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Immigration Litigation Bulletin

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Inside

Constitution Does Not Guarantee Effective Assistance Of Counsel To An Alien In Removal Proceedings

In ***Afanwi v. Mukasey***, __F.3d__, 2008 WL 2082149 (4th Cir. May 19, 2008) (Williams, Duncan, *Ellis* (District Court)), the Fourth Circuit held that a Cameroonian citizen, whose prior counsel failed to file a timely review petition, was not deprived of due process because his counsel was not a state actor, and therefore the ineffectiveness could not be imputed to the government. "Retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of a Fifth Amendment right to a fundamental fair hearing," said the court.

The petitioner entered the United States as a visitor but three days before his authorized stay expired, he affirmatively applied for asylum. The Asylum Officer did not grant the application and referred the petitioner to an IJ for a removal hearing. The IJ found petitioner not credible and denied his applications for asylum, withholding, and CAT protection. The BIA affirmed that decision on November 29, 2005, and mailed a copy to petitioner's counsel of record. Apparently petitioner's counsel, who had relocated, did not learn of the BIA's ruling until after the deadline for seeking judicial review had passed. Petitioner then filed a motion seeking to have the BIA rescind and reissue the November 29 decision, claiming that the BIA had used an incomplete mailing address which could have delayed delivery. The BIA denied that motion. Petitioner then filed a motion to reopen claiming new evidence relating to his asylum claim, and alleging that he had received

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Attorney General Reverses Matter of C-Y-Z-

Per se rule of asylum grant in population control cases eliminated

In ***Matter of J-S-,*** 24 I&N Dec. 520 (A.G. 2008), the Attorney General overruled the Board's decisions in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) (en banc), and *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) (en banc), to the extent those cases held that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is per se entitled to refugee status under section 601(a) of the Illegal Immigration Reform and Immigration Responsibility Act (defining circumstances in which the enforcement against a person of a coercive population control program constitutes "persecution on account of political opinion," and thus qualifies that person for political asylum under the INA).

Background Facts and Procedure

The year after section 601(a) was enacted, the former INS stipulated, and the Board held, that section 601(a) provides per se refugee status not only to the persons who

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AG Overrules Matter of C-Y-Z

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have physically undergone forced abortion or sterilization procedures, but also to the spouses of such persons. This determination was questioned by the INS and by some courts, and, in 2005, the Second Circuit directed the Board to explain the basis for its decision in *C-Y-Z-*. *See Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 191-92 (2d Cir. 2005). In 2006, a divided Board reaffirmed the interpretation it adopted in *C-Y-Z-* on the grounds that 1) section 601(a) is ambiguous, and 2) interpreting the provision to confer per se refugee status to the spouses of persons who had physically undergone forced abortion or sterilization procedures best accorded with congressional intent. Sitting en banc, the Second Circuit reversed *S-L-L-*, holding that section 601(a) "is unambiguous and . . . does not extend automatic refugee status to spouses or unmarried partners of individuals § 601 expressly protects." *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007) (en banc). The Second Circuit's ruling created a circuit split because it conflicted with decisions of other courts of appeals that had deferred to the Board's interpretation of section 601(a) in *C-Y-Z-* as reasonable.

> "This decision does not prevent the spouse of a person who has physically undergone a forced abortion or sterilization procedure from qualifying for political asylum under section 601(a)'s 'failure,' 'refusal,' 'other resistance . . . "

In the instant case, the alien was a married Chinese national who sought asylum under section 601(a) because his wife allegedly was forced to undergo an "involuntary sterilization" procedure. Initially, the agency agreed that section 601(a) provided refugee status to men whose spouses were forced to under go abortion or sterilization, but denied the application on the ground that the procedure performed on his wife (forced insertion and monitoring of an intrauterine device) was not a "sterilization" procedure covered by the statute. The alien sought judicial review to the Third Circuit, which, upon learning of the Second Circuit's 2007 decision in *Shi Liang Lin*, sua sponte ordered en banc consideration and asked the Department to brief whether it adhered to the Board's interpretation of section 601(a) or whether it joined the Second Circuit in reject the Boards's construction of that statutory provision. After receiving the Third Circuit's request for supplemental briefing, then-Attorney General Gonzales directed the Board, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), to refer to him for review the Board's decision in this matter and ordered parties to submit briefs addressing the availability of per se spousal eligibility for asylum under section 601(a).

Holding

Upon consideration of the parties' briefs and two amicus briefs filed in support of the alien, the Attorney General overruled the Board's decisions in *C-Y-Z-* and *S-L-L-* to the extent those decisions provided for per se eligibility for refugee status to the spouses of persons who had been subjected to a forced abortion or sterilization, but had not personally been harmed. In so holding, the Attorney General emphasized that "this decision does not prevent the spouse of a person who has physically undergone a forced abortion or sterilization procedure from qualifying for political asylum under section 601(a)'s 'failure,' 'refusal,' 'other resistance,' or 'well founded fear' provisions . . . or from obtaining asylum under other provisions of the [INA], if that person satisfies the relevant statutory criteria." 24 I. & N. Dec. at 523.

First, the Attorney General held that the plain text of section 601(a) did not support the Board's interpretation of that provision. He noted that the statutory language with respect to both a forced abortion and sterilization referred only to persons who had themselves physically undergone the procedure, and did not include or refer to their spouses. Applying the rule of statutory construction that language used by Congress be read with "their 'ordinary or natural' meaning," the Attorney General concluded that the text of section 601(a) supported the conclusion that the forced abortion and sterilization clauses in that provision extended refugee status *only* to those persons who had physically undergone the referenced procedures. He observed that interpreting section 601(a) to confer per se refugee status on *all* spouses of persons who had undergone forced abortion or sterilization procedures, even spouses who do not themselves qualify as refugees and are *not* accompanied by a qualifying alien, would circumvent with an implied rule the requirements for derivative asylum that the INS expressly set forth in section 208(b)(3)(A) (providing that spouses of persecuted individuals are eligible for derivative asylum if such spouses do not themselves qualify as refugees, but only if they accompany or follow or join the alien who is actually eligible).

The Attorney General further noted that the Board's interpretation of section 601(a) departed from, and created tension with, the INA's general requirement that every applicant for personal asylum (as distinct from statutorily prescribed derivative asylum) must establish *his or her own* eligibility for relief under specific provisions of the statute. *See* INA § 208(b)(1)(B)(i) (providing that the "burden of proof is on the applicant" to "establish that the applicant is a refugee"). Moreover, pointing out that his review of Board decisions was plenary, the Attorney General concluded that he was not bound by

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Asylum litigation update

Whether, Or Under What Circumstances, Is Family Relationship A Social Group?

Social Group Claims, Part 2

Last month's article set out the recommended argument to make in a social group case, showing the history and BIA's four current requirements for a social group: 1) the group must share a common immutable or fundamental characteristic; 2) the group must have social visibility as a group, i.e., be recognized as a group by the society in which it exists; 3) the group must have "particularity" and cannot be defined exclusively by broad characteristics; and 4) the group must not be exclusively defined by the fact that the group is targeted for persecution. *See Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *Matter of A-M-E- & J-G-U-*, 24 I & N Dec. 69 (BIA 2007). Each of these requirements reflects an approach created by the BIA or the circuits. The BIA has also held that the Ninth Circuit's voluntary associational approach is not an appropriate requirement for a particular social group. And the BIA has suggested in dictum that when an alien claims persecution on account of membership in an alleged social group of persons who share a common past experience – such as "former police officers" -- assumption of the risk of persecution might be construed to preclude a social group. The next few articles will discuss the kinds of social claims we are now seeing, and the current state of the law.

The Claim That Family Or Kinship Ties Establish A Social Group

Although aliens often argue that family is a social group, there is no BIA precedent holding that a family constitutes a "particular social group" within the meaning of our laws. In 1985, the Board announced the immutable-characteristic requirement for a social group and suggested, in dictum, that "kinship ties" might be the type of immutable characteristic that could establish such a group. *Matter of Acosta,* 19 I&N Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987). Eleven years later in *Matter of H-*, 21 I&N Dec. 337 (BIA 1996), the Board held that a clan in Somalia was a social group, because the members shared immutable kinship ties plus they shared linguistic and other distinctions making clan members recognizable as a group in Somalia. Recently, in *Matter of C-A-*, *supra*, the BIA explained that in *Matter of H*, the BIA did not rely solely on kinship or family ties to establish the social group, but also required proof of distinctive characteristics making the group socially visible as a group (i.e., used a "family relationship plus" approach, requiring kinship ties plus social visibility as a group).

Since the mid-1980's, courts have expressed their view, primarily in dictum, that family is a social group. The BIA has not decided that question in a published opinion.

Notwithstanding the absence of BIA precedent on the question of a family as a social group, since the mid-1980's courts have expressed their view, primarily in dictum, that family is a social group. The Ninth Circuit first expressed this view, in dictum which aliens and courts sometimes mischaracterize as a holding, in *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). The Ninth Circuit repeated the dictum four years later. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000). However, this is inconsistent with Ninth Circuit decisions expressly recognizing that a "family" cannot constitute a social group. *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (holding that the alien failed to show a well-founded fear of persecution on account of a ground even though she demonstrated persecution of her family); *Hernandez-Montiel,* 225 F.3d at 1092 n.4 (suggesting in the text that family is a social group but acknowledging in a footnote that "[w]e have . . . held that a family cannot constitute a particular social group"[citing *Estrada-Posadas*]). In *Thomas v. Gonzales*, 409 F.3d 1177, 1180 (9th Cir. 2005) (en banc), the Ninth Circuit attempted to clear up its case law on the question, and held that a nuclear family may constitute a social group, and that the family in that case did constitute such a group. But *Thomas* was vacated by the Supreme Court because the agency had not decided these questions, and the court had no authority to get out ahead of the Executive Branch on the issue whether the family may be a social group or was in that case. *See Gonzales v. Thomas*, 547 U.S. 183 (2006).

The Seventh Circuit has held that parents of Burmese students are a social group, appearing to apply both an immutability and social visibility analysis. *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998). The Seventh Circuit has suggested in dictum (which aliens mischaracterize as a holding) that a family is a social group, repeating the Ninth Circuit's dictum to this effect. *See Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997). Relying upon this dictum, the Fourth Circuit held that "family" constitutes a particular social group in *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004). But that decision was vacated and has no precedential effect. *Li Fang Lin v. Mukasey,* 517 F.3d 685, 692 (4th Cir. 2008).

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Social Group Cases

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And the First Circuit has expressed it's view that a nuclear family is an example of a social group. *Gebremichael v. INS*, 10 F3.d 28, 36 (1st Cir. 1993).

