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Immigration Litigation Bulletin

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SUPREME COURT HOLDS THAT ALIENS WHO ARE NOT AUTHORIZED TO WORK ARE NOT ENTITLED TO BACKPAY UNDER THE NLRA

Finding that awarding back pay "to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy" as expressed in the Immigration Reform and Control Act of 1986 (IRCA), the United States Supreme Court held, in a 5-4 decision, that the National Labor Relations Board (Board) had no authority to award back pay to a Mexican citizen who had never been legally authorized to work in the United States. ***Hoffman Plastic Compounds, Inc. v. NLRB***, No. 00-1595 (March 27, 2002). "[A] warding back pay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations," observed the Court.

Awarding back pay "to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy."

The petitioner, Hoffman Plastic Compound, had hired Jose Castro in May 1988, after he presented documents that appeared to show that he was authorized to work in the United States. Eight months later, Hoffman discharged him and several others for engaging in union organizing activities. In January 1992, the Board held that Mr. Castro's discharge violated the National Labor Relations Act (NLRA), and it ordered him reinstated with backpay. At a compliance hearing before an ALJ to determine the amount of backpay, Mr. Castro admitted that he had never been authorized to work in the United States and that he had obtained his job at Hoffman by presenting false documents. Based on this testimony, the ALJ found that the Board was precluded from awarding back pay as such relief would be contrary to *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and in conflict with IRCA. In September 1998, the Board reversed the ALJ with respect to back pay and held that Mr. Castro was entitled to $66,951. The *en banc* D.C. Circuit enforced the NLRB's order.

Writing for the Court, Chief Justice Rehnquist found that, although the Board has broad discretion to fashion remedies for violations of the NLRA, the Court has

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ATTORNEY GENERAL FINDS DRUG TRAFFICKING OFFENSES "PARTICULARLY SERIOUS CRIMES"

On March 5, 2002, the Attorney General, in a consolidated decision, reversed three BIA unpublished cases finding that the three respondents had been "convicted of a particularly serious crime" and therefore were statutorily ineligible for withholding of removal. ***Matter of Y-L-, A-G-, and R-S-R-***, 23 I&N Dec. 270 (A.G. 2002). The Attorney General also held that the respondents were not entitled to protection under the Convention Against Torture. The Board had previously certified these cases to the Attorney General at his request under 8 C.F.R. ' 3.1(h)(1)(i) (2002).

Under INA ' 241(b)(3)(B)(ii), withholding of removal is not available if "the alien, having been convicted by a final judgment of particularly serious

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RECORD TURNOUT EXPECTED AT SIXTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

More than 200 government attorneys have registered to attend the Sixth Annual Immigration Conference to be held in Scottsdale, Arizona on May 6-9, 2002. 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. Sixteen panels will address a variety of related topics, including the detention and removal of criminal aliens, asylum and withholding of removal, revocation of naturalization, and relief under the Convention Against

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Highlights Inside

BACKPAY DENIED TO MEXICAN CITIZEN WHO WAS NOT AUTHORIZED TO WORK IN THE UNTIED STATES

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"consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment." The Court noted that even though in *Sure-Tan* it had affirmed the Board's determination that the NLRA applied to undocumented workers, its reasoning was that "the immigration laws 'as presently written' expressed only a 'peripheral concern' with the employment of illegal aliens." At that time, said the Court, Congress had not "'made it a separate legal offense' for employers to hire an illegal alien, or for an illegal alien 'to accept employment after entering this country illegally.'"

"Awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer."

In this case, the NLRB had interpreted *Sure Tan* to apply only to aliens who had left the United States and thus could not claim back pay without lawful reentry. However, the Court of Appeals have been divided on the question of whether the Board could award backpay to illegal workers under the NLRA.

The Supreme Court determined that the question before it would be better analyzed though a wider lens. Instead of focusing on the language in *Sure-Tan*, the focus should be "on a legal landscape now significantly changed." In particular, in 1996 Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States.

"Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies," noted the Court. Thus, "awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer."

To find otherwise and award back pay to illegal aliens, said the Court, "would unduly trench upon explicit statutory prohibition critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."

Finally, the Court stated that Hoffman did not get off "scot-free." The company was subject to other sanctions that it did not challenge for its violation, including a cease-and-desist order punishable by contempt.

In a dissenting opinion, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, would have found that the backpay award did not conflict with the national immigration policy. For them, the immigration laws only provide that "an employer may not knowingly employ an illegal alien, that an alien may not submit false documents, and that the employer must verify documentation." The immigration laws do not provide that an employer can violate the labor laws "with impunity, at least once — secure in the knowledge that the Board cannot assess a monetary penalty," the dissenters stated.

The dissent further noted that the INS is under the Department of Justice which supported the Board's award of backpay, and therefore the remedy should have been upheld under *Chevron.*

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Torture, and other international law issues.

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

Among the confirmed Department's officials who will be speaking at the Conference are: Robert D. McCallum, Jr., Assistant Attorney General for the Civil Division, James Ziglar, Commissioner of the Immigration and Naturalization Service, Kevin Rooney, Director of the Executive Office for Immigration Review, Paul K. Charlton, U.S. Attorney for the District of Arizona, and Edwin S. Kneedler, Deputy Solicitor General. Honorable Stephen M. McNamee, the Chief United States District Court Judge for the District of Arizona will also be making remarks.

Registration for the conference has been extended to April 19. However, attendance to the two luncheons on May 7 and 8, will be subject to space availability. To register please call Francesco Isgrò at 202-616-4877. Lodging at the Radisson Resort in Scottsdale (480-991-3800) is also subject to space availability. When calling the hotel, please request the group rate for US-DOJ.

