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SOLICITOR GENERAL FILES CERT PETITION IN ASYLUM CASE INTERPRETING `WHETHER A "FAMILY" IS A "PARTICULAR SOCIAL GROUP"

The Solicitor General, has petitioned the Supreme Court to review the opinion of the *en banc* Ninth Circuit in ***Thomas v. Gonzales***, 409 F.3d 1177 (9th Cir. 2005) (cert pet. filed October 31, 2005), suggesting that summary reversal would be appropriate, because that decision "defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts" with the Court's decision in *INS v. Ventura*, 537 U.S. 12 (2002). In *Thomas*, a divided Ninth Circuit held, in the first instance, that "family membership may constitute membership in a 'particular social group,' and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship."

The decision, "defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts" with the Court's decision in *Ventura*.

Specifically, the government's petition asks the Court to consider the question of "whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that members of a family can and do constitute a 'particular social group,' within the meaning of the Immigration and Nationality Act's definition of 'refugee,' 8 U.S.C. § 1101(a)(42)(a), and that they were harmed 'on account of ' that status."

The asylum applicants in *Thomas* are a wife, husband, and two minor children, who entered as visitors from South Africa. The principal applicant testified that she came to the United States to avoid threats of physical violence and intimidation that they were subjected to because of abuses committed by her father-in-law known as "Boss Ronnie." Boss Ronnie was a foreman at Strongshore Construction in Durban and "was and is a racist who abused his black workers both physically and verbally." The petitioner testified to several incidents where she claimed her family had been subject to harassment based on her family's relation to Boss

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En Banc Ninth Circuit Affirms BIA's Denial Of Criminal Alien's MTR

In ***Membreno v. Gonzales***, __F.3d__, 2005 WL 2590646 (9th Cir. October 14, 2005) (Schroeder C.J., Pregerson, Reinhardt, Kleinfeld, McKeown, Gould, Paez, Tallman, Rawlinson, Bybee, Bea), the *en banc* Ninth Circuit held that the BIA did not abuse its discretion in denying the petitioner's motion to reopen, which raised only new legal arguments and did not present new facts. The petitioner had argued for the first time in her motion to reopen that her California "wobbler" offense of assault with a deadly weapon qualified for the "petty offense" exception to a crime of moral turpitude.

The petitioner, a native and citizen of Mexico, entered the United States as a temporary resident in

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RECORD TURNOUT AT ELEVENTH ANNUAL IMMIGRATION LAW SEMINAR

More than 70 attorneys from various government agencies, including, USCIS, ICE, CBP, EOIR, and State, together with OIL attorneys and OIL detailees from various Justice components, attended the Eleventh Annual Immigration Law Seminar, held in Washington, D.C. on October 24-28, 2005. Among highlights were remarks by Ninth Circuit Judge M. Margaret McKeown, who spoke about the growing immigration caseload before the Ninth Circuit and appellate advocacy by government lawyers.

Immigration Judges Lisa Dornell, from the Baltimore Immigration Court,

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Highlights Inside

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Ronnie. An IJ determined that petitioner had not met her burden in demonstrating that her family had suffered persecution based on any of the five statutory grounds, "whether it is race or political opinion." The BIA affirmed that decision without opinion. A divided panel of the Ninth Circuit held that the principal petitioner, her husband and two children, had been persecuted on account of membership in a particular social group, namely because the petitioner was the daughter-in-law of "Boss Ronnie." 359 F.3d 1169. On rehearing en banc, the Ninth Circuit again held that a family may constitute a "particular social group," and overruled all of its prior decisions expressly or implicitly holding otherwise.

The Solicitor General contends that by deciding the issue of whether the applicants qualified as members of a "particular social group," the Ninth Circuit "usurp[ed] the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws, and its constitutionally assigned role in making the sensitive domestic and foreign policy judgments that inhere in identifying which categories of individuals may receive refuge in the United States from persecution in their home land." The petition argues that the Ninth Circuit's decision cannot be reconciled with the Court's ruling in *Ventura*, "or the fundamental principles of administrative review that *Ventura* reconfirmed. Under *Ventura*, the lower court should have applied the ordinary 'remand' rule," and allowed the Board to decide "whether a nuclear family, without more, may constitute a particular social group and, if so, whether respondents qualify and whether any harassment they suffered was 'on account of' a protected status.'" Additionally, the Solicitor General indicates that the Ninth Circuit's failure in *Thomas* to adhere to *Ventura*, "and the traditional limitations on judicial review that it reiterates, is part of a continuing pattern by that court."

The petition argues that the Ninth Circuit's decision also conflicts with the rulings of other Circuits, "which have hewed to this Court's *Ventura* mandate and have remanded immigration law questions to the Board, rather than independently resolving the issues themselves." Consequently, the Solicitor General contends that the Court's review is "is necessary to resolve that conflict in the courts of appeals and to bring uniformity to the lower courts' review of Board decisions." The petition notes that in FY 2005, 10,373 petitions for review in immigration cases were filed in the federal courts of appeals, with 54% of those filed in the Ninth Circuit. Of those petitions for review, 4,460 were in asylum cases, of which 37% were in the Ninth Circuit. In light of these statistics, the Solicitor General contends "stability and consistency in the interpretation and enforcement of the immigration laws is not possible if the primacy of the Executive Branch's interpretive authority is disregarded and the Ninth Circuit is independently formulating new rules and revising extant principles of immigration law in the circuit in which one-third of all asylum cases (and more than half of all removal cases) arise."

"Certainly nothing in the text of the INA compels the conclusion that an immediate family constitutes 'a particular social group.'"

Finally, the Solicitor General contends that "the court of appeals' error is especially egregious because it reached out to identify a broad category of aliens that are now entitled to seek asylum—a decision that has far-reaching ramifications for immigration policy." The petition notes that the Board, recognizing the potential breadth of the phrase "membership in a particular social group," has been "deliberately cautious and circumspect in identifying what groups qualify for protection, and has emphasized that the identification of protected groups should be made on a 'case-by-case basis.'" Observing that "the Board has never held that relations within a nuclear or immediate family alone are sufficient to define a protected social group," the Solicitor General notes that "certainly nothing in the text of the INA compels the conclusion that an immediate family constitutes a 'particular social group' . . . the phrase 'social group' could reasonably be interpreted to suggest a division or class of society at large, identified as such by society, and one that is typically larger than a nuclear family and that shares and exhibits distinctive characteristics beyond immediate familial relations alone. That or other limiting constructions also could reasonably be supported, under the doctrine of *ejusdem generis*, by reference to the other statutorily protected grounds."

Because the Ninth Circuit's decision, "left little basis for distinguishing respondents' situation from those of countless others who, due to gang warfare, crime family syndicates, ordinary inter-family rivalries, or similarly based allegations of motive for street crime," the Solicitor General predicts that these individuals "now can be expected to claim refugee status on the same terms as persons tortured and imprisoned for their race, religion, or politics."

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ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any suggestions for improving this publication, please contact Francesco Isgro at:

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DISPOSITIVE MOTIONS IN NATURALIZATION CASES

I. Introduction

This two-part article discusses motion practice in district court cases involving applications by aliens for naturalized citizenship in the United States ("naturalization applications" or "Form N-400 applications"), pursuant to §§ 310 and 316, *inter alia*, of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. §§ 1421 & 1427. While the article should by no means be considered an exhaustive discussion of the topic, it may provide a helpful overview of the circumstances under which government counsel should make dispositive motions in such cases.

When litigating over a naturalization application, the Government should not hesitate to resort to motion practice where circumstances dictate.

Congress has removed naturalization from the courts and vested the Attorney General with "sole authority to naturalize persons as citizens of the United States," in INA § 310(a), 8 U.S.C. § 1421(a) (as amended by the Immigration Act of 1990 ("ImmAct 90"), Pub. L. No. 101-649, Title IV, 104 Stat. 4978, 5038-48 (Nov. 29, 1990)); *see also id.* § 1421(d) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter."); *INS v. Pangilinan*, 486 U.S. 875, 883-84 (1988) (courts lack "the power to make someone a citizen" except to the extent authorized by Congress).

However, Congress has reserved two specific points at which United States district courts may exercise jurisdiction to review aliens' naturalization applications. The first is where United States Citizenship and Immigration Services ("CIS") has issued an administratively final denial of a naturalization application, in which case the disappointed naturalization applicant may seek judicial review of the denial in an appropriate district court, pursuant to INA § 310(c), 8 U.S.C. § 1421(c). The second is where the agency has failed to render a decision on an application within 120 days of the completion of the applicant's naturalization examination, in which case the applicant may apply to an appropriate district court either to decide the application itself, or remand it to the CIS with instructions, pursuant to INA § 336(b), 8 U.S.C. § 1447(b).