As shown above, there is dictum upon dictum in the circuits expressing the view that a family is a social group, which aliens mischaracterize as actual holdings. Because of the universality of families, this question has the potential to substantially expand the number of aliens who might qualify for asylum and withholding, and thus has profound implications for immigration and foreign policy. The BIA has not decided the question in a published decision.

The BIA's recent decision in *Matter of C-A-* setting out the requirements for a social group requires, among other things, that it must be based on an immutable/ fundamental characteristic and be recognized as a group in the society in which it exists. The Board also suggests that that the more extended the family relationship or ties, the greater the need for proof of social visibility as a group – meaning the greater the need for evidence showing distinctive characteristics that make the members recognizable as a group in the society.

Since this is an undecided, evolving, and sensitive question, with case law that has been misinterpreted or misstated, if you have a social group case involving a claim of family membership alone or in conjunction with other factors, please contact Margaret Perry to determine how to defend the decision.

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Matter of C-Y-Z- Overruled

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the Board's contrary interpretation of section 601(a), particularly where, as here, there was good reason for doing so, namely, that the Board's construction was not supported by the provision's text, structure, history, and purpose.

To the extent the alien contended that the fact Congress – presumptively aware of the Board's interpretation of 601(a) – amended in 2005 the statutory limit on the number of refugees who may be admitted pursuant to this section, but did not otherwise alter the provision's text evidenced Congress's implicit approval of that interpretation, the Attorney General disagreed. Pointing out that Congress takes no governmental action expect by legislation, he cautioned against viewing the 2005 amendment as "acquiescence-by-inaction" of the statutory interpretation espoused in *C-Y-Z-*, as it could also, "to use the Supreme Court's words, 'appropriately be called Congress's failure to express any opinion' on the then-current agency interpretation of the statute." 24 I&N Dec. at 532-33.

The Attorney General additionally found that to predicate political asylum or withholding of removal claims on the enforcement of coercive population control programs alone would essentially result in undermining the policy and intent of section 601(a) because if mere enforcement were the trigger for asylum eligibility, most of China's population would qualify as refugees under the provision. Further, it would result in untenable cases wherein spouses who may not have "resisted," and in fact may have supported the forced abortion or sterilization procedure performed on a spouse, would nevertheless remain eligible for asylum. Finally, the Attorney General observed that nothing in the legislative history of section 601 (a) expressly addressed whether the spouse of a person subject to a forced abortion or sterilization procedure is entitled to per se refugee status.

Accordingly, as the Attorney General's overruling of the per se spousal eligibility rule outlined in *C-Y-Z-* and *S-L-L-* applied "to all cases pending now or in the future before asylum officers, the [i]mmigration [j]udges, or the Board, and to cases pending on judicial review," he vacated the agency's decision in the instant matter and remanded the case for further proceedings consistent with his opinion.

Editor's Note: On May 16, 2008, OIL filed a brief in the *Lin-Zheng v. Atty. Gen.*, No. 07-2135 (3d Cir.) (*en banc*), defending this decision. The brief argues that the Third Circuit should affirm the Attorney General's rejection of the Board's spousal rule under Chevron Step 1, because the statute is clear on its face. It provides for asylum only to a "person" who was forcibly sterilized or subjected to abortion or has a well-founded fear of these procedures, not to "couples" or a "spouse" of such a person.

The brief argues in the alternative that if the statute is ambiguous, the court should affirm under Chevron Step 2, because the Attorney General's construction is permissible, in that it is consistent with the text and purpose. If you have a case where an alien raises a challenge to the Attorney General's new decision, you can find a copy of the *Lin-Zheng* brief defending the decision on OIL's Sharepoint portal or you can contact any OIL attorney to get a copy.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

On January 7, 2008, the Supreme Court heard oral arguments in ***Dada v. Mukasey***, No. 06-1181, on whether the filing of a motion to reopen removal proceedings automatically tolls voluntary departure.

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Asylum — Persecutor Bar

On March 17, 2008, the Supreme Court granted certiorari in ***Negusie v. Gonzales***, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (per curiam), *cert. granted sub nom.* ***Negusie v. Mukasey***, No. 07-499, 2008 WL 695623 (U.S. Mar. 17, 2008). The question presented is: Does "persecutor exception" prohibit granting asylum to, and withholding of removal of, refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

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GMC - Family Unity Waiver

On May 30, 2008, the Solicitor General authorized a petition for en banc rehearing in ***Sanchez v. Mukasey***, 521 F.3d 1106 (9th Cir. 2008), on the issue of whether the "family unity" alien-smuggling waiver of inadmissibility under 8 U.S.C. § 1182(d)(11) may also be applied to waive the good moral character requirement for cancellation of removal, where the alien would otherwise be barred from cancellation because of alien smuggling involving a spouse, child or parent.

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Criminal Alien — Conviction Modified Categorical Approach

The Ninth Circuit granted the government petition for rehearing en banc in ***United States v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007), *reh'g en banc granted*, 519 F.3d 908 (2008), and ordered that the prior opinion no longer be cited. The question raised is whether a minute order can be considered under the modified categorical approach. Oral argument has been scheduled for June 23, 2008.

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CAT — Definition of "Torture"

On June 9, 2008, in ***Pierre v. Mukasey***, __F.3d__, 2008 WL 2331388 (3rd Cir. June 9, 2008) the Third Circuit sitting *en banc*, held inter alia that to obtain CAT protection an applicant must show that his prospective torturer will have the goal and purpose of inflicting severe pain and suffering. The court of appeals had *sua sponte* ordered rehearing en banc and briefing to address specific issues regarding protection under the U.N. Convention Against Torture, including interpretation of the requirement of specific intent of the torturer, whether lack of medical care in prisons may amount to torture and require protection regardless of the intent of the jailer, and is there any other remedy or humanitarian relief from removal available to severely impaired or diseased persons who will be imprisoned in the country of removal.

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Coercive Family Planning Spouses — Lin/S-L-L- Issue

On May 28, 2008, the Third Circuit submitted ***Lin-Zheng v. Attorney General of the U.S.***, No. 07-2135, without oral argument to the en banc court. Prior to the Attorney General's decision in Matter of J-S-. 24 I. & N. Dec. 540 (AG 2008), the court had sua sponte ordered en banc hearing based on the issue of whether spouses of those subjected to forced sterilization or other family planning practices in China should be entitled to eligibility as refugees under 8 U.S.C. § 1101(a)(42)(B) for purposes of asylum, specifically including whether the court should adopt the reasoning of the Second Circuit in Lin v. U.S. Dept. of Justice, 494 F.3d 296 (2d Cir. 2007), which conflicts with ***Chen v. Attorney General of the U.S.***, 491 F.3d 100 (3d Cir. 2007).

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Removal — Blake issue

The en banc Ninth Circuit heard oral arguments March 25, 2008 in ***Abebe v. Gonzales***, 493 F.3d 1092 (9th Cir. 2007), *reh'g en banc granted sub nom.* ***Abebe v. Mukasey***, 514 F.3d 909 (2008) (also ordering that the panel decision cannot be cited as a precedent). The issue is whether an alien who is charged with deportability on a ground that does not have a comparable ground of inadmissibility is ineligible for § 212 (c) relief. The BIA had held that the agency's longstanding "statutory counterpart" rule, as applied in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), rendered petitioner ineligible for § 212(c) relief because there is no statutory counterpart in INA § 212(a) to the sexual abuse of a minor ground of deportability.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Concludes That An Implicit Finding Of Past Persecution Suffices, And Upholds A Finding Of No Likelihood Of Future Persecution Of A Protestant In Indonesia

In *Pulisir v. Mukasey*, __F.3d__, 2008 WL 1868435 (1st Cir. April 29, 2008) (Torruella, *Selya,* Howard), the First Circuit upheld the agency's decision that the petitioner failed to prove past persecution or a clear probability of future religious persecution in Indonesia. The petitioner, a protestant Indonesian, applied for asylum, withholding, and CAT claiming past persecution and fear of future religious persecution by Muslims. The petitioner claimed past persecution based on two incidents in 1987 when unknown vandals, who he assumed were Muslims, threw rocks at his church, and one incident in 1998, when unknown intruders who again he assumed were Muslims, disrupted a prayer meeting in his home. The petitioner also claimed that after he left Indonesia his mother and four friends were assaulted on the way to church by a young man because the women were carrying Bibles.

The court concluded that general conditions of discrimination "standing alone, do not convert disagreeable events into acts of persecution.

The IJ denied the asylum application as untimely, the CAT application for failure to show a risk of torture by the government. In regard to the withholding application the IJ found the petitioner's testimony about past persecution lacked specificity, detail, and corroboration, and concluded that the petitioner did not show a likelihood of future persecution because he returned to Indonesia four times without incident; discrimination against Christians is not widespread or severe; and the Indonesian government is committed to religious diversity and discourages discrimination against non-Muslims. The BIA affirmed, adding that the petitioner failed to prove his past experiences were on account of his religion, and that his family had lived without incident in Indonesia since 1991. The First Circuit denied the petitioner's review petition. The court rejected a contention that the IJ and BIA erred by failing to make an express finding about past persecution, noting that the agency may make an implicit past persecution finding, relying on *Rotinsulu v. Mukasey*, 515 F.3d 68 (1st Cir. 2008) ("Although we expect an [IJ] to make finding on all grounds that are necessary to support his decision, those findings can be either explicit or implicit").

The First Circuit also rejected a challenge to the agency's distinctions between "persecution" and "discrimination," and concluded that general conditions of discrimination "standing alone, do not convert disagreeable events into acts of persecution." The court observed that the "facts are straightforward, although reasonable minds can draw differing inferences from them," and that under the compelling evidence standard of review "[t]he mere fact that [the agency] decision makers weighed the constituent parts differently and reached a conclusion not to the petitioner's liking does not constitute a valid reason for overturning the agency's judgment." The First Circuit also rejected the petitioner's claim that the IJ and BIA did not adequately consider all the country condition evidence and criticized the Seventh Circuit's approach in *Gomes v. Gonzales*, 473 F.3d 746 (7th Cir. 2007), vacating a denial of asylum because the agency failed to explain its rationale, because the Seventh Circuit "cherry pick[ed] positive tidbits from [the country reports], and turn[ed] a blind eye to conflicting evidence in the record."

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Briefing Note: Use this case to describe the substantial evidence standard of review and how to respond when an alien argues the agency failed to consider all of the country condition evidence. But also note that the court's ruling that the IJ may make an implicit past persecution decision appears to be inconsistent with new BIA precedent, *Matter of D-I-M*, 24 I&N Dec. 448 (BIA 2008), requiring an IJ to make an explicit past persecution decision.

