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PRESIDENT SIGNS HOMELAND SECURITY ACT — INS FUNCTIONS TO BE TRANSFERRED TO NEW DEPARTMENT—EOIR REMAINS AT DOJ

Calling it an "historic action to defend the United States," on November 25, 2002, President Bush signed into law the H.R. 5005, Homeland Security Act of 2002 (HSA). This legislation creates a new Department of Homeland Security (DHS) and brings under its roof approximately 170,000 employees from 22 agencies. President Bush has announced that he will nominate Gov. Tom Ridge to serve as the first Secretary of the DHS. The HSA abolishes the Immigration and Naturalization Service and transfers its functions to the new Department. The legislation also codifies the existence of the Executive Office for Immigration Review (EOIR) within the Department of Justice.

The HSA abolishes the Immigration and Naturalization Service and transfers its functions to the new Department.

In his remarks at the signing ceremony, the President stated that the "new department will analyze threats, will guard our borders and airports, protect our critical infrastructure, and coordinate the response of our nation for future emergencies." Attorney General Ashcroft applauded the passage of the Homeland Security Act, noting that "the creation of the Department of Homeland Security begins a new era of cooperation and coordination in the nation's homeland defense."

Immigration Enforcement Functions

Although it is too early to say how all the functions of the INS will be integrated within the new department, several changes are certain. First, the INS as we have known it will be abolished once its functions are transferred to the new department. Second, the INS's enforcement functions will be split from the service functions. The enforcement programs will be transferred to the Directorate of Border and Transportation Security, while the service programs will fall within the Bureau of Citizenship and Immigration Services.

The following is a summary of the

(Continued on page 2)

SUPREME COURT VACATES ASYLUM CASE IN LIGHT OF VENTURA

Following its summary decision in the asylum case of ***INS v. Ventura***, 2002 WL 31444297 (U.S. Nov. 4, 2002), the Supreme Court granted the government's petition for *certiorari* filed in ***INS v. Chen***, 2002 WL 1574850 (Nov. 12, 2002), another asylum case, vacated the judgment, and remanded it to the Ninth Circuit for further consideration in light of *Ventura*.

In *Ventura*, the Supreme Court had summarily reversed the Ninth Circuit on the basis that the asylum case should have been remanded to the BIA to address in the first instance, the issue of "changed circumstances" in Guatemala. In *Chen*, the government's petition for certiorari not only raised the issue of "remand," but also presented

(Continued on page 3)

DEFENDING THE BIA'S STREAMLINING REGULATIONS

An ever-increasing portion of petitions for review and habeas corpus petitions contain arguments challenging the streamlined appellate procedures of the Board of Immigration Appeals. The current wave of cases challenges the streamlining procedures found at 8 C.F.R. § 3.1(a)(7) (1999). On September 25, 2002, however, the Board implemented the "new" streamlining provisions, 8 C.F.R. § 3.1(e) (2002). This article provides an overview of each of the regulations, as well as possible responses to the various legal challenges commonly being raised.

(Continued on page 4)

Highlights Inside

INS TURNS INTO BBS AND BCIS

(Continued from page 1)
key immigration-related provisions of the HSA.

Section 441 transfers the following INS enforcement programs to the Under Secretary for Border and Transportation Security (BTS): the Border Patrol, detention and removal, intelligence, investigations, and, inspections. The President has already announced that he intends to nominate Asa Hutchinson, the current Administrator of the Drug Enforcement Agency, to serve as the Under Secretary for Border and Transportation Security.

"The legal advisor shall provide specialized legal advice to the Assistant Secretary for the Bureau of Border Security and shall represent the bureau in all exclusion, deportation, and removal proceedings."

Section 442 establishes a Bureau of Border Security (BBS) to be headed by an Assistant Secretary who will report directly to the Under Secretary for BTS. The Assistant Secretary will establish policies and oversee the administration of, *inter alia*, the transferred immigration enforcement functions. The Assistant Secretary will also be responsible for administering the program to collect information about nonimmigrant students, including the Student and Exchange Visitor Information System (SEVIS). Section 442 (a)(5) directs the Assistant Secretary to establish a managerial rotation program whereby employees holding supervisory or managerial responsibility will be rotated among the major functions of the BBS and will work in at least one local office. The BBS will also have a Chief of Policy and Strategy who will, among other duties, coordinate immigration policy issues with the Bureau of Citizenship and Immigration Services (BCIS).

Section 442(c) creates the position of Legal Advisor within BBS. It provides that "the legal advisor shall provide specialized legal advice to the Assistant Secretary for the Bureau of Border Security and shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review."

Immigration Benefits Functions

Section 451 establishes the BCIS to be headed by a Director who will report directly to the Deputy Secretary. The following INS adjudications, including personnel, infrastructure, and funding, are transferred to the BCIS: immigrant visa petitions, naturalization petitions, asylum and refugee applications, applications decided at service centers, and all other adjudications performed by the INS immediately before the date when the functions are transferred to DHS. Section 451(a)(4) establishes a managerial rotation program along the same lines as that established for the BBS.

The Director is also authorized to establish innovative pilot initiatives to eliminate any backlog in processing of immigration benefits and to prevent any future backlogs. Section 451(c) creates the position of Chief of Policy and Strategy for BCIS, who will, among other roles, coordinate immigration policy issues with his or her counterpart in the BBS.

Section 451(d) establishes the position of Legal Advisor to the Director of BCIS. The legal advisor will be responsible for "providing specialized advice, opinions, determinations, regulations, and any other assistance to the Director of the BCIS," and "representing the BCIS in visa petition appeal proceedings before the Executive Office for Immigration Review."

Section 451(f) creates the position of Chief of Office of Citizenship whose role will be to promote instruction and training on citizenship responsibilities for aliens interested in becoming naturalized citizens of the United States.