In the former case, judicial review of the final denial of a naturalization application, under INA § 310 (c), proceeds "in accordance with chapter 7 of Title 5," *i.e.*, the Administrative Procedure Act ("APA"). 8 U.S.C. § 1421(c). However, in contrast to the generally limited review provided by the APA, *see* 5 U.S.C. § 706, INA § 310(a) provides that review of a naturalization denial "shall be de novo, and the Court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing *de novo* on the application," 8 U.S.C. § 1421(c); *see also Nagahi v. INS*, 219 F.3d 1166, 1170 (10th Cir. 2000) (discussing review provisions of INA § 310(c); calling "grant of authority [to district court] unusual in its scope").

Notwithstanding the provisions for a *de novo* hearing, such a hearing is not mandatory – and may not even be appropriate – in all naturalization cases. The Supreme Court has historically held that naturalization challenges are "civil actions" and thereby subject to the general rules governing civil litigation. See *Tutun v. United States*, 270 U.S. 568, 577 (1926) (a naturalization "proceeding is instituted and is conducted throughout according to the regular course of judicial procedure."); *see also Abela v. Gustafson*, 888 F.2d 1258, 1262 (9th Cir. 1989) ("Naturalization proceedings are 'civil actions' . . . . [A]n application for naturalization is in every respect a judicial proceeding and encompasses every incident of such proceedings.") (citations omitted); *Petitions of Rudder*, 159 F.2d 695, 697 (2d Cir. 1947) ("If the United States appears in opposition [to a naturalization application], it has [t]he full rights of a litigant.") (quotation marks, citation omitted); *United States v. Jerome*, 16 F.R.D. 137, 138 (S.D.N.Y. 1954) (in analogous context of denaturalization proceedings, "there is strong reason to uphold [the Government's] right as a litigant to avail itself of the procedures authorized by the Rules").

Thus, when litigating over a naturalization application, the Government should not hesitate to resort to motion practice – *i.e.*, motions to dismiss the complaint, for judgment on the pleadings, or for summary judgment, pursuant to Rules 12(b), 12(c), and 56(c) of the Federal Rules of Civil Procedure – where circumstances dictate. Some of those circumstances are discussed in greater detail in Parts III-V, below.

II. The Standard of Review and the Burden of Proof

Historically, the considerable deference accorded the Executive Branch in the realm of immigration was, if anything, higher where naturalized citizenship is concerned. The Supreme Court held that citizenship is a "high privilege," *United States v. Manzi*, 276 U.S. 463, 467 (1928), and called its "[a]cquisition . . . a solemn affair." *Costello v. United States*, 365 U.S. 265, 269 (1961) (quoting *Chaunt v. United States*, 364 U.S. 350, 352 (1960)); *see also United States v. Minker*, 350 U.S.

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179, 197 (1956) ("[w]hen we deal with citizenship we tread on sensitive ground") (Douglas, J., concurring). It has stated:

> When the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by "clear, unequivocal, and convincing evidence." But when an alien seeks to obtain the privileges and benefits of citizenship, the shoe is on the other foot. He is the moving party, affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status, once granted, cannot lightly be taken away, the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship. For these reasons, it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect.

Berenyi, 385 U.S. at 636-37 (footnotes, citations omitted); *accord Pangilinan*, 486 U.S. at 886 (quoting *Berenyi*).

Thus, "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with," *United States v. Ginsberg*, 243 U.S. 472, 474-75 (1917), and "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," *Fedorenko v. United States*, 449 U.S. 490, 506 (1981). *See also United States v. Macintosh*, 283 U.S. 605, 626 (1931) ("It is not within the province of the courts to make bargains with those who seek naturalization."), *overruled in part on other grounds*, *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Maney v. United States*, 278 U.S. 17, 22 (1928) ("not only the conditions attached to the grant, but those attached to the power of the instrument used by the United States to make the grant must be complied with strictly"); *Estrin v. United States*, 80 F.2d 105, 105 (2d Cir. 1935) ("Aliens seeking the privileges of citizenship must possess the qualifications prescribed by the statutes").

Any doubts regarding the Government's grant or denial of a naturalization application "should be resolved in favor of the United States and against the claimant."

Moreover, any doubts regarding the Government's grant or denial of a naturalization application "should be resolved in favor of the United States and against the claimant." *Macintosh*, 283 U.S. at 626 (Government is "entitled to the benefit of any doubt" in naturalization cases); *Price v. U.S. INS*, 962 F.2d 836, 842 (9th Cir. 1992) (citation omitted), *cert. denied*, 510 U.S. 1040 (1994).

III. Motions to Dismiss for Lack of Subject Matter Jurisdiction

A. Where Naturalization Was Denied But Petitioner Failed to Exhaust the INA § 336(a) Hearing Process

A complaint concerning a naturalization application may be susceptible to dismissal for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules, because Congress made exhaustion of the administrative appeals process an explicit prerequisite to judicial review of a naturalization denial. *See* 8 U.S.C. § 1421(c). Exhaustion, where it is required by statute, is jurisdictional and must be enforced. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Theodoropoulos v. INS,* 358 F.3d 162, 172 (2d Cir.) (where exhaustion requirement is statutory, common law "exceptions – including futility – [are] simply not available") (citation omitted), *cert. denied*, 125 S. Ct. 37 (2004); *Bastek v. Federal Crop Ins. Co.*, 145 F.3d 90, 93-95 (2d Cir. 1998) ("Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them."); *Taylor v. United States Treasury Dep't*, 127 F.3d 470, 475 (5th Cir. 1997) ("Whenever the Congress statutorily mandates that a claimant exhaust administrative remedies, the exhaustion requirement is jurisdictional because it is tantamount to a legislative investiture of exclusive original jurisdiction in the agency.") (citing cases).

More specifically, INA § 310(c) provides that "[a] person whose application for naturalization under this subchapter is denied, *after a hearing before an immigration officer under section 1447(a) of this Title*, may seek judicial review of such denial." § 336(a) hearing process. *See, e.g., Levy v. Davis*, 83 Fed. Appx. 602, 602-03, 2003 WL 22903857 (5th Cir. 2003) (per curiam) (holding district court was without jurisdiction to review denial of naturalization where petitioner "failed to comply with the applicable regulations for obtaining [an INA § 336(a)] hearing") (unpublished decision); *Baez-Fernandez v. INS*, 385 F. Supp. 2d 292, 294 (S.D.N.Y. 2005) ("The Court lacks jurisdiction to review [petitioner's] first naturalization application because he did not exhaust his administrative remedies by requesting a hearing before an immigration officer as provided in 8 U.S.C. § 1447(a)."); *Adiemereonwu v. Ashcroft*, 2004 WL 1620245, at *1 n.4 (N. D. Tex. July 19, 2004) ("To the extent petitioner seeks an order compelling CIS to approve his application for citizenship, he has not exhausted his available administrative remedies.") (citing 8 U.S.C. § 1447(a)); *Saad v. Barrows*, 2004 WL 1359165, at *9 (N. D. Tex. June 16, 2004) ("the court cannot review bases for naturalization eligibility

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not . . . heard under 8 U.S.C. § 1447(a) by an immigration officer"); *Li v. INS*, 2003 WL 102813, at *4 (S.D.N.Y. Jan. 10, 2003) ("It is clear that Congress has made the exhaustion of the section 336(a) hearing process a prerequisite to judicial review, under INA section 310(c)."); *Bahet v. Ashcroft*, 2002 WL 971712, at *1 (S.D.N.Y. Apr. 10, 2002) (where applicant had not yet appealed initial denial of naturalization application, holding that "claim [wa]s not yet ripe because he has not yet exhausted his administrative remedies"); *see also* 3C Am. Jur.2d, Aliens and Citizens § 3002 (2003) (noting that naturalization denials are "not subject to judicial review until the applicant has exhausted those statutory administrative remedies available to the applicant"); *cf. United States v. Hovsepian*, 307 F.3d 922, 932 (9th Cir. 2002) ("Congress has expressed a strong preference for naturalization applicants to exhaust the INS's administrative remedies before seeking judicial review.").

B. Where a Naturalization Application is Pending, But Jurisdiction Does Not Lie Under the Terms of INA § 336(b)

A Rule 12(b)(1) motion may also be appropriate in a naturalization case, even where there has been no failure to exhaust administrative remedies. Such cases present no "federal question" susceptible to an exercise of jurisdiction under 28 U.S.C. § 1331 because an alien can point to no right to be naturalized that is protected by the Constitution or any federal statute. *See, e.g., Tutun*, 270 U.S. at 578 ("The opportunity to become a citizen of the United States is . . . merely a privilege, and not a right."); *Maney*, 278 U.S. at 22 (calling grants of naturalized citizenship "Government gifts"); *Olegario v. United States*, 629 F.2d 204, 223-24 (2d Cir. 1980) (naturalization statute did not confer "vested right to citizenship" but, "[a]t most, . . . an opportunity to become a citizen").

Moreover, as noted above, the INA specifies only two points at which a district court may intervene in the naturalization process: i.e., after a final administrative denial, or where more than 120 days have passed since a naturalization examination without a decision, in INA §§ 310(c) & 336(b), respectively. Thus, noted commentators have concluded that:

> The Immigration Act of 1990 . . . provides *no remedy* if the INS fails to schedule an administrative hearing requested by [a naturalization] applicant on the denial of his or her application. Nor is there a remedy for the INS's failure to render a decision in an administrative appeal of a denial.

