii), which precludes review of the Attorney General's discretionary decisions. After he appealed, the INS granted the petitioner a different visa. The court held that the case was now moot and that it was extremely unlikely that petitioner would again be subjected to the same action he challenged in his complaint. The court further found that an interest in attorney's fees is insufficient to create an Article III case or controversy, where none exists on the merits.

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■First Circuit Holds That District Court Cannot Review Whether INS Exercised Its Discretion In Deciding To Initiate Removal Proceedings.

In ***Carranza v. INS***, __F.3d__, 2002 WL 47139 (1st Cir. Jan. 17, 2001) (*Selya*, Stahl, Lynch), the First Circuit held that a claim grounded solely on the INS's failure to exercise its prosecutorial discretion is not subject to review under the habeas statute, 28 U.S.C. § 2241. The petitioner had been convicted of an aggravated felony after the effective date of IIRIRA. The district court had granted the habeas petition, holding that the INS had not exercised its prosecutorial discretion before initiating removal proceedings. The First Circuit held that an alien has no statutory or constitutional right to such a discretionary determination before proceedings are initiated.

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■Fourth Circuit Holds That Alien Must Exhaust Her Administrative Remedies

In ***Kurfees v. INS***, __F.3d__, 2001 WL 1627644) (4th Cir. Dec. 19, 2001 (*Wilkinson*, Widener, Williams), the Fourth Circuit affirmed the district court's denial of the alien's habeas petition for lack of jurisdiction. The petitioner, a native of Peru, entered the

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United States illegally in 1985. In 1988 she married a U.S. citizen and a year later returned to Peru to obtain her immigrant visa. She then reentered the United States as a conditional resident. She later separated from her husband and filed for divorce. Subsequently, the INS terminated her conditional permanent resident status and placed her in proceedings. When she did not appear for her hearing, she was ordered deported in absentia.

Petitioner claimed that she had not received the hearing notice from the INS because she had moved, and by the time she did receive it, the appeal time to the BIA had expired. She then sought to reopen her case, claiming she had never received the OSC which had been mailed to her prior address. The IJ denied the motion because she had failed to inform the court or the INS of her changed address. She claimed she filed an appeal to the BIA but it had no record of the appeal. The district court dismissed petitioner's habeas for failure to exhaust administrative remedies.

The D.C. Circuit held that the petitioner, who was subject to pre-IIRIRA rules, had failed to exhaust the administrative remedies available to her by not appealing to the BIA. "A rule that allowed parties to circumvent the administrative process under the circumstances of this case would undermine agency function and clog the courts with unnecessary petitions," said the court. The court also found that petitioner's constitutional challenges were procedural challenges that could have been addressed by the BIA.

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"A rule that allowed parties to circumvent the administrative process under the circumstances of this case would undermine agency function and clog the courts with unnecessary petitions."

■Eleventh Circuit Holds That Jurisdiction Is Limited And That Repeal Of Waiver Of Inadmissibility Applies To Pre-Effective Date Guilty Plea

In ***Oguejiofor v. Attorney General***, __F.3d__, 2002 WL 5360 (11th Cir. January 2, 2002) (Edmonson, Wilson, Paul (N.D.Fla.)), the Eleventh Circuit in a per curiam decision affirmed the BIA's denial of a discretionary waiver of inadmissibility under INA § 212(c). The petitioner is a citizen of Nigeria and a lawful permanent resident since 1989. The INS charged him with removability under INA § 237(a)(2)(A)(ii), as an alien who had committed two crimes of moral turpitude not arising out of a single scheme of criminal conduct, and under INA § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony. An IJ found him removable as charged and ineligible to apply for discretionary relief and ordered him deported to Nigeria. The BIA affirmed that decision finding that he was ineligible for relief under §§ 212(c) and 212(h).