Finally, section 452 creates a Citizenship and Immigration Service Ombudsman and sets forth comprehensive provisions about the new position and its role. The Ombudsman's function will be, *inter alia*, to assist individuals and employers in resolving problems with the BCIS, identifying areas where there are problems dealing with the BCIS, and proposing changes to resolve the identified problems. The Ombudsman will report directly to the Deputy Secretary. However, the reports that the Ombudsman is required to make under the statute will be transmitted directly to Judiciary Committees on the House and the Senate.

Shared Services for Immigration Functions

Section 475 creates within the Office of Deputy Secretary, a Director of Shared Services who will be responsible for the coordination of resources for the Bureau of Border Security and the Bureau of Citizenship and Immigration Services, including: (1) information resources management, including computer databases and information technology; (2) records and file management; and (3) forms management.

Visa Issuance Functions

Section 428 transfers to the Secretary of Homeland Security control over the issuance and denial of visas to enter the United States, while preserving the Secretary of State's traditional authority to deny visas to aliens based upon the foreign policy interests of the United States. Specifically, section 428(b) provides in pertinent part that the Secretary of DHS "shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provision of such Act, and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas."

(Continued on page 3)

NEW DEPARTMENT OF HOMELAND SECURITY ABSORBS INS

(Continued from page 2)

The section expressly authorizes the Secretary of Homeland Security to delegate his authority under this section to State Department and other federal government personnel, and provides that the Secretary will exercise his authority through the Secretary of State. The section does not alter the employment status of diplomatic or consular officers processing visas abroad, who will remain employees of the Department of State.

Section 429 further provides that whenever a consular officer denies a visa, that officer will enter that fact and the basis for the denial into an electronic data system. The doctrine of consular non-reviewability is preserved.

Status of EOIR

The Executive Office for Immigration Review was created on January 9, 1983, through an internal DOJ reorganization which brought together the Board of Immigration Appeals (BIA) with the Immigration Judge (IJ) function previously performed by the INS. The reorganization also separated the Immigration Courts from the INS. Section 1102 of the HSA codifies the existence of EOIR within the Department of Justice under the direction and regulation of the Attorney General.

Although this massive restructuring of federal agencies into the DHS is not expected to be completed until September 30, 2003, under a Reorganization Plan released by the White House, the BBS, the BCIS, and the Director of Shared Services are expected to be established by January 24, 2003, while the actual functions of the INS will be transferred by March 1, 2003.

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SUPREME COURT VACATES NINTH CIRCUIT'S ASYLUM DECISION WITHOUT ADDRESSING ISSUE OF CREDIBILITY PRESENTED BY THE GOVERNMENT

(Continued from page 1)

the issue of the lower court's review of credibility issues.

The asylum applicant in *Chen* first entered the United States illegally in 1995. At that time he claimed that he feared persecution if he were removed to the People's Republic of China (PRC) because of his alleged participation in the pro-democracy movement. After being denied asylum and removed from the United States, he reentered again illegally in 1998. Once again he applied for asylum and this time claimed that he feared persecution because of alleged resistance to the PRC's coercive family planning activities.

The Court declined to address at this time the government's continuing concern that the Ninth Circuit "has turned the rule of *Elias-Zacarias* on its head."

Eventually, the BIA in a split opinion found that petitioner was not credible and denied his request for asylum solely on that basis. In particular, the BIA noted that the applicant had previously submitted counterfeit birth certificates, had provided contradictory statements regarding his marital status, and had failed to mention an abortion notice that was placed in evidence.

The Ninth Circuit not only overturned the BIA's credibility finding for of lack of substantial evidence, but also found the applicant credible, eligible for asylum, and entitled to withholding of deportation. The court held, *inter alia*, that "adverse credibility determinations based on minor discrepancies, inconsistencies, or omissions that do not go to the heart of an applicant's asylum claim cannot constitute substantial evidence" to support a finding by the BIA.

The Solicitor General then filed a petition for *certiorari* asking the Court to determine first, whether the court of appeals exceeded the proper scope of judicial review when it overturned a determination by the BIA that respondent did not testify credibly when seeking asylum and withholding of removal from the United States. Second, whether the court of appeals erred when, after reversing the BIA's determination that respondent failed to provide credible testimony, the court itself decided the remaining legal and factual issues relevant to respondent's eligibility for asylum and withholding of removal from the United States, rather than remanding the case to the BIA for it to address those issues in the first instance.

Thus, while the Supreme Court's action in vacating the decision below removes the offending credibility analysis in that particular case, the Court declined to address at this time the government's continuing concern that the Ninth Circuit "has turned the rule of *Elias-Zacarias* on its head by accepting the alien's explanation for an inconsistency unless the record compels the conclusion that the BIA was correct in rejecting the BIA's explanation."

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NOTED

Those of us in the Justice Department are federal law enforcement officers. First and foremost, we must follow the Constitution. However, there will be times when we have an obligation to make good faith arguments defending or enforcing acts of Congress, even if they are not perhaps the best view of the law, or what it should be.

Excerpt from remarks of the Attorney General delivered to the Federalist Society on November 14, 2002.

DEFENDING BIA'S STREAMLINED DECISIONS

(Continued from page 1)

Overview of the Streamlining Regulations

The 1999 streamlining regulation provides that a single Board Member may affirm without opinion the decision of an Immigration Judge if the Member determines that (1) the result reached in the decision under review is correct; (2) any errors in the decision were harmless or nonmaterial; and (3) either (a) the issue on appeal is squarely controlled by existing Board precedent and does not involve the application of precedent to a novel fact situation, or (b) the factual or legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

The 2002 streamlining regulation establishes a presumption that appeals will be streamlined unless deemed to meet one of the following circumstances: (1) the need to settle inconsistencies among Immigration Judge rulings; (2) the need to establish precedent construing the meaning of laws, regulations, or procedures; (3) the need to review a legally erroneous Immigration Judge decision; (4) the need to resolve a case or controversy of national import; (5) the need to review a factual determination by an Immigration Judge that is clearly erroneous; or (6) the need to reverse an Immigration Judge decision (other than a reversal based on intervening precedent). 8 C.F.R. § 3.1(e)(6). If the case is not appropriate for three-Member review, the single Board Member reviewing the case may issue an order summarily affirming the case (provided the case meets the harmless/non-novel/insubstantial criteria listed above. 8 C.F.R. § 3.1(e)(4). The single Board Member may alternatively issue a brief order affirming, modifying, or remanding the decision. 8 C.F.R. § 3.1 (e)(5). Finally, the single Board Member may reverse the decision if the decision is plainly inconsistent with intervening precedent. 8 C.F.R. § 3.1(e)(5).

