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Immigration Litigation Bulletin

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Tenth Circuit Upholds Matter of N-A-M–'s Interpretation Of "Particularly Serious Crime" For Purpose of Withholding Of Removal

The Tenth Circuit has deferred to the BIA's interpretation in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), holding that under the withholding of removal provision, INA § 241(b)(3), non-aggravated felonies may constitute "particular serious" crimes, and that a separate "danger to the community" assessment is not required. ***N-A-M- v. Holder***, __ F.3d __, 2009 WL 3949130 (*per curiam*) (10th Cir. November 20, 2009) (Henry, Murphy, Tymkovich).

The petitioner, a thirty-eight year old preoperative transsexual (male-to-female) from El Salvador, entered the United States without inspection in 2004 . In June 2005, N-A-M was convicted in Colorado of felony menacing and reckless endangerment. Upon conviction, she was sentenced to four years deferred judgment and four years of probation. In November 2006, DHS instituted removal proceedings against N-A-M. N-A-M- then applied for asylum, withholding of removal and CAT protection claiming that in El Salvador, she had been subject to multiple instances of persecution due to her transgendered status.

The IJ found that N-A-M had suffered persecution but that the application should be denied as a matter of law because her conviction

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Supreme Court Hears Argument on Judicial Review of Denials of Motions to Reopen

The courts of appeals are divided on the issue. Neither reading of the statute (8 U.S.C. § 1252(a)(2)(B)(ii)) makes complete sense, and both readings lead to anomalous results on matters Congress regarded as important when it enacted the statute. And the government, the respondent in the case, supported the petitioner, so the Court appointed counsel to defend the judgment of the court of appeals. This was the situation before the United States Supreme Court on November 10 in the argument in ***Kucana v. Holder*** (Sup.Ct. No. 08-911).

For more complete background on this case, see the October Bulletin. In short, it concerns the availability of judicial review of Board of Immigration Appeals decisions denying motions to reopen removal proceedings. The court below held, contrary to the view of the government and six other circuits, that section 1252(a)(2)(B)(ii) generally precludes review of denials of motions to reopen. ***Kucana v. Holder***, 533 F.3d 534 (7th Cir. 2008).

At the argument, because of the litigating positions, the counsel for the alien and the government shared a table and the thirty minutes argument time normally allotted to the petitioner. Court-appointed counsel, defending the judgment below, had thirty minutes. Both sides maintained

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Supreme Court Argument In Kucana

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that the meaning of the statute was plain – but disagreed on what it plainly meant. And there was laughter in the courtroom when Justice Breyer, after explaining what *he* thought the statute means, and why *his* interpretation is the only one that made sense to him, observed that no one appeared to share his reading.

Several clear themes emerged from the Court's questions, although it remains unclear where the Court's judgment will lie. No one disagreed that section 1252(a)(2)(B)(ii), which bars judicial review of discretionary actions or decisions "the authority for which is specified under" Subchapter II of the INA, eliminated judicial review of *some* agency exercises of discretion listed in that subchapter. There also was no disagreement that deciding whether to grant or deny a motion to reopen is discretionary and denials are reviewed for abuse of discretion. And there seemed to be general agreement that, absent specific limitation by Congress, the Attorney General has discretion to issue regulations reasonably implementing a statute.

Petitioner's counsel contended that the authority to issue regulations is provided in the INA's Subchapter I, but Chief Justice Roberts questioned whether the validity of a regulation is reviewed under the provision of the statute authorizing the regulation or the provision that regulation implements. Justice Scalia observed, however, that section 1252(a)(2)(B)(ii) literally refers to the "authority" for the regulation. Court-appointed counsel argued that the word "authority" in the statute did not bear dispositive weight because the statute authorized regulations to implement the entire chapter.

Justice Ginsburg noted that if Congress intended to require discretion "in" the subchapter, it would have been clearer to use the word "in" rather than "under." She also observed that ordinarily jurisdictional limitations are created by statute, and she was unaware of any instance where the agency itself could determine whether its decisions will be exempt from judicial review.

Justice Kennedy suggested that, because Congress had included motions to reopen in the statute with a long-established understanding that such motions were discretionary, either discretion was implicit in the statute or discretion provided in regulations might be considered "under" the statute. The government's argument focused on the term "specified." Even if discretion were implicit, section 1252(a)(2)(B)(ii) only has effect if the discretion is "specified" in a particular part of the INA. But the discretion of the Board to deny a motion to reopen is reflected in regulations and confirmed in judicial decisions; the statutory provision regarding motions to reopen contains no discretionary language. Congress enacted the statutory motion to reopen provision at the same time, but did not itself specify that the decision to grant or deny motions is discretionary. Court-appointed counsel conceded that the motion to reopen statute was not sufficiently clear to convey discretion.

Justice Ginsburg noted that if Congress intended to require discretion "in" the subchapter, it would have been clearer to use the word "in" rather than "under."

Several Justices questioned why Congress would distinguish specified discretionary decisions from important decisions that were also discretionary, and bar review only of the former if it intended to reduce immigration litigation. Justice Kennedy observed that it was counterintuitive that Congress would preclude review of the matters about which it cared the most, such as motions to reopen by battered spouses and children, where the statutes do specify discretion. The government responded that the decisions specified as discretionary mainly relate to relief as a matter of executive grace that Congress chose to shield from review, such as those listed in section 1252(a)(2)(B)(i).

Summarizing the government's position to be "the Justice Department can't be trusted without judicial review [,]" the Chief Justice called that "curious," "particularly where the Department won on the opposite position below." The government responded that the choice regarding jurisdiction was made by Congress, and pointed out that the government had not asserted a lack of jurisdiction below. The government also explained it had asserted section 1252(a)(2)(B)(ii) as barring review of reopening denials in only a handful of briefs over a short period, and "as soon as the leadership of the Office of Immigration Litigation heard of those cases, it sat down with the text of the statute and said: We think the text is clear, and we don't think the jurisdiction is taken away. And it directed all of the attorneys in the Office of Immigration [ ] Litigation not to be making this jurisdiction-stripping argument any more."

The Chief Justice also questioned why Congress would intend to exclude denials of reopening from that bar on review, thereby multiplying review, given its apparent desire in 1996 to limit litigation. He observed that it makes better sense from that standpoint to read "specified under" as meaning "specified in regulations implementing Subchapter II," as court-appointed counsel had argued. The government pointed out that such an interpretation would read the words "the authority for which is specified" out of the statute.

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Suspension Clause Challenges To Expedited Removal Orders Against Arriving Aliens

1.1 Introduction

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") enacted section 235 (b)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1225(b)(1). Section 1225(b)(1) sets forth procedures for "expedited" or "summary" removal of aliens seeking admission who are determined by inspecting immigration officers to be inadmissible under § 1182(a)(6)(C) (seeking to procure an immigration benefit by fraud or misrepresentation) or § 1182(a)(7) (lacking proper entry or travel documents). Under the statute, "arriving" aliens who are inadmissible on the designated grounds are automatically subject to expedited removal procedures, excepting Cubans who arrive at a port of entry by aircraft. INA § 235(b)(1)(A)(I), (b)(1)(F); 8 C.F.R. § 235.3(b)(1)(I) (2009).