Before the Eleventh Circuit petitioner challenged on constitutional grounds the retroactive applications of IIRIRA's repeal of § 212(c) and amendment of 212(h) to his case. The court, following its earlier precedents, held that "an alien has no constitutionally protected right to discretionary relief or to be eligible for discretionary relief." It further found that it did not have jurisdiction to grant the kind of relief by the Supreme Court in *St. Cyr*. Alternatively, even if it had jurisdiction under *St. Cyr*, the court would have found that petitioner's argument lacked merit.

The court also rejected petitioner's equal protection challenge to § 212(h), finding that its decision in *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) was dispositive of that issue.

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■Eighth Circuit Holds That Jurisdictional Dismissal Of Previous Petition For Review Is Binding Decision On Subsequently Filed Habeas Petition

In ***Gavilan-Cuate v. Yetter***, __ F.3d__, 2002 WL 21821 (8th Cir. January 9, 2002)(*R. S. Arnold*, Bowman, Hansen), the Eighth Circuit reversed the district court's grant of petitioner's habeas petition because it raised the same issue that the court of appeals had decided as a jurisdictional issue in his previous petition for review. There, the court had held that petitioner's crime of transporting and harboring illegal aliens was an aggravated felony and therefore the court lacked jurisdiction. The court held that its dismissal of the petition for review is a binding decision as to whether petitioner's crime was an aggravated felony, and that the district court was barred from deciding that it was not an aggravated felony.

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MOTION TO REOPEN

■First Circuit Holds That Board Did Not Abuse Its Discretion In Denying Motion For Reconsideration

In ***Nascimento v. INS***, 274 F.3d 26) (1st Cir. December 19, 2001) (*Lynch*, Lipez, Torruella), the First Circuit affirmed the BIA's decision denying petitioner's motion for reconsideration. The court preliminarily noted that it had jurisdiction to review a discretionary denial of a motion to reconsider under its holding in *Bernal-Vallejo v. INS*, 195 F.3d 56 (1st Cir. 1999). It then held that the petitioner's motion for

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reconsideration set forth statements that were conclusory, unsupported by the record, and insufficiently detailed, and that the BIA therefore did not abuse its discretion in denying that motion.

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SUSPENSION/CANCELLATION

■Ninth Circuit Holds That Alien's Due Process Rights Were Not Violated When BIA Refused To Consider New Evidence Submitted On Appeal

In ***Ramirez-Alejandre v. Ashcroft***, __F.3d__, 2002 WL 21982 (9th Cir. Jan. 9, 2002) (*Rymer*, Fernandez; Wardlaw, dissenting), the Ninth Circuit held that petitioner's due process rights were not violated by the BIA's refusal to consider evidence which he had offered for the first time while his case was pending appeal. The petitioner, a native of Mexico, illegally entered the United States on May 5, 1979. When the INS instituted proceedings against him in May 1990, he applied for suspension of deportation. An immigration judge found that petitioner would suffer extreme hardship if deported to Mexico and granted the requested relief. On March 17, 1992, the INS appealed that decision to the BIA. While the case was pending before the BIA, petitioner proffered additional new evidence to bolster the extreme hardship claim. On June 6, 2000, the BIA reversed the immigration judge's decision finding no extreme hardship and refused to consider the new evidence.

Preliminarily, the Ninth Circuit held that it lacked jurisdiction under IIRIRA § 309(c)4)(E) to review the discretionary decision regarding the finding of no extreme hardship. However, the court said that "it is now clear that we have jurisdiction only to review colorable due process challenges to the BIA's denial of suspension of deportation." A BIA decision violates due process, said the court, "if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." Here, the court found that no regulation requires the BIA to consider new evidence on appeal. Indeed, noted the court, the BIA has stated that its function is "to review not create, a record." Moreover, the regulations set forth a procedures for submitting new evidence by the filing of a motion to reopen. This procedure was available to petitioner. Consequently, the court found that having "failed to avail himself of these procedures, petitioner has not colorable claim that his due process rights were violated when the BIA refused to consider as evidence documents appended to his brief on appeal."

"The judges of our court say what the mean and mean what they say in published decisions."

