



# Immigration Litigation Bulletin

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## Supreme Court Unanimously Holds That Jury Does Not Have To Determine \$10,000 Loss Threshold For Alien To Be Removed For Fraud Or Deceit Crime

On June 15, 2009, the Supreme Court issued a decision holding that the \$10,000 loss component of 8 U.S.C. § 1101(a)(43)(M)(i) (an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000) is not an element of the fraud or deceit crime, but rather "the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." *Nijhawan v. Holder*, \_\_U.S.\_\_, 2009 WL 1650187 (2009). The Court concluded that "[i]n the absence of any conflicting evidence (and petitioner mentions none)," the immigration judge's reliance on earlier sentencing-related material was clear and

convincing evidence supporting removal. *Id.* at \*9.

The Court reasoned that "words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime . . . and sometimes refer to the specific acts in which an offender engaged on a specific occasion." *Nijhawan*, \_\_U.S.\_\_, 2009 WL 1650187, at \*4. If a generic crime, the Court ruled that it "must look to the statute defining the offense to determine whether it has an appropriate monetary threshold." *Id.* If, what the Court referred to as "circumstance-specific," it "must look to the facts and circumstances underlying an offender's conviction."

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## Second Circuit Reviews Visa Denial First Amendment Trumps Consular Nonreviewability Doctrine

Deciding an issue of first impression, the Second Circuit held in *Academy of Religion v. Napolitano*, \_\_ F.3d \_\_, 2009 WL 2096225 (2d Cir. July 17, 2009), that "where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country," the court would have jurisdiction to review a visa denial. The court rejected the government's view that under the doctrine of consular nonreviewability, courts lack jurisdiction to review a consular officer's decision to deny a visa.

The organizational plaintiffs who filed this action had invited Tariq Ramadan, a Swiss citizen, to come to the United States "to share his views

with the organizations and with the public in this country." Ramadan, an Islamic scholar, had been previously admitted into the United States under the Visa Waiver Program. In January 2004 Ramadan accepted a tenured-teaching position at Notre Dame. That university then filed on his behalf an application for an H-1B visa which was approved in May 2004. However, that visa was revoked in July 2004, without an official explanation. On October 2004, Notre Dame filed a second H-1B visa petition. Having not heard from DHS, Ramadan on December 13, 2004, resigned from the position at Notre Dame, and consequently DHS revoked the visa petition. On September 16, 2005, Ramadan applied for a

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## Supreme Court Rules on \$10,000 Question

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*Id.* In favor of the first or "generic" interpretation, is *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny, which concerned the Armed Career Criminal Act (ACCA). *Id.* Under those cases, the Court held that the ACCA's language refers to "generic crime as generally committed," and to avoid practical difficulties, the inquiry focused on the statute of conviction. *Id.* at \*4-5. To the extent that the Court would resort to criminal conviction documentation, its inquiry was limited to determining which specific part of the "separately numbered subsection of a criminal statute" the defendant was convicted under. *Id.* at \*5.

The Court ruled that the ACCA differs in general from the INA's "aggravated felony" statute and it differs specifically from the "fraud and deceit" provision at issue. *Nijhawan*, \_\_ U.S. \_\_, 2009 WL 1650187, at \*6. Although the "aggravated felony" statute resembles the ACCA in some respects, in that it "lists several of its 'offenses' in language that must refer to generic crimes," the INA "lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances." *Id.* In determining if a provision may be "circumstance-specific," the Court considered whether the provision would be nullified if considered a generic crime. *Id.* at \*6-7. In conclusion, the Court ruled that "the 'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to specific circumstances in which a crime was committed." *Id.* at \*7.

After determining that the monetary loss under § 1101(a)(43)(M)(i) was "circumstance-specific," the Court considered and rejected Petitioner's argument that the Court should borrow from *Taylor's* "modified categorical approach." *Nijhawan*,

\_\_ U.S. \_\_, 2009 WL 1650187, at \*7-8. The Court ruled that "nothing in prior law [] so limits the immigration court" to the evidentiary rules in *Taylor* and *Shepard v. United States*, 544 U.S. 13 (2005). *Id.* \*9. With regard to the evidentiary list identified in those cases, the Court "developed that list for a very different purpose," namely to determine which part of the statute of conviction a defendant was convicted under. *Id.* The Court further noted that deportation proceedings are civil in nature and that the government must meet a "clear and convincing" standard rather than a "beyond a reasonable doubt" standard. *Id.* The Court cautioned that the "aggravated felony" inquiry "is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Id.*

As to the loss component specifically, the Court ruled that the "loss' must 'be tied to the specific counts covered by the conviction,'" and that "immigration judges must assess findings made at sentencing 'with an eye to what losses are covered and to the burden of proof employed.'" *Nijhawan*, \_\_ U.S. \_\_, 2009 WL 1650187, at \*9. The Court concluded that aliens would have an opportunity to contest the amount of loss first at the earlier sentencing hearing and second at the immigration hearing. *Id.*

**Ed. Note:** *Guidance regarding the Supreme Court's unanimous decision and its impact on our litigation has been circulated internally. If you have any questions regarding a pending case, please contact Jennifer Keeney (202-305-2129) or Holly Smith.*

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## Study Finds High Stress Level Among Immigration Judges

A recent survey conducted by the U.C. San Francisco and published in the Georgetown Immigration Law Journal finds that immigration judges are suffering from significant symptoms of secondary traumatic stress and job burnout.

The study applied a psychological scale for testing professional stress and exhaustion to 96 immigration judges who agreed to participate, just under half of all judges hearing immigration cases. The survey found that the strain on them was similar to that on prison wardens and hospital physicians, groups shown in comparable studies to experience exceptionally high stress.

In response to a New York Times article on the subject, Thomas Snow, Acting Director of EOIR wrote in a letter that EOIR "recognize[s] that adjudicating immigration

cases is a difficult job; and we take the concerns about judicial stress seriously.

We constantly examine our resource needs, including the number and assignment of judges, to ensure that we can address the volume of cases fairly and promptly. For example, hiring is ongoing for 20 new immigration judges. For Fiscal Year 2010, we have requested 28 additional immigration judge positions along with a commensurate number of law clerks and support staff.

Moreover, we continue to work diligently to address our judges' professional concerns through training and mentoring. Training on judicial wellness and stress management is an important part of our upcoming August 2009 annual training conference for immigration judges and Board of Immigration Appeals members."

## MOOTNESS ON APPEAL: EFFECTS OF DISMISSAL

What happens to a case that becomes moot while on appeal in a federal court? Most lawyers correctly surmise that the court will dismiss the case. Less apparent, though, is what else happens.

Lawyers know that federal courts are courts of limited jurisdiction; the Constitution limits them to deciding actual “cases” or “controversies.” See *Honig v. Doe*, 484 U.S. 305, 317 (1988). This limitation underlies the Court’s mootness jurisprudence. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 178-80 (2000). Under that doctrine, mootness is jurisdictional. *Press-Enter. Co. v. Super. Court of California*, 478 U.S. 1, 6 (1986). So when a case becomes moot, a court must dismiss it. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332-33, 335 (1980).

This is because a litigant must have suffered an injury “that can be redressed by a favorable judicial decision.” *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 70 (1983). That is, an actual controversy must exist at *all* stages of review. *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759, 2768 (2008). Courts are “not in the business of pronouncing that past actions [that] have no demonstrable continuing effect were right or wrong.” *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

Occasionally, a case that was “alive” in the trial court or agency may “die” while on appeal or certiorari and will no longer present an actual case or controversy. Should that happen before the court issues a precedential opinion, the “death” of the case matters little to anyone but the parties.

But when the case breathes its last after an appellate court issues its opinion, or even while the case is pending on certiorari in the Supreme Court, its effect on other litigants will differ depending on whether the

judgment is vacated when the newly mooted case is dismissed. Two concerns about such a case are apparent – its *stare decisis* effect and its *res judicata* effect. While cases become moot on appeal infrequently, it behooves lawyers who handle them to be aware of the Supreme Court’s doctrine so that a negative result might be avoided.

Because, historically, vacatur was infrequently used, the Court was slow to develop guidelines for it, first addressing the issue in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). There, it authorized the vacatur of a judgment mooted while the case was pending on appeal. It stated that vacatur is the “established practice” for cases that have become moot while on appeal. *Id.* at 39. The Court’s language was imprecise, but it yielded, if not a presumption, then at least an inclination toward requiring vacatur of the judgment when a case becomes moot on appeal. The Court noted that vacatur “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Id.* at 40. A decade later, in *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961), the Court extended the *Munsingwear* principle to administrative orders. See *Am. Family Life Assur. Co. of Columbus v. FCC*, 129 F.3d 625, 630 (D.C. Cir. 1997) (“[s]ince *Mechling* we have, as a matter of course, vacated agency orders in cases that . . . become moot [on] judicial review”).

Later, in *Karcher v. May*, 484 U.S. 72 (1987), the Court clarified *Munsingwear*, re-emphasizing that vacatur is *required* only when a case

becomes moot because of “happenstance.” The *Karcher* appellants were two presiding officers of the New Jersey Legislature who, in their official capacities, intervened as defendants in a suit that sought to have a New Jersey statute held unconstitutional. The plaintiffs prevailed in the lower courts, and the presiding officers appealed the judgment to the Supreme Court. But between the time the court of appeals entered its judgment and the time the presiding officers appealed to the Supreme Court, they lost their leadership positions. And their successors declined to pursue the appeal.