1.2 Judicial Review of Expedited Removal Orders

Judicial review of an expedited removal order is restricted to limited habeas review before the district court. *See* 8 U.S.C. § 1252(e)(1)(A), (2). Section 1252(e)(2) *only* permits review of expedited removal orders in a habeas corpus petition, but the review is limited to an inquiry into whether: "(A) the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, [or is a refugee or has been granted non-terminated asylum]." 8 U.S.C. § 1252(e)(2). Section 1252(e)(5) clarifies that "[t]here shall be *no review* of whether the alien is actually inadmissible or entitled to any relief from removal." 8 U.S.C. § 1252(e)(5) (emphasis added).

Judicial review of an expedited removal order is restricted to limited habeas review before the district court.

Any other judicial review of an expedited removal order is expressly prohibited, including review under 28 U.S.C. § 2241. *See* 8 U.S.C. § 1252(a)(2)(A)(i)-(iv). Under the current version of 8 U.S.C. § 1252(a)(2)(A), Congress not only restricted judicial review of expedited removal orders to limited habeas review before the district court under § 1252(e), but also expressly foreclosed any vestige of additional review that might otherwise remain under 28 U.S.C. § 2241 or any other provision of law (statutory or nonstatutory). Thus, government attorneys should immediately move to dismiss any petition for review or habeas corpus petition that requests a court of appeals or district court to undertake direct or collateral review of any individual determination relating to — or to entertain any claim arising from the invocation, application, implementation, or operation of — an expedited removal order under § 1225(b)(1). *See* 8 U.S.C. § 1252 (a)(2)(A)(i)-(iv).

1.3 The Impact of the Suspension Clause on Expedited Removal Orders Involving Arriving Aliens

Arriving aliens may attempt to challenge the constitutionality of the very limited habeas review jurisdiction for expedited removal orders based on the Suspension Clause — the limitations on jurisdiction in 8 U.S.C. § 1252(a), (e) deprives them of a forum to seek full review of their habeas petition and therefore suspends the writ.

Government attorneys should first indicate to the courts that arriving aliens who have never enjoyed *lawful* resident status in the United States possess *no constitutional rights for immigration purposes*, even if they had previously been in this country. The Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his admission, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (*citing United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), and *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892)). "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544; *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953). Only an alien who has previously acquired actual lawful permanent resident status accrues any constitutional rights regarding an admission application at the border. *Landon*, 459 U.S. at 33-34.

Government attorneys should be mindful that the only expression from the courts of appeals on whether the very limited habeas review jurisdiction for expedited removal orders constitutes a suspension of the writ of habeas corpus and thus a violation of the Suspension Clause occurred in *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1137-42 (9th Cir. 2008), a case involving a non-legal permanent resident arriving alien seeking to collaterally challenge her expedited removal order on due process grounds. The Ninth Circuit held that the very limited habeas review jurisdiction did not violate the Suspension Clause. In support of this conclusion, the court re-

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Expedited Removal

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lied on a prior circuit decision, *Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), which had been vacated on rehearing as moot. *Garcia de Rincon*, *supra* at 1141. In *Li*, the court affirmed the district court's jurisdictional dismissal of the petitioner's habeas petition challenging her expedited removal, because the petitioner had not raised any claims falling within the narrow scope of review permitted by § 1252 (e)(2). *Id.* (*citing Li*, 259 F.3d at 1133). The court observed that: "Li . . . has no constitutional due process right to challenge her immigration status or to petition for entry into the United States because she is a nonresident alien seeking entry at the border into the United States . . . ." *Id.* The court in *Garcia de Rincon* applied this holding to the facts before it to conclude that there was no Suspension Clause problem, even though in this case the alien had entered the United States *after* her expedited removal. *Id.*

Government attorneys should invite the courts to follow *Garcia de Rincon*'s reasoning because it is consistent with the well-established doctrine that non-resident arriving aliens possess *no constitutional rights for immigration purposes*. Government attorneys should also argue that aliens who claim that the limitations on jurisdiction in 8 U.S.C. § 1252(a), (e) violate the Suspension Clause are not seeking "simple release" from detention. Rather, they generally seek a court order compelling the Secretary of Homeland Security to release them into the United States outside the framework of the immigration laws. "Whatever may be the content of common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy." *Kiyemba v. Obama*, 555 F.3d 1022, 1028-29 (D.C. Cir. 2009) (holding that Chinese citizens formerly detained as enemy combatants at Guantanamo Bay Naval Base, Cuba, whose enemy combatant status had been removed but for whom no country of release had been arranged, were not entitled to be admitted into the United States as a result of their prolonged detention).

Government attorneys should also remind the courts that arriving aliens are *only* placed in expedited removal proceedings either because they sought to procure an immigration benefit by fraud or misrepresentation, or because they lacked proper entry or travel documents. Thus, the United States has a very strong interest in promptly returning these aliens to their home countries or safe third countries so that they will not be detained indefinitely in facilities run by the United States. Indeed, arriving aliens placed in expedited removal proceedings are generally temporarily detained, and thus not immediately removed, pending their request for a credible fear determination, 8 U.S.C. § 1225(b)(1)(B)(iii) (IV), or the adjudication of a status claim, which, if proven, would result in the termination of expedited removal proceedings and release from detention. *See* 8 C.F.R. § 235.3(b) (5)(i) (2009). "But such temporary harborage, an act of legislative grace [(albeit through temporary detention)], bestows no additional rights." *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). Indeed, the Supreme Court "has long considered such temporary arrangements as not affecting an alien's status; he [or she] is treated as if stopped at the border." *Id.* (citations omitted).

Government attorneys should argue that the habeas relief that Congress carved out for review of expedited removal orders does not violate the Suspension Clause.

In short, Government attorneys should argue that the habeas relief that Congress carved out for review of expedited removal orders does not violate the Suspension Clause, inasmuch as non-resident arriving aliens possess no constitutional rights for immigration purposes and the temporary detention of these aliens does not change their immigration or constitutional status.

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Secretary Napolitano on Immigration Reform

At the end of the day, when it comes to immigration, people need to be able to trust the system. Americans need to know that their government is committed to enforcing the law and securing the border—and that it takes this responsibility seriously. Law enforcement needs to have better legal tools and the necessary resources to deal with border-related and immigration-related crime. Businesses must be able find the workers they need here in America, rather than having to move overseas. Immigrants need to be able to plan their lives—they need to know that once we reform the laws, we're going to have a system that works, and that the contours of our immigration laws will last. And they need to know that they will have as many responsibilities as they do rights.

The President is committed to this issue because the need for immigration reform is so clear. This Administration does not shy away from taking on the big challenges of the 21st century, challenges that have been ignored too long and hurt our families and businesses. When Congress is ready to act, we will be ready to support them.

Secretary Napolitano spoke at the Center for American Progress on November 13, 2009.

IMMIGRATION JUDGE TRAINING PROJECT REVAMPED

For the past several years, OIL has provided training assistance to the Office of the Chief Immigration Judge (OCIJ) in the form of quarterly reports about the conduct and adequacy of decision-making by immigration judges and the Board of Immigration Appeals. These reports, compiled from judicial decisions, at first focused on problematic conduct by immigration judges (bias, overly aggressive questioning, etc.), but later we expanded them to include excerpts from all published circuit court decisions, favorable and adverse, that provided useful analysis of the legal sufficiency of immigration judge and Board decisions.

The expanded reports had been a helpful means for supporting the Attorney General's mission of providing improved training for immigration judges. OIL and OCIJ recently agreed, however, that this mission would be better served by focusing once again on problematic conduct, by collecting that information from internal sources rather than judicial decisions, and by sending that information to OCIJ more quickly. It was agreed that OIL is uniquely positioned to identify such issues in light of its role as the primary counsel for defending agency decisions in court. Accordingly, going forward, OIL has committed to using its internally-generated information to identify patterns, trends, or (where sufficiently egregious) individual instances of error by an immigration judge and to notify OCIJ promptly for its training purposes.