In a dissenting opinion Judge Wardlaw would have found that under *Larita-Martinez v. INS*, 220 F.3d 1092 (9th Cir. 2000), the BIA should have considered the new evidence presented by the petitioner. Responding to the government's observation that perhaps the *Larita-Martinez* panel was "confused", she noted that "the judges of our court say what the mean and mean what they say in published decisions."

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■Ninth Circuit On Panel Rehearing Upholds Judicial Review Of Determination Of Statutory Eligibility For Discretionary Cancellation Of Removal

In ***Montero-Martinez v. John Ashcroft***, __F.3d__, 2002 WL ___ (9th Cir. Jan. 16, 2002) (*Pregerson*, Silverman, Tallman), the Ninth Circuit vacated its panel opinion, reconsidered its earlier panel decision (249 F.3d 1156), and held that INA § 242(a)(2)(B) does not bar court of appeals review of the purely legal determination whether an alien is statutorily eligible for discretionary cancellation of relief. The government agreed to rehearing after the Supreme Court decided *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), reasoning that under *St. Cyr*, it was a foregone conclusion that the legal eligibility determination, if not reviewable under the more efficient petition for review procedure in the court of appeals, would be reviewable in a district court habeas action.

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NOTED

In ***United States v. Bonetti***, __F.3d__ 2002 WL 27129 (Jan. 10, 2002), the Fourth Circuit affirmed defendant's conviction of conspiracy to harbor an illegal alien, and harboring an illegal alien under 8 U. S.C. 1324(a)(1)(A). The defendant and his wife, brought a domestic servant when they moved from Brazil to the United States in 1979. The domestic servant's visa expired in 1984. The trial court found that for almost nineteen years the domestic servant, who only spoke Portuguese, worked for the defendants in slavery-like conditions and was subject to violent abuse. Throughout the nineteen years, the defendant falsely told the servant that her wages were being deposited into a bank account. When asked that the wages be paid directly, the defendants refused. The domestic servant never received payments for her work. The court also held that the offense of harboring an illegal alien was by its nature a "crime of violence" within the meaning of the Mandatory Victim Restitution Act because the defendant was found to have caused serious bodily injury to the victim and placed the victim's life in jeopardy during and in relation to the harboring offense.

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CASES SUMMARIZED IN THIS ISSUE

NOTED WITH INTEREST

According to a Washington Post article dated January 31, 2002, the Department of Justice plans to issue regulations reducing the numbers of Board Members who serve on the Board of Immigration Appeals. The Board has currently 19 members and four vacancies. The proposal would reduce that number to eleven.

IMMIGRATION CONFERENCE

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variety of related topics, including the detention and removal of criminal aliens, asylum and withholding of removal, and relief under the Convention Against Torture.

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

Government attorneys who wish to attend should register for the Conference by calling Francesco Isgro at 202-616-4877, before April 1, 2002. To receive the *per diem* rate, participants must make their own hotel reservations before April 1, 2002, by calling the Radisson Resort at 480-891-3800 or 800-333-3333. Please request the group rate for USDOJ. Participants are responsible for hotel, travel, and *per diem* cost. Registration and training materials are provided at no cost to the participants.

INSIDE OIL

A warm welcome to **Laura L. Flippin**, the new Deputy Assistant Attorney General, who is responsible for the Office of Immigration Litigation and the Office of Consumer Litigation.

Ms. Flippin joined the Department of Justice after serving as Clearance Counsel in the Office of Counsel to the President at the White House. Prior to that she was in private practice at the Washington, D.C. office of White & Case LLP, specializing in white collar crime and government investigations involving financial, health care, and telecommunications entities. Ms. Flippin also served as a trial attorney in the Division of Enforcement at the U.S. Commodity Futures Trading Commission, addressing consumer fraud issues. She received her A.B. from the College of William and Mary and her J.D. and M.A. degrees from the University of Virginia.

OIL bids farewell to Senior Litigation Counsel **William J. Howard**. Mr. Howard has accepted a position as Assistant United States Attorney with the U.S. Attorney's Office in Alexandria, Virginia.

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. The deadline for submission of materials is the 20th of each month. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

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

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