The 2002 regulation also notably provides that the standard of review for questions of fact is clearly erroneous, and for questions of law or discretion, de novo. 8 C.F.R. § 3.1(d)(3). Finally, the 2002 regulation provides that the Attorney General may reduce the size of the Board to eleven Members. 8 C.F.R. § 3.1(a)(1).

For both regulations, the decision of the Immigration Judge is designated as the proper subject of judicial review. *See, e.g., Fajardo v. INS*, 300 F.3d 1018, 1019 n.1 (9th Cir. 2002).

1. Due Process Challenges

Most common among the various challenges to the streamlining regulations is an allegation that the practice of summary affirmance violates the alien's right to constitutional due process. Key elements to this challenge usually include an argument that the Board cannot rubberstamp the decision of an Immigration Judge, or an argument that the Board did not give individual consideration to an alien's case.

A showing of prejudice is a required element of a successful due process challenge.

a. Prejudice

In all due process challenges, it is useful to examine the alien's claim to determine whether the alien is alleging prejudice as a consequence of the Board's application of the streamlining procedures to his case. A showing of prejudice is a required element of a successful due process challenge. *See, e.g., Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 1999) ("To prevail on a due process challenge to deportation proceedings, [the alien] must show error and substantial prejudice."); *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989) ("To show prejudice, the alien must establish more than that he would gave availed himself of the procedural protections; he must produce 'concrete evidence' that the violation had the potential for affecting the outcome of the proceeding."); *United States v. Leon-Leon*, 35 F.3d 1428, 1433 (9th Cir. 1994) ("Although Leon-Leon's due process rights were violated because important portions of the hearing were not translated for him, Leon-Leon failed to assert any prejudice as a result of these violations.").

Thus, aliens who cannot prevail on the merits of the underlying claim (*e.g.*, aliens that barred from relief by virtue of their criminal convictions) cannot demonstrate prejudice, and the challenge may best be disposed of with a motion for summary affirmance. Also possible candidates for motions for summary affirmance are cases involving aliens who do not challenge the merits of the underlying removal order, but simply allege a due process violation in the streamlining regulation—these aliens have not attempted to make a showing of prejudice and therefore cannot succeed on the due process challenge. Finally, even in cases in which the alien does challenge the merits of the removal order, the alien must tie the alleged error to the Board's streamlining practice in order to demonstrate prejudice (*i.e.*, by demonstrating that the alleged error in his case was caused by the Board's streamlining of his case).

b. Due Process Defense

As an initial matter, it is worth referencing the fact that the Constitution does not confer a right to appeal; much as Congress may dispense with inferior federal courts by the same legislative stroke that created them, the Attorney General could dispense

(Continued on page 5)

IN DEFENSE OF STREAMLINING

(Continued from page 4)
with the Board of Immigration Appeals altogether. *See, e.g., Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996).

Having decided to provide aliens with the regulatory right to appeal, however, those appellate procedures must comport with constitutional due process. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 400-05 (1985). Most aliens cite *Mathews v. Eldridge*, 424 U.S. 319 (1976), as the touchstone of constitutional due process. It is the Department's position that the appropriate measure of due process in immigration proceedings is actually the "facially legitimate and bona fide" standard of *Fiallo v. Bell*, 430 U.S. 787 (1977).

Even under the less deferential balancing test of *Mathews*, however, the streamlining procedures easily comport with the requirements of the Fifth Amendment. Weighing the alien's interest (generally that of obtaining relief from removal) against the government's weighty interest in effective and efficient adjudication of immigration matters, it should be clear that the incremental difference between three-Member review and streamlined appellate review does not deprive the alien of any cognizable rights under the Due Process Clause. Aliens receive a hearing before the Immigration Judge, a fully-reasoned opinion by the Immigration Judge, an opportunity to brief their cases before the Board, and full consideration of their claims in accordance with the streamlining regulations. It is the alien who bears the burden of proving that his appeal was anything less than fully reviewed and decided by the assigned Board Member within the law and regulations, precedent decision, and federal court regulations. *See, e.g., Abdulai v. Ashcroft*, 239 F.3d 542 (10th Cir. 2001).

There is no basis for a presumption that the two hallmarks of streamlined appellate review—affirmance without opinion and single-member adjudication—violate due process. Every Circuit to consider the issue has already held that the Board may summarily adopt an Immigration Judge's decision without writing its own separate opinion. *See Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997); *Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996); *Larita-Martinez v. INS*, 220 F.3d 1092, 1096 (9th Cir. 2000). Indeed, the Board's summary disposition procedures are similar to the summary disposition procedures used by most Circuit Courts. *See, e.g.,* 9th Cir. R. 3-6(b) (providing for the possibility of summary disposition where " . . . it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings.").