First Circuit Upholds An Adverse Credibility Finding And Ruling That Tragic Family Deaths Were On Account Of Ordinary Crime, Because Of Inadequate Briefing By Petitioner

In *Piedrahita v. Mukasey*, 524 F.3d 142 (1st Cir. April 28, 2008) (Lynch, *Tashima*, Lipez), the First Circuit upheld the agency's decision the petitioner's claim of future persecution by FARC in Colombia was not credible because of inconsistencies and other problems, and that without credible testimony "tragic family deaths" were the "result of criminal lawlessness," not on account of protected ground. The petitioner applied for asylum, withholding, and CAT protection based on a claim of future persecution by FARC because it murdered his uncle, father, stepfather, and mother. The petitioner testified that after these murders he went into hiding, someone shot at him, and he received threatening phone calls.

The IJ, affirmed by the BIA, found the petitioner was not credible because of "significant omis-

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sions" from his asylum application (he failed to mention FARC, or the alleged shooting incident in his application); inconsistencies between his asylum application, asylum officer interview, and testimony about whether his parents were killed because of ordinary crime or by FARC; vague testimony about the threatening phone calls; lack of corroboration by remaining family members; and the implausibility of the petitioner's testimony that he willingly entered a FARC area after the group murdered his parents. Given the adverse credibility finding, the IJ and BIA concluded that the deaths of the applicant's family were because of criminal lawlessness, not on account of a protected ground.

> Issues presented "in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned. . . Judges are not expected to be mindreaders."

The First Circuit denied the review petition, concluding that the petitioner abandoned his challenge to the adverse credibility finding because of inadequate briefing. The court emphasized that issues presented "'in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned;'" "'[j]udges are not expected to be mind readers;'" and "'[i]t is not enough to merely mention a possible argument in the most skeletal way, leaving the court to do counsel's work'"[citations omitted]. The court found the petitioner's brief to be "incoherent and perfunctory" and noted that he made only one, "patently false" challenge to the agency's "well reasoned" adverse credibility finding. Given that finding, the court upheld the agency's determination that the family deaths "were the results of general lawlessness in Colombia and not on account of protected ground" and denied the review petition.

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Briefing Note: This case is good authority for an argument that an alien has waived or abandoned issues by failing to adequately brief them, and for an argument about when an adverse credibility finding is dispositive of asylum and CAT claims.

■ **First Circuit Holds That Agency Failed To Give A Sufficient Explanation For Rejecting A Past Persecution Claim**

In ***Sok v. Mukasey***, __ F.3d __, 2008 WL 2132830 (1st Cir. May 23, 2008) (*Torruella*, Lynch, Tashima), the First Circuit remanded a Cambodian woman's asylum claim due to a "legally insufficient" explanation for rejecting her claim of past persecution, because the IJ failed to discuss six threats or other incidents or consider whether they cumulatively established a pattern of abuse directed at the petitioner. The First Circuit also criticized the IJ's consideration of country condition evidence for failing to take certain portions of the reports that the court considered important into account. Observing that the evidence did not "compel[] a conclusion" either way on the past persecution question, the court remanded to the agency "to make a well-reasoned and well-explained determination" of the petitioner's eligibility for asylum.

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■ **Evidence Of Changed Country Conditions In Cambodia Rebutted Petitioner's Withholding Of Removal Claim**

In ***Ly v. Mukasey***, 524 F.3d 126 (1st Cir. 2008) (Lipez, Howard, *DiClerico*), the court reversed an IJ's determinations that petitioner lacked credibility and failed to establish past persecution, but ultimately rejected petitioner's withholding of removal claim due to changed country conditions in Cambodia.

The IJ based his adverse credibility determination on a single inconsistency during testimony where petitioner described the arrest of her and her husband. Because of translation difficulties and the fact that petitioner had voluntarily corrected the inconsistency on direct examination, the court held that the IJ erred by making an adverse credibility determination on this basis. The court also rejected the agency's alternative finding on the merits, and held that petitioner's mistreatment at the hands of Hun Sen party supporters and police constituted persecution on account of her political support for the Sam Rainsy party, rather than mistreatment due to criminal activity, and entitled to a presumption of future persecution. However, the court found the presumption rebutted by the 2004 Country Report on Cambodia.

Specifically, the court found that, in the absence of specific evidence to the contrary, the circumstances of shared political power and a decrease in politically motivated violence supported the IJ's denial of withholding of removal. The court noted that while earlier Country Reports for Cambodia presented a much different picture, petitioner's family was living safely in Cambodia, and petitioner had testified that there would be no reason for political opponents to target her children because of her political activities. Finally, the court also held that it lacked jurisdiction to review petitioner's untimely asylum application and that petitioner waived her CAT claim.

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■ **Remaining In Country Of Claimed Persecution For Two Years After The Last Incident And Obtaining A Passport Undermines A Well-Founded Fear Of Future Persecution**

In *Phal v. Mukasey*, 524 F.3d 85 (1st Cir. 2008) (*Torruella*, Gibson, Lipez), the court affirmed the agency's adverse credibility determination based on inconsistencies between petitioner's testimony, asylum application, and corroborating evidence regarding the dates she joined the Sam Rainsy party and the dates she was allegedly attacked. The court stated that "while the evidence of inconsistency is not tremendous, we conclude that the IJ's identified grounds for disbelieving [petitioner]'s testimony are supported by substantial evidence and the record does not compel a contrary finding." The court also affirmed the agency's alternative finding that petitioners failed to prove a well-founded fear of persecution in Cambodia where petitioners lived in Cambodia without incident for two years after their alleged arrests and attacks in 1998, and continued to remain politically active. The court also held that their ability to leave the country in 2000 with government-issued passports also weighed against the reasonableness of their fear.

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SECOND CIRCUIT

■ **Vienna Convention On Consular Relations Does Not Create Judicially Enforceable Private Rights Of Consular Notification And Access**

In *Mora v. People of the State of New York*, 524 F.3d 183 (2d Cir. 2008) (Leval, *Cabranes*, Raggi), the court affirmed the dismissal of a lawsuit brought by an alien who alleged that his rights under the Vienna Convention on Consular Relations were violated when state and local law enforcement officials did not notify him of the right to contact his foreign consulate for assistance when he was arrested and detained.

According "great weight" to the position of the United States as amicus curiae, the court held that the Convention did not create any enforceable individual rights to consular notification and access. The court granted that Article 36 (1)(b) explicitly references the "rights" of a foreign national, but reasoned that the "the lack of any mention in the text of Article 36(1)(b) as to whether or how detained foreign nationals might vindicate their asserted rights at least suggests that the drafters of the Convention did not intend to confer rights directly upon individuals" or is at most "ambiguous." Moreover, the court said, "the vocabulary of 'individual rights' may be used to refer to certain potential benefits provided by treaty that do not actually create rights enforceable by the individuals benefitted." The court found further support for its position in the Convention's preamble, which references only "consular relations, privileges and immunities, suggest[ing] that any relations, privileges, or immunities the Convention creates are strictly those of consular officials," and "the development of friendly relations *among nations*." Finally, the court noted that nothing in the treaty's negotiating and drafting history suggested a different result.

"The vocabulary of 'individual rights' may be used to refer to certain potential benefits provided by treaty that do not actually create rights enforceable by the individuals benefitted."

The court rejected petitioner's argument that the government's position be accorded less deference on the basis of inconsistent enforcement, finding no inconsistency between the government's current position on the treaty and its position during the 1980 Iran hostage negotiations. The court explained that "it is manifestly the case that, in its pleading to the International Court of Justice, the United States was *not* suggesting that the American hostages taken by Iran ought to have access to the courts of Iran in order to vindicate their individual rights under the Convention." In addition to petitioner's claim under the Convention, the court also refused to recognize a cause of action under the Alien Tort Statute as detention without informing a consular official is not a violation of customary international law.

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■ **Second Circuit Reiterates That It Lacks Jurisdiction Over Discretionary Cancellation Denial Based On Insufficient Hardship**

In *Mendez v. Mukasey*, 525 F.3d 216 (2d Cir. 2008) (McLaughlin, Calabresi, *Sotomayor*), the Second Circuit amended its previous decision where it dismissed for lack of jurisdiction a Mexican alien's petition for review of the denial of cancellation of removal, based upon a discretionary determination that he had not established that his removal would cause "exceptional and extremely unusual hardship" to his U.S. citizen children.

The court rejected the alien's claims that it retained jurisdiction to consider whether the agency applied the correct hardship standard, finding that the alien had not distinguished his case from precedent that it was bound to follow. Nonetheless, the court found petitioner's arguments to be persuasive. "Were we operating on a new slate, we would be inclined to hold that the question of whether an alien has established 'exceptional and extremely unusual hardship' is a determination for

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which we have jurisdiction to review similar to the other eligibility requirements for cancellation of removal."

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■ **Second Circuit Holds That Application Of Cancellation Of Removal's "Stop-Time" Rule Was Not Impermissibly Retroactive Where Alien Failed To Show Changed Consequences Or Detrimental Reliance Under *Landgraf***

In ***Martinez v. INS***, 523 F.3d 365 (2d Cir. 2008) (*Walker*, B.D. Parker, Straub), the court held that the retroactive application of the seven-year continuous residence requirement of 8 U.S.C. § 1229b(d)(1)(B) for cancellation of removal to an alien's 1995 commission of a drug offense was not impermissibly retroactive under the second step of *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), where the alien could not show that the new law attached a new consequence on past acts or a protectable reliance interest. Indeed, the court said, "deportation is the consequence he receives upon retroactive application of the stop-time rule just as it is the consequence he would have received immediately following his criminal conduct."

Regarding the first step of *Landgraf*, however, the court found that Congress had not expressly commanded that 8 U.S.C. § 1229b(d)(1)(B) be retroactively applied to conduct occurring before the effective date of IIRIRA, and it would not defer to the Agency's decision in *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999). The court rejected the government's argument that, according to the transitional rules of IIRIRA, Congress clearly meant the stop-time rule to apply retroactively because "this case is a permanent rule case: [] the proceedings against [petitioner] were *not pending* when IIRIRA was enacted or when it went into effect, [thus] the transitional rules do not apply." The court declined to follow the approaches of the Fifth and Ninth Circuits and "artificially stretch the transitional rules to cover this case."

Justice Straub filed a concurring opinion finding that the stop-time rule had attached new consequences to petitioner's conviction, but agreeing that petitioner could not show detrimental reliance.

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"Where an alien has demonstrated good cause . . . an IJ may, in the exercise of his informed discretion, depart from the deadline imposed by the relevant local rules."