The Court ultimately dismissed the appeal for lack of jurisdiction. The presiding officers had argued that the Court should vacate the adverse judgments based upon the “practice of vacating lower court judgments when a case becomes moot on appeal[,]” i.e., the *Munsingwear* procedure. *Karcher*, 484 U.S. at 82. They contended that the rationale underlying the *Munsingwear* procedure applied, for it was the “happenstance” of the loss of their status that rendered the judgment unreviewable. *Id.*

The Court rejected that argument because the case did not become unreviewable when the presiding officers left office. Rather, their authority to pursue the appeal on behalf of the legislature passed to their successors, who declined to press the appeal. The controversy had not become moot as a result of circumstances unattributable to any party – in other words, by happenstance. Instead, the controversy ended when the losing party, i.e., the New Jersey Legislature through its new presiding officers, dropped its appeal. As a result, the *Munsing-*

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## Mootness on appeal

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wear procedure did not apply. *Karcher*, 484 U.S. at 83.

Six years after *Karcher*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993) (per curiam), presented an opportunity to consider the propriety of vacatur. The Court did not reach the issue, though, as it dismissed the writ of certiorari as improvidently granted because *Izumi* lacked standing. Justices Stevens and Blackmun dissented from the dismissal and reached the vacatur issue. Justice Stevens offered two reasons for refusing routine vacatur: first, judgments serve a public function and should be vacated only if it is in the public interest to do so; and, second, routine vacatur reduces incentives to settle. See *id.* at 40-41 (Stevens, J., dissenting). “Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.” *Id.* at 40.

The following year, the Court decided a case that shifted the presumption from one of routinely granting vacatur in a mooted appellate case to that of frequently denying it – at least in situations involving settlement agreements. The case was *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18 (1994), in which the Court held that mootness occurring as a result of a settlement will not ordinarily justify vacating the judgment. *Id.* at 29. Emphasizing *Karcher*’s distinction between deliberate acts and happenstance, the Court acknowledged the policy concerns that Justice Stevens had discussed in *Izumi*. See *Bancorp Mortgage*, 513 U.S. at 26-27. It concluded that, in “exceptional circumstances,” a court could vacate a case mooted by settlement. But it emphasized

that just because the settlement agreement calls for vacatur does not qualify it as an “exceptional circumstance,” for such a provision does not diminish the voluntary nature of the appellant’s abandonment of review. *Id.* at 29.

In reaching this result, the Court reaffirmed its view that vacatur must be decreed for those judgments whose review is “prevented through happenstance,” i.e., when a live controversy on appeal has become moot because of circumstances unattributable to any party. *Id.* at 23. Further, vacatur must be granted when mootness results from the unilateral action of the party who prevailed below – thereby depriving the losing party of an opportunity to appeal. *Id.*

Another condition to which the Court looks is whether the party seeking relief from the judgment caused the mootness by his own voluntary action. *Id.* at 24. The Court believes that a party who seeks review of an adverse ruling, but who is frustrated by the vagaries of circumstance, ought not, in fairness, to be forced to acquiesce in the judgment. *Id.* at 25.

By contrast, when mootness results from settlement, the losing party has voluntarily forfeited his appellate remedy, thereby surrendering any claim to “the equitable remedy of vacatur.” *Id.* When that happens, the judgment is not *unreviewable* but *unreviewed*, by the losing party’s own choice. *Id.*

To summarize, the circumstances under which an appellate court will be more inclined to grant a vacatur are those in which the parties had

no hand in causing the mootness. That is, the mootness must have been beyond their control.

Because a settlement represents the parties’ voluntary act, the presumption is that motions to vacate in light of mootness created by a settlement will be denied. As the Court explained in *Bancorp Mortgage*, it considers vacatur upon dismissal for mootness an *equitable* doctrine, and it does not view a settlement on appeal as the sort of exceptional circumstance that justifies a vacatur.

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These precepts notwithstanding, there is some play in the joints. Courts are sometimes more open to vacatur when the government is a settling party. They recognize that federal agencies, as “repeat players,” have legitimate public-policy concerns about the effect of adverse precedents on the agency’s enforcement efforts. Thus, they may find “exceptional circumstances,” warranting vacatur of a ruling adverse to the government. One example of this is *Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747 (1st Cir. 2003), in which the court, as part of a settlement, vacated a preliminary injunction barring Puerto Rico’s Secretary of Justice from pursuing an antitrust action against Wal-Mart. The court acknowledged the future impact of the ruling on the Secretary, Puerto Rico’s chief enforcement officer. See *id.* at 749-50.

Government cases can also raise questions about whether the actions that moot the case are attributable to the agency before the court. Generally, legislative changes that moot an appeal are not attributable to the government entity in the litigation and, thus, do not preclude vacatur. See *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995). But when the litigant-agency moots the appeal

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## VISA DENIAL SUBJECT TO REVIEW

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B visa to enter the United States to attend the conferences and events sponsored by the organizational plaintiffs. He was then interviewed by consular and DHS officials at the U.S. Embassy in Berne. During the interview Ramadan informed the officials that he had donated \$1,336 to ASP, an organization that the Department of Treasury in August 2003 had designated as a terrorist organization due to its funding of Hamas.

Because the government did not act on Ramadan's visa application, plaintiffs sought an injunction to compel the consular official to make a decision. The district court in New York then ordered the government to make a decision on Ramadan's application. See *American Academy of Religion v. Chertoff*, 463 F. Supp.2d 400 (S.D.N.Y. 2006). On September 19, 2009, Ramadan was informed telephonically that his visa application had been denied because he had provided material support to a terrorist organization, an inadmissible offense under INA § 212(a)(3)(B)(iv)(VI). In a declaration, the consular official stated that he had concluded, *inter alia*, that Ramadan did not demonstrate that he did not know that the ASP raised money for Hamas.

On December 20, 2007, the district court dismissed plaintiffs' complaint after considering the parties cross-motion for summary judgment. The court found that the doctrine of consular nonreviewability precludes judicial review of visa denials but that under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Supreme Court had permitted judicial review where a First Amendment violation had been alleged. Applying the *Mandel* standard, the court then found that the government had provided a "facially legitimate and bonafide reason" for the visa denial.

On plaintiffs' appeal, the government contended that the court lacked jurisdiction under the principle that a

consular officer's denial of a visa is immune from judicial review. The government argued that *Mandel* did not apply to plaintiffs' case because that case involved the review of the Attorney General's decision not to waive the alien's inadmissibility rather than a threshold decision by a consular officer to deny a visa as happened in this case.

The Second Circuit found that *Mandel* had not provided a definitive answer to the jurisdictional question raised by plaintiff's case. However, it found that the case law, in the aftermath of *Mandel*, favors some judicial review of a constitutional claim. In particular, the court cited to *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), the court rejected the government's view of *Mandel*. Accordingly, it held that where a plaintiff with standing asserts a First Amendment claim "to have a visa applicant present views in this country," *Mandel* would be applied to review the consular officer's denial of a visa. The court found it "counterintuitive" that a discretionary decision of a cabinet official would be subject to review, but not a consular officer's decision as to statutory ineligibility. We note that the court did not mention the fact that INA § 104(a) gives exclusive jurisdiction to "consular officers relating to the granting or refusal of visas," a power not shared with nor given to any cabinet official.

### Scope of Review

The court then considered what limited review of the visa denial would be permitted under *Mandel*. The court found that the Supreme Court had not elaborated on the meaning of "facially legitimate" or "bona fide" reason for justifying the

denial of a visa. Accordingly it defined the standard as requiring the "identification of both a properly construed statute that provide a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category." The court agreed with the Ninth Circuit in *Bustamante*, that the absence of an allegation that the consular officer acted in bad faith in denying the visa satisfies the requirement that the reason is bona fide.

**The court agreed with the Ninth Circuit in *Bustamante*, that the absence of an allegation that the consular officer acted in bad faith in denying the visa satisfies the requirement that the reason is bona fide.**

Here, the court found that there were three issues to consider in determining whether the consular officer had properly construed the application of the inadmissibility ground to

Ramadan: retroactivity, knowledge requirement, and the "unless" clause. The government conceded that prior to the REAL ID Act of 2005, the "material support" provision did not apply to "undesignated terrorist organization" such as ASP, that in turn provided funds to terrorist organization. The court disposed of this claim by applying the plain meaning of "before, on, or after" phrase in section 103(d)(2) of the REAL ID Act which made the amendments applicable to Ramadan's acts occurring before 2005.

The court then construed the statutory requirement of knowledge has having two components: first that the visa applicant has to commit an act that he know or reasonably should know, affords material support, to a terrorist organization and second that the statute bars an alien with such knowledge "unless he can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization." The court found that the district court had concluded that the first knowledge component had been

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## DHS Secretary Announces New Agreements under INA § 287(g)

Department of Homeland Security Secretary Janet Napolitano has announced that ICE has standardized the Memorandum of Agreement (MOA) used to enter into "287(g)" partnerships-improving public safety by removing criminal aliens who are a threat to local communities and providing uniform policies for partner state and local immigration enforcement efforts throughout the United States.

Additionally, ICE announced eleven new 287(g) agreements with law enforcement agencies from around the country. "This new agree-

ment supports local efforts to protect public safety by giving law enforcement the tools to identify and remove dangerous criminal aliens," said Secretary Napolitano. "It also promotes consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards in implementing the 287(g) program."