To that end, the Appellate Team has been charged with the responsibility of monitoring: 1) remand recommendations; 2) oral argument trip reports; and 3) further review recommendations. These are likely to reveal, as early in litigation as possible, issues arising during proceedings that are of interest. To implement this retooled "IJ Training Project," a general email address has been created: ijtrainingissues.oil@usdoj.gov. Attorneys should include this address on the email distribution list regarding requests to the Director for remand and trip reports of oral arguments. Attorneys are also invited to send messages regarding immigration judge conduct and decision-making directly to this address. In preparing trip reports and further review recommendations, attorneys are requested to include any comments or information relevant to this project.

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BIA's Matter of N-A-M– Upheld by Tenth Circuit

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for felony menacing under § 241(b)(3)(b)(ii), was a conviction for a particularly serious crime and a danger to the community. The BIA affirmed the IJ's decision in a published opinion. The BIA concluded that "Congress did not intend to limit what offenses may be particularly serious crimes to those offenses classified as aggravated felonies." As to N-A-M's danger to the community claim, the BIA observed that it "no longer engage[d] in a separate determination to address whether the alien is a danger to the community." The BIA's also rejected N-A-M's claim that the IJ had violated her due process right by considering evidence outside the record of conviction.

In deferring to the BIA's interpretation that non-aggravated felonies may constitute "particularly serious" crimes under § 241, the court declined petitioner's suggestion to follow *Alaka v. Atty. General*, 456 F.3d 88 (3d Cir. 2006), where the Third Circuit held that that "an offense must be an aggravated felony to be sufficiently 'serious.'" The court, instead, agreed with the BIA's interpretation and noted in particular that "the statute contains no limiting language restricting the Attorney General's discretion to label other crimes as 'particularly serious.'"

The court also affirmed the BIA's longstanding interpretation that the "particularly serious crime" bar does not require a separate finding that an alien is a danger to the community. The court noted that the latter interpretation is not consistent with views of some other countries or the UNHCR, but concluded that *stare decisis* required the panel to follow circuit precedent previously affirming this interpretation. The court also noted that this interpretation conflating the two requirements has been accepted by every circuit that has considered the issue.

The court summarily dismissed petitioner's due process clam, noting that she was only entitled to procedural due process and that she was free to contest any evidentiary matters with her own evidence.

In a concurring opinion, Judge Henry would have concluded that the BIA's interpretation in *N-A-M-*, and the court's own precedent in *Al Salehi* were contrary to § 241 on the question of whether the statute requires a separate consideration to whether the petitioner is a danger to the community. In particular, Judge Henry pointed to the arguments made by the amicus, UNHCR, that the decisive factor is not whether the crime committed by the refugee is serious, but whether the refugee "poses a future danger to the community." Judge Henry "invited further scrutiny to this matter."

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Transition to U.S. Immigration Law Begins in the CNMI

The U.S. Department of Homeland Security announced that as of Nov. 28, the immigration laws of the Commonwealth of the Northern Mariana Islands (CNMI) will be replaced by the Immigration and Nationality Act (INA) and other U.S. immigration laws. The definition of "United States" in the INA simultaneously will be amended to include the CNMI—providing new privileges and easing restrictions to CNMI residents wishing to live and work in the United States.

Although U.S. immigration law applies to the CNMI beginning on Nov. 28, the CNMI will undergo a transition period with temporary measures ending Dec. 31, 2014, to allow for an orderly transition and give individuals time to identify an appropriate visa classification under the INA.

On May 8, 2008, the Consolidated Natural Resources Act of 2008 (CNRA) was signed, extending certain provisions of U.S. immigration law to CNMI for the first time in history. Tomorrow's transition marks a major step in a series of DHS initiatives undertaken since the CNRA's signing to address the legal and operational needs for a smooth transition.

Five important rules to facilitate the transition were published in the Federal Register in 2009 to address key changes under the CNRA—including a CNMI-Guam Visa Waiver Program interim rule; an E-2 Nonimmigrant Status for Aliens in the CNMI with Long-Term Investor Status proposed rule; a CNMI Transitional Worker Classification interim rule; and an Application of Immigration Regulations to the CNMI "conforming amendments" interim rule.

■ On Jan. 16, U.S. Customs and Border Protection (CBP) published an interim final rule on the Guam-CNMI Visa Waiver Program extending the period of admission from 15 to 45 days, expanding the geographic area from Guam-only to Guam and the CNMI, and modifying the list of eligible countries and geographic areas.

■ On March 10, U.S. Citizenship and Immigration Services (USCIS) officially opened its Application Support Center (ASC) at TSL Plaza in Saipan to provide biometric services—including fingerprint capture, photos and signatures—along with additional services, including naturalization and adjustment of status interviews, as well as opportunities for the general public to obtain answers to their immigration questions.

■ On Sept. 14, USCIS published a proposed rule that would create a CNMI-specific nonimmigrant investor visa classification—the "E-2 CNMI Investor" status—allowing eligible CNMI investors to remain in the CNMI for the duration of the transition period under E-2 CNMI Investor status, and to exit and enter the CNMI with valid E-2 CNMI Investor visas.

■ On Oct. 27, USCIS published an interim final rule creating a Transitional Worker visa classification in the CNMI during the transition period—allowing alien workers currently ineligible for other classifications under INA and who perform services or labor for an employer in CNMI to receive nonimmigrant visa classification. However, on Nov. 25, 2009 a federal district court issued an order prohibiting DHS from implementing this interim final rule. As a result, the transitional worker visa classification is unavailable to CNMI employers, workers and their families until further notice. This court order does not affect any aspect of the transition to federal immigration law other than the specific transitional worker program that was the subject of this interim final rule.

■ On Oct. 27, USCIS and the Department of Justice's Executive Office for Immigration Review also published an interim final rule to revise the wording of immigration regulations in order to implement new law applying to the CNMI.

Recognizing that some unique situations would result as the CNMI transitions to U.S. immigration laws, the Secretary of Homeland Security may grant parole to applicants for admission on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

Parole authority will be used in two specific situations in the CNMI: eligible Chinese and Russian nationals visiting for business or pleasure will be eligible for CBP-administered parole into the CNMI on a case-by-case basis; and certain impacted aliens—notably CNMI permanent residents and various categories of immediate relatives—will be eligible for USCIS-administered parole on a case-by-case basis.

The CNRA also contains two provisions that specifically impact the U.S. Territory of Guam: elimination of the current Guam Visa Waiver Program and creation of a new Guam-CNMI Visa Waiver Program, under which eligible nationals of program countries and geographic areas may be authorized to visit Guam and/or the CNMI for up to 45 days; and elimination of the statutory cap on the number of H nonimmigrant worker petitions that can be filed by employers in Guam and the CNMI.

All passengers arriving to CNMI on flights from outside the United States will be inspected by CBP. CNMI authorities will continue to conduct customs inspections.

FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction—Motion to Reopen

On November 10, 2009, the Supreme Court heard argument in ***Kucana v. Holder*** (Sup.Ct. No. 08-911). The issue under consideration is the circuit split regarding the courts of appeals' jurisdiction to review the agency's denials of motions to reopen. In ***Kucana v. Holder***, 533 F.3d 534 (7th Cir. 2008), cert. granted, 129 S. Ct. 2075 (2009), the Seventh Circuit held that 8 U.S.C. § 1252(a)(2)(B)(ii), which bars judicial review of discretionary actions or decisions of the Attorney General "the authority for which is specified under" Subchapter II of the INA, precludes its review of the Board of Immigration Appeals' denial of Kucana's motion to reopen based on changed circumstances for asylum. The petitioner and the government agreed that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar a court's review of the denial of a motion to reopen. Court-appointed amicus curiae defended the position of the court of appeals.