There is no basis for a presumption that the two hallmarks of streamlined appellate review—affirmance without opinion and single-member adjudication—violate due process

As to the adequacy of single-Member as opposed to three-Member review, at least one federal court has held that there is no constitutional due process right to obtaining review by a full panel as opposed to a single judge disposition. *See Arnesen v. Principi*, 300 F.3d 1353 (Fed. Cir. 2002). Here, the Attorney General has determined that single-Member dispositions are preferable in the class of cases identified in the regulations. Such a decision is entirely within the Attorney General's discretion and does not implicate constitutional due process. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978) (courts should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

2. Challenges to the Decision to Streamline a Particular Case or Class of Cases

Many aliens also argue that either their case was not a proper candidate for streamlining, or that an entire class of cases (*e.g.*, asylum, cancellation of removal) is not appropriately streamlined. The Board's discretionary decision to streamline a case is immune from judicial review as there is no judicially manageable standard by which to judge the agency's exercise of discretion under the streamlining regulation. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *ICC v. Locomotive Engineers*, 482 U.S. 270, 282 (1987). The Board's decision to streamline a particular case involves a complicated balancing of a number of factors which are peculiarly within the expertise of the agency. The Board must assess not only whether the case was correctly decided, but also whether, against the backdrop of an extraordinarily large caseload, the case involves such novel or complex issues that a full three-Member decision is required. Because courts are limited to reviewing the administrative record of a particular case, and thus lack information about the Board's resources and caseload priorities, it is virtually impossible to devise a judicially manageable standard to review a Board Member's decision regarding the nature and scope of administrative review appropriate to any particular case.

3. Challenges to the Integrity of the Board

As cases are adjudicated under the 2002 regulation, aliens may begin to argue that the reduction in the number of Board Members will compromise the Board's independence, alleging that the decision to retain certain Members will be politically motivated. Absent a showing by the alien of agency bias or prejudgment, the bald assertion that the Board reform is politically motivated does not rise to the level of a viable due process challenge. It is the alien who

(Continued on page 6)

In Defense of Streamlining

(Continued from page 5)

bears the burden of proving that the Board's decisional independence has been compromised, and to meet this burden, the alien "must overcome a presumption of honesty and integrity in those serving as adjudicators." *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *United States v. Morgan*, 313 U.S. 409, 421 (1941).

Aliens raising an argument of compromised decisional independence are most likely to rely on *Shaughnessy v. Accardi*, 349 U.S. 280 (1955) & 347 U.S. 260 (1954). *Accardi* involved a challenge to the Attorney General's designation by name of certain "unsavory" aliens for deportation. The Attorney General's list was made available to the nascent Board of Immigration Appeals, and an alien on the list challenged the Attorney General's dictation of the results of his case to the Board. The resulting Accardi doctrine stands for the proposition that administrative agencies may not take actions inconsistent with their internal regulations when to do so would affect individual rights. Pursuant to a remand from the Supreme Court, the district court determined that the Board Members *had* reached their individual and collective decisions on the merits, free from interference by the Attorney General. The Supreme Court affirmed. The case therefore confirms that aliens bear the burden of proving any alleged encroachment on the Board's decisional independence, and that in the absence of such proof, courts are not free to speculate on possible impermissible motivations for the Board's decisions.

The streamlining regulations are a permissible agency reform, outside the province of judicial scrutiny.

4. Retroactivity

Aliens with cases pending before the Board at the time the regulations were implemented may argue that the regulations have an impermissible retroactive effect. Because both of the regulations are administrative and procedural in nature, and do not attach any new legal consequences to events completed before enactment, the regulations do not implicate the retroactivity concerns articulated in *INS v. St. Cyr*, 533 U.S. 289, 320-21 (2001); *Lindh v. Murphy*, 521 U.S. 320, 327-28 (1997); or *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994). The difference between three-Member review and single-Member review is entirely a matter of internal Board function, and does not affect the legal standards under which a case is reviewed, the precedent which is applied, or the requirements placed on aliens filing appeals with the Board. The 2002 regulation does establish that questions of fact will be reviewed under the "clearly erroneous" standard of review, but 8 C.F.R. § 3.3(f) provides that cases pending on the regulation's effective date are exempt from the new standard of review. Accordingly, the regulations have no retroactive effect, and any challenge on this basis lacks merit.

In sum, the streamlining regulations allow the Board to concentrate its resources on cases where there is a reasonable possibility of reversal, or where a significant issue is raised on appeal, while still providing review in all cases under the Board's appellate jurisdiction. Whether or not the courts agree with the wisdom of the Attorney General's policy determination, the streamlining regulations are a permissible agency reform, outside the province of judicial scrutiny.

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REGULATORY UPDATE

Registration of Certain Nonimmigrants

On November 22, 2002, the Acting Attorney General published a Notice requiring certain nonimmigrant aliens to appear before, and provide requested information to the INS on or before January 10, 2003. *See* 67 *Fed. Reg*. 70526 The Notice applies to aliens males born on or after December 2, 1986, who are national or citizens of the following countries: Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen. A prior Notice required the registration of certain nonimmigrants from Afghanistan, Iran, Iraq, Libya, Sudan, and Syria. 67 Fed. Reg. 67766 (Nov. 6, 2002). The new Notice applies only to those aliens who were last admitted to he United States as nonimmigrant on or before September 30, 2002, and who will remain in the United States at least until January 10, 2003. The Notice applies to aliens who also have a dual nationality or citizenship.

Expedited Removal of Certain Aliens

On November 13, 2002, the INS published a Notice pursuant to INA § 235(b)(1)(A)(iii) and 8 C.F.R. 235.3 (b)(1)(ii) authorizing INS to place in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the U.S. continuously for the two-year period prior to the determination of inadmissibility by an INS officer. *See* 67 *Fed. Reg*. 68924 (Nov. 13, 2002). An alien who falls within this designation who indicates an intention to apply for asylum will be interviewed by an asylum officer to determine whether the alien has a credible fear of persecution. The expedited removal proceedings will not be initiated against Cuban national who arrives by sea. The Notice becomes effective as of November 13, 2002.

Summaries Of Recent Federal Court Decisions

CONSTITUTIONAL ISSUES

■Ninth Circuit Holds AEDPA 440(d), As Interpreted By The BIA In *Fuentes-Campos*, Violative Of Equal Protection As Applied

In *Servin-Espinoza v. Ashcroft*, __F.3d__ (9th Cir., November 5, 2002), (Thompson, *W. Fletcher*, Berzon), the Ninth Circuit affirmed the district court's grant of a writ of habeas corpus and approved the relief ordered, an opportunity for a hearing on § 212(c) relief before an immigration judge. The petitioner, a long-time lawful permanent resident and a citizen of Mexico, pled guilty in 1996 to a serious drug charge. At his deportation hearing, the immigration judge did not advise him of § 212(c) relief because of *In Re Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997) (which bars deportable, but not excludable, aliens from 212(c) relief).