The new MOA aligns 287(g) local operations with major ICE enforcement priorities-specifically, the identification and removal of criminal aliens. To address concerns that individuals may be arrested for mi-

nor offenses as a guise to initiate removal proceedings, the new agreement explains that participating local law enforcement agencies are required to pursue all criminal charges that originally caused the offender to be taken into custody.

The new MOA also defines the objectives of the 287(g) program, outlines the immigration enforcement authorities granted by the agreement and provides guidelines for ICE's supervision of local agency officer operations, information reporting and tracking, complaint procedures and implementation measures.

"The new agreement strengthens ICE's oversight of the program and allows us to better utilize the resources and capabilities of our law enforcement partners across the nation," said ICE Assistant Secretary John Morton.

## Consular Nonreviewability Doctrine Pierced

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satisfied simply by the fact that Ramadan had admitted to have given money to ASP. Plaintiffs claimed, on the other hand, that the statute required that Ramadan knew that ASP was providing material support to Hamas. The government countered that by adopting such an interpretation the "unless clause would be eliminated and the alien could never establish by clear and convincing evidence that he did not know the group was a terrorist organization. Although the court found that the issue not free from doubt, it agreed with the government that the first knowledge requirement component under § 212(a)(3)(B)(iv)(VI) requires only knowledge that "the alien knew he was rendering material support to the recipient of his support." Thus, under this first step, the consular office did not have to find that Ramadan knew that ASP funded Hamas.

The court then construed the "unless" clause under § 212(a)(3)(B)(iv)(VI)(bb), as meaning that "before a decision on the visa application is made, the alien must be confronted with the allegation that he knew had supported a terrorist organization." Thus, Ramadan should have been confronted with "the claim that he knew his donations to ASP constituted

material support to a terrorist organization because it had funded Hamas, and then afforded him the opportunity to negate such knowledge." The court found that it was unclear from the record below whether Ramadan had been confronted with such claim.

Accordingly, the court remanded the case to afford the government an opportunity to ascertain whether the consular officer had confronted Ramadan regarding his knowledge that ASP had funded Hamas, and if not" to conduct a renewed visa hearing now that Ramadan is aware of the knowledge he must negate."

Finally, the court concluded that under Mandel, it could not "look behind" the consular officer's decision that a statutory ground of inadmissibility applied, "at least in the absence of a well supported allegation of bad faith, which would render the decision not bona fide." Thus, said the court, to the extent that the district court may have assessed Ramadan's evidence negating knowledge it had exceeded its proper role.

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## MOOTNESS

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by withdrawing its own contested policy or regulation, its action will likely preclude a vacatur. See, e.g., *Amoco Oil Co. v. EPA*, 231 F.3d 694, 698-99 (10th Cir. 2000) (noting vacatur not warranted when EPA's unilateral withdrawal of contested order mooted case). At the same time, a vacatur might be appropriate if the government's action is remedial and was not undertaken to manipulate the judicial process. E.g., *Wyoming v. United States Dep't of Agric.*, 414 F.3d 1207, 1213 (10th Cir. 2005).

This brief overview is not a treatise on the advisability, or permissibility, of vacatur when an appellate case is mooted. Instead, it seeks to make government lawyers aware of possible avenues and pitfalls when dealing with cases that, while on appeal, die.

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## ICE Announces Major Reforms To Immigration Detention System

U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton announced that ICE is undertaking a major overhaul of the agency's immigration detention system.

"This change marks an important step in our ongoing efforts to enforce immigration laws smartly and effectively," said DHS Secretary Janet Napolitano. "We are improving detention center management to prioritize health, safety and uniformity among our facilities while ensuring security, efficiency and fiscal responsibility."

"In the past five years, ICE has experienced considerable growth in immigration detention. This growth has presented significant challenges to a system that was not fundamentally designed to address ICE's specific detention needs," said Morton. "Implementing these reforms will improve medical care, custodial conditions, fiscal prudence and ICE's critical oversight of the immigration detention system. ICE remains committed to enforcing our nation's immigration and customs laws. We also reaffirm our commitment to ensuring the security, safety and well-being of individuals in our custody."

As the first of many concrete steps ICE is taking to implement comprehensive detention reform, the agency is creating an Office of Detention Policy and Planning (ODPP). The role of this office is to design and plan a civil detention system tailored to addresses ICE's needs. Dr. Schriro, who will report directly to the assistant secretary, will lead the ODPP with support from detention and health care experts.

The ODPP will evaluate the entire detention system in a methodical way, with seven areas of focus, each with benchmarks for progress:

- Population Management: To ensure the best location, design,

and operation of facilities reflecting the unique nature of civil detention;

- Detention Management: To ensure appropriate custodial conditions and address day-to-day detention functions, including classification, discipline and grievances;
- Programs Management: To ensure the provision of religious services, family visitation, recreation and law libraries;
- Health Care Management: To ensure the timely provision of medical, dental and mental health assessment and services;
- Alternatives to Detention Management: To develop a national strategy for the effective use of alternatives to detention including community supervision;
- Special Populations Management: To provide attention to women, families, the elderly and vulnerable populations; and
- Accountability: To ensure ICE employees perform the core functions of detention oversight, detainee classification and discipline, and grievance review.

While ICE continues to undertake the ODPP review, other immediate actions announced include:

- Discontinued use of family detention at the T. Don Hutto Family Residential Facility in Texas. In place of housing families, the Texas facility will be used solely as a female detention center. Presently, Hutto is used to detain families and low custody female detainees. Detained families will now be housed at Berks Family Residential Center in Pennsylvania.
- Formation of two advisory groups of local and national organizations interested in ICE's detention system. These groups will provide feedback and input

to the Assistant Secretary. One will focus on general policies and practices, while the other will focus on detainee health care.

- Appointment of 23 detention managers to work in 23 significant facilities - facilities which collectively house more than 40 percent of our detainees. These 23 federal employees will directly monitor the facilities and ensure appropriate conditions.
- Establishment of an Office of Detention Oversight (ODO) whose agents will inspect facilities and investigate detainee grievances in a neutral manner. The ODO will be part of ICE's Office of Professional Responsibility, an independent office which reports directly to the Assistant Secretary.

Shortly after taking office, Secretary Napolitano issued an action directive initiating a comprehensive review of ICE's detention system. Although the review is ongoing and additional reforms lie ahead, the steps announced by ICE address the vast majority of complaints about the immigration detention system while allowing ICE to maintain a significant, robust detention capacity to carry out serious immigration enforcement.

### TPS Somalia Extended

USCIS has announced that it will extend TPS for nationals of Somalia from its current expiration date of Sept. 17, 2009 through March 17, 2011. DHS Secretary Janet Napolitano has determined that an 18 month extension is warranted because the armed conflict is ongoing, and the extraordinary and temporary conditions that prompted the last TPS designation of Somalia on Sept. 4, 2001 persist.

Under the extension, individuals, who have already been granted TPS, are eligible to re-register and maintain their status for an additional 18 months.

## FURTHER REVIEW PENDING: Update on Cases & Issues

### Jurisdiction—Motion to Reopen

On July 13, 2009, the Solicitor General filed in the Supreme Court the government's top-side merits brief in *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), cert. granted, 129 S. Ct. 2075 (2009). The Supreme Court granted the petitioner's request for certiorari on whether INA §§ 242 (a)(2)(B)(ii) & (D), 8 U.S.C. §§ 1252(a)(2)(B)(ii) & (D) bar review of a denial of a motion to reopen. The Seventh Circuit dismissed the case, holding that 8 U.S.C. § 1252 (a)(2)(B)(ii), which bars courts' 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 motions to reopen.

In its response to the petition, the government stated "after reexamining its prior filings on this issue," that the majority position—namely the majority of the courts holding that judicial review is available, "represents the better reading of the statute." The government's brief agrees with petitioner 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. Oral argument has been scheduled for November 10, 2009.

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### Fourth Amendment—Exclusionary Rule

The Solicitor General has decided against a petition for certiorari in *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), reh'g en banc denied sub nom. *Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (2009), on the issue of whether the exclusionary rule applies in removal proceedings despite *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), where evidence is obtained as a

result of "conduct a reasonable officer should know is in violation of the Fourth Amendment." DHS, EOIR, Civil Division, and Tax Division had recommended certiorari.

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### Jurisdiction—REAL ID Act

The Solicitor General has decided against a petition for rehearing en banc in *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009), on the issue of whether the court erred in concluding that it has jurisdiction to review the agency's determination that an alien failed to prove that his removal from the United States to Mexico would work an "exceptional and extremely unusual hardship" upon his two United States citizen children. The Second Circuit remanded the petition for review because "where, as here, some facts important to the subtle determination of 'exceptional and extremely unusual hardship' have been totally overlooked and others have been seriously mischaracterized, we conclude that an error of law has occurred."

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### Aggravated Felony—\$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)(ii)) 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. On June 29, 2009, the court ordered supplemental

briefing (now due by August 20) 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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### VWP — Waiver, Due Process

On January 30, 2009, the Seventh Circuit granted the government's petition for rehearing en banc in *Bayo v. Chertoff*, 535 F.3d 749 (7th Cir. 2008). The questions presented are whether a waiver of the right to contest removal proceedings under the visa waiver program (VWP) is valid only if entered into knowingly and voluntarily, and is the alien entitled to a hearing on whether the waiver was knowing and voluntary. The case was argued on May 13, and the parties have filed supplemental briefs on four issues identified by the court at argument.