7 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure*, § 96.07[3][a], at 96-23 (rev. ed. 2000) (emphasis added).

Apart from the 120-day period specified in INA § 336(b), there is no statutory basis for a district court to exercise jurisdiction where a naturalization applicant complains of alleged delays or mistakes in the adjudication of his application.

In other words, apart from the 120-day period specified in INA § 336 (b), there is no statutory basis for a district court to exercise jurisdiction where a naturalization applicant complains of alleged delays or mistakes in the adjudication of his application. Although a naturalization applicant may invoke jurisdiction under the APA, 5 U.S.C. §§ 701, et seq.; the mandamus statute, 28 U.S.C. § 1361; or the general immigration jurisdiction provisions in INA § 279, 8 U.S.C. § 1329, those statutes do not, of themselves, support an exercise of jurisdiction. That Congress set a 120-day "deadline" for the CIS to decide a naturalization application following an examination – but set no similar deadline for the CIS to complete any other step of the naturalization process – strongly indicates that Congress did not intend for jurisdiction to attach at any other point in that process. *See, e.g., Danilov v. Aguirre*, 370 F. Supp. 2d 441, 445 (E.D. Va. 2005) (holding that "general grants of subject matter jurisdiction, in sharp contrast to the specific grant of subject matter jurisdiction set forth in 8 U.S.C. § 1447(b) . . . . may not be relied upon to expand a very specific statute that either grants or limits jurisdiction"); *see also Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("*expressio unius est exclusio alterius*").

In any event, assertions of jurisdiction under the APA, the mandamus statute, and INA § 279 are easily turned aside. Neither APA nor mandamus jurisdiction lie in such cases because of the discretionary nature of naturalization decisions: chapter 7 of the APA, governing judicial review, specifically exempts from its jurisdiction review of any "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and the Supreme Court long ago held that "[m]andamus . . . cannot be used to compel or control a duty in the discharge of which by law [a federal officer] is given discretion," *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925); *see also Webster v. Doe*, 486 U.S. 592, 599 (1988) (termination of Central Intelligence Agency employee was discretionary action not subject to APA review); *Leonhard v. Mitchell*, 473 F.2d 709, 712-13 (2d Cir. 1973) ("Traditional teaching views a writ of mandamus as appropriate solely 'to compel officials to comply with the law when no judgment [or discretion] is involved with the compliance.'") (citation omitted; brackets in original). Nor does INA § 279 support an exercise of jurisdiction in actions against the government. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 477 n.4 (1999); *Checknan v. McElroy*, 313 F. Supp. 2d 270, 275-76 (S.D.N.Y. 2004); *Sadowski v.*

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INS, 107 F. Supp. 2d 451, 453 (S.D.N.Y. 2000).

Finally, at least one district court has taken an expansive view of the meaning of "examination" in INA § 336(b), holding that jurisdiction does not attach until 120 days after the completion of a naturalization applicant's full background investigation by the Federal Bureau of Investigation ("FBI") and related agencies. *See Danilov*, 370 F. Supp. 2d at 444 ("the [naturalization] interview is merely a part of the overall examination process, as is a review of plaintiff's FBI background investigation, and the 120 day period does not begin to run until these and all other aspects of the examination process are completed"); *but see El-Daour v. Chertoff*, 2005 WL 2106572, at **2-3 (W.D. Pa. Aug. 26, 2005) (rejecting *Danilov*'s reasoning that "examination" is a "process").

C. Where Petitioner Alleges INA § 336(b) Jurisdiction in His Complaint, but the CIS Later Adjudicates the Application

The majority of courts to have considered the question have held that jurisdiction does not lie under INA § 336(b) where the CIS has issued a decision respecting a naturalization application – even where that adjudication took place more than 120 days after an examination or where the adjudication was "overdue" when the complaint was filed. As the Ninth Circuit put it, "the need for immediate judicial review ordinarily evaporates when the INS renders a decision before the district court elects to exercise jurisdiction over the matter." *Hovsepian*, 307 F.3d at 932; *but see Castracani v. Chertoff*, 377 F. Supp. 2d 71, 75 (D.D.C. 2005) (where 120-plus days had elapsed after examination without adjudication, holding that court "obtained exclusive jurisdiction over [petitioner's] naturalization application [and that the CIS's subsequent] adjudication of the application [wa]s invalid").

Jurisdiction does not lie under INA § 336(b) where the CIS has issued a decision respecting a naturalization application – even where that adjudication took place more than 120 days after an examination or where the adjudication was "overdue" when the complaint was filed .

In concluding that INA § 336(b) does not apply where the CIS has acted, some courts have focused on that statute's reference to the agency's "failure to make a determination," 8 U.S.C. § 1447(b). *See, e.g., Kembi v. INS*, 8 Fed. Appx. 328, 330, 2001 WL 278187 (6th Cir. 2001) ("the plain language of § 1447 (b) suggests that the courts' jurisdiction is premised on the INS's failure to make an administrative determination") (unpublished decision); *Langer v. McElroy*, 2002 WL 31789757, at *2 (S.D.N.Y. Dec. 13, 2002) ("While the INS may have taken more than the 120 days to make its decision, it eventually did make such a determination and thus jurisdiction cannot be based on this premise."); *see also Chavez v. INS*, 844 F. Supp. 1224, 1225 (N.D. Ill. 1993) (refusing to reinstate prior action in which court directed INS to adjudicate petitioner's long-delayed naturalization application, pursuant to INA § 336(b), and INS later denied application, holding that INA § 336(b) was not intended "to permit a district court to circumvent the [administrative] appeals process" in INA § 336(a)).

Other courts have simply held that where the CIS has acted, the complaint has become moot. *See, e.g., Sze v. INS*, 153 F.3d 1005, 1007-09 (9th Cir. 1998) (although INS took more than 120 days to adjudicate applications, complaint became moot when applications were approved during pendency of appeal); *Bahet*, 2002 WL 971712, at *1 (same, where INS denied application). Finally, one circuit court has intertwined mootness with other considerations. *See Kia v. U.S.* INS, 175 F.3d 1014 (table), 1999 WL 172818, at *1 (4th Cir. 1999) ("the plain language of § 1447 suggests the district court requires an unreviewed application in order to make a determination, and that the INS's denial of naturalization shortly after [petitioner] filed suit mooted the case and deprived the court of jurisdiction") (unpublished decision).

D. Where the Action is Untimely

Regulations promulgated to implement the INA's naturalization provisions require a disappointed applicant to seek judicial review in an appropriate court "not more than 120 days after the . . . final determination" of his application. 8 C.F.R. § 336.9(b). Therefore, several district courts have observed – without holding – that failure to seek review of a naturalization denial within 120 days deprives the court of jurisdiction. *See, e.g., Jalloh v. Dep't of Homeland Security*, 2005 WL 591246, at *3 (D. Mass. Mar. 11, 2005); *Bakerian v. INS*, 2004 WL 724946, at *1 (N.D. Cal. Mar. 30, 2004). However, research has disclosed no decision in which a district court has dismissed a naturalization complaint solely because it was untimely under the regulation; moreover, the Tenth Circuit has rejected the argument, holding that it is beyond an executive agency's regulatory power to limit access to judicial review. *See Nagahi*, 219 F.3d at 1169 (holding that time limit for judicial review in 8 C.F.R. § 336.9(b) "is beyond the authority delegated [by Congress] and will not be applied," and that "[i]n the absence of a specific statutory limitations period, a civil action against the United States under the APA is subject to the six year limitations period found in 28 U.S.C. § 2401(a)").

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Part 2 of the article will appear in the next issue.

ASYLUM LITIGATION UPDATE

Editor's note: Asylum, withholding of removal, and Torture Convention cases are approaching 50% of the immigration litigation caseload. Margaret Perry, Senior Litigation Counsel, and OIL's asylum expert, has agreed to contribute a monthly column on asylum, highlighting important asylum issues and trends. .

■Contact OIL If You Have A Case Claiming Criminal Prosecution For Participating In An Unregistered Church Constitutes Persecution On Account Of Religion

The Acting Deputy Attorney General and the Assistant Attorney General of the Civil Division Department want to identify all asylum cases that raise an issue recently addressed by the Fifth Circuit in ***Li v. Gonzales***, 420 F.3d 500 (5th Cir. 2005) - whether prosecution of participating in an unregistered church constitutes persecution on account of religion.

The Justice Department and DHS want to explore developing a comprehensive policy on cases raising the issue of whether prosecution for participating in an unregistered church constitutes persecution on account of religion.