Participants are responsible for hotel, travel, and *per diem* cost. Registration and training materials are provided at no cost to the participants.

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

ATTORNEY GENERAL REVERSES BIA'S RULINGS

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crime, is a danger to the community of the United States." Torture Convention protection is governed by its implementing regulations. 8 C.F.R. '' 208.16, 208.17, and 208.18 (2002).

Each of the three cases involved a criminal alien convicted of a felony cocaine offense or offenses. Y-L- had been convicted in state court of trafficking and resisting an officer with violence. Both A-G- and R-S-R- had been convicted in federal courts. A-G- had been convicted of two counts of distribution and one count of conspiracy; R-S-R- had been convicted of conspiracy to possess with intent to distribute. The INS commenced removal proceedings against the three respondents, charging each with removability based on an aggravated felony conviction. Each respondent was ordered removed by an Immigration Judge, though A-G- was granted withholding of removal.

"Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes.'"

On appeal to the Board of Immigration Appeals, each respondent was granted withholding of removal under INA ' 241. To reach this result, the same Board panel found that the respondents' aggravated felony drug trafficking convictions were not "particularly serious crimes" which would preclude a grant of withholding of removal. The Board's analysis "emphasized such factors as the respondents' cooperation with federal authorities in collateral investigations, their limited criminal history records, and the fact that they were sentenced at the low-end of the applicable sentencing guideline ranges." 23 I&N Dec. at 272.

In his decision, the Attorney General recognized that the INA does not define "particularly serious crime," but stated that he was guided by the language of section 241(b)(3). Though the statute explicitly states that aggravated felons sentenced to at least five years imprisonment have committed "particularly serious crimes," Congress reserved to the Attorney General the question of whether a conviction and sentence of less than five years represented a "particularly serious crime" and the Attorney General had not spoken to the issue. For its part, the Board used a case-by-case approach, which "has led to results that are both inconsistent and, as plainly evident here, illogical." 23 I&N Dec. at 273.

Citing the widespread recognition of the effects of drug trafficking on society, the Attorney General concluded that "aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes' within the meaning of section 241(b)(3)(B)(ii). Only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible." 23 I&N Dec. at 274, footnote omitted.

The Attorney General further explained that the rare case justifying a departure would need to show all of the following factors to mandate consideration of a whether a crime was a "particularly serious" one:

> (1) a very small quantity of con trolled substance;
>
> (2) a very modest amount of money paid for the drugs in the offending transaction;
>
> (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy;
>
> (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense;
>
> (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and
>
> (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

23 I&N Dec. at 276-277.

In reviewing the records of the three cases, the Attorney General found that none of the respondents presented the factors and were, thus, statutorily ineligible for withholding of removal. He emphasized that "such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation." 23 I&N Dec. at 277, footnote omitted.

Reviewing the respondents' applications for protection under the Convention Against Torture, the Attorney General found that none of the respondents proved entitlement to such protection. In all three cases, there was no proof that the respondents would be tortured by government officials or with their acquiescence. In A-G-'s case, the Attorney General specified that "[t]o suggest that [the requirement of governmental involvement or acquiescence] can be met by evidence of isolated rogue agents engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction's laws and policies, but are committed despite authorities' best efforts to root out such misconduct, is to empty the Convention's volitional requirement of all rational meaning." 23 I&N Dec. at 283.

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NEW CLASS ACTION LAWSUITS CHALLENGE INS'S PAROLE DECISIONS IN SOUTH FLORIDA, REFUGEE ADJUSTMENT PROCEDURES, AND RIGHT TO COUNSEL FOR MINORS

Haitians Detained In South Florida Pending Asylum Determination Challenge INS's Parole Decisions

On March 15, 2002, a group of Haitian asylum seekers detained in South Florida filed class action claiming that the INS does not provide them with individualized parole determinations and denies them release because of their race and/or national origin. ***Moise v. Bulger,*** No. 02-20822-CIV (S.D. Fla.).

The identified plaintiffs are six Haitians who arrived in Florida in a boat carrying 167 Haitians in December 2001 and who are awaiting adjudication of their applications for asylum.

"In the special context of claims of unadmitted aliens, considerations of sound policy dictate that court-ordered parole be foreclosed when inconsistent with the determinations of the political branches."

Plaintiffs contend that the INS is violating the facially neutral parole provision of the INA and the INS regulations, as well as the equal protection and due process protection under the Fifth Amendment. Plaintiffs also seek to certify a class comprised of all detained Haitian aliens in the Southern District of Florida who arrived on or after December 3, 2001, and who have established a "credible fear" of persecution.

In response to plaintiffs' emergency motion for injunctive relief, the government has stated that the INS decided not to grant parole to Haitians (except minors and pregnant women), including plaintiffs and others who arrived with them is an effort to deter other Haitians from taking risky sea voyages to the United States.

The government contends that "in the special context of claims of unadmitted aliens, considerations of sound policy dictate that court-ordered parole be foreclosed when inconsistent with the determinations of the political branches." Moreover, the government has stated to the court, that "the grant of parole is solely within the unfettered discretion of the Attorney General."

The government further contends that the issuance of an injunction "would impose considerable administrative burdens that will improperly intrude upon the INS's ability to carry out its statutory obligations and policy objectives."