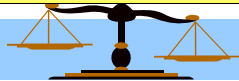
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### Aggravated Felony—Crime of Violence

On June 8, 2009, at the government's recommendation, the Supreme Court granted the alien's petition for certiorari in *Serna-Guerra v. Holder*, No. 08-983, vacated the decision below, and remanded the case to the Fifth Circuit for further consideration in view of *Chambers v. United States*, 129 S. Ct. 687 (2009), on the issue of whether the crime of unauthorized use of a vehicle, in violation of Texas law, is a crime of violence.

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## Summaries Of Recent Federal Court Decisions

### FIRST CIRCUIT

#### ■ First Circuit Holds That Adjustment Grandfathering Provision Not Available To Beneficiaries Of A Visa Petition That Was Not Approvable When Filed

In *Santana v. Holder*, 566 F.3d 237 (1st Cir. 2009) (Boudin, Farris, Howard), the petitioners challenged the BIA's determination that they did not qualify for grandfathering under INA § 245(i), and thus were ineligible for adjustment of status. The grandfathering provision is available to aliens who are beneficiaries of visa petitions filed before April 30, 2001.

The petitioners, Benjamin Santana and Leonardo Santana, a father and son citizens of Brazil, were placed in proceedings in 2004 after they overstayed their visas. They claimed that they were eligible under § 245(i) on the basis of a special immigrant visa petition filed in 2000 on behalf of Benjamin's former spouse, Vasti Santana, by the alleged employer the Assembly of God (AOG). The former INS initially approved the visa petition. However, following an investigation of fraudulent immigrant worker petitions filed by the attorney who represented AOG, the DHS challenged the legitimacy of the petition filed on behalf of Vasti and asked AOG for additional information. When none was received, DHS in 2003 revoked that visa petition. No appeal was taken.

The BIA determined that petitioners were ineligible for grandfathering because petitioners had failed to establish that the petition filed on Vasti's behalf was not "approvable when filed," one of the regulatory requirements under 8 C.F.R. § 245.10 (a)(1)(i)(A). The BIA relied on evidence in the record that the petition was not meritorious in fact when filed pointing to DHS's notice of intent to revoke on the basis of derogatory information and AOG's failure to submit any coun-

tervailing evidence

The First Circuit held that the BIA properly relied upon the record evidence and agreed with the BIA's interpretation that the petition filed on Vasti's behalf was not "approvable when filed." The court then rejected petitioners' claim that their due process rights had been violated because the IJ had refused to consider a letter from Vasti indicating that she was a religious worker at AOG. "The appropriate time for submitting [evidence of the approvability of the special-immigration visa] would have been in the proceeding in which the petition was" revoked, said the court.

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#### ■ First Circuit Holds That Pattern Or Practice Claims Of Persecution Based On Generalized Civil Strife Do Not Establish Eligibility For Asylum

In *Balachandran v. Holder*, 566 F.3d 269 (1st Cir. 2009) (Lynch, Selya, Stahl), the First Circuit affirmed the BIA's denial of asylum, withholding, and CAT to a Sri Lankan national. The BIA had denied petitioner's requests because he had failed to provide corroborating evidence and that his claim was based on the general conditions of violence in Sri Lanka. Petitioner's principal argument on appeal was that the BIA had overlooked his pattern-and-practice claim under 8 C.F.R. § 1208.13(b)(2) and therefore his case had to be remanded.

The pattern-or-practice theory, said the court requires the applicant to "present evidence of 'systematic persecution' of a group," and to demonstrate that "persecutors target the group specifically on account of one of the five statutory grounds." Here,

petitioner did not fully articulate his claim to the BIA and presented no evidence of "systematic persecution." The court, then found that the BIA had implicitly addressed the claim when it noted that it was "well-settled that aliens whose asylum claims are based on the general conditions of violence in a country are not entitled to 'refugee' status." The court then reaffirmed its holding that a pattern or

**It is "well-settled that aliens whose asylum claims are based on the general conditions of violence in a country are not entitled to 'refugee' status."**

practice claim of persecution cannot be predicated on a group's suffering due to generalized civil strife in the home country.

The court also affirmed the BIA's finding that petitioner had failed to sufficiently corroborate his claim under the REAL

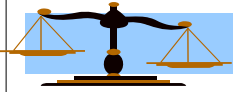
ID Act because he was able to procure other documents from Sri Lanka in support of his claim.

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#### ■ First Circuit Upholds Adverse Credibility Determination Against Asylum Applicants from Cambodia

In *Mam v. Holder*, 566 F.3d 280 (1st Cir. 2009) (Lynch, Selya, Lipez), the First Circuit held that it could not conclude that the IJ was compelled to find the asylum applicants, husband and wife, credible, where there were a number of material discrepancies and omissions that were clearly in the record, including discrepancies between their testimony regarding a rape incident. The wife claimed that she had been raped by a police officer as a result of her husband's political activity. However, they could not agree on a date, "and indeed gave a series of dates spread over a year for when this alleged traumatic event occurred" said the court, adding that this was a "specific, cogent reason for inferring a

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lack of credibility.”

The court further ruled that the adverse credibility determination was also supported by the petitioner’s failure to provide corroborating evidence, such as hospital reports, which would have confirmed the husband’s claim that he had been hospitalized for two weeks following an incident when he was pushed off his motorcycle by supporters of the Cambodian government as he was leaving the opposition party’s office.

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■ **First Circuit Holds That It Lacks Jurisdiction To Review One-Year Asylum Bar**

In *Usman v. Holder*, 566 F.3d 262 (1st Cir. 2009) (Boudin, Stahl, Lipez), the First Circuit held that it lacked jurisdiction to review the agency’s determinations that petitioner’s application for asylum had been untimely filed and rejected petitioner’s “ignorance of the law” excuse as it did not constitute extraordinary or changed circumstances. The petitioner, a citizen of Pakistan, entered the United States as a seaman on April 21, 1999, on a C1 transit visa. He was required to join his ship two days later and depart the United States. He never did. When DHS placed him in proceedings as an overstay, he sought asylum, withholding, and CAT protection. He claimed that he had been persecuted in Pakistan on account of his political affiliation with the Pakistan People’s party.

The court held that absent a colorable non-frivolous legal or constitutional defect in the decision below, it lacked jurisdiction to review the BIA’s determination that the application for

asylum was untimely or that there were no changed or extraordinary circumstances that might have justified considering the application. Moreover, said the court, a denial of asylum due to untimeliness is not a due process violation.

**“An argument that the petitioner is entitled to asylum does not properly raise the issue of withholding of removal,” said the court.**

The court also held that petitioner had waived any challenges to the denial of withholding because he had not mentioned it in his opening brief. “An argument that the petitioner is entitled to asylum does not properly raise the issue of withholding of removal,” said the court. The court also affirmed the denial of CAT protection finding a lack of evidence in the record to demonstrate that the alleged torture occurred with the consent of the Pakistani government.

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■ **First Circuit Holds No Jurisdiction To Review BIA’s Decision Declining To Reopen Sua Sponte**

In *Peralta v. Holder*, 567 F.3d 31 (1st Cir. 2009) (Howard, Selya, Hansen), the First Circuit held that “the BIA’s exercise of its unfettered discretion to decline reopening of the petitioner’s removal proceedings *sua sponte* lies beyond this court’s authority to review.”

The petitioner, an Ecuadorian citizen, entered the U.S. illegally in 1998, and obtained adjustment in 2002 based on a marriage to a USC. However, he had failed to mention that in the interim, he had been convicted of a deportable offense. He was order deported in 2005 and did not seek judicial review. He then married another USC who filed an I-130 on his behalf. Based on this new development he sought reopening. The BIA denied reopening, noting that peti-

tioner’s prior commission of immigration fraud did not warrant the favorable exercise of discretion. Petitioner sought review of that decision but the First Circuit dismissed on the merits.

Undaunted, petitioner again sought reopening this time based on the fact that the visa petition filed by his second USC spouse had been approved. Because the motion was time-barred and number-barred, petitioner asked the BIA to reopen *sua sponte*. When the BIA declined, petitioner returned to the First Circuit.

In finding that the court lacked jurisdiction to review the BIA’s denial of a *sua sponte* reopening, the court noted that its view was consistent with its sister circuits (citing the most recent decisions by ten circuits).

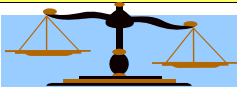
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■ **First Circuit Holds That Asylum Applicant Failed To Establish Nexus Between Criminal Sex Trade Activity And Government Of Lithuania**

In *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009) (Lipez, Lynch, Selya), the First Circuit affirmed a denial of asylum to an applicant from Lithuania who sought asylum for herself and her daughter based on her fear that they would be kidnapped and forced into the sex trade. The IJ and BIA had determined that petitioner had failed to show that the risk of being forced into prostitution in Lithuania results from government action, government-supported action, or private conduct that the government is unwilling or unable to control.

The court explained that under the INA, persecution “always implies some connection to government action or inaction, relate to a protected ground.” Here, the court held that the evidence in the record demon-

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strated that that human trafficking in Lithuania is committed by criminal elements. While Lithuania has been unable to eradicate such criminal activity, despite efforts to do so, scattered incidents did not suffice to establish the government's unwillingness or inability to control it," said the court. Accordingly, the court concluded that substantial evidence supported the BIA's conclusion "because the facts do not establish a nexus between the petitioner's fear of harm and the government of Lithuania."