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Aggravated Felony -- Second or Subsequent State Controlled Substance Conviction

On December 14, 2009, the Supreme Court granted certiorari in ***Carachuri-Rosendo v. Holder*** (Sup.Ct. No. 09-60). In the government's response to the petition for writ of certiorari, the Solicitor General agreed that certiorari is appropriate in view of an inter-circuit split regarding the circumstances under which an alien's state conviction for illegal possession of a controlled substance qualifies as an "aggravated felony." Defending the judgment below (570 F.3d 263 (5th Cir. 2009)), the Solicitor General argued, contrary to the interpretation of the Board of Immigration Appeals (***Matter of Carachuri-Rosendo***, 24 I. & N. Dec. 382 (BIA 2007) (*en banc*)), that such a conviction constitutes an aggravated felony if the conduct occurred after a prior illegal drug conviction has become final, regardless of whether the recidivist nature of the crime was established in the prosecution.

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Aggravated Felony — Missing Element

On November 19, 2009, the Ninth Circuit ordered the petitioner to respond to the government's petition for rehearing en banc in ***Aguilar-Turcios v. Holder***, 582 F.3d 1093 (9th Cir. 2009), challenging the court's use of the "missing element" rule for analyzing statutes of conviction. The panel majority held that the alien's conviction by special court martial for violating Article 92 of the Uniform Code of Military Justice (10 U.S.C. § 892)---incorporating the Department of Defense Directive prohibiting use of government computers to access pornography---was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(I) because neither Article 92 nor the general order required that the pornography at issue involve a visual depiction of a minor engaging in sexually explicit conduct, and thus Article 92 and the general order were missing an element of the generic crime altogether.

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Aggravated Felony — Loss to Victim(s) Exceeding $10,000

On September 15, 2008, the government filed a petition for rehearing en banc in ***Kawashima v. Gonzales***, 503 F.3d 997 (9th Cir. 2007), challenging the court's holding that to sustain a charge of removability for the aggravated felony of fraud or deceit with a loss exceeding $10,000 (8 U.S.C. § 1101(a)(43)(M)(i)) based on conviction for signing a false tax return, must the government prove, using only the categorical approach, not the modified categorical approach, that the alien was convicted of an offense with the elements of fraud or deceit and loss over $10,000. In August 2009 the parties filed supplemental briefs regarding the impact of *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), on this case and *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc).

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Particularly Serious Crimes

In June 2009, the government filed a petition for panel rehearing and opposed petitioner's petition for rehearing and rehearing en banc in ***Delgado v. Holder***, 563 F.3d 863 (9th Cir. 2009). The questions presented are: 1) must an offense constitute an aggravated felony in order to be considered a particularly serious crime rendering an alien ineligible for withholding of removal; 2) may the Board determine in case-by-case adjudication that a non-aggravated felony crime is a PSC without first classifying it as a PSC by regulation; and 3) does the court lack jurisdiction, under 8 U.S.C. § 1252(a)(2)(B)(ii) and *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), to review the merits of the Board's PSC determinations in the context of both asylum and withholding of removal? Proceedings are currently stayed pending the Supreme Court's decision in *Kucana v. Holder*, because its decision on the scope of the jurisdictional stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) may affect the Ninth Circuit's decision on the rehearing petitions.

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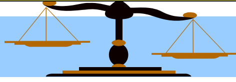

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds That Repeated Exposure To Sight Of Corpses Littering Roads Does Not Compel Finding Of Past Persecution

In *Lopez Perez v. Holder*, __F.3d__, 2009 WL 3932801 (1st Cir. November 20, 2009) (Howard, Ripple, *Selya*), the First Circuit held that the petitioner's repeated experience of seeing mutilated corpses along the roads as she walked to church did not compel a finding of past persecution.

The petitioner, a Guatemalan national, entered the United States without inspection in 1994, and later that year applied for asylum. She claimed that, while walking to church in her home town (outside of Quetzaltepeque), she often observed mutilated corpses in plain sight. She also asserted that, after she left Guatemala, her husband (who suffers from Parkinson's disease) was victimized by relatives; the relatives stole from him and threw rocks at the house in which he lived. She also claimed that, if she were repatriated, she would be at risk of grave harm because Guatemalans perceive those who return from the United States as wealthy and, thus, ripe for plunder. The IJ concluded that petitioner had not shown past persecution and had not presented objective reasons to fear future persecution in Guatemala. The BIA affirmed.

The First Circuit court acknowledged the "horror" of such a sight, but nevertheless held that in the usual case, "more than an assault on the senses" is needed to compel the agency to find ill-treatment rising to the level of persecution. "Horror, however, ordinarily is not a proxy for harm that achieves the level of persecution," said the court. The court also found that petitioner failed to show "that the grisly images were in any way, shape, or form related to a statutorily protected ground," and that there was a "connection between the sightings of dead bodies and any governmental action or inaction." The court then held that petitioner had not shown compelling evidence to reverse the denial of asylum based on fear of future persecution. In particular, the court noted that petitioner's fear of "being targeted by criminal elements as an emigré from the United States," was a "fear of private conduct. As such, the agency correctly found this possibility to be a non-factor in analyzing the prospect of future persecution."

> "More than an assault on the senses" is needed to compel the agency to find ill-treatment rising to the level of persecution."

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■ First Circuit Holds that Physical Harm Is Relevant to the Asylum Inquiry, but Only One Factor to Be Considered

In *Decky v. Holder*, __ F.3d __, 2009 WL 4068609 (*Torreulla*, Boudin, Saris) (1st Cir. November 25, 2009), the First Circuit held that an asylum applicant's experience of physical harm is relevant, but is only one factor to consider in determining eligibility for asylum. Here, the petitioner suffered physical harm on one occasion, but "the absence of evidence of systemic mistreatment of comparable severity" during the four years he remained in Indonesia following the incident supported "the conclusion that the beating was an 'isolated' event." The court held that petitioner's claim of a well-founded fear of future persecution was undercut by the fact that his nine brothers and sisters remained in Indonesia without suffering significant mistreatment, and noted that it had repeatedly affirmed the determination that "there is no ongoing pattern or practice of persecution against ethnic Chinese or Christians in Indonesia."

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■ First Circuit Affirms Denial Of Chinese Asylum Claim Based On Spouse's Sterilization

In *Dong v. Holder,* __F.3d__, 2009 WL 3682652) (1st Cir. Nov. 6, 2009) (*Lipez*, Boudin, Hansen), the First Circuit affirmed the BIA's denial of an asylum aplicant's claim under China's population control policy. Because the applicant himself did not suffer past persecution, he sought to "bootstrap" his claim onto his wife's alleged forced IUD insertion and sterilization, under *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). However, during the course of the his removal proceeding, intervening decisions in *Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), and *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008) abrogated the spousal bootstrapping rule. Petitioner sought to shift his claim to the "other resistance" clause of §101 (a)(42). However, the court found that petitioner had never argued the "other resistance claim" to the BIA and therefore had failed to exhaust his administrative remedies.