In *Li*, an alien organized a "house church" which he refused to register with the Chinese government. He was arrested, physically abused, and charged by local officials for violating China's criminal laws barring the unregistered practice of religion. An Immigration Judge found the alien eligible for withholding of removal, but the Board of Immigration Appeals reversed. On review in the Fifth Circuit, the Department of Justice argued that Li was not eligible for relief because he was able to practice his religion in China as long as he registered. Because he had a viable option for practicing his religion, any harm he experienced was not on account of his religion but rather on account of his choice not to register in violation of China's criminal laws. The Fifth Circuit agreed, explaining that the record "establishes that the Chinese government . . . tolerates the Christian faith and seeks to punish only the unregistered aspects of Li's activities."

There are concerns about the *Li* decision based on new information that was not in the record in that case, indicating that church registration may not be a viable option in China. For example, according to the United States Commission on International Religious Freedom, registered churches have publicly accepted modifications of fundamental tenets of their faith in order to overcome government suspicion of their religious activities. Thus, if someone wants to faithfully practice his religion in China, he or she may need to join an unregistered church and risk criminal prosecution and detention.

In light of this new information the Department of Homeland Security (DHS) asked the Board to reopen Mr. Li's case, the Board granted the motion, and Li was granted withholding of removal. In addition, the Fifth Circuit vacated its opinion and judgment. The Justice Department and DHS want to explore developing a comprehensive policy on cases raising the issue of whether prosecution for participating in an unregistered church constitutes persecution on account of religion.

OIL is taking an inventory of all pending cases raising this issue, whether or not they are from China. If you are an outside OIL attorney and have such a case now, or get an "unregistered church" asylum case in the future, let OIL know by contacting Margaret Perry, who will forward the information to counsel for the Assistant Attorney General.

■Assess Asylum Cases For Stale Records And Other Problems Requiring Remand

If you have an asylum or other immigration case, assess it to see if you have outdated, stale country reports that do not reflect present conditions in the alien's country, as shown by current Department of State reports you can find on its website.

The courts of appeals, particularly the Third Circuit, have complain about stale administrative records in asylum cases. In the Third Circuit attorneys must always check their asylum cases to make sure the record reflects current country conditions and is not stale, but you should do this in all cases, in all circuits.

In addition there may be other kinds of problems that warrant remand: (1) the agency decision may contain a material error of law; (2) the agency decision contains a material factual error; (3) the agency decision is contrary to circuit law and it would be inappropriate to seek to distinguish that law; (4) the agency decision lacks essential analysis or determinations (the IJ or Board failed to made a determination required by law or failed to address a material claim properly raised and preserved); or (5) defense of the case would be patently inappropriate (the case is a compelling case for the exercise of prosecutorial discretion, because of problems in the case, or because the alien has become eligible for other relief, like adjustment of status based on marriage to a U.S. citizen).

If you are outside OIL and have a case you think warrants remand, contact OIL to find out how to bring the case to the attention of the agency and seek remand. .

If you have an unusual issue you would like to see discussed, you may contact Margaret Perry at:
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Exercising Prosecutorial Discretion To Dismiss Adjustment Cases

On October 6, 2005, ICE's Principal Legal Advisor, William J. Howard, issued a memorandum to the ICE Chief Counsels setting forth the criteria and procedures by which an Immigration and Customs Enforcement (ICE) Office of the Chief Counsel (OCC) may join in or file a motion to dismiss proceedings without prejudice when the ICE OCC determines adjustment applications currently pending before EOIR would be appropriate for approval by Citizenship and Immigration Services (CIS). The purpose of this policy is to reallocate limited ICE resources to priority cases by dismissing cases where it appears in the judgment of the ICE OCC, that relief in the form of adjustment of status is clearly approvable. The following is a synopsis of the criteria and procedures as outlined in the memorandum.

Where the application for adjustment is predicated on a visa petition, the case may be dismissed where the visa petition is approved and a visa is immediately available.

CRITERIA

Motions to Dismiss Proceedings Without Prejudice pursuant to this memorandum should be predicated on the following threshold criteria.

■ EOIR must have jurisdiction to adjudicate the application for adjustment.

■ The respondent must demonstrate prima facie eligibility for adjustment of status based on a properly filed application for adjustment under the Immigration and Nationality Act (including but not limited to sections 209, 245, and 249, or section 1 of the Act of November 2, 1966). Where the application for adjustment is predicated on a visa petition, the case may be dismissed where the visa petition is approved and a visa is immediately available, or the record establishes a long-term relative relationship where approval of an immediately available petition is likely.

■ Adjustment applications must support a discretionary determination by the ICE OCC that the applications appear clearly approvable.

■ There is no asylum application pending adjudication before the Immigration Judge.

■ ICE OCC should not generally join in a Motion to Dismiss Without Prejudice or so move *sua sponte* in removal proceedings involving threats to national security, human rights violators, criminal convictions or conduct necessitating a 212(h) waiver (e.g., Operation Community Shield, Operation ICE Storm, Operation Cornerstone or Operation Predator), immigration fraud necessitating a 212(i) waiver (e.g. Operation Jakarta), or detained aliens. With the approval of the Chief Counsel, dismissal may be permitted in the above cases based upon unique or special circumstances including, but not limited to, the extent and/or seriousness of criminal conduct, regency and/or significance of immigration fraud, or national security interests. While this is not an exhaustive list, the policy outlined herein should ordinarily be followed absent a competing enforcement interest.

PROCEDURES

A Motion to Dismiss Without Prejudice must be predicated on the respondent demonstrating prima facie eligibility through an application for adjustment before EOIR. When applicable, the respondent or his/her representative must contact the ICE OCC representing DHS before the Immigration Court to request ICE OCC consent to dismiss proceedings. ICE OCC may require that such request be made in writing, be supported by a true and complete copy of the adjustment application pending before EOIR, and be supported by any other evidentiary material including, but not limited to, a copy of the current DOS Visa Bulletin showing current priority date and respondent's FBI Identification Record accessible at http://www.fbi.gov/hq/cjisd/fprequest.htm . (FAQ's accessible at http://www.fbi.gov/hq/cjisd/faqs.html)

■ The ICE OCC may join in a Motion to Dismiss without Prejudice or move *sua sponte* for dismissal without prejudice if the ICE OCC determines that the respondent's application for adjustment is likely to be granted.

■ Where appropriate, ICE OCC may request revisions to a proposed motion be made as a precondition for giving its consent. ICE OCC should strive to reply in a timely manner to requests for dismissal of proceedings for adjustment before CIS.

■ ICE OCC should specifically request that a decision of the Immigration Judge dismissing proceedings will expressly state that dismissal of the matter shall be without prejudice to the Department of Homeland Security (DHS) so that the record will be clear that the recommencement of removal proceedings will not be barred by the doctrines of res judicata or collateral estoppel. If the Immigration Judge dismisses removal proceedings without prejudice, the OCC should route the administrative file(s) through DRO to CIS for adjudication of adjustment applications and update the General Counsel Electronic Management System (GEMS). While the applicant bears the burden of satisfying CIS filing and eligibility requirements, should the immigration court grant a joint request to forward the original adjustment application to the ICE OCC at the time of dismissal of proceedings, the original adjustment application should be placed in the administrative file prior to routing the administrative file to CIS.

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BIA DECISIONS

Board Rules Immigration Judges Have No Jurisdiction To Determine Validity Of Alien's Employment-Based Visa Petition Under INA § 204(j), Following Change In Alien's Employment

On October 28, the Board issued its precedent decision in ***Matter of Perez Vargas***, 23 I. & N. Dec. 829 (BIA 2005), holding that Immigration Judges do not have authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under 8 U.S.C. § 1154(j), after the alien's change in jobs or employers.

"Congress did not intend that the Immigration Judges would determine whether an alien continues to qualify for a visa petition upon a change in circumstances."

Perez Vargas was the beneficiary of an approved I-140 visa petition, but he was no longer employed by the petitioning employer at the time of his hearing before the Immigration Judge.

The Immigration Judge denied his application for adjustment of status because of his employment status, and concluded that he lacked jurisdiction to apply INA § 204(j), 8 U.S.C. § 1154(j), which would allow Perez Vargas's visa petition to remain valid if he had a new job in the same or similar occupational classification. Noting that only the DHS has the authority to approve a visa petition or to determine that one already approved remains valid following an alien's change in employment, the Board stated that Immigration Judges have no authority to adjudicate an application for relief based on such a visa petition. "Original jurisdiction over employment-based visa petitions lies with DJS following issuance of a labor certification by the Department of Labor," said the Board.

By Song Park, OIL
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REGULATORY UPDATE

Adjustment of the Immigration Benefit Application Fee Schedule

U.S. Citizenship and Immigration Service (USCIS) has announced fees increases for immigration benefit applications and petitions to account for cost increases due to inflation. The fee increases will apply to applications or petitions filed on or after October 26, 2005. 70 *Fed. Reg*. 56181 (Sept. 26, 2005).

The average fee increase for inflation is approximately $10 per application or petition. The fees will be deposited into the Immigration Examinations Fee Account (IEFA) to fund the full cost of providing immigration benefits, including the full cost of providing benefits for no charge services such as asylum and refugee claims.