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### ■ First Circuit Holds That Mistreatment Must Be Systematic In Order To Rise To The Level Of Past Persecution

In *Touch v. Holder*, 568 F.3d 32 (1st Cir. 2009) (Torruella, Lipez, Howard), the First Circuit upheld the denial of asylum finding that to establish past persecution, an applicant must show that the mistreatment he suffered was systematic and "reached a fairly high threshold of seriousness," and not a series of isolated incidents. The court further held that an unfulfilled threat must "cause significant actual suffering or harm" to rise to the level of past persecution.

The petitioner and his wife, both Cambodian citizens, claimed that he had been mistreated because of his participation in demonstrations and for his support of opposition parties. In one incident, in 1993, he claimed that following his speech at a political meeting, individuals shot at the car in which he was riding. In another incident in 1998, petitioner, who had switched to another opposition party, participated in demonstrations and at one of those where he spoke, the police fired on the demonstrators and drove a car into the crowd, hitting petitioner, who managed to escape in the confusion. The IJ did not find him credible and denied asylum on that basis. On appeal, the BIA found that petitioner had not shown past persecu-

tion and that some of the incidents had not established persecution on account of political opinion.

The First Circuit upheld the BIA's denial. In particular, the court held that the BIA was not compelled to find that petitioner had been shot on account of his political opinion and that the incidents during the demonstrations did not rise to the level of persecution. The court also affirmed the BIA's finding that petitioner lacked a well-founded fear of future persecution where he remained in Cambodia for two years following the last incident without harm, and where similarly situated family members continue to live without harm in Cambodia. Finally, the court concluded that a long period without mistreatment after petitioner experienced a serious grenade attack rebutted any presumptive well-founded fear of future persecution based on that attack.

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### ■ First Circuit Concludes That Denial Of Motion To Reopen For Adjustment Of Status Based Upon No Immediate Availability Of Visa Was Not An Abuse Of Discretion

In *Oliveira v. Holder*, 568 F.3d 275 (1st Cir. 2009) (Lynch, Stahl, Boudin), the First Circuit concluded that, because the priority date for the petitioner's visa was not current at the time he filed his motion to reopen to apply for adjustment of status, the BIA acted well within its discretion in denying the motion.

The petitioner, a Brazilian citizen, entered the United States in September 1999, but did not depart when his visa expired. When DHS placed him in removal proceedings in 2004, he obtained a series of continuances on the basis of his pending application for a

labor certification. In 2006, the IJ declined to further continue the case and ordered petitioner removed. The BIA affirmed. In June 2008, petitioner timely moved to reopen his proceeding proffering the notice of an approved employment-based third preference "other worker" immigrant visa petition, with a priority date of May 24, 2007. The BIA denied the motion finding that the "other worker" visa is not current and only those with a priority date of January 15, 2003, were being processed.

**Petitioner had failed to demonstrate one of the threshold requirements for reopening, namely that he was qualified for adjustment of status.**

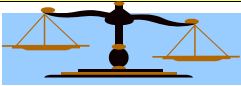
The court agreed, holding that petitioner had failed to demonstrate one of the threshold requirements for reopening, namely that he was qualified for adjustment of status. The court held that "because the visa was not current at the time petitioner filed his motion to reopen the Board did not abuse its discretion in denying the motion." The court rejected petitioner's argument that he nevertheless qualified for adjustment of status because he would be eligible for a visa at some future date.

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### ■ First Circuit Finds No Jurisdiction To Consider Petitioner's Motion To Reopen Removal Proceedings Based On Equitable Tolling Of Time And Numerical Limitations

In *Neves v. Holder*, 568 F.3d 41 (1st Cir. 2009) (Lynch, Toruella, Ebel) (*per curiam*), the First Circuit held that it lacked jurisdiction to review the BIA's denial an untimely and number-barred motion to reopen removal proceedings. Petitioner filed his second motion to reopen so that he could apply for adjustment under INA § 245(i), claiming that the numeric and temporal restrictions in motions to reopen

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should be equitably tolled due to the ineffective assistance of his prior counsel. The BIA denied reopening for lack of due diligence.

The court declined to rule whether the statutory provision limiting motions to reopen is subject to equitable tolling. Even if it were, said the court it would be unavailable to a party who failed to exercise due diligence. The court then held that it lacked jurisdiction to review the decision pursuant to 8 U.S.C. § 1252(a)(2)(B)(i) & (D) because the BIA had made a factual determination of lack of due diligence and there thus was no issue of law or a constitutional claim raised in its decision. The court further concluded that it lacked jurisdiction over the BIA's decision to not exercise its authority to *sua sponte* reopen.

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### ■ Withholding Applicant Failed To Establish A Clear Probability Of Persecution Where Neither She Nor Her Immediate Family Were Ever Personally Harmed

In *Pangemanan v. Holder*, 569 F.3d 1 (1st Cir. 2009) (*Lynch*, Selya, Stahl), the First Circuit held that substantial evidence supported the conclusion that the applicant for withholding did not meet her burden of establishing a clear probability of future persecution if returned to Indonesia where she, her husband, and her daughters were never personally harmed or mistreated on account of their Christian religion. The court also found that petitioner's allegations of a series of isolated incidents involving others were not sufficient to establish systemic mistreatment indicative of past persecution or a clear probability of future persecution. Moreover, the court noted the fact that petitioner's family "continued to live safely in Indonesia undermines her claim that she faces a clear probability of persecution." The court declined to review

petitioner's untimely filed asylum application.

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### THIRD CIRCUIT

#### Third Circuit Holds Adverse Credibility Determination Not Supported By Substantial Evidence

In *Issiaka v. Att'y Gen. of the United States*, \_\_\_ F.3d \_\_\_, 2009 WL 1620386 (3d Cir. June 11, 2009) (*McKee*, Nygaard, Michel), the Third Circuit held that the IJ and the BIA's adverse credibility determination based on the asylum applicant's lack of specificity about his head wounds, his failure to mention medical treatment for those wounds, and his lack of corroboration, was not supported by substantial evidence.

The petitioner, a citizen of Cote d'Ivoire, allegedly entered the United States in December 2003, as a stow-away aboard a cargo ship. He affirmatively applied for asylum on December 13, 2004, but USCIS denied the application and served petitioner with a notice to appear for a removal hearing before the IJ. Petitioner claimed that he had been imprisoned in a military camp and beaten by government soldiers because his father had worked as a chauffeur for General Robert Guei, Cote d'Ivoire's deposed military leader. He claimed that they beat him on his head. First, the IJ determined that petitioner could not establish that he had filed for asylum within one year of his arrival. Second, the IJ then denied withholding of removal because he determined that petitioner had given inconsistent testimony regarding his head wounds and because he failed to mention any medical treatment for those wounds in his asylum applica-

tion, and because of the absence of corroboration. The BIA affirmed.

The court found that the reasons given by the IJ and BIA to justify rejecting petitioner's testimony were not supported by substantial evidence. The court reviewed the transcript of petitioner's testimony regarding his head wound and concluded that it was "not the least bit apparent what

**The court found that the transcription problems were so prevalent that it could not intelligently review the record.**

additional explanation or description the IJ or the Board thought that [petitioner] could provide." The court noted that the IJ had examined petitioner's head and had acknowledged that he had scars and found petitioner's failure to mention in his application what medical treatment he had received an "exceedingly minor omission."

The court also found that the transcription problems were so prevalent that it could not intelligently review the record. The court noted that petitioner did not object to the translation problems and that the IJ although aware of the problems elected to continue with the hearing. The court declined to rule on the IJ's remaining justification for finding petitioner not credible and remanded the case to ensure a better interpretation if the BIA determined that further development of the record would be necessary.

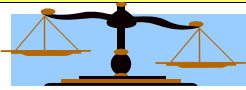
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### FOURTH CIRCUIT

#### ■ Fourth Circuit Holds That The Child Status Protection Act Does Not Apply To Haitian Applicants For Adjustment Of Status

In *Midi v. Holder*, 566 F.3d 132

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(4th Cir. 2009) (*Motz, Micheal, King*), the Fourth Circuit held that under the REAL ID Act it had jurisdiction to address constitutional or legal questions regarding an alien's eligibility for adjustment of status under the Haitian Refugee Immigration Fairness Act (HRIFA). The petitioner, who sought benefits under the Child Status Protection Act (CSPA), challenged the BIA's determination that the CSPA did not apply to aliens seeking relief under HRIFA. The government contended, *inter alia*, that the court lacked jurisdiction to review the BIA's determination.

The court noted that HRIFA provides, *inter alia*, that "a determination by the Attorney General as to whether the status of any alien should be adjusted under [HRIFA] . . . shall not be subject to review by any court." The court also noted, however, that it retained jurisdiction under the REAL ID Act to review a constitutional claim or a question of law, and held that petitioner's claim presented a pure question of law because she was raising the question of whether the age-out protection under the CSPA applied to HRIFA beneficiaries. The court also held that petitioner also raised a constitutional claim when she challenged on equal protection basis the BIA's interpretation that the benefits of CSPA did not apply to HRIFA applicants. The court then applied the *Chevron* analysis and after finding that the statute was silent on this question, deferred to the BIA's reasonable interpretation that the CSPA did not apply to aliens seeking relief under HRIFA.

The court further held that the denial of CSPA benefits to HRIFA applicants did not violate equal protection "because Congress has plenary power over immigration and naturalization and may permissibly set immi-

gration criteria based on an alien's nationality." "We cannot say that Congress decision to deny CSPA protection to HRIFA applicants lacks any rational basis," conclude the court.

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### FIFTH CIRCUIT

#### ■ Fifth Circuit Holds That Second Possession Offense Under State Law That Could Have Been Punished As A Felony Under Federal Law Is An Aggravated Felony.