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■ First Circuit Holds That Substandard Prison Conditions In Haiti Are Not Sufficiently Severe To Constitute Torture

In *Gourdet v. Holder*, __ F.3d __, 2009 WL 3630990 (1st Cir. Nov. 4, 2009) (Lynch, Ebel, *Lipez*), the First Circuit affirmed the agency's denial of petitioner's application for CAT protection. Gourdet, a citizen of Haiti, was ordered removed as an alien convicted of a controlled substance violation. He sought CAT protection arguing that if returned to Haiti he would

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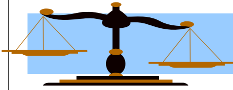

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be imprisoned as a criminal deportee for up to four weeks. Gourdet presented the testimony of an expert who testified as to general prison conditions faced by criminal detainees in Haiti, as well as physical abuse inflicted on individual detainees by prison officials. He also submitted documentary evidence of current country conditions in Haiti. The IJ found the testimony credible but denied CAT protection finding that he had not established acts causing severe physical or mental pain or suffering. The BIA affirmed that decision relying on its precedent in *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), and *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004), where notwithstanding evidence of gross inadequacies in Haitian prisons, the BIA and the First Circuit concluded that "indefinite detention and severely substandard prison conditions did not constitute torture under CAT, even though they might very well be considered 'cruel, inhuman, or degrading punishment or treatment.'"

The court concluded that the BIA did not err in finding that Haiti's substandard prison conditions are not acts causing severe physical or mental pain or suffering.

Preliminarily, the court explained that it had limited jurisdiction under the REAL ID Act, but only to review the issue of whether an undisputed or adjudicated course of conduct constitutes "torture" because this issue raises a question of law. The court then concluded that the BIA did not err in finding that Haiti's substandard prison conditions are not acts causing severe physical or mental pain or suffering. Because Gourdet failed to establish the first element of his CAT claim, the court did not address his contention he had established that the substandard prison conditions are intentionally inflicted on detainees by Haitian authorities.

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SECOND CIRCUIT

■ Second Circuit Holds That Nurse In Chinese Hospital's Maternity Ward Is Not A Persecutor Subject To The Persecutor Bar

In ***Lin v. Holder***, __ F.3d __, 2009 WL 3273236 (2d Cir. Oct. 14, 2009) (*Jacobs*, CJ, Kearse. J., Straub, J.), Chief Judge Jacobs granted in part, denied in part, and remanded petitioner's case to the BIA for further proceedings to determine her eligibility for asylum and withholding of removal. Lin was a maternity nurse employed by a state general hospital that (sometimes) performed forced abortions pursuant to China's family planning policy.

The IJ denied relief (in part) on the ground that Lin was therefore a "persecutor" and statutorily ineligible for asylum or withholding of removal . The IJ also denied Lin's request for CAT protection because Lin failed to demonstrate that it was "more likely than not" that she would be tortured if removed to China. The BIA affirmed the IJ's decision and dismissed the appeal.

To determine whether the persecutor bar applies to a particular alien, the Second Circuit considers four factors: (1) whether the alien was "involved in" acts of persecution by ordering, inciting, or actively carrying out the acts; (2) whether there is a nexus between the persecution and the victim's race, religion, nationality, membership in a particular social group, or political opinion; (3) whether the alien's actions, if not outright "involvement" under the first factor, amount to assistance or participation in persecution; and (4) whether the alien had sufficient knowledge that her actions might assist in persecution to make those actions culpable. For the persecutor bar to apply, an alien's conduct must be persecution under either the first or third factors, and must also satisfy the second and fourth factors.

Here, said the court, Lin is a persecutor if "she knowingly did or assisted acts that would be persecution on account of the victim's race, religion, nationality, membership in a particular social group, or political opinion." In determining whether conduct amounts to 'assistance' in persecution, the court looks to the alien's "behavior as a whole. Where the alien's conduct is "active and has direct consequences for the victims it is 'assistance in persecution.'" However, where the conduct is "tangential to the acts of oppression and passive in nature," it does not amount to "assistance in persecution."

The court held that Lin was not subject to the persecutor bar, because she only assisted examinations in the maternity ward that were used to detect the position and health of the fetus. "The kinds of examinations in which Lin assisted (e.g., ultrasounds) are given to all pregnant women, whether the pregnancy is scheduled to result in a live birth, a voluntary abortion, or a forced abortion. The exams are more akin to routine patient care than a protocol specific to forced abortions."

The court distinguished Lin's case from that in *Xie v. INS*, 434 F.3d 136 (2d Cir. 2006), where the applicant in that case occasionally "transported pregnant women to hospitals in the locked back of a van, against their will, so that county officials could perform forced abortions on them pursuant to China's mandatory family planning policies."

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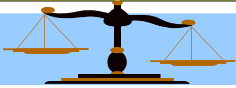

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THIRD CIRCUIT

Third Circuit Remands Liberian Asylum Case for Board to Consider Humanitarian Asylum

In *Sheriff v. Holder*, __ F.3d __, 2009 WL 4042936 (*Barry*, Fisher and Jordan) (3rd Cir. Nov. 24, 2009), the Third Circuit remanded the case with directions for the BIA to consider whether the presumption of well-founded fear of persecution was rebutted by evidence of changed country conditions, given the applicant's testimony that she feared her persecutors were "still there" and her witness's affidavit that former president Charles Taylor still has power in the country.

The petitioner, a 48 year-old native and citizen of Liberia, is a Muslim and a member of the Mandingo tribe, a group targeted and savaged by the National Patriotic Front of Liberia ("NPFL"), rebels led by former Liberian president, Charles Taylor. The court found this to be "a case of almost unimaginable horrors inflicted on" Sheriff by supporters of Taylor, including "witnessing the murder of her mother and the rape of her daughter, who later died; the abduction of her other daughter, now presumed dead; and her own capture and detention, during which time she was bound with electrical wire and raped multiple times."

The IJ granted asylum concluding that DHS had not rebutted the well-founded fear of future persecution. Following an appeal by DHS, the BIA reversed taking notice of the 2006 State Department country report among others, as sufficient rebuttal evidence, and also finding that although Sheriff's "mistreatment was despicable," humanitarian asylum was not warranted because she had not shown compelling reasons for being unable or unwilling to return to Liberia.

In reversing the BIA, the court explained that "general evidence of improved country conditions will not suffice to rebut credible testimony and other evidence establishing past persecution; evidence of changed country conditions can successfully rebut the presumption only if it addresses the specific basis for the alien's fear of persecution." The court noted that, the Country Report relied upon by the BIA did not suggest that "Taylor supporters are no longer roaming the country or Sheriff's region and no longer pose a threat to her." This was a close call, said the court, but in light of "the questionable basis on which the BIA rejected the IJ's findings," it would remand the case to give the parties an opportunity to address the 2006 Country Report.

As a matter of first impression for the court, the BIA was also instructed to consider whether the severity of past persecution warranted a grant of humanitarian asylum and whether the alien faced the possibility of "other serious harm." In particular, the court noted that the BIA had disposed of Sheriff's humanitarian asylum claim in one sentence, and it was unclear whether the BIA had considered, "the evidence that Taylor's forces burned Sheriff's home to the ground, murdered her mother and raped her daughter in front of her, shot her father and then refused to allow him to leave the country for medical treatment, abducted her other daughter, and murdered the woman with whom she was staying in Guinea."