■ **IJ's Broad Discretion To Adopt And Enforce Deadlines Includes The Authority To Deviate From Local Rules Where A Petitioner Demonstrates Good Cause For The Delay**

In ***Dedji v. Mukasey***, 525 F.3d 187 (2d Cir. 2008) (*Cabranes*, Pooler, Sack), the Second Circuit held that "where an alien has demonstrated good cause for the failure to timely file documents and a likelihood of substantial prejudice from enforcement of the deadline, an IJ may, in the exercise of his informed discretion, depart from the deadline imposed by the relevant local rules." Here, petitioner's counsel had submitted a letter indicating that the failure to timely submit the documents was the result of a fire at her office and that petitioner had submitted the documents to his counsel in a timely manner. The IJ acknowledged receiving the documents but refused to admit them on the basis that the submissions were untimely under the local rules.

The court held that the IJ's failure to recognize that he possessed discretion to deviate from local rules was error, and should be reviewed for an abuse of discretion. Intimating no view on these issues, the court remanded the case to the BIA for a determination of whether (1) good cause existed, (2) strict adherence to local rules would cause unfairness in this particular instance, and (3) a reprieve from the filing deadline is warranted.

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■ **Second Circuit Holds That It Lacks Jurisdiction Over Challenge To The Government's Decision To Commence Or Continue Removal Proceedings**

In ***Ali v. Mukasey***, 524 F.3d 145 (2d Cir. 2008) (Walker, *Cabranes*, Raggi), the court held that pursuant to 8 U.S.C. § 1252(g), it lacked jurisdiction to hear an alien's claim that DHS should not have commenced proceedings or should have terminated proceedings against him where the alien did not raise a constitutional claim or question of law. The court also rejected petitioner's allegation that DHS violated its regulations by refusing to let them withdraw their asylum application and instead referred their claim to an IJ. Even assuming the truth of the allegation, the court said, petitioner did not demonstrate prejudice in the DHS officer's decision, nor did he demonstrate that any different outcome would have occurred had he been allowed to withdraw his asylum application in front of the officer.

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■ **Second Circuit Finds That Giving A False Name On A Visa Application Renders The Alien Inadmissible**

In ***Emokah v. Mukasey***, 523 F.3d 110 (2d Cir. 2008) (*Walker*, Cabranes, Raggi), the court determined that the alien's act of providing a false name in connection with a visitor visa application constituted a willful and material misrepresentation of fact rendering the alien inadmissible. The court fur-

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ther held that the alien was ineligible for a waiver of inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(ii) based on an approved I-360 visa, because she "was not present in the United States without being admitted or paroled," but rather entered pursuant to a visa, albeit fraudulently, and the abuse on which she secured the Violence Against Women Act visa bore no nexus to her reasons for coming to the United States. Finally, the court determined that it lacked jurisdiction to review the agency's discretionary denial of the alien's application for an 8 U.S.C § 1182(i) waiver of inadmissibility.

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THIRD CIRCUIT

■ **Third Circuit Upholds Findings That Criminal Conspiracy Conviction Involving Fraud Or Deceit Without A Jury Determination Of Monetary Loss Was An Aggravated Felony**

In ***Nijhawan v. Att'y Gen. of the United States***, __F.3d__, 2008 WL 1914756 (3d Cir. May 2, 2008) (*Rendell*, Stapleton, Irenas), the Third Circuit upheld the BIAs' determination that the alien had committed an aggravated felony and was thus removable under 8 U.S.C. § 1101(a)(43)(M)(i), because his conspiracy conviction constituted an offense involving fraud or deceit in which the loss to the victims exceeded $10,000. The court noted that the criminal statutes under which the alien was convicted require that fraud or false or fraudulent pretenses be employed (mail fraud, wire fraud, and bank fraud) and, thus, "involve" fraud or deceit for the purposes of the Immigration & Nationality Act.

With regard to the loss element, the court concluded that the language of INA § 101(a)(43)(M)(i) does not require a jury to have determined that there was a loss in excess of $10,000, and that there was clear and convincing evidence that a loss to the victim or victims exceeding $10,000 was tied to the alien's offense.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds That Knowingly Filing A False Tax Return Is An Aggravated Felony And That The BIA May Look At The Alien's PSR To Determine The Amount Of Loss**

In ***Arguelles-Olivares v. Mukasey***, __F.3d__, 2008 WL 1799987 (5th Cir. April 22, 2008) (Garwood, Dennis, *Owen*), the court held that the alien's conviction for filing a false tax return was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M), which includes: "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in § 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000."

> "When the amount of loss to a victim is not an element of an offense, the focus should not be limited to the conviction itself."

The court rejected the Third Circuit's approach that subsection (M)(i) does not apply to any federal tax offenses because subsection (M)(ii) specifically identifies tax evasion as the only tax offense that qualifies as an aggravated felony. In so holding, the court stated "Congress may well have seen subsection 43(M)(ii) as a necessary addition to subsection 43 (M) since neither fraud nor deceit is a specific element of the crime of tax evasion under 26 U.S.C. § 7201 . . . Moreover, it is difficult to discern why Congress would want only a violation of 26 U.S.C. § 7201 involving $10,000 or more to constitute an aggravated felony, but not tax felonies involving fraud and deceit and the same amount of loss to the Government fisc."

The court also determined that the BIA did not abuse its discretion in using the Pre-Sentence Investigation Report (PSR) to determine the amount of loss because the crime of filing a false tax return does not itself define a monetary threshold, thus the BIA need not apply the modified categorical approach and may look beyond the statute to the PSR. The court explained "when the amount of loss to a victim is not an element of an offense, the focus should not be limited to the conviction itself. The amount of loss is relevant in a criminal prosecution primarily, if not exclusively, to sentencing. When a tribunal subsequently examines, for collateral purposes like those here, the amount of loss resulting from an offense, the reason for applying the modified categorical approach does not fully obtain."

Judge Dennis dissented. He would have adopted the Third Circuit's approach and found that filing a false tax return does constitute and aggravated felony under 8 U.S.C. § 1101(a)(43)(M) and that the BIA erred by looking to the PSR.

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■ **Fifth Circuit Holds That Misprision Of A Felony Is An Aggravated Felony**

In ***Patel v. Mukasey***, __ F.3d __, 2008 WL 1874579 (5th Cir. Apr. 29, 2008) (Higginbotham, Benavides, Dennis), the Fifth Circuit held, in a matter of first impression, that an alien's conviction for misprision of a felony in violation of 18 U.S.C. § 4 was an aggravated felony under INA § 101(a)(43)(M)(i), in that it was "an offense that involves fraud or deceit

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in which the loss to the victim or victims exceeds $10,000." Applying the categorical approach and the commonly understood legal meanings of "fraud" and "deceit," the court reasoned that misprision of a felony necessarily entailed fraud or deceit because, in order to be convicted of a misprision offense, an alien must commit some affirmative act to prevent discovery of an earlier committed felony.

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■ **Fifth Circuit Holds That Visa Priority Date Cannot Be Transferred To Daughter**

In ***Bolvito v. Mukasey***, __F.3d__, 2008 WL 1971392 (5th Cir. May 8, 2008) (Reavley, Smith, *Dennis*), the Fifth Circuit held that although an I-130 relative visa petition was approved for the alien with a priority date of 2002, no visa was currently available such that she could adjust her status to that of a lawful permanent resident. The court rejected the alien's argument that a 1981 priority date should be made available to her based on an I-130 relative visa petition that her stepfather filed on behalf of her mother in 1981. The court upheld the IJ's determination that because the alien was not a named beneficiary on that visa petition, and she turned twenty-one years old before her mother adjusted her status, she was no longer a derivative "child" under the Immigration & Nationality Act for purposes of that petition. The court also held that the IJ did not err by issuing a decision on the day of the master calendar hearing.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That Arrest For Criticizing A Prince Of UAE Is On Account Of A Personal Business Dispute, Not Political Opinion**

In ***Zoarab v. Mukasey***, __F.3d__, 2008 WL 1946544 (6th Cir. May 6, 2008) (Gilman, Rogers, *McKeague*), the Sixth Circuit held that a petitioner's arrest and abuse in the United Arab Emerates for calling a prince "thief" was on account of a soured business deal, not political opinion. The petitioner was a Palestinian bank official who was arrested and detained for six months in U.A.E. after he unsuccessfully tried to collect an investment debt on behalf of his bank from a prince of one of the emirates, and accused him of being a thief after he refused to meet with the petitioner. The petitioner was asked to resign from his job at the bank and could not work in U.A.E. because of his accusations against the prince. The IJ affirmed by the BIA found the petitioner ineligible for asylum or withholding for failure to show his arrest and problems were on account of any expression of political opinion, as opposed to a personal business dispute.

The court rejected the petitioner's contention that criticizing the prince was the same as criticizing the integrity of the government and was an expression of political opinion.

The Sixth Circuit denied the review petition. It rejected the petitioner's contention that criticizing the prince was the same as criticizing the integrity of the government and was an expression of political opinion. The court found substantial evidence supported the agency's position that the petitioner was acting as an angry investor, not a political dissident when he confronted the prince. The Sixth Circuit declined to adopt the Ninth Circuit's approach in *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000) (treating criticism of corrupt government officials as a political dispute where "the alleged corruption is inextricably intertwined with government operation"). The Sixth Circuit also distinguished *Grava* on the basis that there was no evidence the U.A.E. prince had any direct involvement with government actions, and any problems associated with management of his private business venture could not be linked to government corruption.

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[**Briefing Note**: This is an excellent case and analysis to use when an alien claims political persecution because of a personal dispute with a government official, and also shows a good way to distinguish *Grava* in the Ninth and other circuits].

■ **Sixth Circuit Holds That It Lacks Jurisdiction To Review Untimely Asylum Claim, And Affirms The Agency's Fraudulent Marriage Determination And Denial Of Withholding Of Removal And CAT Protection Based On The Aird Affidavits**

In ***Huang v. Mukasey*** 523 F.3d 640 (6th Cir. 2008) (McKeague, *Moore*, Schwartzer), the court held that substantial evidence supported the IJ's determination that petitioner entered into a fraudulent marriage in 1996 for the purpose of securing admission to the United States. The court found that significant evidence demonstrated the fraudulent nature of the marriage, including testimony at the hearing offered by the officer who interviewed the married couple, as well as the documentary evidence produced at that time, including the officer's sworn statement that the marriage was fraudulent, the bank record of an essentially empty "joint" account, and the business card containing contact information for petitioner in New York and a New York-issued social security number, when the couple allegedly lived together in

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Michigan.