The IEFA was established by Congress in 1988, and has been the primary source of funding for providing immigration and naturalization benefits, as well as other benefits directed by Congress. *See* 101 Public Law 515, 210 (d)(2), 104 Stat. at 2121. The current immigration benefit application fees are based on the review conducted in 1997, adjusted for cost of living increases and other factors; the fees were last changed effective April 30, 2004. 69 *Fed. Reg*. 20528. The current fees include a $5 per immigration benefit application surcharge to recover information technology and quality assurance costs. This surcharge allows USCIS to improve upon the delivery of services to its customers such as offering electronic filing for certain immigration benefit applications.

GICM Designated As A Foreign Terrorist Organization

On October 11, 2005, the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, designated under INA § 219, the Moroccan Islamic Combatant Group, a.k.a Groupe Islamique Combattant Marocain (GICM) as a foreign terrorist organization. 70 *Fed. Reg* 59114 (October 11, 2005).

Determination of Waiver by the Secretary of Homeland Security

On September 22, 2005, the Secretary of Homeland Security issued a notice determining that it was necessary to waive all federal, state or other laws, regulations and legal requirements that may impede the construction of barriers and roads along the international land border of the United States in California, an area of high illegal entry. 70 *Fed. Reg*. 55622 (September 22, 2005). The Secretary of Homeland Security relied on section 102(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which authorizes him to take necessary action to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) to prevent illegal entry into the United States.

State Department Finalizes E-Passport Rule

State has published a final rule amending its passport regulations to incorporate the changes related to the introduction of the "electronic passport." 70 *Fed. Reg.* 61553 (October 25, 2005). As defined, an electronic passport means "a passport containing an electronically readable device, an electronic chip, encoded with the information printed on the data page, a biometric version of the bearer's photograph, a unique chip number, and a digital signature to protect the integrity of the stored information." The decision to issue e-passports has raised a number of concerns such as identify theft, governmental intrusion, an adequacy of Radio Frequency Identification (RFID).

By Angela Oh, OIL Law Intern

Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

■ Second Circuit Remands Case For Consideration Of Whether Congress Intended To Grant Exceptions To The Ten-Year Penalty For Failure To Comply With A Voluntary Departure Order

In ***Zmijewska v. Gonzales***, __F.3d__, 2005 WL 2462132(2d Cir. October 6, 2005)(Meskill, *Cabranes*, Mukasey), the Second Circuit remanded the case to the BIA and directed it to clarify whether Congress intended to permit courts to grant equitable relief, notwithstanding the ten-year ineligibility period for adjustment of status imposed once the alien failed to voluntarily depart. Section 240B of the INA provides, *inter alia*, that an alien who is permitted to depart voluntarily and fails to do so "is ineligible for a period of 10 years for any further relief. . . ." Petitioner, a citizen of Poland, had been permitted to depart voluntarily by November 8 or 9, 2002. Subsequently, petitioner filed a motion to reopen, and following its denial, filed a motion to reconsider. In its first decision, the BIA found that petitioner was statutorily ineligible for adjustment because she had failed to comply with the voluntary departure order. In the second decision, the BIA found that petitioner had not shown "exceptional circumstances" for her failure to comply with the order. Both BIA decisions were consolidated before the Second Circuit.

Petitioner sought equitable relief because she claimed that the BIA's accredited representative had failed to notify her of the existence of the VD order until the day after she was required to leave. The court found that the BIA "provided no clear resolution of the pivotal question presented in the case." Instead, said the court, "the BIA provided contradictory assessments of whether the voluntary departure requirement under INA 240B precludes courts from granting equitable relief from the ten-year ineligibility period upon a finding of 'exceptional circumstances."

"The BIA provided contradictory assessments of whether the voluntary departure requirement under INA 240B precludes courts from granting equitable relief."

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■ Second Circuit Holds That It Lacks Jurisdiction Over Petition For Review Filed Out Of Time Despite Claim That Counsel Filed Timely In Wrong Circuit

In ***Lucaj v. Gonzales***, __F.3d__, 2005 WL 2403854 (2d Cir. September 30, 2005) (Winter, Pooler, Sotomayor) (*per curiam*) the Second Circuit determined that it lacked jurisdiction to consider an alien's challenge of the BIA's denial of asylum and withholding of removal because there was no evidence of a timely filing of the petition for review. The alien claimed that his counsel filed a timely petition, but it did not reach the Second Circuit within the statutory 30-day filing deadline because it was improperly filed in the Fifth Circuit. The court held that the alien provided no contemporaneous or plausibly authentic records demonstrating the filing of an earlier petition or payment of a docketing fee before the expiration of the 30-day deadline.

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■ Substantial Evidence Does Not Support IJ's Denial Of Asylum To Applicant From China

In ***Chen v. DOJ***, 426 F.3d 104 (2d Cir. 2005) (*Pooler*, Sotomayer, Korman), the Second Circuit reversed the IJ's denial of petitioner's request for asylum, withholding of removal, and protection under the Convention Against Torture. The petitioner claimed that he fled China because his wife had been subjected to a forced abortion, and that he feared persecution due to his practice of Falun Gong. The IJ did not find credible petitioner's testimony on his claimed fear of persecution by a coercive population control policy. The IJ found that his testimony was "scant of details" and "lack[ed] specificity." The IJ also found that the corroborative certificates submitted by the petitioner bore numbers that were not sequential and "appeared fabricated." The court found that the adverse credibility findings were not supported by substantial evidence and that petitioner's testimony, though sparse, sufficed to meet the requirements for a claim based on coercive population control. In particular, the court noted that the IJ's finding regarding the birth control certificates "was grounded solely on speculation and conjecture."

The court, however, affirmed the denial of relief based on petitioner's practice of Falun Gong. The IJ had denied that claim also on an adverse credibility finding. The count pointed to petitioner's vague testimony "as to his religious beliefs, which are an essential element of a claim or religious persecution" The court also affirmed petitioner's request for CAT protection, finding that he "provided no evidence whatsoever that he is likely to be tortured if returned to China."

Finally, the court rejected petitioner's argument that in light of the court's conclusion that the IJ's adverse credibility findings were not supported by substantial evidence he should have been granted asylum as the Ninth Circuit has done under *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003), and its progeny. Citing to *Ventura*, the court stated that remand "for additional investigation or explanation is appropriate except in rare circumstances," this being not one of them. Accordingly, the court remanded the

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case on the forced abortion issue.

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THIRD CIRCUIT

■ Third Circuit Denies Panel Rehearing Of Its Holding That Moral Turpitude Does Not Inhere In Violation Of New Jersey's Aggravated Assault On A Police Officer Statute

In ***Partyka v. Gonzales*** (Alito, Smith, *Rosenn*) (3d Cir. October 12, 2005), the Third Circuit denied the government's petition for panel rehearing of its previous decision (417 F.3d 408), which ruled that the IJ's holding that aggravated assault on a police officer categorically is a crime of moral turpitude rested on an erroneous interpretation of the state statute. Because the statute also punished negligently causing bodily injury to a police officer with a deadly weapon, and because such conduct did not connote moral turpitude, the court concluded that moral turpitude did not inhere in the least culpable conduct under the statute.

The rehearing petition argued that the BIA should be afforded a further opportunity to evaluate the record of conviction, and the relevant state law issues.

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■ Third Circuit Holds Vehicular Homicide Under New Jersey Law Is Not A Crime Of Violence

In ***Oyebanji v. Gonzales***, 418 F.3d 260 (3d Cir. 2004) (*Alito*, Smith, Wallace), the Third Circuit reversed the district court's denial of the alien's petition for writ of habeas corpus and the BIA's holding that the alien's conviction for vehicular homicide under New Jersey law was a "crime of violence" such that it constituted an aggravated felony - a ground for removal. The petitioner, a citizen of Nigeria and an LPR since 1997, was arrested in NJ after causing a car accident that killed another person. He then pled guilty to vehicular homicide, driving under the influence of intoxicating drug, and reckless driving. He was sentenced to six year's imprisonment. A district court agreed with the administrative finding of removal and petitioner appealed to the Third Circuit. The case was then held on abeyance pending a decision in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004).

> "The cornerstone of the *Leocal* Court's reasoning was that the concept of the use of physical force against the person or property of another 'requires active employment' and 'naturally suggests a higher degree of intent than negligent or merely accidental conduct.'"

The government argued that because under New Jersey law vehicular homicide requires proof of recklessness, the case was distinguishable from *Leocal*. The court, while recognizing "plausible grounds" for the government's position, rejected it explaining that "the cornerstone of the *Leocal* Court's reasoning was that the concept of the use of physical force against the person or property of another 'requires active employment' and 'naturally suggests a higher degree of intent than negligent or merely accidental conduct.'" In particular, the court noted *Leocal's* "repeated statement that 'accidental' conduct (which would seem to include reckless conduct) is not enough to qualify as a crime of violence." "As a lower federal court, we are advised to follow the Supreme Court's 'considered *dicta*,'" said the court.