After the BIA affirmed the judge's finding, the petitioner successfully pursued a habeas action, claiming that the application of *Fuentes-Campos* to him violated equal protection. On the government's appeal, the Ninth Circuit held that it was bound by *United States v. Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999) (subsequently overruled on other grounds), holding – in conflict with a number of other circuits – that Congress intended AEDPA 440(d) to deny relief to both excludables and deportables.

Here, the court found that, while the government's justifications for the distinction "might well" be adequate to sustain a distinction created by Congress, they were not strong enough to sustain a distinction in violation of Congress's intent. "Congress treated excludable and deportable aliens equally, not differently, with respect to the availability of relief under § 212(c). That is, neither category of aliens is eligible to receive it," said the court. The court then held that "[b]ecause it is not feasible to go back and retroactively deny" 212(c) relief to excludables, the only way to provide equal treatment to petitioner was to give him the opportunity to apply for § 212(c) relief.

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■Ninth Circuit Remands Asylum Case, Finding IJ Violated Petitioner's Due Process Rights

In ***Cano-Merida v. INS***, __F.3d__ 2002 WL 31628292 (9th Cir., Nov. 22, 2002), the Ninth Circuit held that Petitioner was denied a meaningful opportunity to present his asylum application. The petitioner, a citizen of Guatemala appeared pro se at his deportation proceedings and requested that the IJ consider his asylum application. When he attempted to submit documents in Spanish to support his application the IJ told him to have the documents translated into English and to provide copies to the court and the attorneys.

"Whether or not the IJ believed he was doing Cano a favor is irrelevant. As this case suggests, shortcuts frequently turn out to be mistakes."

At the second hearing held on April 4, 1997, the IJ provided the petitioner with a copy of the Department of State's country report for Guatemala, which noted that "peace accords were entered into between the Guerillas and the [Guatemalan] Government." The IJ stated that he wished "to offer [the report] into evidence without any objection." The IJ asked petitioner if he would like an opportunity to review the report, but did not allow petitioner to answer. Instead, the IJ asked him what he thought would happen to him if he returned to Guatemala. Petitioner answered that he had "no certainty," and the IJ went off the record to talk to petitioner. When back on the record, the IJ indicated that he had informed the petitioner that his application had no merit and then negotiated with the petitioner to drop his asylum claim in exchange of a six-month of voluntary departure. The IJ then closed the hearing, assuming there was no appeal.

The petitioner then obtained counsel who filed a motion to reopen arguing that his client never intended to give up his right to present his asylum claim. The IJ found that petitioner had failed to demonstrate prima facie eligibility for the relief sought and denied his motion to reopen. A subsequent motion to reconsider the denial of his motion to reopen was also denied. Petitioner then appealed to the BIA and also filed a motion to reopen to seek protection under the Convention Against Torture (CAT). The BIA affirmed the IJ's decision, dismissed petitioner's appeal, and denied his motion to reopen.

The Ninth Circuit held that the IJ did not provide petitioner a full and fair hearing of his claims and an opportunity to present evidence on his behalf. The court found that when the IJ went off the record and then presented petitioner with the Hobson's choice of proceeding or abandoning a claim that the he had labeled as baseless, the IJ did not behave as a neutral fact-finder because he had prejudged petitioner's claim for asylum. "Whether or not the IJ believed he was doing Cano a favor is irrelevant. As this case suggests, shortcuts frequently turn out to be mistakes," observed the court.

The court remanded the asylum case to the BIA with instructions to remand to the IJ for a hearing on the merits of his claim. The court, however, agreed with the BIA that petitioner had not made a prima facie showing that he was eligible for CAT protection and therefore the BIA had properly exercised its discretion in denying the motion to reopen.

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(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

CRIMES

■Fifth Circuit Finds That Federal Conviction Vacated By District Court For Equitable Purposes Remains a Conviction For Immigration Purposes.

In ***Renteria-Gonzalez v. INS***, __F.3d__, 2002 WL 31409420 (5th Cir. Nov 11, 2002)(*Smith*, Benavides, Fitzwater), a transitional rule case, the Fifth Circuit found substantial evidence to uphold the BIA's finding that petitioner was deportable for being in the United States in violation of law and for smuggling. See INA § 237(a)(1)(B), (E)(1) (as recodified under IIRIRA). As the court notes, the petitioner and the INS have "wrangled for over a decade." Among other violations, petitioner plead guilty in 1989 of transporting illegal aliens. However, the district court after sentencing him, issued a "judicial recommendation against deportation" (JRAD), a form of relief repealed in 1990. Subsequently, after several skirmishes, the INS sought to remove the petitioner notwithstanding the JRAD. In 1992, a district court granted petitioner's request to vacate the earlier conviction under the All Writs Acts, 28 U.S.C. § 1651. The INS did not appeal that order. In 1994, the INS again charged the petitioner with deportability, basing the order this time also on the smuggling charge. Ultimately, based on testimonial evidence the IJ found petitioner deportable as charged. The BIA reached the same conclusion in April 2001, seven years later.

Preliminarily, the Fifth Circuit addressed petitioner's contentions that he no longer had a "conviction" because the district court had vacated it. The court rejected those arguments. First, it held that the district court had lacked statutory authority, based upon a JRAD, to vacate petitioner's conviction for transporting illegal aliens within the United States. The court noted that in 1990 Congress rescinded all JRADs whether "issued before, on, or after" November 29, 1990. Thus, the JRAD was no longer effective when the district court relied on it to vacate petitioner's conviction. Second, the court found that the district court lacked equitable authority to vacate such conviction. "When a court vacates an otherwise final and valid conviction on equitable grounds merely to avoid the immigration-law consequences of the conviction, it usurps Congress's plenary power to set the terms and conditions of American citizenship and the executive's discretion to administer the immigration laws," said the court.