The court also held that it lacked jurisdiction to consider the untimeliness of petitioner's asylum claim based on changed circumstances. The court explained that whether petitioner had established changed circumstances based on her alleged marriage and birth of her son was "predominantly factual" and therefore barred from review pursuant to 8 U.S.C. § 1158(a)(3). Moreover, the court denied petitioner's withholding of removal and CAT claims based on China's coercive family planning policy because the 2003 and 2005 Aird affidavits did not compel a conclusion contrary to the BIA's decision, citing *Matter of J-W-S-*, 24 I&N Dec. 185, 192 (BIA 2007), and *Matter of S-Y-G-*, 24 I&N Dec. 247, 255 (BIA 2007).

Further, the court found petitioner's argument based on the *Shou Yung Guo* documents irrelevant as she did not claim to be from the Fujian Province. Finally, the court affirmed the agency's denial of a motion to remand for adjustment of status based on her second marriage for failure to meet the factors listed in *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002), namely that the government opposed adjustment due to marriage fraud. The court also denied petitioner's motion to remand to the BIA in order to supplement the record as IIRIRA "explicitly revoked our authority to remand to the BIA for the taking of additional evidence."

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■ **Sixth Circuit Upholds Denial Of Continuance Based Mainly On Government's Issuance Of Notice Of Intent To Deny Visa Petition Filed By Third Spouse**

In ***Ukpabi v. Mukasey***, 525 F.3d 403 (6th Cir. 2008) (Clay, McKeague, Boyko (District Court)), the Sixth Circuit granted the government's motion to publish a decision originally filed April 17, 2008. The court upheld an IJ's denial of a continuance requested by the petitioner in order to await the adjudication of a visa petition filed by his third wife. The court based its decision mainly on the USCIS' issuance of a Notice of Intent to Deny the visa petition. The court ruled that showing "good cause" for a continuance is "crucial" and stated, "an unreasonable continuance would thwart the operation of the statutes providing for removal of inadmissible (8 U.S.C. § 1182) and deportable (8 U.S.C. § 1227) aliens."

The court denied a stay of the mandate because petitioner had not established that his anticipated certiorari petition had a reasonable probability of succeeding on the merits.

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■ **Sixth Circuit Holds That Alien Failed To Show Due Diligence In Pursuing Her Ineffective Assistance Of Counsel Claim**

In ***Barry v. Mukasey***, 524 F.3d 721 (6th Cir. 2008) (Batchelder, Moore, *McKeague*), the court affirmed the BIAs' decision denying a Guinean alien's untimely motion to reopen predicated on a claim of ineffective assistance of counsel. The court held that petitioner failed to exercise due diligence in filing her motion to reopen and therefore did not warrant equitable tolling of the ninety-day time limit for filing. Specifically, "[petitioner]'s lack of diligence is reflected in her untimely actions: she did not inquire about her immigration status for approximately one year despite having actual knowledge that the BIA dismissed her case, and, after learning of the need to file a motion to reopen, she waited over three months to file," the court said.

The court also ruled that, pursuant to *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004), it lacked jurisdiction to review petitioner's challenge to the BIA's refusal to exercise its *sua sponte* authority to reopen her case.

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SEVENTH CIRCUIT

■ **Seventh Circuit Denies Motion To Stay Mandate**

In ***Al-Marbu v. Mukasey***, __F.3d__, 2008 WL 1823298 (7th Cir. April 24, 2008) (Ripple) the court denied petitioner's motion to stay the court's mandate pending a petition for writ of certiorari to the Supreme Court. The court held that petitioner had not established that his anticipated certiorari petition had a reasonable probability of succeeding on the merits, and concluded that any further delay in the issuance of the mandate was not justified. In denying the stay, the court noted that the five arguments petitioner presented to show a reasonable probability of success on the merits were the exact same arguments he previously presented to the court on petition for en banc review, and found petitioner's claim he would suffer irreparable harm if removed because he was the sole care-taker of his children while his wife sought medical treatment in Europe lacking in detail.

The court also denied petitioner's request for a 30-day extension in which to file additional arguments because "the matters he intends to raise in his petition for certiorari have been examined thoroughly in the proceedings in this court and further delay in the issuance of our mandate is not justified."

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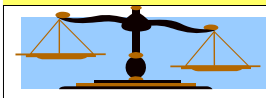

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■ **Seventh Circuit Affirms An Adverse Credibility Finding In Chinese Family Planning Case Based On Improbable Testimony And Questionable Documents**

In *Huang v. Mukasey*, _ F.3d _, 2008 WL 1976595 (7th Cir. May 8, 2008) (*Flaum*, Wood, Evans), the Seventh Circuit held that the evidence amply supported an adverse credibility finding in an asylum case filed by a husband and wife in China alleging past forced abortion. The IJ, affirmed by the BIA, found inconsistencies and implausiblities in narratives of the husband and wife, including their inability to explain how they each paid $ 50,000 to be smuggled into the U.S. but could not find resources to pay a $ 370 fine for violating birth control policy in China. In addition, the abortion certificate they submitted to corroborate their claim of forced abortion is generally only given in cases of voluntary abortion. There were also inconsistencies or problems with an alleged fine notice, summons, and detention notice, and a DHS forensic documents examiner testified that these documents were either not authentic or could not be verified. The Seventh Circuit held that substantial evidence supported these reasons for finding the petitioners not credible and denied the review petition.

IJ found implausible that asylum applicants could each pay $ 50,000 to be smuggled into the U.S. but could not find resources to pay a $ 370 fine for violating birth control policy in China.

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Briefing Note: This case contains an excellent discussion of DHS forensics examination procedures and opinions that may be of benefit if you have a Chinese case where there are questions about the authenticity of abortion or other documents.

■ **Seventh Circuit Holds That The Agency Erred By Finding That An Alien Who Fraudulently Attempted To Enter Was Not Entitled To Seek An Advance Permission Waiver In A Motion To Reconsider The Denial Of A Motion To Reopen**

In *Atunnise v. Mukasey*, __ F.3d __, 2008 WL 1883909 (7th Cir. Apr. 30, 2008), the Seventh Circuit held that the BIA correctly found the alien statutorily ineligible for a waiver of inadmissibility pursuant to INA § 212(i) because a K-3 nonimmigrant may not seek an immigrant waiver. The court also held that the Board committed error in finding that the alien had lost her opportunity to seek a waiver of inadmissibility under INA § 212(d)(3) by not asking for that form of relief until it was presented in argument in her motion to reconsider a previously denied motion to reopen. The court also held that the IJ did not discharge his duty to advise a represented alien of her opportunity to seek an advance permission waiver, nunc pro tunc.

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■ **Seventh Circuit Agrees That Guinean Asylum Applicant Was Not Credible Given Inconsistencies In His Testimony And Failure To Corroborate**

In *Soumare v. Mukasey*, __F.3d _, 2008 WL 19876595 (7th Cir. May 8, 2008) (*Kanne*, Sykes, Tinder), the Seventh Circuit upheld an adverse credibility finding against a Guinean asylum applicant and held that the IJ did not err in requiring corroborating evidence. The IJ, summarily affirmed by the BIA, found the petitioner not credible based discrepancies between his asylum application and testimony about the dates of alleged lootings of his family's business by political opponents, and inconsistencies about the number of times he was arrested, whether he was convicted as a result of an arrest, incoherent answers to questions, and his attempt to blame inconsistencies on translation errors. After finding the petitioner not credible, the IJ stated it would be reasonable to require corroboration and found the petitioner had not corroborated his claim or explained the absence of some form of corroboration such as documentation relating to his family business.

The Seventh Circuit denied the review petition. The court held that the petitioner had the burden of proof and the evidence amply supported the adverse credibility finding. The court also held that because the IJ expressly found the petitioner was not credible, he needed to provide corroboration or a convincing explanation for the lack of corroboration, which the petitioner failed to do.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds That It Lacks Jurisdiction Over Voluntary Departure Denial Where Alien Fails To Present Colorable Legal Or Constitutional Claims**

In *Garcia-Aguillon v. Mukasey*, 524 F.3d 848 (8th Cir. 2008) (*Wollman*, Bright, Smith), the Eighth Circuit held that it lacked jurisdiction to review the discretionary denial of voluntary departure where petitioner failed to present a colorable legal or constitutional claim. The court ruled that petitioner's argument that the IJ erroneously considered his repeated illegal entries and other character evidence did not raise a colorable question of law. The court said that the argument amounted "to nothing more than a challenge to the IJ's discretionary and fact-finding exercises

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cloaked as a question of law." The court also rejected the alien's due process argument – that his rights were violated because he lacked prior notice that his previous returns could later be used to deny him voluntary departure – because an alien possesses no protected interest in discretionary relief.

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■ **Eighth Circuit Reaffirms Jurisdictional Limits In Asylum Denial**

In ***Isse v. Mukasey***, 524 F.3d 886 (8th Cir. May 8, 2008) (*Loken*, Hansen, Murphy), the Eighth Circuit held that its jurisdiction was limited to reviewing the BIA's denial of the alien's motion to reconsider where the alien did not petition for review of the BIA's denial of his appeal on the merits. The court also held that the BIA's denial of the motion to reconsider was not an abuse of discretion, concluding that the BIA's finding that his application for asylum was not frivolous was not inextricably linked to its adverse credibility finding.

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■ **Eighth Circuit Uphholds BIA's Construction That Alien May Not File An Untimely Motion To Reopen To Apply For Asylum Based On Birth Of Children In U.S.**

In ***Li Yun Lin v. Mukasey,*** __F.3d__, 2008 WL 2151715 (8th Cir. May 23, 2008) (Loken, Beam, Bye) (per curiam), and ***Zhong Qin Zheng v. Mukasey,*** 523 F.3d 893 (8th Cir. April 28, 2008) (*Loken,* Wollman, Shepard), the Eighth Circuit upheld the BIA's construction that the birth of children in the United States is not a changed circumstance excusing the late filing of a motion to reopen to apply for asylum. In *Lin*, the court also agreed with the agency that the alien failed to show changed country conditions in China, because the affidavits or other evidence of changed conditions was not new, or had already been found insufficient in *Matter of J-W-S-*, 24 I&N Dec. 185, 192 (BIA 2007) and *Matter of S-Y-G*, 24 I&N Dec. 247, 258 (BIA 2007).

Briefing Note: The Eighth Circuit decisions do not cite *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007) (holding that an alien who is subject to a final removal order is barred by statute and regulation from submitting an untimely motion to reopen based on changed personal circumstance of birth of US children). But the court's decisions in effect affirm that decision. Also, *C-W-L-* and the Eighth Circuit decisions only apply to untimely motions to reopen, not to timely motions.

"In the absence of extraordinary circumstances, the imposition of a monetary sanction for a violation of a local rule without notice and an opportunity to be heard is a violation of the Due Process Clause."