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FOURTH CIRCUIT

■ Fourth Circuit Determines That An Offense Must Be Classified As A Felony Under State Law For Sentencing Enhancement Under The Federal Sentencing Guidelines To Apply

In ***United States v. Amaya-Portillo,*** 423 F.3d 427 (4th Cir. 2005) (*Cacheris*, Widener, Shedd), the Fourth Circuit reversed the district court's ruling that an eight level enhancement for an aggravated felony was appropriate under the federal sentencing guidelines where the prior offense was classified as a misdemeanor under state law, but the punishment for the offense was up to four years in prison. Relying on the definition of "felony" under 21 U.S.C. § 802 (13), the court held that the prior conviction had to be classified as a felony by federal or state law in order to warrant the eight level enhancement.

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FIFTH CIRCUIT

■ Crime Of Attempted Misdemeanor Child Abandonment With Intent To Return Is Not A CIMT

In ***Rodriguez-Castro v. Gonzales,*** __F.3d__, 2005 WL 2417048 (Davis, Stewart, *Dennis*) (5th Cir. October 3, 2005), the Fifth Circuit ruled that the crime of attempted misdemeanor child abandonment with intent to return for child, in violation of Texas Penal Code section 22.041, was not a crime involving moral turpitude. The BIA had determined that the petitioner was ineligible for cancellation of removal due to her commission of a crime involving moral turpitude. The court found that, as interpreted by the Texas courts, "that crime is not an "abandonment" in the ordinary sense of the word, but is, in essence, leaving a child under the age of 15 years temporarily without adult supervision under circumstances that a reasonable

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person would perceive exposing the child to an unreasonable risk of harm." Applying the BIA's definition of a CIMT to that category of crimes, the court concluded that the offense does not amount to a CIMT "because it does not shock the public conscience as being inherently base, vile, or depraved; it is not per se morally reprehensible and intrinsically wrong, or malum in se; and it is not accompanied by a vicious motive or a corrupt mind."

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■ An Alien Who Has Applied For Adjustment And Received Temporary Resident Benefits Is Unlawfully Present In the United States

In ***U.S. v. Rubio-Lucio***, __F.3d__ , 2005 WL 2529686 (5th Cir. October 12, 2005) (Davis, *Stewart*, Dennis), the Fifth Circuit held that an alien who illegally entered the United States and applied to have his immigration status changed to permanent resident status under the 1986 amnesty program, was prohibited from possessing a firearm under 18 U.S.C. § 922(g)(5)(A). The court determined that, although the alien was authorized to work and could not be deported while he was awaiting a ruling on his application for permanent residence status, he was nevertheless prohibited from possessing a firearm during the pendency of his application for purposes of the gun statute because he was still unlawfully present in this country.

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SIXTH CIRCUIT

■ Sixth Circuit Adopts Hypothetical Felony Rule And Reverses District Court's Application Of Aggravated Felony Sentencing Enhancement.

In ***United States v. Palacios-Suarez***, 418 F.3d 692 (6th Cir. 2005) (*Moore*, Restani, Nelson), the Sixth Circuit adopted the "hypothetical felony" approach, holding that a state felony conviction which does not contain a trafficking component must be punishable as a felony under federal law in order for it to be considered an "aggravated felony" under the Immigration and Nationality Act. The court held that because the alien's two prior state felony possession convictions had no trafficking component nor fit within the recidivist provision of the Controlled Substance Act, his offenses could not be used to enhance his sentence as "aggravated felonies."

> "To make a valid due process claim, "a claimant must have a liberty or property interest in the outcome of the proceedings . . . in immigration proceedings, a petitioner has no liberty or property interest in obtaining purely discretionary relief."

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SEVENTH CIRCUIT

■ Seventh Circuit Holds That IJ Did Not Violate Res Judicata Principles When He Commented On Prior Asylum Decision

In ***Hamdan v. Gonzales,*** __F.3d__, 2005 WL 2556652 (7th Cir. October 13, 2005) (*Coffey*, Williams, Sykes), the Seventh Circuit held that the Immigration Judge had supplied sufficient additional reasons for denying petitioner's adjustment of status application beyond his comments regarding petitioner's previously adjudicated asylum application, and therefore any alleged violation of the principle of res judicata was harmless. The court also rejected petitioner's claim that the IJ's violated his due process by "aggressively questioning" him at his adjustment of status hearing. The court held that in order to make a valid due process claim, "a claimant must have a liberty or property interest in the outcome of the proceedings . . . in immigration proceedings, a petitioner has no liberty or property interest in obtaining purely discretionary relief .... Thus, an alien's right to due process does not extend to proceedings that provide only discretionary relief, and the denial of such relief does not violate due process."

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■ BIA Cannot Affirm Without Opinion An IJ's Decision That Denies Relief On Both Judicially Reviewable And Non-Reviewable Grounds

In ***Cuellar-Lopez v. Gonzales***, __F.3d__,2005 WL 2757515 (7th Cir. October 26, 2005) (Flaum, Bauer, *Wood),* the Seventh Circuit vacated the BIA's AWO order affirming without opinion the IJ's denial of petitioner's application for cancellation of removal. The petitioner, who has lived in the United States continuously since 1982, left the country to visit Mexico. After staying there for about ten days, she flew back to the United States. At the Houston airport, immigration officials stopped her and she presented a false U.S. birth certificate. The officials spotted the fraud, but they allowed her into the country under humanitarian parole because of her three minor children. Petitioner was placed in removal proceedings where she conceded removability and applied for cancellation of removal. An IJ denied her application on two grounds. First, he found that she was unable to meet the statutory requirement of being "physically present" in the U.S. for ten years because of her attempted unlawful entry. Second, he found that she lacked "good moral character" because of her unlawful reentry, and thus she was statutorily barred from cancellation of removal under INA § 101(f)(3). Alternatively, even if not statutorily barred, the IJ found that as a matter of discretion

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her application should be denied for lack of good moral character. The Board of Immigration Appeals (BIA) affirmed the IJ's decision without an opinion.

Preliminarily, the court considered whether it had jurisdiction in light of the government's argument that jurisdiction was lacking because of the bar found in INA § 242(a)(2)(B)(I). "If it were clear that this was the ground on which the BIA relied, we would agree with that position," said the court, adding however, that "the BIA's decision to affirm summarily leaves us in the dark." The court noted that there is a circuit split about the reviewability of an IJ decision that contains both a reviewable and nonreviewable basis, which the BIA affirms without opinion. The Ninth, Fifth, and First Circuits have concluded that the proper disposition when an IJ opinion contains both reviewable and nonreviewable grounds is to remand to the BIA so that it may clarify the basis of its holding. The Tenth Circuit, in contrast, rejects the "assum[ption] that the decision from which jurisdiction is determined must be the decision by the highest tribunal in the hierarchy that considers the matter," holding instead that "we look to the IJ's decision (rather than the BIA's unexpressed reasons) ... when we are determining our jurisdiction." *Ekasinta v. Gonzales*, 415 F.3d 1188, 1193-94 (10th Cir. 2005). The court decided to follow the reasoning of the majority position in this circuit split, reasoning that to be "the best way to apply the rules that confine our jurisdiction in immigration matters to particular questions, while still safeguarding due process."

"If it were clear that this was the ground on which the BIA relied, we would agree with that position . . . but the BIA's decision to affirm summarily leaves us in the dark."

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EIGHTH CIRCUIT

■ **Guatemalan Asylum Applicants Failed To Establish Past Persecution Or A Well-Founded Fear Of Future Persecution**

In ***Gomez v. Gonzales,*** __F.3d__, 2005 WL 2483883 (8th Cir. October 10, 2005) (*Melloy*, Beam, Benton), the Eighth Circuit upheld the BIA's determination that the harm alleged by the petitioners was not based on an imputed political opinion, where the soldiers who attacked them made no statements regarding a political opinion and no other events suggested that any group imputed a political opinion to them. The court held that the petitioners failed to establish a well-founded fear of future persecution in light of improved country conditions in Guatemala and the absence of any problems to family members currently residing there.

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■ **Eighth Circuit Upholds One-Year Asylum Bar For Native Of Sierra Leone And Affirms Designation Of Great Britain And Sierra Leone As Alternate Sites For His Removal**

In ***Al-Jojo v. Gonzales***, __F.3d__, 2005 WL 2347740 (Arnold, *McMillian*, Colloton) (8th Cir. September 27, 2005), the Eighth Circuit held that it lacked jurisdiction to review the BIA's ruling that the alien failed to establish extraordinary circumstances excusing his untimely asylum application. The court affirmed the BIA's designation of Great Britain or, alternatively, Sierra Leone, as countries for the alien's removal, where he testified that he had lived in Great Britain for four years before entering the United States and that he had been born in Sierra Leone, holding that under Supreme Court precedent, an alien may be removed to the country in which he was born even if that country's government has not given its prior consent.