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Class Action Suit Challenges Method And Timeliness Of Adjusting The Status Of Asylees

Under INA § 209(b) refugees who have been granted asylum ("asylees") may apply to adjust their status to that of an alien lawfully admitted for permanent residence. Upon adjustment of their status, these individuals may obtain employment based on their lawful permanent resident status, petition for admission of their relatives, and accrue time towards naturalization. Section 209(b) permits the Attorney General to make available no more than 10,000 overall refugee admission numbers per fiscal year for the purpose of adjusting the status of asylees.

In ***Ngwanyia v. Ashcroft*** (D. Minn), 46 named plaintiffs filed suit challenging the Attorney General's method and timeliness in adjusting the status of asylees on behalf of themselves and all other similarly situated asylees. The plaintiffs allege that since Fiscal Year 1994, the INS has failed to distribute 18,417 available asylee immigrant visas that should have been allocated to them and to class members. As a result, plaintiffs have been prevented from adjusting their immigration status to lawful permanent resident status, and have delayed their becoming United States citizens.

The plaintiffs assert Due Process, Equal Protection, Administrative Procedure Act, and other statutory violations. They seek class certification, declaratory, and injunctive relief to compel the Attorney General to remove obstacles to, properly account for, and timely distribute available asylee adjustment visas.

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Indigent Minors In Proceedings Seek Legal Counsel At Government Expense

In ***Machado v. Ashcroft***, No. CS-02-0066 (E.D. WA)(complaint filed Feb. 19, 2002), the plaintiff, a fifteen year old currently in INS custody, seeks to represent a class of similarly situated indigent minors, and claims that the failure to appoint counsel in their removal proceedings denies their due process rights in violation of the Fifth Amendment.

Plaintiff claims that in February 2002 he was kidnapped at gunpoint. When he went to the police to report the crime, the police notified the INS. The INS placed him custody where he is awaiting removal proceedings.

Petitioner claims that his father died when he was young and his mother abandoned him shortly thereafter. He also claims that he does not speak English and that he has not been able to secure an attorney to represent him in his immigration matters.

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SUMMARIES OF RECENT BIA DECISIONS

ASYLUM

In ***Matter of Y-C-***, 23 I&N Dec. 286 (BIA March 11, 2002), the *en banc* Board of Immigration Appeals considered whether an alien was excused from the one-year filing deadline for asylum applications contained in Section 208(a)(2)(B) of the Act. The Board concluded that the respondent, who entered the United States as an unaccompanied minor and remained a minor during the one-year period following his arrival, had shown extraordinary circumstances to excuse his failure to file an asylum application during that period. The appeal was sustained and the case remanded for further proceedings.

There was a concurring opinion filed by Board Member Filppu, joined by Acting Chairman Scialabba, Vice Chairman Dunne, and Board Members Cole, Hess, and Pauley. Board Member Filppu objected to "that portion of the majority's opinion which indicates that an alien's discretion as to when to file is constrained by the authority of an Immigration Judge to set deadlines." 23 I&N Dec. at 289. He found that the combination of the respondent's "youth and the totality of the circumstances" met the statutory exception and was consistent with applicable regulations. *Id.*

MOTION TO REOPEN

In ***Matter of Velarde-Pacheco***, 23 I&N Dec. 253 (BIA March 6, 2002), the *en banc* Board considered the respondent's motion to reopen to apply for adjustment of status based on his marriage to a United States citizen. His wife had filed a relative visa petition (I-130) with INS, but the petition had not been adjudicated. The motion was opposed by INS which relied on the Board's decisions in *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992), and *Matter of H-A-*, Interim Decision 3394 (BIA 1999), requiring an approved visa petition.

In its decision, the Board observed that "[t]he effect of our policy in *Matter of Arthur*, *supra*, coupled with the regulation limiting respondents to one motion to reopen filed within 90 days of a final administrative decision and the Service's inability to adjudicate many I-130 visa petitions within that time frame, has been to deprive a small class of respondents, who are otherwise prima facie eligible for adjustment, of the opportunity to have their adjustment applications reviewed by an Immigration Judge." 23 I&N Dec. at 255, citations omitted. It also noted that the INS had revised its policy on joining untimely motions to reopen for adjustment of status to make it easier to aliens to obtain INS joinder. *Id.*

A respondent should not "be subject to an additional, *absolute* bar to reopening that arises neither from statute nor regulation, but instead is *solely* of the Board's own creation."

The Board established a 5 factor test to determine whether a motion to reopen for adjustment may be granted. Such a motion "may be granted, in the exercise of discretion," where "(1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the Service either does not oppose the motion or bases its opposition solely on *Matter of Arthur*, *supra*." 23 I&N Dec. at 256. The majority found that the respondent had met all five factors of its test and reopened and remanded the case for further proceedings.

There was a concurring opinion filed by Board Member Holmes, joined by Board Member Hurwitz. Board Member Holmes agreed with the majority opinion, finding that a respondent should not "be subject to an additional, *absolute* bar to reopening that arises neither from statute nor regulation, but instead is *solely* of the Board's own creation." 23 I&N Dec. 258, citations omitted. He was persuaded by the amendment of the Immigration and Nationality Act in 1990 to provide an exception to an absolute bar to adjustment and believed that a change in Board precedent was appropriate to conform with the statutory amendment.

Board Member Rosenberg also concurred. She did not agree with the fifth factor of the test, that "the Service either does not oppose the motion or bases its opposition solely on *Matter of Arthur*, *supra*." 23 I&N Dec. at 256, 259. She found that such a restriction was not required by sections 204(g) and 245(e) of the INA. *Id.* "I do not believe that Service opposition is an appropriate 'condition' that, as a rule, should result in denial of a motion to reopen." 23 I&N Dec. at 264. Critical of the Board's reasoning in *Matter of Arthur*, Board Member Rosenberg drew a contrast between "the district director's ultimate authority to approve a visa petition with the authority of the Immigration Judge or the Board to determine that a hearing to consider the merits of an adjustment application is warranted based on preliminary assessment that a respondent has made a prima facie showing that his marriage is bona fide." 23 I&N Dec. 261, citation omitted.