Finally, the court questioned whether the district court had the subject matter jurisdiction to vacate the conviction, noting that the All Writs Act does not confer an independent basis for subject matter jurisdiction. Nonetheless, the court concluded that the INS could not collaterally attack the order to vacate because it did not directly appeal that order in 1992.

"Although it may seem counterintuitive, the text, structure and history of the INA suggest that a vacated federal conviction does remain valid for purposes of immigration laws."

The court held, however, as a matter of first impression, that petitioner's conviction remained valid for purposes of immigration laws even if it had been properly vacated by district court. "Although it may seem counterintuitive, the text, structure and history of the INA suggest that a vacated federal conviction does remain valid for purposes of immigration laws," concluded the court. The court then rejected the government's argument that it lacked jurisdiction over the petition for review because the petitioner's crime now qualifies as an aggravated felony even though it did not when he committed it. The court explained that a conviction for transporting illegal aliens did not qualify as an aggravated felony at the time IIRIRA was enacted. Finally, the court found that substantial evidence supported the BIA's decision that the alien was deportable for smuggling aliens into the United States.

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DETENTION

■Ninth Circuit Upholds Bond As Reasonable Condition Of Alien's Release Where Removal Of Alien Was No Longer Foreseeable Because No Country Would Take Alien Back.

In ***Doan v. INS***, __F.3d__ 2002 WL 31667621 (9th Cir. Nov. 27, 2002) (*Schroeder*, W. Fletcher, J. Weiner (E.D. Pa.)), the Ninth Circuit upheld a district court's denial of an injunction sought by a detained alien who challenged the bond requirement. The petitioner is a Vietnamese national who was ordered removed to Vietnam because of two felony convictions. Vietnam would not take him back, and therefore, under *Zadvydas v. Davis*, 533 U.S. 678 (2001), the INS released the petitioner but imposed certain conditions on that release including the posting of a $10,000 bond. Petitioner sought an injunction in district court challenging the bond requirement. The district court denied the request finding that the amount of the bond was reasonable and that the imposition of a bond as a condition of release was within the exercise of discretion contemplated under the statute and implicitly ratified by the Supreme Court's decision in *Zadvydas.* Petitioner appealed the district court's denial to the Ninth Circuit.

The Ninth Circuit held that, although the statute authorizing the terms of supervision, INA § 241(a)(3) and (6), does not expressly authorize a bond, it does not exclude such a condition. Moreover, the court found that a bond is well

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

within the kinds of conditions contemplated by the Supreme Court in *Zadvydas*, where the Court observed that 8 C.F.R. § 241.5 (2001) establishes conditions of release. However, the Ninth Circuit noted that "serious questions may arise concerning the reasonableness of the amount of the bond if it has the effect of preventing an alien's release." Here, the court found that there was no question concerning the reasonableness of the bond.

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JURISDICTION

■Third Circuit Holds Third Habeas Petition Is Abuse Of The Writ

In ***Zayas v. INS***__F.3d__, 2002 WL 31546389 (3d Cir. Nov. 18, 2002)(Sloviter, Ambro, *Pollak* (E.D. Pa.)), the Third Circuit affirmed a district court dismissal holding that petitioner's third habeas petition was an "abuse of the writ," because it raised issues he could have raised in prior petitions, and rejected his argument that his *pro se* status excused him. Petitioner, a Cuban citizen, was paroled into the United States in 1966 at the age of two. In 1974 he acquired permanent resident status retroactive to 1969. On March 23, 1990, he was convicted in New York State Supreme Court of two felony offenses (attempted robbery, drugs) and sentenced to a prison term of one and one-third years to four years. As a consequence, on January 22, 1991, the INS ordered him to show cause why he should not be deported. On January 10, 1992, petitioner filed for relief under INA § 212(c). At that time, the relief was not available if an alien had committed two or more crimes of moral turpitude. However, an alien subject to deportation for a drug offense was eligible for relief. Petitioner's deportation hearing was scheduled for April 26, 1994; however, due to an intervening arrest and conviction on February 15, 1994 for attempted robbery in the second degree, his immigration case was administratively closed pending his release from state custody. At the rescheduled hearing on January 16, 1997, petitioner conceded the allegations contained in the order to show cause, and again applied to the IJ for waiver of inadmissibility under § 212(c).

The Court held that the "gatekeeping" restrictions on successive habeas petitions under the immigration statute did not apply to petitions filed under 28 U.S.C. § 2241. However, the court found that the "abuse of the writ" formulation expressed by the Supreme Court *McCleskey v. Zant*, 499 U.S. 467 (1991), applied to petitioner's successive petitions and barred relief.

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REINSTATEMENT

■Seventh Circuit Holds Reinstatement Orders May Only Be Litigated In Courts Of Appeal, and Rejects Constitutional Challenge to Reinstatement Procedures

In ***Gomez-Chavez v. Ashcroft***, __F.3d__, 2002 WL 31387523 (7th Cir. October 24, 2002)(Easterbrook, Ripple, *D. Wood)*, the Seventh Circuit held that courts of appeal, and not district courts, have jurisdiction over an alien's challenge to his reinstatement order. The petitioner, a Mexican national, was detained while attempting to enter the United States unlawfully with a fraudulent passport. He was placed in expedited removal proceedings under INA § 235(b)(1). In a proceeding before an immigration inspector, petitioner admitted all pertinent facts, including his identity and the manner in which he had procured the fraudulent passport. On this basis, the INS found him ineligible for admission to the United States and barred him from entering without the Attorney General's consent for a period of five years. Petitioner was then removed on January 30, 1999. Less than a month after his removal, petitioner reentered the United States.

On March 5, 1999, he married a United States citizen. Two months later, his spouse filed a Form I-130 with the INS seeking to classify petitioner as an immediate family member, and I-485 application for adjustment of status. Despite the existence of the January 30 removal order, on June 1, 1999, the INS issued an Employment Authorization Card to petitioner and renewed the card twice. On July 18, 2001, during an INS interview conducted in conjunction with the application for adjustment of status, the INS agent realized that petitioner had reentered the country illegally. This led to the immediate reinstatement of the January 30 removal order, under INA § 241 (a)(5). Petitioner then unsuccessfully sought mandamus and a declaratory judgment challenging the reinstatement order.