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NINTH CIRCUIT

■ **Ninth Circuit Vacates District Court's Monetary Sanction Against Government Attorneys And Remands For Further Hearing.**

In ***Ali Ali v. Mukasey***, __F.3d__, 2008 WL 2001040 (9th Cir. May 5, 2008) (Alarcon, Graber, Rawlinson) (*per curiam*), the Ninth Circuit held that the district court violated the due process rights of Justice Department attorneys in imposing a monetary sanction for violating a local rule without providing notice and an opportunity to respond. "In the absence of extraordinary circumstances, the imposition of a monetary sanction for a violation of a local rule without notice and an opportunity to be heard is a violation of the Due Process Clause," said the court. The district court had issued a $1,000 sanction for filing a pleading that exceeded the page limit by three pages. The court said that on remand, following a hearing, "the district court can determine whether the sanctioned party's conduct amounted to 'recklessness, gross negligence, repeated-although unintentional-flouting of court rules, or willful misconduct before approving the imposition of monetary sanctions under local rules.'"

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■ **Ninth Circuit Affirms BIA's Position In *C-W-L-* That An Alien May Not File An Untimely Motion To Reopen To Apply For Asylum Based On Birth Of Children In U.S.**

In ***Chen v. Mukasey,*** 524 F.3d 1028 (9th Cir. May 2, 2008) (*Canby*, Graber, Gould), the Ninth Circuit upheld the BIA's decision in *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007) ruling that an alien who is subject to a final removal order may not file an untimely motion to reopen to make a successive asylum application based on the birth of children in the United States. The Ninth Circuit affirmed the BIA's decision in *C-W-L-* under *Chevron* step two as a permissible construction of ambiguous statutes and the regulations. The court acknowledged language in a footnote in a prior Ninth Circuit decision, *He v. Gonzales*, 501 F.3d 1128, 1133 n. 9 (9th Cir.2007), suggesting that an alien in Chen's position may seek asylum without having to file a motion to reopen, but found that the the interplay between statutes and regulations that was decided by the BIA in *Matter of C-W-L-* was not before the Ninth Circuit in *He*, so"we are not bound by *He*'s offhand observation," citing *Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam).

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Briefing Note: The Ninth Circuit has

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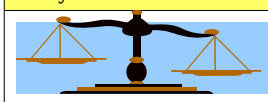

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joined the Eighth Circuit in upholding the BIA's approach in *C-W-L-,* but these decisions are limited to untimely motions to reopen. They do not apply to timely motions. This Ninth Circuit decision is useful if you want authority for arguing that adverse language in a prior Ninth Circuit decision is dictum or not binding.

■ **Ninth Circuit Rejects Alien's Challenge To The Validity Of Underlying Removal Proceedings In Petition For Review Of Reinstatement Decision**

In *Martinez-Merino v. Mukasey*, 525 F.3d 801 (9th Cir. 2008) (Wallace, *Noonan*, Paez), the Ninth Circuit rejected a Mexican alien's attempt to collaterally attack the validity of his underlying removal order through a petition for review of the reinstatement of that order. Relying on its decision in *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007) (*en banc*), the court held that the alien had not successfully alleged the deprivation of any constitutional or statutory right to be free from the restraint imposed by the reinstatement order. Because the alien also failed to show that he suffered a "gross miscarriage of justice" in the underlying proceedings, the court denied the petition for review. The court also withdrew its previous opinion and denied the alien's petition for *en banc* rehearing as moot.

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■ **Ninth Circuit Holds That Alien's Conviction For "Annoying Or Molesting A Child Under 18" Does Not Constitute A Crime Involving Moral Turpitude**

In *Nicarnor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008) (*W. Fletcher*, Pregerson, Bybee), the court held that the government failed to show the alien's misdemeanor conviction of "annoying or molesting a child under 18," under California Penal Code 647.6(a), was a crime involving moral turpitude.

In 1990 Petitioner, an LPR, was convicted of two counts of "annoying or molesting a child under 18" pursuant to California Penal Code 647.6(a). A criminal complaint and jury verdict evidenced the convictions. Because of his convictions, in 2001 the INS placed petitioner in removal proceedings as an alien convicted of an aggravated felony and an alien convicted of two or more crimes involving moral turpitude. Petitioner sought cancellation of removal in addition to a § 212(c) waiver. An IJ denied all relief and found petitioner removable as both an aggravated felon and an alien convicted of crimes involving moral turpitude. The BIA affirmed.

The court, parsing out the required actus reus and mens rea, held that a conviction under California Penal Code 647.6(a) does not categorically constitute a CIMT because it proscribed conduct that was not inherently base or vile.

Before the Ninth Circuit, the government conceded that pursuant to *United States v. Pallares-Galan,* 359 F.3d 1088, 1102-03 (9th Cir. 2004), petitioner's convictions did not categorically constitute aggravated felonies. Regarding whether the convictions constituted crimes involving moral turpitude, the court found in the negative. First, the court, parsing out the required actus reus and mens rea, held that a conviction under California Penal Code 647.6(a) does not categorically constitute a CIMT because it proscribed conduct that was not inherently base or vile. The court explained that 647.6(a)'s actus reus punishes such "annoying," but non-morally reprehensible conduct as "brief touching of a child's shoulder" and even "no actual touching" at all. "For example," the court said, "photographing children in public places with no focus on sexual parts of the body satisfies the actus reus element of § 647.6(a), so long as the manner of photographing is objectively 'annoying.'" Regarding the mens rea of the crime, the court found that it lacked the requisite specific or reckless intent, stating that "under California law, a defendant may be found to have manifested an 'unnatural or abnormal sexual interest,' and thereby have satisfied the mens rea requirement of 647.6(a) solely because he possessed an otherwise natural and normal interest in an underage person whom he negligently believed to be eighteen." Therefore, the court said, after considering the actus reus and mens rea together, a conviction under 647.6(a) merely constitutes "annoying a child by objectively non-sexual conduct while holding an unarticulated private sexual interest," rather than categorically a CIMT.

The court found further support for its decision by applying the "realistic probability" test articulated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S. Ct. 815, 166 L.Ed.2d 683 (2007), albeit somewhat reluctantly, as the court expressed doubt about whether *Duenas-Alvarez* had invalidated its "extensive case law" on the "'application of legal imagination to a state statute's language' to determine the range of conduct that might be successfully prosecuted under it." The court cited an unpublished decision of the California Court of Appeals where a § 647.6(a) conviction resulted from an individual's pulling up next to a minor walking on the street, attempting to flirt with her, and then offering her a ride - conduct which the court found was not a "grave act of baseness or depravity." Turning to the modified categorical approach, the court held that "both the criminal complaint and the jury verdict sheet simply recite the elements of the crime" and were thus insufficient to show a CIMT.

Judge Bybee, in a lengthy opinion, dissented. He would have held that §647.6(a) proscribes only reprehensi-

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ble conduct committed with a "predatory" intent and failed the "realistic probability" test.

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■ **Ninth Circuit Holds That A "Cultivating Marijuana" Conviction Is An Aggravated Felony Rendering An Alien Ineligible For Cancellation Of Removal**

In *United States v. Reveles-Espinoza*, __F.3d__, 2008 WL 1722828 (9th Cir. Apr. 15, 2008) (Fisher, Callahan, Collins) (per curiam), the Ninth Circuit held that the alien's California state conviction for cultivating marijuana in violation of Cal. Health & Safety Code § 11358 was an aggravated felony within the meaning of 8 U.S.C. § 1229b. The court rejected the argument that the § 11358 was categorically overbroad due to its inclusion of the term "drying." The court held that the ordinary meaning of the terms "production" and "processing" used in the Controlled Substances Act also includes the act of drying. The court also held that the fact that the Notice to Appear characterized the alien's underlying conviction as a "controlled substance offense" rather than an "aggravated felony" was not a due process violation.

The court held that the ordinary meaning of the terms "production" and "processing" used in the Controlled Substances Act also includes the act of drying.

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■ **Ninth Circuit Holds That Aliens Convicted Of A Crime Of Violence Are Removable As Aggravated Felons Whether Or Not They Are Convicted As Aiders, Abettors, Or Principals**

In *Ortiz-Magana v. Mukasey*, __ F.3d __, 2008 WL 1849155 (9th Cir. Apr. 28, 2008) (Silverman, McKeown, *Tallman*), the Ninth Circuit upheld the BIA's finding that an alien was removable as an aggravated felon for his conviction for assault with a deadly weapon under California Penal Code § 245(a)(1), rejecting his argument that he was convicted as an aider or abettor and not as a principal. The court determined that this was "a matter of first impression," and applied the reasoning in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which recognized that the distinction between aiders, abettors, and principals had been abrogated in nearly every jurisdiction. The court agreed with the Board that "no principled distinction can be drawn for immigration purposes between an alien's status as an accessory and his role as a principal in the commission of a section 245(a)(1) aggravated felony."

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■ **Ninth Circuit Holds That Neither A Conviction Under California Vehicle Code § 10851(a) Nor A Conviction Under California Vehicle Code § 2800.2(a) Constitutes An Aggravated Felony**

In *Penuliar v. Mukasey*, 523 F.3d 963 (9th Cir. 2008) (Browning, *Pregerson*, Berzon), the court again held that petitioner's two convictions under California Vehicle Code § 10851(a) for unlawful driving or taking of a vehicle did not categorically constitute aggravated felonies under 8 U.S.C. § 1101(a)(43)(G), as "theft offenses (including receipt of stolen property) or burglary offenses for which the term of imprisonment [is] at least one year." The court also held that petitioner's conviction under California Vehicle Code § 2800.2(a) for evading an officer likewise did not categorically constitute a crime of violence.

Regarding petitioner's two convictions under California Vehicle Code § 10851(a), the Supreme Court, in *Gonzales v. Penuliar*, 127 S. Ct. 1146 (2006), had vacated the panel's prior decision granting the petition for review and remanded the case for further proceedings in light of *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007) (holding that a generic "theft offense" includes the crime of aiding and abetting). The court, following its decision in *United States v. Vidal*, 504 F.3d 1072, 1077 (9th Cir. 2007) (en banc), held that a conviction under § 10851(a) does not categorically qualify as a "theft offense" because it extends liability to accessories after the fact for post-offense conduct.

The court explained that "unlike a principal, an accomplice, or an accessory before the fact, an accessory after the fact had no part in causing the crime" and therefore lacked the requisite specific intent. Turning next to the modified categorical approach, the court held that the record evidence was insufficient to show that petitioner committed a theft offense. The court explained that the charging documents for both convictions and abstracts of judgement only cited the generic statutory language. The court distinguished this case from its recent decision in *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), applying the modified categorical approach to find a conviction under § 10851(a) constituted an aggravated felony because *Arteaga* "did not describe the record before it concerning the conviction or explain what in the record of conviction indicated that the offense of conviction was a generic theft offense."