A separate concurring opinion was filed by Board Member Espenoza. She noted that "[a] fundamental interest in our immigration laws is the preservation of the rights of United States citizens to process immigration visas for designated members of their families. The spouse of a United States citizen is a

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SUMMARIES OF RECENT BIA DECISIONS

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member of such a class. It is our duty to ensure that the competing interests of immigration enforcement and rights of citizens be recognized. The rule advanced today sets forth a reasonable, limited remedy." 23 I&N Dec. at 265, footnote omitted. Board Member Grant filed a dissenting opinion without discussion.

There was also a dissenting opinion filed by Board Member Pauley, joined by Acting Chairman Scialabba, Vice Chairman Dunne, and Board Members Filppu, Cole, Ohlson, and Hess. Board Member Pauley objected to the "majority's implicit premise that the Service often acts with insufficient celerity on" I-130 visa petitions. 23 I&N Dec. 267. He did not agree that *Arthur* and *H-A-* ought to be revisited based on "resource constraints or allocations" or a change in Service policy, noting that Congress had not intervened since the decisions were published. 23 I&N Dec. 267-8. He concluded that the Board's new position may result in "useless additional paperwork" and result in an "unmerited windfall" to the respondent, namely reopening. 23 I&N Dec. at 269.

"The Convention Against Torture draws a clear distinction between torturous acts as defined in Article 1 and acts not involving torture referenced in Article 16."

TORTURE CONVENTION

In ***Matter of J-E-***, 23 I&N Dec. 291 (BIA March 22, 2002), the *en banc* Board considered a claim for protection under the Convention Against Torture and its implementing regulations. *J-E-* provides a more detailed analysis of a Torture Convention claim than did the Board's only prior substantive decision on such an application, *Matter of S-V-*, Interim Decision 3430 (BIA 2000). *J-E-* involved a Haitian national convicted of the sale of cocaine. He sought protection under the Convention, arguing that he would be tortured in Haiti because he would be detained for an indeterminate period following his return and because prison conditions in Haiti are substandard. Interestingly, neither the majority opinion nor the dissents mention the Attorney General's recent decision in *Matter of Y-L-*, *A-G-*, and *R-S-R-*, 23 I&N Dec. 270 (A.G. 2002).

In its analysis, the majority considered the language of the Convention and observed that "the Convention Against Torture draws a clear distinction between torturous acts as defined in Article 1 and acts not involving torture referenced in Article 16." 23 I&N Dec. at 295. The Board also focused on the language of the regulations implementing the Convention and the definition of torture contained therein. 23 I&N Dec. at 296-299. The regulations require that an act be an "*extreme* form of cruel and inhuman treatment, . . . *specifically intended* to inflict severe physical or mental pain or suffering," with an illicit purpose, intentionally inflicted by governmental authorities or with their acquiescence, and not arising from lawful sanctions. 23 I&N Dec. at 298-299 and 8 C.F.R. 208.18(a) (2002).

The Board recognized that returnees to Haiti are detained and are subject to substandard prison conditions. Notwithstanding, the Board found that the respondent failed to meet his burden of proof. The Board emphasized that the detention policy is a lawful sanction and that there was no evidence of a specific intent to inflict severe pain or suffering on the detainees. 23 I&N Dec. at 300. The Board also noted that the majority of evidence related to acts covered under Article 16 or the Convention, not Article 1. 23 I&N Dec. at 304.

There were two dissenting opinions. Board Member Schmidt was joined in dissent by Board Members Guendelsberger, Brennan, Espenoza, and Osuna. Board Member Rosenberg, joined by Board Member Espenoza, also dissented. Both dissenting opinions show a significant divergence of Board opinion on the interpretation of the Convention Against Torture and its implementing regulations. Board Member Schmidt found that the evidence clearly met the definition of torture and criticized the majority for "looking at the various factors that contribute to the abuse of Haitian returnees in isolation, and not as a whole." 23 I&N Dec. at 309. His opinion was that "the majority goes to great lengths to avoid applying the Convention Against Torture to this respondent." 23 I&N Dec. at 309.

Board Member Rosenberg agreed with the Schmidt dissent and also criticized the majority opinion, noting that the effect of the decision was "to restrict, rather than extend, protection to "potential victims." 23 I&N Dec. at 310-311. She also objected to the majority's interpretation that the regulations required proof of specific intent. She would find "only that something more than an accidental consequence is necessary to establish the probability of torture." 23 I&N Dec. at 316.

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Contributions To The ILB Are Welcomed!

Summaries Of Recent Federal Court Decisions

ASYLUM

■Eighth Circuit Holds That Alien's Claim Of Persecution Was Stale Where She Admitted That The Eritrean Government Is Neither Anti-Catholic Nor Pro-Marxist And Is Dedicated To Democratic Reform

In ***Francois v. INS***, __F.3d__, 2002 WL 407579 (8th Cir. March 18 2002) (*Bye*, R. Arnold, Beam), the Eighth Circuit affirmed the BIA's denial of asylum to petitioner, a native of Eritrea. In the 1980's, petitioner was sent to Russia to study Marxism-Leninism by the Mengistu government. She refused to pursue the study because of her Catholic religion. She was questioned over a prolonged period after her return, although she was not detained. She departed as a student in the United States but failed to attend the school for which she was admitted. When placed in proceedings she sought asylum and withholding on account of her religious beliefs and her prior political activities. She testified that she had denied the latter when interrogated.