**The court held that the denial of CSPA benefits to HRIFA applicants did not violate equal protection "because Congress has plenary power over immigration and naturalization."**

In *Carachuri-Rosendo v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1492821 (5th Cir. May 29, 2009) (*Jones, King, Elrod*), the Fifth Circuit held that a second state possession offense that could have

been punished as a felony under federal law qualified as an aggravated felony under INA § 101(a)(43)(B). The court noted that the underlying decision of the BIA, *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (*en banc*), properly followed Fifth Circuit law, but in other circuits would have required that the second possession offense be prosecuted under a state recidivism law that corresponds to a federal recidivism law in order for the crime to fall within § 101(a)(43)(B).

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#### ■ Fifth Circuit Concludes That Totality Of Circumstances Established That The Alien Was Not Credible

In *Wang v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1519805 (5th Cir. June 2, 2009) (*Jones, Higginbotham, Haynes*), the Fifth Circuit held that with the passage of the REAL ID Act, Congress intended to provide more discretion to

IJs to determine witness credibility. The court was not persuaded by petitioner's claim that she could not understand the immigration court's interpreter, and left undisturbed the IJ's conclusions that petitioner feigned problems to avoid probing questions about inconsistencies in her story. The court further denied petitioner's claim of IJ bias.

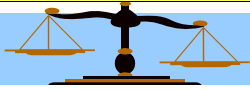
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#### ■ Fifth Circuit Holds That Immigration Judge Abused His Discretion In Denying Further Continuance Pending Adjudication Of Immediate Relative Petition

In *Wu v. Holder*, 571 F.3d 467 (5th Cir. 2009) (*Jolly, Prado, Southwick*), the Fifth Circuit held that the IJ abused his discretion in denying petitioner's request for a third continuance where his wife had filed an I-130 visa petition which was pending before USCIS, because the denial was based solely on the length of time it was taking to process the petition. The court relied on the recent BIA decision in *Matter of Hashmi*, I&N Dec. 785 (BIA), where the BIA held that an IJ cannot rely solely on timing concerns to deny a continuance when a prima facie approvable I-130 is pending. The court noted the government's assertion that petitioner had not submitted any evidence that he had a bona fide marriage to a U.S. citizen, but concluded that the issue was not addressed by either the IJ and the BIA, which instead relied solely on concerns regarding the length of time it was taking to process the I-130. Accordingly, the court remanded the proceedings for consideration of the factors for analyzing such continuance motions under *Matter of Hashmi*. At oral argument, the parties agreed, and the court so ruled, that notwithstanding petitioner's removal to China, the case was not moot.

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### SEVENTH CIRCUIT

#### ■ Seventh Circuit Upholds Determination That Sexual Misconduct With A Minor Under Indiana Criminal Law Constitutes Sexual Abuse Of A Minor

In *Gaiskov v. Holder*, 567 F.3d 832 (7th Cir. 2009) (Bauer, *Flaum*, Kapala), the Seventh Circuit held that a violation of an Indiana criminal statute prohibiting touching a minor for a sexual purpose constituted sexual abuse of a minor pursuant to INA § 1101(a)(43)(A). The court rejected the alien's argument that sexual abuse of a minor required harm to befall the minor or necessarily involved the touching of a specific sexual part of the body. The court said that touching, let alone the touching of sexual body parts, is not required for a crime to be classified as "sexual abuse of a minor." Moreover, it said, the Indiana statute requires the government to prove that the adult touched or fondled the child with "the intent to arouse or satisfy the sexual desires of either the child or the older person." "Because the statute requires specific intent, purely innocuous touching is not criminalized," said the court.

The court also concluded that its previous determination that the same Indiana statute did not constitute sexual abuse of a minor for criminal law purposes was not applicable in the immigration context because the BIA's broad definition of sexual abuse of a minor set forth in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), was owed deference.

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#### ■ An Alien In Exclusion Proceedings Is Ineligible For Cancellation Of Removal

In *Wu v. Holder*, 567 F.3d 888 (7th Cir. 2009) (Easterbrook, *Kanne*, Williams), the Seventh Circuit held that petitioner was not eligible for suspension of deportation or cancellation of removal because he was subject to an exclusion proceedings prior to the IIRIRA's effective date of April 1, 1997. The petitioner, a citizen of the PRC, was detained and placed in exclusion proceedings upon his attempted entry in New York on March 27, 1992. When he failed to appear at his hearing, he was ordered removed in absentia. Ten years later, in 2002, he filed a motion to reopen claiming that he had never received notice of the hearing. The IJ "most reluctantly" granted the motion. At a new hearing in Chicago, where his case was transferred, the IJ found petitioner ineligible for suspension and cancellation but continued the case to allow petitioner to ask DHS to "repaper" his case. DHS declined and, in 2007, petitioner was found statutorily ineligible for suspension and cancellation because he was in exclusion proceedings. The BIA affirmed that decision.

The court agreed with the BIA that petitioner was statutorily ineligible for cancellation. It found that the IIRIRA provisions apply prospectively except for two narrow exceptions, § 309(c)(2) and (c)(3). The court concluded that the alien waived his argument that § 309(c)(2) applied, but even if this argument was properly raised, it would still be unsuccessful because petitioner had an evidentiary hearing.

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### EIGHTH CIRCUIT

#### ■ Courts Retains Jurisdiction To Review Whether The BIA Properly Applied The Law To The Facts

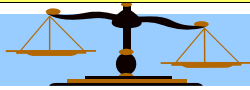
In *Ibrahimi v. Holder*, 566 F.3d 758 (8th Cir. 2009) (*Melloy*, Benton, Magnuson (sitting by designation)), the Eighth Circuit held that eligibility for discretionary relief is a question of law or the application of law to facts, and the court has jurisdiction to review the BIA's decision to deny the waiver on the basis that the alien had failed to establish a good-faith marriage.

The petitioner, a Tunisian citizen, was granted conditional permanent resident status on the basis of his marriage to a U.S. citizen. That marriage, however, ended in a divorce prompting USCIS to notify petitioner of its intent to terminate the conditional permanent resident status. Petitioner unsuccessfully sought to waive the joint-filing requirement and eventually was placed in removal proceedings where the issue was relitigated. The IJ denied the request relying principally on the testimony of petitioner's former girlfriend who apparently had alerted DHS about petitioner's unlawful status. The BIA affirmed the denial of the waiver request and found that petitioner's marriage was not a good-faith marriage on the testimony of petitioner's girlfriend.

On appeal the court determined that because the IJ had not rendered an explicit adverse credibility finding, it would treat petitioner's testimony as credible. The court then held that the BIA had properly placed the burden on petitioner to show that he had entered into the marriage in good faith. The court then determined that it had jurisdiction to review the waiver denial "because the question of whether a marriage was entered into in good faith is a 'predicate legal

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**The court rejected the alien's argument that sexual abuse of a minor required harm to befall the minor or necessarily involved the touching of a specific sexual part of the body.**



## Summaries Of Recent Federal Court Decisions

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question' that amounts to a 'nondiscretionary determination underlying the denial of relief.'" The court distinguished two of its own precedents to the contrary by noting that the waiver denials were premised on purely factual determinations. Here, however, explained the court, petitioner was challenging whether the BIA properly applied the law to the facts. The court then upheld the BIA's determination that petitioner failed to meet the legal standard of what constitutes a good-faith marriage. Finally, the court agreed with the government's view that petitioner could not claim a due process violation because he had no liberty interest in obtaining the discretionary relief from removal.

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### NINTH CIRCUIT

#### ■ Ninth Circuit Holds That A Parent's Lawful Permanent Resident Status May Be Imputed To Her Child

In *Escobar v. Holder*, 567 F.3d 466 (9th Cir. 2009) (Farris, Graber, *Wardlaw*), the Ninth Circuit overturned the BIA's decision in *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), and held that the rationale of *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), extends to allow a parent's lawful permanent resident status to be imputed to an unemancipated minor child residing with that parent, for purposes of cancellation of removal under INA § 240A(a)(1). However, at the time the court issued its decision, the alien no longer had a final order of removal as the BIA had reopened her case on April 21, 2009. Therefore, on June 1, 2009, the Government filed a petition for panel rehearing requesting that the court vacate its judgment, withdraw its opinion, and dismiss the petition for review for lack of jurisdiction.

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#### ■ Ninth Circuit Holds That A Parent's Physical Presence Cannot Be Imputed To Minor Child Under NACARA.

In *Ramos-Barrrios v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1813469 (9th Cir. Jun. 26, 2009) (Farris, Graber, *Wardlaw*), the Ninth Circuit held, in an issue of first impression, that the continuous physical presence requirement under section 203 of NACARA cannot be satisfied by imputation and that a derivative applicant must personally satisfy that requirement. The court also upheld the BIA's denial of asylum finding that petitioner who claimed persecution based on his refusal to join a gang was not a member of a particular social group and failed to show persecution on account of a protected ground.

The petitioner, a Guatemalan citizen, entered the U.S. unlawfully on December 18, 2001 and was shortly thereafter placed in removal proceedings. Petitioner then applied for asylum claiming that he had left his home county because of his refusal to join a gang. He also applied for special rule cancellation of removal under section 203 of NACARA. The IJ denied all forms of relief and the BIA adopted and affirmed that decision.