Regarding petitioner's conviction under California Vehicle Code § 2800.2(a) for evading an officer, the court held that the statute's definition of "willful or wanton disregard" for public safety" as including three violations of the statute constituted a pro-

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scription of negligent conduct and therefore did not have the specific intent required to constitute a crime of violence. Because the statute did not categorically punish a crime of violence, the court turned to the modified approach. Again, however, the court found the record insufficient to show a crime of violence. Specifically, the criminal information charging document and the abstract of judgment simply reiterated the generic statutory language and the probation officer's report was errantly relied upon.

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■ **Eleventh Circuit Applies The Criminal Alien Bar To Hold That It Lacks Jurisdiction Where Alien Was In Removal Proceedings But Had Previously Been Excluded For A Controlled Substance Violation**

In ***Alvarez Acosta v. U.S. Attorney General***, 524 F.3d 1191 (11th Cir. 2008) (*Tjoflat*, Barkett, Kravitch), the court held that it lacked jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(C) because the alien's 1993 conviction for drug paraphernalia (for which he had been excluded and deported in 1997) was a crime "relating to a controlled substance" under 8 U.S.C. § 1182(a)(2)(A)(i)(II), and where the alien presented no constitutional claim or question of law over which the court could exercise jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D).

An IJ ordered petitioner deported from the United States in 1997 as an alien convicted of a controlled substance offense based on a 1993 conviction for possession of drug paraphernalia. The INS deported petitioner, but he subsequently reentered the United States in 2001 without inspection. In 2002, the INS placed petitioner in removal proceedings whereupon petitioner requested asylum, withholding of removal, and CAT protection. Petitioner appeared before an IJ in 2003 and requested a continuance on the basis that an I-130 had been filed on his behalf. The IJ denied the continuance and then denied petitioner's applications for asylum, withholding, and CAT protection. Petitioner appealed the IJ's decision to deny the continuance to the BIA, but the BIA adopted and affirmed the IJ's decision.

> The court rejected petitioner's "pencil-thin" argument claiming that "possession of drug paraphernalia is not a criminal violation 'relating to a controlled substance,' because he could have used the drug paraphernalia he possessed with *any* controlled substance, not "*a* specific controlled substance."

Before the Eleventh Circuit, petitioner argued that the agency had violated his right to due process by denying the continuance. The court did not reach the issue, however, because it found it lacked jurisdiction to consider the petition for review due to petitioner's 1993 conviction for a crime relating to a controlled substance pursuant to 8 U.S.C. § 1252(a)(2)(C). The court rejected petitioner's "pencil-thin" argument claiming that "possession of drug paraphernalia is not a criminal violation 'relating to a controlled substance,' because he could have used the drug paraphernalia he possessed with *any* controlled substance, not "*a* specific controlled substance." "It is unfathomable," the court said, "that Congress would exclude from our jurisdiction appeals brought by those convicted of possessing, say, a cocaine freebase kit, but not those convicted of possessing scales, razor blades, and plastic baggies, simply because the latter paraphernalia provide more versatility in violating a law 'relating to a controlled substance.'" The court also held that petitioner's attempt to invoke jurisdiction by claiming a constitutional violation was instead a "garden-variety abuse of discretion argument-which can be made by virtually *every* alien subject to a final removal order." The court finally noted that petitioner had no liberty interest in either a continuance or adjustment of status.

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■ **Eleventh Circuit Holds That It Lacks Jurisdiction To Review The BIA's Discretionary Decision Whether To Reopen *Sua Sponte***

In ***Lenis v. Mukasey***, __ F.3d __, 2008 WL 1931239 (11th Cir. May 5, 2008) (Tjoflat, *Marcus*, Vinson), the Eleventh Circuit joined ten other circuits in holding that it lacks jurisdiction to review the BIA's discretionary decision whether to exercise its *sua sponte* authority to reopen a removal proceeding. Noting that *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999), did not squarely address whether the court had jurisdiction to review the BIA's denial of *sua sponte* reopening, the court determined that the absence of any statutory or regulatory factors to guide the BIA's exercise of this authority supported the conclusion that the BIA's exercise of its *sua sponte* authority is committed to its discretion by law, and thus, is unreviewable under the Administrative Procedure Act.

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■ **Eleventh Circuit Holds That Alien Failed To Establish Good Moral Character Based Upon A Conviction For An Aggravated Felony And The Court Lacked Authority To Confer Citizenship**

In ***Williams v. USDHS***, __ F.3d __, 2008 WL 1914364 (11th Cir. May 2, 2008) (Tjoflat, Black, Barkett) (*per curiam*), the Eleventh Circuit affirmed the order of the United States District Court for the Southern District of Florida dismissing plaintiff's complaint for failure to state a claim for which relief

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could be granted. The court held that notwithstanding a June 24, 1992 judgment of conviction for trafficking cocaine, entered *nunc pro tunc* to May 3, 1990, the alien's conviction for an aggravated felony rendered him statutorily ineligible for naturalization because he could not establish the requisite good moral character pursuant to 8 C.F.R. § 316.10(b)(1)(ii). The court further held that it lacked authority to exercise its equitable powers to confer its citizenship where the governing statute prohibits the alien from naturalizing.

Even if petitioner's physical injuries were relatively minor, the court said, "we have not required serious physical injury where the petitioner demonstrates repeated threats combined with other forms of severe mistreatment."

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■ **Eleventh Circuit Sua Sponte Vacates Its Prior Opinion And Enters New Decision Reversing An IJ's Determination That Petitioner's Mistreatment By The FARC Did Not Constitute Persecution**

In ***De Santamaria v. U.S. Attorney General***, __F.3d__, 2008 WL 1787731 (11th Cir. April 22, 2008) (Edmondson, Dubina, *Story*), the court vacated its prior decision and entered a new opinion reversing the IJ's determinations that a Columbian petitioner failed to demonstrate past persecution, persecution on account of her political opinion, and a well-founded fear of future persecution.

Petitioner sought relief from removal in the form of asylum, withholding, and CAT protection. Petitioner claimed FARC persecuted her for her support for the Columbian government. Specifically, that FARC threatened her with death on numerous occasions, dragged her by her hair out of a vehicle and struck her, and kidnaped and beat her with the butts of guns after witnessing a murder. Petitioner further claimed she was traumatized by FARC's torture and murder of her family groundskeeper who refused to give information on her whereabouts. Following the incident where FARC pulled her out of a vehicle, but before all other incidents, petitioner traveled to and fro the United States three times. Thereafter, petitioner traveled back and forth to the United States only once. Based on this evidence, an IJ denied relief. The IJ determined that the incidents described to did not amount to persecution. Further, the IJ stated that petitioner's return trips from the United States belied any fear of future persecution in Colombia. The BIA affirmed.

The court reversed the BIA. First, the court held that the events described constituted persecution - "extreme mistreatment" - on account of political opinion. The court rejected the government's argument that petitioner's injuries from the incidents were too minor to constitute persecution. "Even if [petitioner]'s physical injuries were relatively minor," the court said, "we have not required serious physical injury where the petitioner demonstrates repeated threats combined with other forms of severe mistreatment." Moreover, the court found that FARC explicitly referenced petitioner's political opinion by warning her not to support the Colombian government and by painting red graffiti explicitly referencing the political organization she founded. The court then held that petitioner's trips to the United States did not negate her fear of persecution. "Here," the court said, "[petitioner]'s fully-credited testimony reflects that the majority of her return trips to Colombia occurred prior to the most egregious incidents. Moreover, [petitioner] explained that she made the trips to the United States to evade detection by FARC, but returned to Columbia each time in an effort to remain with her family and work against those responsible for her persecution and the persecution of others. Importantly, each time [petitioner] returned to Colombia, the persecutory acts continued and grew more serious. Because the found that petitioner was entitled to a rebuttable presumption of a well-founded fear of future persecution, the case was remanded to afford the government the opportunity to rebut the presumption.

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D.C. CIRCUIT

■ **DC Circuit Remands Case To District Court To Determine Who Has Authority To Respond To Requests Of U.S. Citizens To Renounce Citizenship Within The United States.**

In *Kaufman v. Mukasey*, __ F.3d __, 2008 WL 1932774 (D.C. Cir. May 2, 2008) (Randolph, *Rogers*, Edwards), the D.C. Circuit remanded to the district court a suit in which a U.S. born American citizen sought to renounce his citizenship from within the borders of the United States under 8 U.S.C. § 1481(a)(6). The court held that the district court must address the threshold question of whether authority to respond to such requests lies in the Attorney General or in the Secretary of Homeland Security.

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DISTRICT COURT LITIGATION

■ **D.C. District Court Finds Diversity Lottery Winner's Visa Application Moot At Close Of Fiscal Year**

In ***Mogu v. Chertoff***, __ F. Supp. 2d __, 2008 WL 1977523 (D.D.C. May 8, 2008) (Henry H. Kennedy, Jr.), the D.C. District Court dismissed a petition for a writ of mandamus to compel adjudication of a visa application and for an injunction preventing the government from denying him a visa. The petitioner, a citizen of Nigeria, became eligible to seek a visa during the 2007 fiscal year after being randomly selected under the Diversity Lottery program and the government denied his visa application. The court held that it lacked jurisdiction to grant the relief sought.

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■ **Habeas Relief denied Where Alien Is Mandatorily Detained During Removal Period After IJ Grants Withholding Of Removal**

In ***Al-Bareh v. Chertoff***, __ F. Supp. 2d __, 2008 WL 2001951 (N.D. Ill. May 7, 2008) (*Der-Yeghiayan*), the District Court for the Northern District of Illinois denied the Iraqi alien's habeas petition seeking release from mandatory custody pursuant to 8 U.S.C.§ 1226(c)(1)(B) and 8 U.S.C. § 1231(a). The alien became a lawful permanent resident in 2000 and has been mandatorily detained since June of 2007 because of his aggravated felony fraud conviction. An immigration judge granted him withholding of removal, and he subsequently claimed that he was improperly detained in the post-order removal period. The court recognized the government's statutory right to attempt to remove the alien to a third country under 8 U.S.C. § 1231 (b)(2)(E), and found that the government has lawfully detained him during that removal period under 8 U.S.C. § 1231(a)(1)(A) & (B).

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■ **United States District Court For The District Of Western Washington Grants Class Certification In A 1447 (b) Case**

In ***Roshandel v. Chertoff***, __F. Supp.2d__, 2008 WL 1929894 (W.D. Wash. April 25, 2008) (Pechman), the district court granted plaintiffs' request to certify a class defined as: "All lawful permanent residents of the United States residing in the Western District of Washington who have submitted naturalization applications to USCIS but whose naturalization applications have not been determined within 120 days of the date of their naturalization examination due to the pendency of a 'name check.'" The court, noting that it is the first district court to certify such a class, rejected the government's arguments to dismiss the complaint for lack of standing, mootness, and failure to meet the criteria for class certification.