By the time of her hearing in 1993 the Mengistu government had been overthrown and the State Department condition report indicated that there was no longer reason to fear persecution on account of religion or political opinion. Petitioner noted that her two brothers had been granted asylum. The IJ and the BIA denied her request for asylum and withholding based in large part on the changed circumstances. In doing so the BIA relied in part on country condition reports prepared after her hearing. It found she was not entitled to humanitarian relief even if she had been subjected to past persecution as the persecution had not been extreme.

The Eight Circuit held that the BIA's determinations were supported by substantial evidence, because the BIA properly took administrative notice of changed country conditions as described in 1995 and 1999 State Department Country Reports. Those Reports indicate that Islam and Christianity are freely practiced in Eritrea and that the excesses of the former Mengistu regime had ended.

Although the petitioner had not been given advanced notice of the BIA's reliance on the Reports, the court found that "she was neither harmed nor prejudiced because the BIA noticed current conditions in Eritrea of which [petitioner] was aware."

Finally, the court found that it was not inequitable to deny asylum to petitioner when two of her brothers had been granted refugee status, because their status had been granted while Mengistu was still in power.

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■Ninth Circuit Denies Government's Petition For Rehearing *En Banc* Seeking Remand Of Issues Never Addressed By BIA.

On March 11, the Ninth Circuit denied the government's petition for rehearing filed in ***Chen v. INS***, 266 F.3d 1094 (9th Cir. 2001), an asylum case. The government sought *en banc* review and suggested that the Ninth Circuit is improperly determining *de novo* issues regarding fear of persecution, eligibility for asylum, and entitlement to withholding of removal, rather than remanding to the BIA for an administrative adjudication in the first instance. The government's petition argued that the court exceeded the proper limits of judicial review by preempting the BIA in that manner.

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CRIMES

■Third Circuit Holds That Making Terrorist Threats Is An Aggravated Felony

In ***Bovkun v. Ashcroft,*** __F.3d__, 2001 WL 369802 (3d Cir. March 8, 2002) (*Alito*, Roth, Schwarzer), the Third Circuit dismissed the petition for review for lack of jurisdiction pursuant to INA ' 242(a)(2)(C) (barring judicial review of criminal aliens' review petitions). The petitioner, a citizen of Ukraine, was paroled into the United States in 1992 but was never admitted for lawful permanent residence. In February 1998, he was charged by with the crime of making terroristic threats, in violation of Pennsylvania law. He had threatened to kidnap and kill the child of a police officer in an attempt to thwart the officer from arresting him on outstanding warrants. In October 1998, the petitioner pled guilty to this offense and was sentenced to imprisonment for 11 to 23 months. In October 2000, the INS instituted expedited removal proceedings against the petitioner under INA ' 238(b), 8 U.S.C. 1228(b) on the basis that he had been convicted of an aggravated felony. Subsequently, the INS issued a final administrative order of removal ordering petitioner's removal from the United States.

> The court found that the erroneous citation in the order of removal could not surmount the jurisdictional restriction in INA ' 242(a)(2)(C).

On appeal, the court first rejected petitioner's contention that the final administrative order of removal flawed because it erroneously reflected that he had been convicted of a theft offense, instead of a crime of violence. The court found that the erroneous citation in the order of removal could not surmount the jurisdictional restriction in INA ' 242(a)(2)(C). Moreover, the petitioner did not dispute the fact that he was convicted for the offense of making

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terroristic threats; did not allege that the erroneous citation confused him regarding the basis on which deportation was being sought or that he was prejudiced by the citation in any other way; and failed to cite any authority for the proposition that an error of this type would be sufficient to overcome the jurisdictional bar.

Petitioner also contended that he had not been convicted of an "aggravated felony" as defined under the INA. The court found that petitioner's conviction required proof of a threat to commit a crime of violence. The crime in question, said the court, necessarily involved "the use, attempted use, or threatened use of physical force," making it a "crime of violence" under federal law (18 U.S.C. ' 16(a). The court also found that petitioner's term of imprisonment was for at least one year, even though he had received an 11-months minimum sentence. The court reasoned that since petitioner had to serve at least 11 months and would not serve more than 23 months under Pennsylvania law, the sentence was functionally the same as a sentence of 23 months. Finally, the court rejected petitioner's contention that a misdemeanor under state law may not constitute an aggravated felony. Accordingly, the court held that petitioner had been convicted of an aggravated felony and therefore the court lacked jurisdiction to entertain the petition.

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■Eighth Circuit Holds That Alien, Whose First-Time Drug Possession Conviction Was Expunged Under Texas Law, Is Still Convicted For Immigration Purposes

In ***Vasquez-Velezmoro v. INS***, __F.3d__, 2002 WL 313376 (8th Cir. March 1, 2002) (*Arnold*, Bye, Beam), the Eighth Circuit affirmed the BIA's denial of cancellation of removal to petitioner, who had entered the United States without inspection in 1985. In 1986, petitioner was charged in a Texas state court with possession of a controlled substance. This was his first drug offense. He was sentenced to ten years' imprisonment, all of which was probated. In 1988, after completing two years of probation, petitioner was permitted to withdraw his guilty plea. The indictment was dismissed, and his judgment of conviction was set aside. This relief was granted pursuant to Article 42.12 of the Texas Code of Criminal Procedure. In 1997, the INS instituted removal proceedings against petitioner. In response, petitioner filed an application for cancellation of removal. On April 1, 1999, an Immigration Judge denied this request and ordered petitioner removed to Peru. On appeal, the BIA ruled that the expunged state court drug conviction made him ineligible for cancellation of removal and ordered him removed.