"The United States has a compelling interest in the efficient and evenhanded administration of the laws regulating the admission of foreigners to this country and, in cases where it becomes necessary, removal of anyone who had no right to be here."

The Seventh Circuit affirmed the district court's dismissal. It held that the INS' reinstatement procedures do not violate due process in light of the political branches' plenary power over immigration matters. "Here," said the court, "we are dealing with immigration policy, which has traditionally been the province of the political branches. The United States has a compelling interest in the efficient and evenhanded administration of the laws regulating the admission of foreigners to this country and, in cases where it becomes necessary, removal of anyone who had no right to be here, or who has forfeited that right by his or her conduct."

Additionally, the court ob-

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

served that petitioner did not have a "liberty interest in remaining in violation of applicable United States laws." Finally, the court held that an alien's opportunity for judicial review of reinstatement orders is in the courts of appeal.

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TERRORISM

■Ninth Circuit Finds That Plaintiffs Have No Standing To Challenge Detention of Combatants in Guantanamo Bay

In ***Coalition of Clergy v. Bush***, __F3d__, 2002 WL 31545359 (9th Cir. Nov. 18, 2002) (Noonan, *Wardlaw*, Berzon), the Ninth Circuit held that the plaintiff members lacked next-friend and third party standing to bring a habeas action on behalf of the detainees being held in the Guantanamo Naval Base.

This case arose when a coalition of clergy, lawyers, and law professors petitioned for a writ of habeas corpus on behalf of combatants captured in Afghanistan and now being detained in the U.S. facilities in Guantanamo Bay. The district court dismissed the petition on the grounds that the plaintiffs lacked next-friend standing, the district court lacked jurisdiction to issue the writ, and that no federal court could have jurisdiction over the writ. *Coalition of Clergy v. Bush*, 189 F. Supp.2d 1036 (C.D. Cal. 2002).

The Ninth Circuit agreed with the lower court that the plaintiffs did not have standing to bring the action. However, it disagreed with the lower court's finding that it lacked jurisdiction and that no other federal courts could properly entertain the habeas claims. As to standing, the court found that the plaintiffs had no significant relationship either as to any individual detainee or to the detainees *en mass* and therefore their relationship was insufficient to support next-friend standing. The court also found that since plaintiffs could not demonstrate either an injury-in-fact or a close-relationship to the detainees, they could not assert a third-party standing on their behalf.

In light of its findings on standing, the court declined to reach the other jurisdictional questions addressed by the district court. Indeed, it stated that it was inappropriate for the district court to find that no federal court had jurisdiction because the habeas rights of the individual detainees were not before the court. "Courts should not adjudicate rights unnecessarily; the real parties in interest in an adversarial system are usually the best proponent of their own rights," observed the court.

"To construe the statute otherwise would create an opportunity for immigration for exchange visitors who have committed fraud, but not for those who have participated in the program in good faith."

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VISAS

■Ninth Circuit Applies Chevron And Affirms BIA's Holding That Foreign Residence Requirement Also Applies To Aliens Who Obtain Visas By Fraud

In ***Espejo v. INS***, __F.3d__, 2002 WL 31628411 (9th Cir. Nov. 22, 2002)(Canby, *Gould*, Berzon), the Ninth Circuit affirmed the BIA's decision concluding that the language in INA § 212 (e) applies to a person who fraudulently gains admission to the U.S. as an exchange visitor under INA § 101(a)(15)(J). Petitioner, a native of the Philippines, was admitted into the United States on July 26, 1992, as a J-1 nonimmigrant exchange visitor, with authorization to remain until September 15, 1992. However he remained here after his exchange visa expired. In 1996, the INS commenced deportation proceedings petitioner conceded deportability but sought to adjust his status to lawful permanent resident because he had married a United States citizen in 1994. At the hearing petitioner unsuccessfully argued, *inter alia*, that the two-year foreign residence requirement did not apply to him because he had procured his J-1 visa by fraud. The BIA dismissed his appeal finding that he remained subject to the § 212(e) foreign residence requirement, relying on its precedent decision in *In re Park*, 15 I&N Dec. 436 (1975). Presented with similar facts, the BIA in *Park* concluded that the language of § 212(e) applies to a person who fraudulently gains admission to the U.S. as an exchange visitor under INA § 101(a)(15)(J).

The Ninth Circuit deferred to the BIA's interpretation of the INA, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), after finding it reasonable. "To construe the statute otherwise," said the court, "would create an opportunity for immigration for exchange visitors who have committed fraud, but not for those who have participated in the program in good faith."

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WAIVERS - 212(c)

■First Circuit Reverses District Court's Dismissal Of Habeas Where Alien Sought 212c) Relief Under *St. Cyr* Even Though He Had Been Removed From The United States

In ***Leitao v. Ashcroft***, __F.3d__ , 2002 WL 31664501 (1st Cir.

(Continued on page 11)

Recent Federal Court Decisions

(Continued from page 10)

Nov. 26, 2002)(*Torruella*, Gibson (8th Cir.), Howard), the First Circuit reversed the district court's dismissal of the alien's habeas corpus petition, in which he sought a hearing on his eligibility for § 212(c) relief. The petitioner lived in the United States as a lawful permanent resident from April 17, 1971 until October 16, 2000, when he was deported to Portugal. On May 9, 1989 he pleaded *nolo contendere* to a charge of possession of marijuana with intent to deliver. At the time of the plea, petitioner's controlled substance conviction was a deportable offense but he could have applied for § 212(c) relief. After AEDPA's amendments, effective April 24, 1996, petitioner became statutorily ineligible for 212(c) relief.