. The court explained that "even assuming that Plaintiffs do not have a right to naturalization, that does not mean they do not have a right to a prompt adjudication of their naturalization application."

First, the court rejected the government's contention that plaintiffs failed to demonstrate actual harm because there is no right to naturalization until all the statutory requirements are met. "Not only does this argument assume that the name check is a statutory requirement," the court said, "which is itself at issue in this litigation, but it ignores the fact that under 8 C.F.R. § 335.3(a) and 8 U.S.C. § 1447(b), plaintiffs are entitled to a naturalization *decision* by USCIS within 120 days of their naturalization examination." The court explained that "even assuming that Plaintiffs do not have a right to naturalization, that does not mean they do not have a right to a prompt adjudication of their naturalization application." Regarding the actual harm suffered by the delay, the court listed the plaintiffs' inability to vote or serve on juries, inability to travel abroad without fear of being denied re-entry into the United States, and ineligibility for jobs for which they are otherwise qualified. The court disagreed with the government's position that plaintiffs could otherwise participate in civic society notwithstanding the inability to vote, stating that the "suggestion that Plaintiffs should be resigned to participate vicariously in civic society is shocking, offensive, and wrong," and quoted Susan B. Anthony to illustrate the point.

Second, the court denied the government's argument that the complaint was moot on the basis that the FBI recently completed the background checks of some of the plaintiffs because the complaint had been amended to include three additional plaintiffs whose background checks had not been completed. Regarding class certification criteria - specifically, the requirements of commonality, typicality, and adequacy of representation - the court held that all plaintiffs challenged the legality of the same government program and that "the claims of the named plaintiffs are typical of those of the class because all of the potential plaintiffs suffered delayed naturalization adjudications due to the name check requirement." The court noted that individual cases may vary, but stated that "this is not an appropriate factor to consider on a motion for 23(b)(2) certification."

Finally, the court found the representation adequate, rejecting the government's argument that the plaintiffs' claims are antagonistic because the relief sought-an injunction that would require adjudication of the class member's applications and completion of their name checks-

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DISTRICT COURT LITIGATION

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would disrupt the FBI's current policy of completing name checks in the order in which they are received. "Class treatment would not create antagonism among class members because all class members would be treated in exactly the same manner — an injunction would likely instruct USCIS to complete the name checks and adjudicate *all* naturalization applications by the same date certain," the court said. However, the court required counsel to provide an opt-out provision for members of the class.

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District Court Grants EAJA Fee Application in 1447(b) Mandamus Action

In ***Liu v. Chertoff***, __F. Supp.2d __, 2008 WL 706594 (D. Minn. March 14, 2008) (Davis), the court, after remanding the case for completion of the name check and adjudication of the naturalization application with a six month deadline, which USCIS accomplished within two months, awarded attorney's fees under EAJA. The court held that the plaintiff was a prevailing party because the court's "ruling altered [plaintiff]'s legal relationship with Defendants by requiring Defendants to adjudicate his application within a specific time frame. [Plaintiff] could have moved to enforce the Court's Order if Defendants had failed to comply with it, which is the reason the Court retained jurisdiction over this matter." The court noted that "although the court did not order 'immediate' adjudication, over Defendants' objections, the court ordered remand to USCIS to adjudicate [plaintiff]'s naturalization application within a specific time frame, which was a position [plaintiff] did advocate in his opposition to Defendants' motion to dismiss."

The court also held that the pre-litigation delay was not justified and no circumstances made the award unjust. "The USCIS had a nondiscretionary duty to adjudicate applications for naturalization within 120 days of examination," the court said, "[and] Defendants demonstrated no attempts to comply with this duty. USCIS did not request that the FBI expedite Liu's name check, nor did it attempt to determine the reasons for the FBI's delay." The court rejected the government's argument that an EAJA award would be unjust because "the Government did not affirmatively act to violate the law." The court explained that "Defendants have provided no explanation why [plaintiff]'s name check, in particular, took so long and they created this procedural predicament. Additionally, [plaintiff] bears no responsibility for the delay. These equities do not make an award unjust."

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INEFFECTIVE ASSISTANCE

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ineffective assistance of counsel. The BIA denied reopening finding that the proffered evidence was not "new" and that the ineffective assistance claim was beyond its jurisdiction. Petitioner then sought judicial review of the three BIA orders.

The Fourth Circuit first found that it could not review petitioner's untimely appeal from the BIA November 29th order because it had not been filed within the 30-day statutory period. The court also found no error in the BIA's decision not to reissue the November 29th order, noting that such decision is a "matter of grace and discretion."

Second, the court affirmed the BIA's denial of the motion to reopen on the ground that petitioner had not presented "new" evidence warranting reopening and that the BIA had properly determined that it did not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel failure to file a timely petition for review with the court of appeals.

Third, the court found that it had jurisdiction over the ineffective assistance of counsel claim because the "zipper" clause, INA § 242(b)(9), consolidates review of matters arising out of removal hearings in the courts of appeals. The court then addressed "whether the Constitution guarantees effective assistance of counsel to an alien in removal proceedings." It noted the well settled principle that aliens in removal proceedings are "not entitled to the Sixth Amendment right to counsel, nor to the associated right to effective counsel." Yet, aliens have a statutory right to retained counsel at their own expenses at a removal hearing said the court, "and it is quite clear that aliens enjoy a Fifth Amendment right to due process in such proceedings." However, the court finally concluded that the Fifth Amendment right to due process does not include a remedy for ineffectiveness of privately retained counsel. The court explained that the rights guaranteed by the Constitution cannot be impaired by wrongful acts of individuals, and thus "an alien's counsel cannot violate his client's Fifth Amendment rights unless he can be said to be engaging in state action." Here, petitioner's counsel was not a state actor, nor did the court find a sufficient nexus between the federal government and counsel's ineffectiveness. That petitioner was "was denied an opportunity to petition this court for review of the BIA's November 29, 2005 order may be unfortunate, but it is not a constitutional violation, and it is only the latter that we may redress," concluded the court.

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INSIDE OIL

Congratulations to OIL's Assistant Director **Linda S. Wendtland** and former OIL Senior Litigation Counsel **Hugh Mullane** who have been selected to serve as Members of the Board of Immigration Appeals.

Welcome onboard to the following attorneys who have recently joined OIL.

Ann Welhaf earned her B. S. in Accounting from the University of Alabama, and her J.D. and L.L.M. from The University of Denver College of Law. Prior to joining OIL, she served as a Law Clerk at the United States Tax Court and as an attorney with the IRS Office of Chief Counsel.

Paul Cygnarowicz ("Sig narrow wits") earned a BA from Loyola College and a JD from the University of Baltimore. He practiced for fourteen years in the U.S. Army Judge Advocate General's Corps and still serves as a reserve judge advocate. His experience includes four years in the Army Government Appellate Division and he most recently worked for the Army Court of Criminal Appeals.

Jon Wasden graduated from Washington and Lee University School of Law, in Lexington Virginia, in 2002. Prior to joining OIL he spent six years on active duty in the US Air Force JAG Corps. In that time he was stationed in Idaho, Japan, and the Pentagon

Jack Bunker graduated from Florida and obtained his J.D. from St. John's University. Following law school he clerked for the Hon. Boyce F. Martin, Jr. (6th Cir.), and then became an associate at King & Spalding LLP.

MARK YOUR CALENDAR

OIL & Clients Annual Picnic and Baseball Game will be held on July 11, 2008, at the Nationals Stadium. Picnic at 6:00 pm and Game at 7:35 pm. Contact Katrina Brown for additional information (202616-7804).

OIL's 12th Annual Immigration Litigation Conference will be held at the National Advocacy Center on August 4-8, 2008. Additional information regarding this conference may be found on the OLE web site.

OIL 14th Annual Immigration Law Seminar will be held in Washington, DC on October 20-24. This is the basic immigration law course. Contact Francesco Isgro at francesco.isgro@usdoj.gov for additional information.

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YOUR CONTRIBUTIONS TO THE IMMIGRATION LITIGATION BULLETIN ARE INVITED

Donna D. Zeigler August 20, 1959—May 30, 2008

The OIL Family mourns the untimely passing of Donna D. Bailey Zeigler, who joined OIL on May 24, 1987. Dee's love for her job and her colleagues at OIL was legendary. She was a caring and truthful friend to many. At her Celebration of Life held on June 6th at the First Baptist Church of Glenarden, many of her her OIL colleagues were there to pay tribute to Dee. We reproduce the following obituary from that ceremony.

Obituary

Donna D. Bailey Zeigler, affectionately known as "Dee," daughter of Bessie Jenkins and the late Syrus Jenkins, was born on August 20, 1959 in Washington, D.C.

Donna gave her life to Christ at a young age and joined the New Life Baptist Mission in New Carrollton, Md. In 1997, she became a member of First Baptist Church of Glenarden in Landover, Md. where she served in the Epistle Ministry and the Fellowship Chorale.

She was raised on Ridge Road, S.E. in Washington, D.C. and later moved to Maryland where she was educated in the Prince George's County Public School System. Donna graduated from Fairmont Heights High School and started her career with the Federal Government shortly thereafter. On May 24, 1987, she began her employment with the Office of Immigration Litigation (OIL) as a Legal Secretary. After working several

years as a Secretary, and taking several paralegal courses, she was promoted to a Paralegal Specialist. Dee was a very diligent worker. She was also instrumental in starting a lunch time Bible Study, under the guidance of one of OIL's attorneys, Papu Sandhu. She was a faithful member of this small group.

Over the past five years, she was given the informal title of Ninth Circuit Coordinator. Dee was well known throughout the Ninth Circuit Court of Appeals, in San Francisco, CA, even though they never met her in person. Dee served in this position until her untimely death.

Dee was united in holy matrimony to Warren Zeigler on May 2, 2006. They worshiped together and spent quality time sharing their love for one another.

She was a loving and compassionate person who would do anything for anybody. Dee was known for her big, bright and beautiful smile. Everyone who knew her will remember how she loved artwork, writing and poetry. She will be sorely missed by all.

She leaves to cherish her memories, her husband, Warren Zeigler; mother, Bessie Jenkins; mother-in-law, Naomi Zeigler; five sisters-in-law; one brother-in-law; several aunts, uncles, cousins and a host of other relatives and dear friends.

She was preceded in death by her sister, Debby.

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

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

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

Office of Immigration Litigation

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

If you would like to receive the *Immigration Litigation Bulletin* electronically send your email address to: karen.drummond@usdoj.gov