Preliminarily the Eighth Circuit held that it had jurisdiction to determine its own jurisdiction. The court then found that although Vasquez's Texas drug conviction was expunged after he successfully completed two years of probation, his conviction was still valid for immigration purposes. The court also found that there was no Equal Protection violation, because there is a rational reason to treat expunged state convictions differently from expunged federal convictions.

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DETENTION

■Tenth Circuit Holds That Mandatory Detention Of Criminal Aliens Under Section 236(c) Of The INA Is Unconstitutional

In ***Hoang v. Comfort***, __F.3d__ (10th Cir. March 5, 2002) (*Briscoe*, Baldock, Alley (D.J., W.D. Ok.)), the Tenth Circuit held that INA § 236(c), which requires the INS to detain certain criminal aliens during removal proceedings, is unconstitutional as applied to lawful permanent resident aliens. This appeal involved three lawful permanent resident aliens who are in removal proceedings based on their convictions for aggravated felony offenses, two for violent crimes. All three of them were detained pursuant to INA § 236(c). Petitioners filed separate habeas petitions challenging their mandatory detention pending removal proceedings. The district court granted their petitions and the government appealed.

The Tenth Circuit held that INA § 236(c), which requires the INS to detain certain criminal aliens during removal proceedings, is unconstitutional as applied to lawful permanent resident aliens.

Preliminarily the court rejected the government's argument that it lacked jurisdiction over the appeal of the two petitioners who had failed to exhaust their administrative remedies. The court found that exhaustion of remedies is statutorily required only for appeals of final orders of removal, and it is not required in this instance to protect administrative authority and promote judicial efficiency. First, a petitioner's detention during the period required for the exhaustion of remedies may infringe upon his or her rights, especially where the issue sought to be raised, the constitutionality of ' 236(c), is one which does not implicate the discretion or the expertise of the agency involved. Second, the agency involved, the BIA, does not have the power to reach constitutional arguments, and thus is not empowered to grant effective relief. Third, the BIA has previously ruled that it is barred by ' 236 (c) from granting bond, and therefore any attempt by a petitioner to exhaust would be futile.

On the merits the court acknowledged that the constitutionality of ' 236(c)

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has been addressed by numerous courts, with conflicting results. The court found, relying on *Zadvydas v. Davis*, 533 U.S. 678 (2001), that the permanent resident alien petitioners had a fundamental liberty interest in freedom from detention pending deportation proceedings. The court noted that the "vitality" of the Seventh Circuit's holding in *Parra v. Perryman*, 172 F.3d 954 (1999), which upheld the constitutionality of ' 236(c), "is greatly diminished" in the wake of *Zadvydas*. The court then applied a heightened due process analysis, and held that the statute as applied to petitioners violated their rights to substantive due process.

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Eleventh Circuit Denies Emergency Motion To Release Suspected Terrorist.

In ***Al Najjar v. Ashcroft***, the Eleventh Circuit on March 14, 2002, denied petitioner's emergency motion for release, rejecting his argument that after his deportation order became final the Government lacked authority to detain him unless it could prove he was a flight risk or danger to the community. In an earlier decision, the Eleventh Circuit had held the Government had "unfettered authority" to detain him in this context. *Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

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EAJA

Ninth Circuit Holds That "Legalization" Class Is Not Retroactively Entitled To $600,000 EAJA Fees

In ***Zambrano v. INS***, __F.3d__, 2002 WL 356299 (9th Cir. March 7, 2002) (*Hug*, Nelson, Hawkins), the Ninth Circuit held that a court may not reconsider the issue of subject-matter jurisdiction for purposes of awarding fees under the Equal Access to Justice Act (EAJA) when the underlying action had been dismissed for lack of subject matter jurisdiction in a final judgment. The court reasoned that: (1) the EAJA is a limited waiver of sovereign immunity and does not provide an independent grant of subject matter jurisdiction, and (2) Congress did not retroactively restore subject matter jurisdiction over the case with passage of the Legal Immigration Family Equity Act (LIFE) in December 2000 because it would be unconstitutional to undo a final judgment of the courts. In this appeal plaintiffs sought $604,651.14 in attorneys' fees for work done up to August of 1993, when the Supreme Court issued its decision in *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), holding that the courts lacked jurisdiction over "unripe" claims.

A court may not reconsider the issue of subject-matter jurisdiction for purposes of awarding fees under the Equal Access to Justice Act (EAJA).

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■Ninth Circuit Holds That EAJA Request Was Timely Filed But Denies It On The Merits Finding That Government's Position In Denying Asylum Was Substantially Justified

In ***Al-Harbi v. INS***, 2002 WL 449525 (9th Cir. March 25, 2002) (Kleinfeld, Tashima, Berson), the Ninth Circuit held that for purpose of applying for attorneys' fees under EAJA, the 30-day filing period begins to run only after the 90-day time for filing a petition for a writ of certiorari with the Supreme Court has expired. Here, the court found that the request was timely because it had been filed 29 days after the government's time to petition for certiorari had expired.