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NINTH CIRCUIT

■ **Knowledge Of Plan And Riding In Car As Passenger Are Insufficient To Show Alien Was "Assisting" In Alien Smuggling**

In ***Altamirano v. Gonzales,*** __F.3d__, 2005 WL 2839982 (9th Cir. October 31, 2005) (B. Fletcher, *Paez*, Rymer), the Ninth Circuit determined that the petitioner, a Mexican citizen, who was a passenger in a car in which her husband and father were smuggling aliens, had not engaged in alien smuggling under INA § 212(a)(6)(E)(I)(providing that "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible").

The INS denied petitioner's request for admission when she attempted to enter the United States in a vehicle in which an illegal alien was hiding in the trunk. Petitioner, who was married to the U.S. citizen driver of the car, did not dispute that she knew the alien was in the trunk when the vehicle attempted to pass through the port of entry. An IJ found petitioner removable as charged and the BIA affirmed that decision without opinion.

The Ninth Circuit found that the plain meaning of INA § 212(a)(6)(E)(i), "requires an affirmative act of help, assistance, or encouragement." Here, because the petitioner "did not affirmatively act to assist [the alien being smuggled into the U.S.], she did

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not engage in alien smuggling," said the court. Consequently, the court held that the IJ's conclusion that petitioner's "mere presence and knowledge constituted alien smuggling is 'clearly contrary to the plain and sensible meaning of the statute.'"

Judge Rymer partially dissented, opining that petitioner's presence on the trip and staying in the car at the border crossing were affirmative acts that assisted the plan by making it less likely the car would be stopped.

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■ Ninth Circuit Holds That Aliens Are Not Eligible Class Members Under The *Barahona-Gomez* Class Action Settlement

In ***Sotelo v. Gonzales***, __F.3d__, 2005 WL 2679781 (9th Cir. October 21, 2005) (*Farris*, Thompson, Bybee), the Ninth Circuit affirmed the BIA's denial of petitioners' motion to reopen. The petitioners attempted to avail themselves of the class action settlement approved in *Barahona-Gomez v. Ashcroft*, 243 F. Supp.2d 1029 (N.D.Cal.2002), which permitted eligible immigrants to apply for suspension of deportation under the law as it existed prior to the 1996 statutory amendments. The court ruled that the petitioners were not members of the class, as they did not have a suspension of deportation hearing before April 1, 1997, nor would they have had a hearing if the challenged directives had not been issued.

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■ Ninth Circuit Rules That Regulation Prohibiting Arriving Aliens From Applying For Adjustment Of Status Is *Ultra Vires*

In ***Bona v. Gonzales,*** __F.3d__, 2005 WL 2401874 (9th Cir. September 30, 2005) (*Hug*, Ferguson, Hawkins), the Ninth Circuit reversed the BIA's decision holding the alien to be ineligible to apply for adjustment of status as an arriving alien in removal proceedings under 8 C.F.R. § 1245.1 (c)(8). The court rejected that ruling and, agreeing with the First Circuit's analysis in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), held that the regulatory provision is *ultra vires*. The court remanded the case to the BIA to give the alien an opportunity to apply for adjustment of status.

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> "Failure to exhaust administrative remedies by not first presenting a claim to the BIA deprives this court of jurisdiction to hear it."

TENTH CIRCUIT

■ Tenth Circuit Upholds Exhaustion Requirement And Declines To Extend Equitable Tolling Doctrine

In ***Galvez Pineda v. Gonzales***, __F.3d__, 2005 WL 2767155 (10th Cir. October 26, 2005) (*Hartz*, Anderson, Tymkovich), the court upheld the BIA's dismissal of petitioners' appeal for failure to file a brief, and the denial of a subsequent untimely motion to reopen. The principal petitioner, his wife and four children entered the U.S. on visitors' visas but never departed. When placed in removal proceedings they applied for asylum and withholding claiming that if returned to the Phillippines, they would be persecuted by the New People's Army (NPA) on account of political opinion and membership in a social group of business owners. Petitioner, who was a successful businessman, testified that the NPA made a series of demands for assistance leading on one occasion to a particularly threatening confrontation. The IJ determined that the NPA's demand for money in the form of a revolutionary tax was not persecution. Petitioner's counsel filed a Notice of Appeal to the BIA indicating that a he would file brief. The brief was never filed and the BIA summarily dismissed the appeal. Petitioner then filed a petition for review. Subsequently, petitioner obtained new counsel who filed a motion to reopen based on ineffective assistance of counsel. The BIA denied the motion as untimely and rejected petitioner's request to equitably toll the 90-day period.

The Tenth Circuit held that petitioners, in seeking a review of the summary dismissal, could not raise a due process challenge based on ineffective assistance of counsel, because they had not raised that issue to the BIA in the first instance. "Failure to exhaust administrative remedies by not first presenting a claim to the BIA deprives this court of jurisdiction to hear it," said the court. The court noted that petitioners raised their due process claims in their motion to reopen filed with the BIA, but because that motion was untimely, it did "not constitute exhaustion of administrative remedies."

Turning to its review of the BIA's denial of the motion to reopen, the court found that the record "amply" supported the rejection of the equitable-tolling argument noting that the BIA properly considered the petitioners' diligence in complying with *Lozada* factors when it denied their untimely motion to reopen.

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■ Sino-Indonesian Applicants Denied Asylum

In ***Tulengkey v. Gonzales,*** __F.3d__, 2005 WL 2563089 (10th Cir. October 13, 2005) (Ebel, *Hartz*,

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Summaries Of Recent Federal Court

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McConnell), the Tenth Circuit sustained the IJ's determination that a Sino-Indonesian couple had failed to establish their eligibility for asylum. The petitioner was admitted to the United States on May 2, 2001, on a nonimmigrant tourist visa with authorization to remain for six months. She overstayed her visa and married an Indonesian, who had arrived in this country 11 months earlier and had also overstayed his visa. Petitioner subsequently filed an application for asylum including her husband in the application. She claimed persecution on her Christian religion and Chinese ethnicity. An IJ denied the request for asylum and the BIA affirmed without opinion.

The court ruled that the two isolated attacks on the female applicant, one perpetrated by other kids in junior high school and the other an attack by a Muslim mob at a Christian wedding, did not rise to the level of past persecution. The court also held that the applicants lacked a well-founded fear of future persecution due to their ability to reasonably relocate to other parts of Indonesia that were predominantly Christian.

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■ BIA Has Discretion To Consider Adjustment Application Of Alien Who Re-Entered The U.S. And Had More Than 1 Year Of Illegal Presence

In ***Padilla-Caldera v. Gonzales,*** __F.3d__, 2005 WL 2651385 (10th Cir. October 18, 2005) (Henry, *Lucero*, Brack), the Tenth Circuit reversed the BIA's holding that it did not have discretion to consider an adjustment of status application for an alien who re-entered the United States and had greater than an aggregate of one year of illegal presence. It resolved the conflict between INA § 212(a)(9)(C)(i)(I), which bars adjustment for such an alien, and the LIFE Act, which allows applications for adjustment, in favor of the Life Act; it was "improbable" that Congress intended the § 212(a)(9)(C)(i)(I) bar to apply in this case since the LIFE Act, by its terms, allowed aliens with an aggregate illegal presence of at least four months to adjust their status.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Rules Alien's Prior Conviction Was For An Aggravated Felony Even Though He Received A Pardon

In ***Balogun v. U.S. Attorney General,*** __F.3d__, 2005 WL 2333840 (Birch, *Carnes*, Fay) (11th Cir. September 26, 2005), the Eleventh Circuit denied the alien's challenge to his removal order based on his conviction of an aggravated felony offense for which he was subsequently pardoned. The petitioner, a citizen of Nigeria, entered the United States in 1960 as a student and his status was later adjusted to lawful permanent resident. In 1988 he was convicted in federal district court in Alabama on one count of embezzling and one count of conspiring to embezzle more than $10,000 from the United States government. He was sentenced to fifteen months in federal prison on each count, to be served concurrently. In 1997 the State of Alabama granted petitioner's request for a pardon. The pardon restored some of petitioner's civil and political rights and withheld others. Subsequently, petitioner left the country. He returned on October 28, 2002, seeking to be admitted to the United States as a returning resident. The then INS charged him with removability because, as an alien who had committed a crime of moral turpitude, he was "inadmissible" or "ineligible to be admitted to the United States." See 8 U.S.C. § 1182(a)(2)(A)(i)(I). An IJ found that petitioner was ineligible for waivers because he had been convicted on an aggravated felony and that the pardon was not "full and unconditional." The BIA affirmed that decision.

The court determined that the pardon-waiver provision applied only to deportable aliens, not aliens, such as this petitioner, ruled ineligible to enter or re-enter the United States in the first place. "We believe that if Congress had intended to extend the pardon waiver to inadmissible aliens, it would have done so," said the court.

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■ IJ Judge Did Not Abuse His Discretion In Denying Requests For A Continuance To Await Adjudication Of A Labor Certification

In ***Zafar v. U.S. Attorney General***,__F.3d__, 2005 WL 2367526 (11th Cir. September 27, 2005) (Anderson, Hull, *Roney*), the Eleventh Circuit affirmed the IJ's denial of the three individual petitioners' requests for a continuance to await the adjudication of pending labor certifications to support their adjustment applications.