The court held, following its recent decision in *Ramos-Lopez v. Holder*, that "resistance to gang membership is not a protected ground." In that case the court found that young Honduran men who have been recruited by gangs but refuse to join do not constitute a particular social group. The court found petitioner's claim indistinguishable from that raised in *Ramos-Lopez*. The court also found that petitioner had not presented any evidence to indicate that he was politically or ideologically opposed to the ideals by the gang that recruited him, or that the gang im-

puted to him any particular political belief. Accordingly, the court affirmed the denial of asylum and withholding because petitioner failed to show persecution on account of a protected ground.

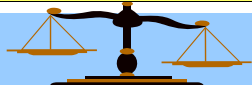
The court then considered petitioner's contention that he was eligible for special rule cancellation under section 203 of NACARA. Preliminarily the court held that it had jurisdiction under the REAL ID Act to consider the issue, notwithstanding the jurisdictional bar under IIRIRA 309(c)(5)(C) (ii) as amended by section 203(b) of

NACARA, because the dispositive facts were undisputed and therefore it could consider whether the BIA had properly applied the law. The court then determined that the BIA had erred in concluding that petitioner had failed to satisfy one of the threshold requirements for relief.

**The court held, following its recent decision in *Ramos-Lopez v. Holder*, that "resistance to gang membership is not a protected ground."**

The court found that petitioner had properly applied for and was eligible under 8 C.F.R. §1240.61(a)(4) as the child of someone who is applying for NACARA. Petitioner's father had been granted NACARA relief in 2004 and petitioner qualified as his child under INA §101(b)(1). One of the requirements of special rule cancellation is that the applicant must establish 7 years of continuous physical presence in the United States. Petitioner did not personally meet this requirement. He argued instead, that his father's physical presence should be imputed to him for purpose of meeting the 7-years requirement. The BIA rejected petitioner's argument in an unpublished opinion. The court noted that unpublished opinions are given *Skidmore* deference but here, because the BIA did not provide any reasoning for reject-

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ing imputation, the court would review the issue de novo. The court noted that there were analogous precedents where a parent's physical presence had been imputed to a minor child, particularly under former INA § 212(c), but distinguished those cases "because the minor child either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent on his parents." By contrast, said the court, "the definition of 'physical presence' does not require a specific 'status, intent, or state of mind.'" The petitioner here, had not lived in the U.S. for almost his entire life when he applied for NACARA and unlike the aliens in the other case, he had no additional legal hurdles to clear beyond mere presence, said the court. Additionally, the court determined that the legislative history of NACARA did not support imputation. Accordingly, the court found petitioner ineligible for relief under NACARA.

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### ■ Ninth Circuit Affirms That Asylee Status Is Not Retained Upon Adjustment Of Status To Lawful Permanent Resident

In *Robleto-Pastora v. Holder*, 567 F.3d 437 (9th Cir. 2009) (*Callahan*, Beezer, Gould), the Ninth Circuit concluded that an asylee who adjusted status to lawful permanent resident did not retain the status of "asylee" after his lawful permanent resident status was terminated as a result of a criminal conviction. The court concluded that INA § 208(c)(3) does not require the formal termination of asylee status prior to removal, and that because certain grounds for removal are not listed as grounds for termination of asylee status, the adoption of the alien's argument would effectively mean that certain asylees would never be removable despite their commission of crimes.

The court also rejected petitioner's argument that he was entitled to seek relief from removal by "re-adjusting" his status to lawful permanent resident under INA § 209(b). The BIA had determined that petitioner retained his LPR status, not asylee status, and as such, could not avail himself of §§ 209(b) and (c). "We decline to read section 209(b) as providing asylees who have acquired LPR status with additional avenues for avoiding removal that are otherwise foreclosed to similarly situated refugees," said the court.

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### ■ Ninth Circuit Holds That Conviction Under State Law Criminalizing Lewd And Lascivious Acts On A Child Under 14 Is An Aggravated Felony

In *United States v. Medina-Villa*, \_\_ F.3d \_\_, 2009 WL 1758742 (9th Cir. June 23, 2009) (*Pregerson*, Graber, *Wardlaw*), the Ninth Circuit held that a conviction under California Penal Code section 288(a), which criminalizes lewd and lascivious acts on a child under the age of 14, was an aggravated felony because it constituted sexual abuse of a minor. The court further determined that its decision in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), "in no way undermine[d] [this] conclusion."

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### ■ Ninth Circuit Holds That Immigration Judge Cannot Delegate Duties To Government Attorney

In *Pangilinan v. Holder*, 568 F.3d 708 (9th Cir. 2009) (*Reinhardt*, Noonan, McKeown), the Ninth Circuit reversed the decision of the BIA denying asylum, withholding, and CAT, and also denying petitioner's motion to

reopen. The court preliminarily noted that an IJ has an obligation, especially where an alien is pro se, to scrupulously and conscientiously probe into, inquire of, and explore all relevant facts. This obligation is founded on his statutory duty under INA § 240(b)(1) to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses," explained the court.

The court then found, without describing the underlying events, that the IJ improperly "delegated his duties to develop this unrepresented [alien's] case to the attorney for the government." "The result was to impose an unfair conflict of interest on the government and prejudicially to deprive petitioner of development of the record," said the court. Accord-

ingly, it remanded the case for a new hearing.

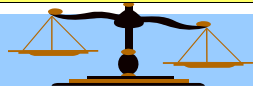
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### ■ Ninth Circuit Holds That Aliens' Right To A Fair Hearing Was Violated When Government Failed To Produce Forensic Evidence Prior To Hearing Date

In *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009) (*Hawkins*, Berzon, Clifton), the Ninth Circuit held that petitioners' right to a fair hearing was violated and their asylum applications prejudiced by the combination of the government's failure to make the author of an adverse forensic evaluation of petitioners' documents available for cross-examination or to disclose the existence of the report to petitioners until the day of their hearing, and by the IJ's insistence on proceeding in the

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**The court found, that the IJ improperly "delegated his duties to develop this unrepresented [alien's] case to the attorney for the government."**



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face of those failures.

The petitioner, her husband and two sons, claimed that they were citizens of Iran, ethnic Armenians, and Christians, who had suffered persecution in Iran because they had discussed the tenets of the Christian faith with a thirteen-year old Muslim boy. Following this incident, they were arrested, detained, and charged with attempting to convert a Muslim to Christianity, a crime punishable by death or a lengthy prison sentence. Fearful for their lives, petitioner and her husband arranged for a smuggler to help them cross the border into Turkey. From there, they boarded a plane to Mexico, where they later entered the United States.

Petitioner and her husband then affirmatively applied for asylum and must have indicated that they had entered the United States on September 26, 1999. That application was not granted for reasons not reflected in the record, and they were served with Notices to Appear charging them, *inter alia*, with having last entered on September 26, 2009. In the interim, petitioners' two sons sought to enter the United States illegally. The first son, flew from Moscow using a false passport. He was later joined by his brother who, when stopped at the border, claimed to be an Armenian citizen. At some point in the proceedings, their cases were consolidated with those of their parents.

At the asylum hearing, petitioner submitted documents to show that she was born in Iran, including a photocopy of her birth certificate, and that she was member of the Armenia apostolic church. She also submitted the original birth certificate of one of her sons. These documents, except the photocopied ones, were forwarded to DHS'

forensic laboratory for analysis. Their report indicated that the documents were fraudulent. Because the report was not provided to petitioner prior to the hearing, petitioner's counsel objected to it, and because petitioner had not had an opportunity to cross-examine the author of the report.

### Petitioner's admission to the allegations in the Notice to Appear was a judicial admission rendering her arrival date undisputed.

Nonetheless, the IJ proceeded with the hearing and petitioner explained that they had paid a cousin in Iran to send the documents and had not paid attention to them. The IJ did not find petitioner credible and denied withholding and CAT on that basis. The IJ also denied the request for asylum because petitioner could not prove the date of her last arrival. The BIA adopted and affirmed the IJ's decision.

The court reversed the denial of asylum holding that petitioner's admission to the allegations in the Notice to Appear was a judicial admission rendering her arrival date undisputed. The court then held that the government's failure to provide adequate notice of the forensic reports and an opportunity to cross-examine their author denied a fair hearing to petitioners, and also denied "an effective opportunity to rehabilitate their testimony."

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### ■ Ninth Circuit Holds That A Conviction For Corporal Injury To Family A Member Is Not Categorically A Crime Involving Moral Turpitude

In *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009) (Tashima, McKeown, Gould), the Ninth Circuit held that an alien's conviction under California Penal Code § 273.5(a) - Corporal Injury To Spouse/Cohabitant/Former Cohabitant/Child's Parent - is not categorically a

CIMT because some of the perpetrator-victim relationships covered by § 273.5(a) are more akin to strangers or acquaintances, as interpreted by state courts, and do not necessarily trigger a CIMT. The court remanded so the BIA could conduct a modified categorical analysis.

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### ■ Ninth Circuit Holds That Conceding Alienage Does Not Constitute Ineffective Assistance of Counsel

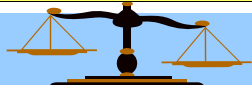
In *Torres-Chavez v. Holder*, 567 F.3d 1096 (9th Cir. 2009) (McKeown, Ikuta, Block), the Ninth Circuit held that an alien was not deprived of due process when his counsel conceded his alienage. The court held that an attorney in counsel's position "could have reasonably made the tactical decision to concede his client's alienage" and to seek affirmative relief rather than pursue a motion to suppress. The court stated that it was not aware of any authority for the proposition "that voluntarily conceding a true fact can fundamentally undermine the fairness of a proceeding."