On the merits of the application, however, the court found that the position of the government had been substantially justified. The petitioner had been denied asylum by the BIA only to have that decision reversed by the Ninth Circuit in *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001)(Al-Harbi I). In reversing the denial of asylum, the court had found that the BIA's decision was lacking in "reasonable, substantial and probative evidence in the record." However, here, the court noted that the underlying Immigration Judge's decision denying asylum to petitioner on the basis that he had participated in the persecution of others appeared substantially justified. The court noted that the BIA in its denial had not reached that issue and consequently it was never presented by the government in *Al-Harbi I*. Moreover, in *Al-Harbi I*, the court had upheld the government's central position that petitioner was not credible as to his claims of past persecution. Accordingly, the court found that "the government's litigation position as a whole [was] substantially justified, albeit not ultimately adequate to sustain the agency's decision."

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FOURTH AMENDMENT

■Seventh Circuit Holds That Evidence Gathered Against Alien In Violation Of Procedural Regulation Does Not Warrant Suppression And Does Not Violate Fourth Amendment.

In ***Martinez-Camargo v. INS,*** __F.3d__, 2002 WL 338650 (7th Cir. March 5, 2002) (*Flaum*, Bauer, Easterbrook), the Seventh Circuit affirmed the removal order issued by the BIA, denying the alien's motion to suppress his

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concession of illegal status. The court held that: (1) there was no Fourth Amendment violation when the INS officer asked the alien for basic biographical information, including his immigration status, in the context of an independent criminal stop which the INS officer did not initiate; and (2) the INS's conceded violation of the regulation requiring that different INS officers arrest and interrogate did not infringe upon any fundamental, substantive right of the alien, and therefore, absent a showing of prejudice, suppression of the alien's admission of illegal status was not warranted.

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IN ABSENTIA

■Eleventh Circuit Holds That Notice Of Removal Hearing Sent To Alien's Last Known Address Comported With Due Process

In ***Dominguez v. Attorney General,*** __F.3d__, 2002 WL 370198 (11th Cir. March 8, 2002) (Anderson, Carnes, Hull, *per curiam*), the Eleventh Circuit affirmed the BIA's denial of motion to reopen an *in absentia* removal hearing. The petitioner, a Jamaican citizen, entered the United States as a visitor but never departed when her visa expired on January 25,1991. Instead, in September 1997, she applied for lawful permanent status. That application was denied and she was placed in removal proceedings were initiated. On September 19, 2000, a Notice to Appear at the November 14, 2000, removal proceeding was mailed to petitioner at a Jacksonville, North Carolina address. Petitioner did not deny that the address to which the notice was sent was the address which she had given the INS in her formal submission. Petitioner did not appear at the removal hearing, and was ordered removed *in absentia* on November 14, 2000. On November 24, 2000, she moved to reopen that decision, claiming that she had not received constitutionally sufficient notice. The Immigration Judge denied that motion, noting that she had no proof, other than an uncorroborated affidavit, that she did not receive notice. The BIA dismissed her appeal.

The Eleventh Circuit held that the due process right to notice was satisfied when the notice to appear was sent to the petitioner's last known address. Under INA ' 240(c), 8 U.S.C. ' 1229(c), service by mail at the most recent address provided by the alien is sufficient notice. Therefore, "[f]ailing to provide the INS with a change of address will preclude the alien from claiming that the INS did not provide him or her with notice of a hearing," said the court. The court also found that an INS interviewer's note that the petitioner was staying with a relative at a different address, for which there was no evidence as to when or if the note was actually placed in petitioner's file, did not satisfy the requirement that an alien provide written notice of a change of address.

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MOTION TO REOPEN

■Ninth Circuit Holds That Ineffective Assistance Of Counsel Tolls Numerical Limitation On Motions To Reopen.

In ***Rodriguez-Lariz v. INS,*** __F.3d__, 2002 WL 386574 (*Tashima*, Berzon, Pregerson) (9th Cir. March 13, 2002), the Ninth Circuit granted the petition for review and remanded the case to the BIA with directions to grant petitioner's motion to reopen. The BIA had denied petitioner's first motion to reopen. He then filed a second motion to reopen alleging ineffective assistance of counsel, which the BIA denied because it exceeded the numerical limit for motions to reopen. The court held that: the BIA had abused its discretion in determining that it had no jurisdiction to reopen petitioner's proceedings. It found that "[t]he defective representation petitioners received equitably tolled the numerical limit on motions to reopen and constituted ineffective assistance of counsel, requiring a new hearing on the issue of suspension of deportation."

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SUSPENSION

■Tenth Circuit Holds That Transitional Stop-Time Rule Applies In Deportation Case Pending On Rule's Date Of Enactment

In ***Sibanda v. INS***, __F. 3d__, 2002 WL 393855 (*McKay*, Seymour, Murphy) (10th Cir. March 14, 2002), the Tenth Circuit affirmed a BIA decision, and held that the petitioners were statutorily ineligible suspension of deportation. The court held that the transitional "stop-time" rule, which terminates an alien's accumulation of continuous physical presence in the United States upon service of an order to show cause, applies in deportation cases pending at the time of the rule's enactment. It also found that the Supreme Court's holding in *INS v. St. Cyr* does not prevent the application of the stop-time rule in such cases.

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■Second Circuit Finds No Jurisdiction To Review BIA Decision That Alien Is Ineligible For Suspension Of Deportation By Reason Of Extreme Hardship

In ***Kalkouli v. INS***, __F.3d__, 2002 WL 318303 (2d Cir. March 1, 2001)(*per curiam)*, the Second Circuit dismissed a petition seeking review of the BIA's denial of suspension of deportation. Petitioner's deportation proceedings commenced on May 18, 1995,

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and the BIA issued the final order of deportation on June 12, 2000. The BIA denied petitioner's application for suspension of deportation upon finding that petitioner had failed to demonstrate that his deportation would result in "extreme hardship" pursuant to INA § 244(a).