Preliminarily, the court rejected the government's argument that under INA § 242(a)(2)(B)(ii) it lacked jurisdiction to review an IJ's discretionary decision to deny a continuance. The court found that the IJ's authority to grant a continuance derived solely from regulations and was specified in the jurisdictional statutory provision.

The court held that there was no abuse of discretion where the aliens had failed to demonstrate that they were eligible for adjustment of status at the time of their hearing, and they only had the "speculative" possibility that at some point in the future they may receive approved labor certifications. The court rejected petitioners' argument that their due process and equal protection rights had been violated, stating that "there is no constitutionally protected right to discretionary relief."

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Topical Index To Recent Federal Courts Decisions Under the REAL ID Act

Conversion of Habeas Appeals to Petitions for Review

Bonhometre v. Gonzales, 414 F.3d 442 (3d Cir. 2005) (treating habeas appeal as a petition for review); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) (same); *see also Ishak v. Gonzales*, __ F.3d __, 2005 WL 2137774 (1st Cir. Sept. 6, 2005) (treating habeas appeal as "still 'pending' in the district court within the meaning of the Real ID Act" and transferring petition to court of appeals to be treated as a petition for review); *Marquez-Almanzar v. Gonzales*, 418 F.3d 210 (2d Cir. 2005); *but see Rosales v. Bureau of Immigration & Customs Enforcement*, __ F.3d __, 2005 WL 1952867 (5th Cir. Aug. 16, 2005) *(per curiam)* (continuing to assert appellate jurisdiction over habeas appeal and providing no discussion of whether case should be converted).

Scope of Review of Removal Orders in Courts of Appeals Required by REAL ID

Martinez-Rosas v. Gonzales, __ F.3d __, 2005 WL 2174477, at *3 (9th Cir. September 9, 2005) (distinguishing legal issues from non-legal issues); *Kamara v. US Attorney General*, F.3d __, 2005 WL 2063873, at *6 (3d Cir. 2005) (same); *Grass v. Gonzales*, 418 F.3d 876, 878 (8th Cir. 2005) (same); *Vasile v. Gonzales,* 417 F.3d 766, 768-69 (7th Cir. 2005) (same); *Hamid v. Gonzales,* 417 F.3d 642, 647 (7th Cir. 2005) (same); *see also Bakhtriger v. Elwood*, 360 F.3d 414, 425 (3d Cir. 2004) (pre-REAL ID case which has helpful language distinguishing between legal and factual claims); *but see Elia v. Gonzales*, 418 F.3d 667 (6th Cir. 2005) (noting that Court only had jurisdiction to review legal claims of criminal alien but then addressing alien's factual claims based on an equitable estoppel argument) (government has moved court to amend decision to make clear that there is no review over factual determinations).

No Jurisdiction in District Court Over Removal Orders

Ishak v. Gonzales, __ F.3d __, 2005 WL 2137774, at *5 (1st Cir. Sept. 6, 2005) ("The plain language of these amendments, in effect, strips the district court of habeas jurisdiction over final orders of removal, including orders issued prior to the enactment of the REAL ID Act . . . Congress now has definitely eliminated any provision for jurisdiction.").

Cases Previously Governed by the Transitional Rules for Judicial Review are Now Governed by 8 U.S.C. § 1252(a) Pursuant to REAL ID § 106(d)

Paripovic v. Gonzales, 418 F.3d 240, 241 (3d Cir. 2005); *Elia v. Gonzales*, 418 F.3d 667, 671 (6th Cir. 2005).

REAL ID Act §§ 101(e) and 101(g) Apply to Pending Cases

Rodriguez-Galicia v. Gonzales, __ F.3d __, 2005 WL 2108688, *9 (7th Cir. September 2, 2005) (REAL ID Act § 101(e)'s modification of the standards by which this Court reviews the agency's determination concerning the availability of corroborating evidence applies to pending cases); *Lin v. U.S. Dept. of Justice*, 416 F.3d 184, 188 (2d Cir. 2005) ("We note that the 1,000 person-per-year cap has been lifted by § 101(g) of the recently enacted REAL ID Act.").

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EN BANC NINTH CIRCUIT AFFIRMS BIA

(Continued from page 1)

1987. In 1992, she was arrested after shooting (but not killing) the owner of a restaurant that competed with the restaurant owned by petitioner and her husband. Petitioner pled guilty to a felony count of "willfully and unlawfully commit[ting] an assault ... with a firearm" in violation of California Penal Code section 245(a)(2). The state criminal court suspended the imposition of her sentence and granted her three years of probation, the first 180 days of which were to be served in the county jail.

On April 13, 2000, Petitioner was detained at the port of entry in San Ysidro, California and placed in removal proceedings. An IJ ordered her deported and removed to Mexico on the ground that her California conviction for assault with a firearm constituted "a crime involving moral turpitude." On June 28, 2002, the BIA summarily affirmed that decision. Petitioner did not seek review of the BIA's final order. Instead, on September 24, 2002, she timely filed a motion to reopen arguing that she was not removable because assault with a firearm under California Penal Code section 245(a)(2) fell within the scope of the "petty offense" exception to the inadmissibility bar triggered by an alien's conviction for a crime involving moral turpitude. See 8 U.S.C. § 1182 (a)(2)(A)(ii)(II). When the BIA denied the motion to reopen on February 20, 2003, petitioner filed a petition for review.

The Ninth Circuit held, preliminarily, that under 8 U.S.C. 1252(b)(I) it lacked jurisdiction to review petitioner's contention that the BIA erred in determining that she committed a crime involving moral turpitude because the petition was filed almost a year after the issuance of that decision. "That [petitioner] timely petitioned for review of the BIA's denial of her motion to reopen is irrelevant because of the Supreme Court's holding

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Fall 2005 Seminar

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and Chuck Adkins-Blanch, from EOIR Headquarters spoke about the daily challenges that they face in deciding immigration cases, especially asylum cases where the credibility of the applicant is most times the pivotal issue.

A panel of attorneys from the Ninth Circuit Clerk's Office, including Jennifer Matthews, Cole Benson, and Circuit Mediator Stephen Liacouras, discussed motion practice before that court and the role of mediation in immigration cases.

William Howard, ICE's Principal Legal Advisor, discussed his efforts to bring uniformity in exercising prosecutorial discretion as reflected in his recent memoranda to ICE's Chief Counsels.

During the week-long seminar, there were other memorable moments, such as when Senior Litigation Counsel Doug Ginsburg surprised the Due Process Panel, by singing and playing the harmonica to his new hit, the "Due Process Liberty Blues." On another musical note, guitar-playing Senior Litigation Counsel Ethan Kanter, performed his new and improved version of "Gimmee 212" waivers.

Senior Litigation Counsel Chris Fuller, speaking on the Torture Convention

The "Due Process Liberty Blues" panel

INDEX TO CASES SUMMARIZED IN THIS ISSUE

SEMINAR MATERIALS ONLINE

The training outlines from the 11th Annual Immigration Law Seminar are available on line on the OIL website at: https://oil.aspensys.com

MEMBRENO

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in *Stone v. INS* that an order of removal "is final, and reviewable, when issued," and that "[i]ts finality is not affected by the subsequent filing of a motion to reconsider," added the court.

On the merits, the court held that the BIA had properly denied the motion to reopen because petitioner presented "no new facts, but only legal arguments."

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INDEX TO FEDERAL COURTS*

***See p. 17 for the index to the individual cases.**

INSIDE THIS ISSUE

Congratulations to **Paul Sonosky** one of our mail messengers who has completed 25 years of federal service at Justice, including 20 years of service with Environmental Torts Section.

INSIDE OIL

A warm to the following new OIL Attorneys:

Kristin Edison is a graduate of Indiana University and earned her J.D. from the Washington College of Law at American University. Ms. Edison was a law clerk in the Fall of 2004, and she joins OIL through the Honors Program.

Tom Fatouros is a graduate of James Madison University and the George Mason University School of Law. He joined Justice through the Honors Program where he worked for the DEA as a Judicial Law Clerk. Prior to joining OIL, Mr. Fatouros served in the Commercial Litigation Branch.

Erica Miles is a graduate of Columbia University, and The Catholic University of America. Ms. Miles joined Justice through the Honors and Summer Law Intern Programs. Prior to joining OIL she was an Attorney Advisor in the Office of the Chief Immigration Judge.

Mike Truman is a graduate of the Brigham Young University (Provo, UT) and from the University of Utah (Salt Lake City, UT). He was an OIL Summer Intern in 2003 and last year clerked for the Utah Supreme Court.

From L to R: Mike Truman , Kristin Edison, Erica Miles, Tom Fatouros

The goal of this monthly publication is 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. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov. 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 Executive's authority to administer the Immigration and Nationality laws of the United States"

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