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FOURTH CIRCUIT

Fourth Circuit Holds that Guinean Asylum Applicant Established Past Persecution Based on FGM

In *Kourouma v. Holder*, __ F.3d __, 2009 WL 4061582 (4th Cir. November 24, 2009) (Traxler, C.J., *Gregory*, Shedd), the Fourth Circuit held that the BIA erred by determining that an asylum applicant from Guinea who claimed that she had suffered past persecution through FGM was not credible. Although the IJ found the alien not credible due to doubts about her identity, the court found that the BIA accepted her identity, and the agency failed to explain its adverse credibility finding that noted similarities between the petitioner's application and that of another applicant.

The mere assertion that a document is not notarized without noting any further indicia of unreliability is certainly not a sufficient reason for rejecting it as incredible."

The court also concluded that petitioner presented sufficient medical evidence of FGM, which the IJ erroneously rejected because it was not notarized. The court explained that an IJ "cannot reject documentary evidence anymore than testimonial evidence without specific, cogent reasons why the documents are not credible. The mere assertion that a document is not notarized without noting any further indicia of unreliability is certainly not a sufficient reason for rejecting it as incredible." The court further held that the agency improperly ignored a State Department report finding 98% of Guinean women were subjected to FGM.

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Fourth Circuit Holds that an Ethnic Hadrami from Yemen Experienced Past Persecution and Remanded for Rebuttal of Presumption of Well-Founded Fear of Future Persecution

In *Baharon v. Holder*, __ F.3d __, 2009 WL 4061568 (4th Cir. Nov. 24, 2009) (*Gregory*, Motz, Keith), the Fourth Circuit held that, while it is not its role on review to re-weigh the evidence, the BIA errs when it arbitrarily ignores legally significant unrebutted evidence.

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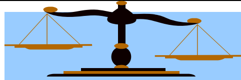

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The petitioner, a citizen of Yemen, and a Hadrami, an ethnic minority that lives primarily in southern Yemen, entered the United States as a visitor on August 5, 2004, but never departed. When placed in proceedings on August 5, 2005, he applied for asylum, withholding and CAT protection. He testified that he was repeatedly subjected to discrimination. In Yemen he and his family were active in the Sons of Hadramut ("SOH"), a group that provides services to and advocates on behalf of Hadramis. On April 8, 2004, he and his brother were arrested by Yemeni police. They were subject to violent interrogations for three days regarding the activities with SOH and then released. Petitioner's brother apparently had been severely beaten and threatened with death. Petitioner's uncle had also been arrested by security forces but later released upon the payment of a bribe. The IJ denied relief finding specifically, that the three-day detention did not amount to past persecution and that petitioner could not establish a well-founded fear of persecution if he returned to Yemen. The BIA adopted and affirmed the IJ's decision.

The court held that the BIA erred by finding no past persecution because it failed to cumulatively consider petitioner's three day detention and beating in Yemen, the fear and intimidation of petitioner's family members, and threats that he would suffer a similar fate as his family–specifically, his uncle, who disappeared, and his brother, who was also detained. "Having established in the record that Baharon was subjected to the type of abuse that, on the whole, constitutes persecution, the IJ and BIA were not then free to base their decision on only isolated snippets of that record while disregarding the rest," said the court.

The court ruled that this evidence compelled a finding of past persecution and remanded to allow the DHS to rebut the presumption of a well-founded fear of future persecution.

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FIFTH CIRCUIT

■ **Fifth Circuit Affirms BIA's Interpretation Of The REAL ID Act's "One Central Reason" Requirement.**

In *Shaikh v. Holder*, __ F.3d __, 2009 WL 3855715 (5th Cir. Nov. 19, 2009) (*Garza*, Clement, Owen), the petitioner, a citizen of India and an Ismaili Muslim, was admitted to the United States in November 2000 with a non-immigrant visitor's visa. He stayed beyond the authorized period and in 2005 was placed in removal proceedings. He conceded removability but sought withholding of removal on the grounds of religious persecution. He claimed that Shiv Sena, a Hindu nationalist organization, persecuted him in the past based on his status as an Ismaili Muslim. The IJ determined that petitioner had failed to show that any harm he experienced "was on account of his religion or that his religion was "one central reason" for the harm. The BIA affirmed that finding.

Although a statutorily protected ground need not be the only reason for harm to alien seeking withholding of removal, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm.

The Fifth Circuit, addressing an issue of first impression, under the REAL ID Act's "one central reason" standard, held, accepting the BIA's interpretation in *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007), that although a statutorily protected ground need not be the only reason for harm to alien seeking withholding of removal, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That The Record Compelled The Conclusion That Alien Faced A Clear Probability Of Persecution in Yemen**

In *Al-Ghorbani v. Holder*, __ F.3d __, 2009 WL 3717996 (*Gilman*, Griffin, Steeh) 6th Cir. November 9, 2009), the Sixth Circuit upheld the BIA's denial of the petitioners' asylum claims, finding no jurisdiction to review the agency's determination that they had failed to establish changed circumstances to excuse their untimely applications.

As to withholding, however, the court held that the record compelled the conclusion that petitioners would more likely than not face persecution on account of their membership in a particular social group, defined by their membership in the Al-Ghorbani family and their active opposition to paternalistic marriage traditions in Yemen.

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SEVENTH CIRCUIT

■ **Seventh Circuit Rules Alien's Conviction For Fraud In Connection With Identification Documents Was A Crime Involving Moral Turpitude**

In *Lagunas-Salgado v. Holder*, 584 F.3d 707 (7th Cir. 2009) (Flaum, Evans, *Williams*), the Seventh Circuit upheld the BIA's decision that the alien's conviction for fraud in connection with identification documents (false Social Security and false alien

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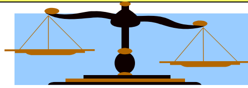

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registration cards) constituted a crime involving moral turpitude.

The court explained that under *Chevron*, it has deferred to the BIA's interpretation that a crime of moral turpitude includes "conduct that shocks the public conscience as being 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" The court then rejected the alien's claim that he lacked the specific intent to commit fraud because the aliens purchasing the false identifications from him were not deceived and he did not present the false IDs himself.

The court explained that the alien knowingly engaged in a crime of inherently deceptive conduct and defrauded the government. The court also denied the alien's appeal of the BIA's denial of his time and number-barred motion to reopen to address current conditions in Mexico.

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EIGHTH CIRCUIT

■ **Eighth Circuit Affirms Denial Of Asylum And Withholding of Removal Because Intimidations Did Not Amount To Persecution**

In *Ladyha v. Holder*, __ F.3d __, 2009 WL 4042122 (8th Cir. Nov. 24, 2009) (*Murphy*, Smith, Benton), the petitioner, Ladyha, entered the United States as a non-immigrant business visitor on May 26, 2004. He overstayed his visa and conceded removability and on July 21, 2004, applied for asylum. Ladyha, a Pentecostal Christian, a religious minority in Belarus, claimed that he had been subject to persecution on account of his religion and political advocacy and would face future persecution if deported. He testified, *inter alia*, that because of his Pentecostalism, he was mistreated by both teachers and students in his public school, the former purposefully lowering his grades and using a stick against him, and the latter pushing him, and throwing stones at him. He also claimed that the Belarus government would jail him upon his return because of his refusal, on religious grounds, to join the military.

The Eighth Circuit held that Ladyha failed to establish past persecution because the threats he received did not rise to the level of persecution. "Persecution is an extreme concept that does not encompass low-level intimidation and harassment," said the court.

"Persecution is an extreme concept that does not encompass low-level intimidation and harassment."