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### ■ On Reconsideration, The Ninth Circuit Holds That Attorneys Working On Complex Immigration Cases Are Entitled To Fees At More Than Twice The Statutory EAJA Rate.

In *Nadarajah v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1588678 (9th Cir. June 7, 2009) (Thomas, Paez; Tallman, dissenting), the Ninth Circuit held that immigration attorneys in complex cases may receive awards of attorney fees in excess of twice the hourly rate authorized by Congress. The dissent noted that, not only did the fee award exceed the hourly rate authorized by the EAJA, but it also exceeded the rate authorized by the Criminal Justice Act for handling

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## Summaries Of Recent Federal Court Decisions

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death penalty habeas cases, which are far more complex.

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### ■ Ninth Circuit Holds That An Expunged Controlled Substances Conviction Does Not Render Alien Ineligible For Cancellation Of Removal

In *Romero-Tapia v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1578506 (9th Cir. June 8, 2009) (*Pregerson*, D. W. Nelson, Thompson), the Ninth Circuit held that a controlled substances conviction that would have been eligible for expungement under the Federal First Offenders Act, and was expunged under a state rehabilitative statute, cannot serve as an "admission" of a drug offense, which would statutorily bar a finding of good moral character under INA § 101(f)(3), thus rendering the alien ineligible for cancellation of removal. The court remanded for further proceedings.

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### ELEVENTH CIRCUIT

### ■ Eleventh Circuit Holds That Alien With Two United States Citizen Children Established Changed Country Conditions In China Warranting Reopening Of Her Proceedings

In *Jiang v. United States Att'y Gen.*, \_\_\_ F.3d \_\_\_, 2009 WL 1423343 (11th Cir. May 22, 2009) (*Marcus*, Pryor, Schlesinger), the Eleventh Circuit held that the BIA abused its discretion by failing to adequately consider the alien's previously unavailable evidence that Chinese officials in her home village have increased enforcement of China's forced sterilization, one-child policy. The court disagreed with the BIA's finding that the alien experienced changed personal circumstances and not changed country conditions arising in China, and considered the case to be virtually identical

to *Li v. United States Att'y Gen.*, 488 F.3d 1271 (11th Cir. 2007). The court concluded that the alien's new evidence established prima facie eligibility for asylum and withholding of removal.

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### ■ Eleventh Circuit Holds That Spouse Of An Individual Who Underwent Forced Abortion Or Sterilization Is Not Automatically A Refugee

In *Yu v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 1457102 (11th Cir. May 27, 2009) (*Birch*, Carnes, Pryor) *per curiam*, the Eleventh Circuit held that INA § 101(a)(42)(B) did not confer automatic refugee status on an individual merely because his or her spouse underwent a forced abortion or sterilization. The court held that an applicant must establish "actual persecution" for resisting a country's coercive family planning policy. The court also rejected the alien's contention that the BIA's application of the Attorney General's decision in *Matter of J-S-* was impermissibly retroactive. The court reasoned that the BIA simply applied the Attorney General's "determination of what the law had always meant."

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### DISTRICT COURTS

### ■ District Court Issues Permanent Injunction In Class Action Lawsuit Requiring USCIS To Accept Adjustment Of Status Applications Filed Concurrently With Special Immigrant Religious Worker Visa Petition

In *Ruiz-Diaz v. United States of America*, 08-cv-1881 (W.D. Wash. June 11, 2009) (*Lasnik*), the district court entered judgment against USCIS following its March 23, 2009 order granting summary judgment to plaintiffs and invalidating the bar against

concurrent filing in USCIS's regulations. The injunction requires USCIS to accept adjustment of status applications filed concurrently with special immigrant religious worker visa petitions and grants retroactive and prospective relief to religious workers who sought or are seeking to become permanent residents. A class of religious workers seeking to adjust to permanent resident status filed suit to invalidate a USCIS regulation, alleging that the regulation was inconsistent with the governing statute, it was unconstitutional, and it violated the Religious Freedom Restoration Act. The regulation prohibited nonimmigrant religious workers from applying for permanent resident status prior to their obtaining an approved visa petition.

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### ■ District Of Nevada Partially Dismisses Lawsuit Challenging The Constitutionality Of The "Exceptional And Extremely Unusual Hardship" Standard Of 8 U.S.C. § 1229b

In *John Doe v. Mukasey*, 08-cv-457 (Nevada June 16, 2009) (*Hicks*), after a district court judge determined that the court's subject matter jurisdiction was not precluded by 8 U.S.C. § 1252(b)(9), he agreed with the government's argument that United States citizen children of alien parents have no constitutional right to live with an alien parent in the United States. The court determined that the statutory legal standard of "exceptional and extremely unusual hardship," set forth in 8 U.S.C. § 1229b, is rationally related to the legitimate government purpose of discouraging aliens from trying to circumvent the immigration statutes by entering the United States illegally to deliver their unborn children, in an effort to gain legal residence status through an American-born child.

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**EOIR: Brian O’Leary, New Chief Immigration Judge**

Attorney General Eric Holder has announced the appointment of Brian M. O’Leary as the Executive Office for Immigration Review’s (EOIR) Chief Immigration Judge. Prior to his appointment, Judge O’Leary served as an immigration judge from May 2007 to June 2009 at the Arlington, Va., Immigration Court. He served as a temporary board member on the Board of Immigration Appeals from May 2006 to May 2007 and as a deputy chief immigration judge in the Office of the Chief Immigration Judge from March 2003 to May 2006.

Judge O’Leary served as an assistant chief immigration judge from May 1994 to March 2003, during which time, from May 2000 to October 2001, he served as an acting deputy chief immigration judge. Before joining EOIR, Judge O’Leary worked for five years in numerous positions with

the former Immigration and Naturalization Service (INS) Headquarters Office of the General Counsel where he served as associate general counsel, deputy associate general counsel, and assistant general counsel. He also served with the U.S. Attorney’s Offices in the Southern District of Florida, as well as the Eastern District of Virginia, where he worked as special assistant U.S. attorney. Prior to that experience, Judge O’Leary worked as a trial attorney with the INS Miami District Office.

Judge O’Leary completed undergraduate work at Georgetown University’s School of Foreign Service in 1982, and received a juris doctorate in 1985 from the New England School of Law. He is a member of the Massachusetts and Florida state bars.

**DHS ICE: Peter S. Vincent New Principal Legal Advisor**

Peter S. Vincent has been appointed as the principal legal advisor for U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS).

Mr. Vincent joined the former Immigration and Naturalization Service in July 2002, where he served on the National Security Litigation Team in the San Francisco Office of the Chief Counsel.

In November 2006, Mr. Vincent was appointed to serve as DOJ assistant judicial attaché at the U.S. Embassy in Bogotá, Colombia. In December 2008, he was promoted to judicial attaché. In those capacities, Mr. Vincent advised DOJ, the U.S. Department of State and various law enforcement and intelligence-gathering agencies on matters concerning extradition, terrorist organizations and narco-trafficking. During his tenure at the U.S. Embassy, he coordinated nearly 500 extraditions to the United States, including the extraditions of dozens of high-profile leaders of designated For-

eign Terrorist Organizations.

Mr. Vincent graduated with high honors from the University of California at Berkeley with a bachelor of arts degree in political science. He received his law degree from the University of Virginia School of Law where he served as the editor-in-chief of the *Virginia Journal of International Law*.

**INSIDE OIL**

*(Continued from page 20)*  
 feats they did that day. Then shall those names for whom we fight, familiar in their mouths as household words – Eric the Holder; West and Osuna; Hussey, McConnell, Keener, Lawrence, and Kline – be in their flowing cups freshly remembered. This story shall the good parent teach their child; and thus Euplus shall never go by from this day to the ending of the world. But we in it shall be remembered – we few, we

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happy few, we band of brothers and sisters – for those that shed their blood with us shall be our siblings; be them never so vile. This day shall gentle their condition, and those in OIL now-a-bed shall think themselves accursed they were not there on the National Mall, and hold their pride cheap whilst any speaks that fought with us on Euplus’ day.

By James Lindhal, OIL  
 ☎ 202-305-2040

## INSIDE OIL

OIL welcomes new Trial Attorney **Todd J. Cochran**. He received his B.A. from Miami University, majoring in Political Science and Psychology, and his J.D. from Indiana University. Todd previously worked

for the Department of Justice in the National Courts section of the Civil Division. Prior to joining OIL, Todd practiced at Crowell & Moring LLP and Shulman, Rogers, Gandal, Pordy & Ecker, P.A., where he was active in

commercial litigation and real estate litigation practices.



**Todd J. Cochran**

### OIL Summer Interns Join AAG Tony West at Reception



**Stacy Paddack**, OIL's Intern coordinator, **Tony West**, Assistant Attorney General, Civil Division; **Elizabeth Chapman**; **Lindsay Corless**; **Juan Osuna**, Deputy Assistant Attorney General; **Marissa Ronk**; **Courtney Hanson**; **Kim Trinh**; **Mike Kureluk**; **David McConnell**, Deputy Director, OIL.

### OILers End Season 5-8

August 12 was the final game of your intrepid OILers. That day is called the feast of Euplus. They who outlived that day, and came safe home, will stand a tip-toe when this day is named and rouse them at the name of Euplus. They who lived that day to see old age will, yearly on the vigil, feast his neighbors and say "tomorrow is Saint Euplus." Then will they strip their sleeves and show their scars and say, "These wounds I had on Euplus' day." Old men forget; yet all shall be forgot, but they'll remember - with advantages - what

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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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