On July 9, 1996, the INS served petitioner with an order to show cause why he should not be deported. Petitioner conceded deportability, but requested leave to file for discretionary relief under § 212(c). The Immigration Judge denied that request, as did the BIA, on the basis that he was statutory ineligible for the relief. Petitioner then filed a habeas corpus petition, alleging that section 440(d) of the AEDPA should not have been applied to his case and that he should be granted a hearing on his request for discretionary relief. The district court dismissed his habeas petition and petitioner was deported to Portugal. Nonetheless, petitioner appealed the district court's decision, and while his appeal was pending, the Supreme Court decided *St. Cyr*.

The First Circuit found that petitioner's case was not moot even though he was no longer in custody. The court explained that petitioner was in custody when he filed is habeas petition, which is enough to satisfy the jurisdictional custody requirement. The court found and the government did not dispute, that under *St. Cyr*, petitioner was eligible for § 212(c) relief. Accordingly, the court reversed the decision below and remanded the case so that petitioner would be afforded a hearing on his requested relief.

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■First Circuit Holds That Application Of AEDPA Did Not Have An Impermissible Retroactive Effect

In ***Dias v. INS***, __F.3d__, 2002 WL 31664762 (1st. Cir. Nov. 27, 2002)(Lynch, Cyr, Lipez) *(per curiam)*, the First Circuit held that application of the new statutory limitations on discretionary relief, pursuant to AEDPA, did not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial. In 1995, the petitioner was convicted in Massachusetts of a violation of the drug laws of that state. At the time of the conviction, he was eligible for a discretionary waiver of deportation pursuant to former § 212(c) of the INA. In 1996, § 440(d) of AEDPA eliminated the availability of § 212(c) relief for aliens convicted of a number of felonies, including petitioner's controlled substance offense. Relying on *INS v. St. Cyr*, petitioner argued that application of the statute would have an impermissible retroactive effect. However, the First Circuit noted that the decision in *St. Cyr* relied on the Court's recognition that aliens often attach much importance to the immigration consequences of the decision whether or not to enter into a plea. Therefore, the potential for unfairness would be significant to an alien who pled guilty in reliance on immigration law as it existed at the time of the plea if the new law were applied retroactively.

The court held that alien criminal defendants who chose to go to trial, prior to the change wrought by AEDPA, were not relying on immigration law as it existed at the time in making that decision. The court cited its decision in *Mattis v. Reno*, where it held that the retroactivity analysis must include an examination of reliance in a guilty plea situation. The court found that petitioner did not rely on the availability of discretionary relief, and therefore, the new statutory limitations did not have an impermissible retroactive effect.

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■First Circuit Finds Alien Ineligible For Former Section 212(c) Relief

In ***Gomes v. Ashcroft***, __F.3d __ , 2002 WL 31501234 (1st. Cir. November 12, 2002), the First Circuit (Howard, *Sthal*, Torruella) affirmed the district court's conclusion that petitioner was ineligible for deportation relief under former INA § 212(c). The petitioner is a native and citizen of Trinidad who was admitted as a lawful permanent resident in 1972. On August 22, 1992, he was convicted by a Massachusetts superior court jury of four counts of rape, and was sentenced to six to twenty years' imprisonment. He apparently began serving this sentence immediately, and was released from prison on May 9, 2001. On October 31, 1997, the BIA denied his application for a 212(c) waiver on basis of statutory ineligibility and as a matter of discretion.

The First Circuit followed the Second Circuit's decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291, 296 (2d Cir. 1993), in holding that an alien is ineligible for 212(c) relief if he has served more than five years imprisonment at the time the BIA issues a decision in his case. Here, petitioner was ineligible because on the date that the BIA issued its final decision, he had served more than five years in prison and was ineligible for former section 212(c) relief as amended by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (IMMACT). The court also rejected petitioner's argument that he remained eligible for 212(c) relief because he entered the United States in 1972, before the effective date of the IMMACT which amended § 212(c) by eliminating such relief for any alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years.

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CASES SUMMARIZED IN THIS ISSUE

MARK YOUR CALENDAR

SEVENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE TO BE HELD IN ST. LOUIS ON APRIL 21-25, 2003

INSIDE OIL

Congratulations to Deputy Director **David McConnell** who has accepted a temporary teaching position at the University College Cork, in Cork City, Ireland. Mr. McConnell will be on sabbatical until April 11, 2003, when he is expected back at OIL. In his absence, Assistant Director **David Bernal** will serve as Acting Deputy.

Congratulations to Senior Litigation Counsel, **Christine Bither,** who has been selected as an Immigration Judge for the Los Angeles Immigration Court. Ms. Bither joined OIL as a Trial Attorney in February 1995. She received her law degree from the University of Maine School of Law. Following graduation she joined the Department of Justice in the Attorney General's Honor Law Program, where she worked for five years as an INS attorney in the San Francisco Office of the District Counsel.

On November 7-8, Deputy Assistant Attorney General, **Laura L. Flippin,** Deputy Director **David McConnell**, Senior Litigation Counsel **Francesco Isgro**, and Trial Attorney **Nelda Reyna** traveled to the INS El Paso District Office to present an immigration training program to local INS attorneys, Assistant United States Attorneys, and law clerks to the local district court. **Guadalupe Gonzalez**, District Counsel for the El Paso District Office hosted the training and arranged for a tour of the border area and of the El Paso Intelligence Center (EPIC).

On November 18-19, Deputy Director **David McConnell**, Senior Litigation Counsel **Francesco Isgro**, and Trial Attorney **Anthony Payne**, traveled to the United States Attorney's Office for the Middle District of Florida, located in Tampa, to provide immigration litigation training to the Appellate and Civil Division Staff. The training was hosted by Ms. **Tamra Phipps**, Chief of the Appellate Division.

OIL's Annual Holiday Reception will be held on December 13, 3:30-7:00 p.m. at the 1331 Lounge in the JW Marriott Hotel, located on 1331 Pennsylvania Avenue. In keeping with a tradition begun in 1990, before the reception OILers will participate in the annual White Elephant Game.

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

Office of Immigration Litigation

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

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