The court also held that Ladyha failed to establish a well-founded fear of persecution because prosecution for draft evasion does not constitute persecution. The court noted that the evidence reflected that the Belarus military conscripts all men between ages eighteen and twenty seven and allows religious conscientious objectors to serve in unarmed positions. "Attributing any other motive to the government's conscription of Ladyha is speculative," concluded the court.

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■ **Eighth Circuit Holds That Alien Failed To Establish The Requirements For A Good Faith Marriage Waiver**

In *Yohannes v. Holder*, 585 F.3d 402 (8th Cir. 2009) (*Wollman*, Hansen, Shepherd), the Eighth Circuit held that it had jurisdiction consider the legal standard for a good faith marriage and to determine whether the credited evidence meets that standard, but that its jurisdiction was "limited to this legal determination and does not extend to the underlying factual determination."

Yohannes, an Ethiopian citizen, entered the United States on a student visa in December 1987. As a result of his April 1989 marriage to a United States citizen, Yohannes's status was adjusted to that of a conditional permanent resident. To remove the conditions on his status, Yohannes and his spouse were required to file a joint petition within ninety days of the two-year anniversary of the grant of conditional permanent residency and appear together at a personal interview. 8 U.S.C. § 1186a(c)(3). Yohannes failed to satisfy this requirement. On March 18, 2002, the fomer INS terminated Yohannes's status and subsequently charged him as removable.

Yohannes filed a petition seeking a waiver of the spousal joint-filing requirement under 8 U.S.C. § 1186a(c)(4), which provides the Attorney General the discretion to grant a waiver if an alien demonstrates that removal would cause extreme hardship or that the qualifying marriage was entered in good faith and the alien is not at fault in failing to meet the joint-filing requirement. The IJ determined that Yohannes had not established either a good faith marriage nor that his removal would cause extreme hardship, and accordingly denied the request for a waiver. The BIA affirmed.

The court held that even if credible, Yohannes failed to establish eligibility for the good faith marriage waiver. The court said that "Yohannes bears the burden to prove he married in good faith, 8 U.S.C. § 1186a(c)(4), and the central issue is 'whether the couple intended to establish a life together at the time they were married.'" However, he produced virtually no documentation in support of his claim of a bona fide marriage. There were no records of joint assets or li-

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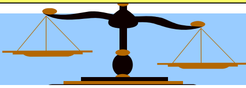

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abilities, no documents establishing that the couple cohabited for any significant length of time, and no children born to the marriage.

The court also affirmed that aliens lack a constitutionally protected liberty interest in a hearing to determine eligibility for discretionary relief such as the good faith marriage waiver.

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■ **Eighth Circuit Upholds Finding That Petitioer Did Not Establish An Objective Risk That Her Daughter Would Be Forced To Undergo FGM**

In *Diop v. Holder*, __ F.3d __, 2009 WL 3713810 (8th Cir. Nov. 9, 2009) (*Wollman*, Hansen, Shepherd), the Eighth Circuit upheld the BIA's denial of asylum to an applicant who claimed that if returned to Senegal her daughter would be forced to undergo female genital mutilation. The court held that substantial evidence supported the agency's decision that the petitioner failed to establish "an objective risk" that her daughter would be forced to undergo FGM. The court also held that the IJ did not abuse his discretion by excluding the testimony of a witness who was not on the pretrial witness list, and that the alien failed to show any prejudice from the exclusion of an expert witness who would not have added any relevant information beyond that already set forth in an affidavit.

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■ **Alien Failed To Establish An Objectively Reasonable Fear That She Would Be Forced To Undergo FGM In Kenya**

In *Kipkemboi v. Holder*, __ F.3d__, 2009 WL 4016683) (8th Cir. November 23, 2009) (*Benton*, Colloton, Beam), the court on remand, upheld the BIA's denial of asylum to an asylum applicant who claimed that she would be forced to undergo female genital mutilation in Kenya.

Kipkemboi and Sugut, Kenyan citizens, entered the United States in 1999 and have three U.S. citizen children. In 2002, an immigration officer placed Kipkemboi and Sugut in removal proceedings because they had overstayed their visas. They requested asylum, withholding of removal, and CAT protection, based on Kipkemboi's fears that she and her daughter would be subjected to female genital mutilation, or female circumcision, if returned to Kenya. Kipkemboi claimed that she narrowly escaped an attempted mutilation in Kenya at age 14, at least two of her five sisters in Kenya suffered genital mutilations, and Sugut's family adamantly wants her circumcised. Sugut testified that several of his family members came to Nairobi on multiple occasions to abduct and circumcise Kipkemboi, but left when they were unable to find her.

The court upheld the BIA's finding that petitioner's fear of future persecution was not objectively reasonable because the evidence suggested that female genital mutilation is generally limited to rural, less-educated populations.

The IJ denied all claims and the BIA later affirmed the decision, and also denied petitioner's motion to reopen. Following a remand from the court to clarify its legal standards, the BIA again denied relief, and adopted the IJ's finding that Sugut's testimony about his family's attempts to abduct and circumcise Kipkemboi was not credible. Kipkemboi and Sugut again moved for reconsideration, and the BIA denied the motion.

The court upheld the IJ'd finding that petitioner's family's attempts to abduct and circumcise his wife was not credible. It then found that Kipkemboi's remaining evidence of past persecution, namely her assertions that she narrowly escaped an attempted female genital mutilation at age 14 and that her husband's family shunned her, was not "so compelling that no reasonable fact finder could fail to find the requisite fear of persecution."

The court also upheld the BIA's finding that petitioner's fear of future persecution was not objectively reasonable because the evidence suggested that female genital mutilation is generally limited to rural, less-educated populations, and is far less common in Nairobi, where she and Sugut could relocate to. The court distinguished the BIA's decision in *Kasinga v. INS*, 21 I&N Dec. 357 (BIA 1996), because in that case the IJ and the BIA found that Kasinga would not likely escape mutilation by relocating within Togo.

The court also upheld the denial of the motion to reconsider finding that petitioners had not show any legal or factual errors in the BIA's decision.

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NINTH CIRCUIT

■ **Ninth Circuit Holds that Violations of Cal. Health And Safety Section 11379(a) Involving Federally-Controlled Substances Are Crimes Relating to a Controlled Substance**

In *Hernandez-Aguilar v. Holder*, __ F.3d __, 2009 WL 4067644 (9th Cir. Nov. 25, 2009) (*W. Fletcher*, Clifton, Pollak (E.D. Pa.)), the Ninth Circuit affirmed the BIA's ruling that an alien's conviction for violating California Health and Safety Code section 11379(a) by transporting methamphetamine rendered him inadmissible under 8 U.S.C. § 1182 (a)(2)(A)(i)(II) as an alien convicted of violating a law relating to a federally-

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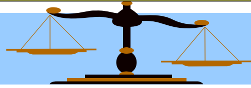

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controlled substance. Applying *Mielewczyk v. Holder*, 575 F.3d 992, 994 (9th Cir. 2009), in view of the alien's concession that the relevant substance was methamphetamine, the court ruled that the conviction establishes inadmissibility even though the statute also encompasses solicitation offenses.

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DISTRICT COURTS

■ District Of Columbia District Court Rejects Challenge To Act That Applies Federal Immigration Law To The Commonwealth Of The Northern Mariana Islands

In *Commonwealth of the Northern Mariana Islands (CNMI) v. United States*, No. 08-cv-1572 (D.D.C. Nov. 23, 2009) (Friedman, J.), the CNMI sought a preliminary injunction against implementation of portions of Title VII of the Consolidated Resources Act of 2008 (Act), which applies federal immigration law to the CNMI starting on November 28, 2009. The CNMI argued that the Act was unconstitutional and violated the 1976 Covenant defining the political relationship between the CNMI and the United States. The United States moved to dismiss. On November 23, 2009, the district court granted the motion to dismiss and denied the preliminary injunction as moot.