The court held that whether an alien is eligible for suspension of deportation by reason of "extreme hardship" is a "discretionary decision" that, is barred from appellate review under IIRIRA ' 309(c)(4)(E). The court noted that its conclusion was consistent with the findings of every circuit that has confronted the issue.

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VISAS

■District Court Orders INS To Adjudicate Adjustment Application For 1998 Diversity Visa Applicant.

In ***Nyaga v. Ashcroft***, __F. Supp. 2d__, 2002 WL 264613 (Evans) (D. N. D. Ga. February 20, 2002), the district court granted plaintiffs' request for mandamus relief, and ordered that the INS must adjudicate their adjustment applications filed in reliance on their winning the 1998 diversity visa lottery under INA § 203(c). The court held that it had jurisdiction despite the INA's preclusion of judicial review of a "decision or action" related to an adjustment application, because the INS failed to take any "action" on plaintiffs' adjustment applications. The court then found that mandamus jurisdiction existed to compel INS to exercise its discretion by adjudicating plaintiffs' applications. Finally, the court held that the government had the authority to issue a diversity visa after the end of the 1998 fiscal year, because the INA's limit of the award of any visa to the fiscal year within which the applicant was notified only required that the applicants remain "eligible" for a diversity visa within the fiscal year.

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WAIVERS – 212(C)

■Eleventh Circuit Holds That Repeal Of Waiver Of Removal Does Not Violate Equal Protection Or Sixth Amendment

In ***Brooks v. Ashcroft,*** __F.3d__, 2002 WL 331956 (11th Cir. March 1, 2002)(Black, *Fay*, Restani), the Eleventh Circuit held that it lacked jurisdiction to review a final order of removal issued against the petitioner, a permanent resident alien who had been convicted of an aggravated felony. The petitioner had been convicted in Dade County, Florida, of battery and the lesser included offenses of battery and false imprisonment, and sentenced to a term of imprisonment of less than five years. Based on that conviction, on April 9, 1998, the INS instituted removal proceedings against the petitioner on the basis that he had been convicted of an aggravated felony. An Immigration Judge and subsequently the BIA found the petitioner deportable as charged.

Before the Eleventh Circuit, the petitioner argued that the repeal of INA ' 212(c) had an impermissible retroactive effect when applied to an individual convicted prior to the enactment of AEDPA ' 440(d) and IIRIRA ' 304(b). However, the court found that under the plain language of INA ' 242(a)(2)(C), it was permitted to review only whether petitioner was an alien, who was removable based on having committed a disqualifying offense. Here, there was no dispute that petitioner satisfied all three requirements. Consequently, it held that it lacked jurisdiction to review the final order of removal.

The court then held that although it retained jurisdiction over substantial constitutional questions raised by criminal aliens, it lacked jurisdiction over petitioner's Sixth Amendment and Equal Protection claims against the repeal because those claims were without merit.

In a closing footnote, the court made this observation: "We would like to comment on the plethora of cases that have inundated our Circuit and our sister Circuits regarding this issue, and the ease in which this burdensome and protracted litigation could have been avoided with a simple declaration by Congress regarding the retroactivity of legislation when it is passed. A one line sentence could have avoided many of these problems, and would certainly have spared the resources of the federal court system."

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■District Court Remands Case To BIA For Deportation Waiver Application After Concluding That Alien Had Seven Years Of Unrelinquished Lawful Domicile.

In ***Kolster v. Ashcroft***, __F. Supp. 2d__, 2002 WL 264753 (Otoole) (D. Mass. February 25, 2002), the district court granted the habeas petition and remanded to the BIA after finding that petitioner was eligible for relief under INA § 212(c) because he had been lawfully domiciled in the U.S. for seven consecutive years. The court reasoned that § 212(c)'s requirement of seven years of lawful unrelinquished domicile does not require seven years of legal permanent residency, as the BIA had found, but also includes petitioner's presence in the U.S. pursuant to a visa as an immediate family member of an international organization employee.

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CASES SUMMARIZED IN THIS ISSUE

ENDNOTE

OIL Attorney **Audrey Hemesath** (formerly known as Audrey Benison) ran in the Washington, D.C. Marathon yesterday, and completed the course in an approximate time of 3 hours and 45 minutes – a personal record!

INSIDE OIL

OIL bids farewell to **Ashley Tabaddor** who has accepted a position as an Assistant United States Attorney in Los Angeles.

A warm welcome to three new OIL Attorneys: **Jennifer L. Lightbody**, **David E. Dauenheimer**, and **Blair T. O'Connor**.

Ms. Lightbody received her B.A. from West Virginia University and her

J.D. from the Capital University Law School in Columbus, Ohio. Before joining OIL Ms. Lightbody served as a Judicial Law Clerk to the Honorable Donald C. Nugent, of the United States District Court for the Northern District of Ohio.

Mr. Daunenheimer is a graduate of Lafayette College in Easton, Pennsylvania. He obtained his law degree from the University of Colorado School of Law. Prior to joining OIL he served as a Trial Attorney with the Torts Branch in the Department's Civil Division. Prior to joining the Department, Mr. Daunenheimer served in numerous capacities with the Army's Judge Advocate General's Corps.

Mr. O'Connor is a graduate of the University of Notre Dame and the Valparaiso School of Law. He has

served with the United States Army and taught legal writing at the George Washington Law School.

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

Office of Immigration Litigation

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

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