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■ Central District Of California Grants Summary Judgment To Government In Class Action Child Status Protection Act ("CSPA") Case

In *Costelo v. Chertoff*, No. 08-cv-688 (C.D. Cal. Nov. 10, 2009) (Selna, J.), the district court granted summary judgment to the government and denied summary judgment to class plaintiffs. Finding the relevant statute ambiguous, the district court granted deference to the relevant BIA's decision denying conversion of aged-out derivative beneficiaries of third and fourth preference visa petitions into primary beneficiaries of second-preference visa petitions. The court disagreed with plaintiffs and held that there is no contradiction between the conversion of aged-out derivative beneficiaries of self petitioners and the CSPA because the derivatives of self-petitioners are explicitly reclassified by statute when they age-out, making them ineligible for CSPA protection.

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■ Southern District Of Indiana Denies Habeas Petition, Holding that Detention Of A Dangerous, Mentally Ill Alien Under DHS Regulations Is Lawful And Does Not Violate Due Process

In *Marfarlan v. Warden, U.S.P. - Terre Haute*, No. 2:09-cv-158 (S.D. Ind. Oct. 20, 2009) (Young, J.), the Southern District of Indiana dismissed a habeas petition alleging that the alien's detention pursuant to DHS regulations was unlawful and violated due process. The regulations permit DHS to detain dangerous, mentally ill aliens beyond the presumptive six-month removal period provided for in Supreme Court decisions.

In dismissing the habeas petition, the court agreed with a relevant Tenth Circuit decision that the regulation does not raise a serious constitutional question and is a reasonable statutory interpretation by DHS entitled to judicial deference. The court also agreed that the evidentiary requirements and procedural protections in the regulations satisfy constitutional due process concerns.

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■ Court Approves Settlement In Los Angeles Putative Class Action Challenging Naturalization Adjudication Delays

In *Kolhatkar v. Holder*, No. SACV07-1394 (C.D. Cal. Nov.6, 2009) (Carter, J.), the district court approved the parties' settlement, which provides for adjudication of 90 percent of the putative class members' naturalization applications within six months of final court approval of the settlement agreement. Those benefitting from the agreement reside in the Los Angeles area and have pending naturalization applications where the FBI name check has not been completed for more than 180 days after USCIS interviewed the applicant. The agreement is expected to last less than one year before the government fulfills all the settlement's terms.

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■ District of Arizona Dismisses Visa Waiver Program Alien's Habeas Petition for Lack of Jurisdiction

In *Del Priore-Tejera v. Holder,* No. 2:09-cv-01907 (D. Az. December 1, 2009) (Wake, J.), the district court dismissed an alien's habeas petition for lack of jurisdiction. The court found that the alien was challenging his removal and, pursuant to the REAL ID Act, it lacked jurisdiction to review the lawfulness of the alien's removal. Additionally, the court held that the alien's challenges to his detention had become moot upon his removal to Uruguay and that there were no "collateral consequences" of the removal that rendered the case justiciable. The court stated that the bar to reentry is a collateral consequence of the order of removal, and not the length of the detention or the fact that the alien had been denied bond.

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INSIDE DHS

Roxana Bacon, has been appointed as the USCIS Chief Counsel.

Ms. Bacon has been In an immigration law practitioner and policy advisor for 35 years. She has been a partner with the international firm of Bryan Cave, where she served on the firm's Executive Committee and as resident manager of the Phoenix office, and later founded her own firm, Bacon & Dear, which she grew from 10 to 150 persons. Ms. Bacon also taught immigration law as a visiting professor and adjunct professor at Arizona State University College of Law. Among her many professional achievements, Ms. Bacon was the first woman to serve as the president of the Arizona Bar Association, the first woman to serve as general counsel to the American Immigration Lawyers Association, and a recipient of the American Bar Association's Margaret Brent Award, its highest award given to women lawyers nationally.

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15th Annual Immigration Law Seminar

About attorneys attended the 15th Annual Immigration Law Seminar held on October 5-9,, 2009, in Washington, D.C. This is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law. In addition to new OIL attorneys, attorneys from ICE, USCIS, DHS, EOIR, Department of State, and USAOs also attended the seminar.

Among the speakers were Assistant Attorney General Tony West who in his remarks emphasized the special role that government lawyers play when they represent the United States in court.

(Pictured at left David McConnell, AAG Tony West, Francesco Isgro, and Papu Sandhu)

Supreme Court Argument in *Kucana*

(Continued from page 2)

Justices Kennedy and Alito asked how many cases would be affected if there were jurisdiction to review motions to reopen. Government counsel stated that the rate of judicial review of all Board decisions was 30 percent in 2008, and that the Board denies 80 to 85 percent of the eight to ten thousand motions to reopen decided each year, therefore members of the Court estimated that there are about two thousand petitions to review denials of motions to reopen filed per year. When government counsel noted that most of those cases are in circuits that currently exercise jurisdiction to review them, Justice Kennedy, drawing laughter, asked, "[h]ave any of those courts said they don't have workload problems?"

Court-appointed counsel argued that due to 8 U.S.C. § 1252(a)(2)(D), "a far narrower subset of those decisions" likely would be rendered unreviewable. Justice Sotomayor questioned the reasoning of the court of appeals that the passage, years later, of section 1252(a)(2)(D), should inform the interpretation of section 1252(a)(2)(B)(ii).

By Andy MacLachlan, OIL

INSIDE OIL

Oil welcomes the following two new Trial Attorneys:

Stefanie A. Svoren joined OIL through the Attorney General's Honors Program. She received her B.A. in History from the SUNY College at Geneseo in 2004 and her J.D. from the University at Buffalo Law School in 2009. During law school, Stefanie interned with the Kenya Human Rights Commission in Nairobi, Kenya and the U.S. Department of Justice, Criminal Division, Domestic Security Section in Washington, DC.

Jennifer A. Singer (Jenn) received her BA from the University of Wisconsin-Madison in 2003, majoring in History and International Relations, and her JD from Suffolk University Law School in 2009. During law school, she interned at the International Criminal Tribunal for the Former Yugoslavia in The Hague, Netherlands and was a student prosecutor at the Suffolk County District Attorney's Office in Boston, MA. Jenn joined OIL through the Attorney General's Honors Program.

Stefanie A. Svoren, Jennifer A. Singer

OIL congratulates Assistant Director **Barry Pettinato** who has been selected as an Immigration Judge for the immigration court in Charlotte, North Carolina.

Judge Pettinato joined OIL in August of 2001. He received his B.A. in 1978 from Fitchburg State College in Massachusetts and his J.D. in 1991 from the Suffolk University Law School in Boston. Judge Pettinato worked as an attorney at the INS District Counsel's Office in San Francisco from 1991 until August of 2001. He was promoted as an OIL Assistant Director in 2006.

Congratulations to **Paul Fiorino** who has been promoted to Senior Litigation Counsel. Paul joined OIL in November, 1998, as a trial attorney. Prior to joining OIL he was a Judge Advocate in the U.S. Army, serving as a trial defense counsel and appellate

OIL's Annual Holiday Party will be held at OIL LSB LL100 at 3:30 pm on December 17, 2009. The party will be preceded by Dave's Annual White Elephant Affair.

For additional information, contact Stacy Paddack at 202-353-4426

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

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

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

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

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