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Immigration Litigation Bulletin

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SOLICITOR GENERAL FILES BRIEF IN DUI CASE

The Solicitor General has filed a brief in ***Leocal v. Ashcroft***, No. 03-583, arguing that a conviction for driving under the influence (DUI) and causing serious bodily injury by reason of the operation of the vehicle, in violation of a Florida statute, is a crime of violence under 18 U.S.C. § 16, and consequently an aggravated felony under INA § 101(a)(43)(F).

The "use" of physical force "need not be intentional, and causing serious bodily injury by the operation of a vehicle necessarily entails the use of 'physical force' against a person."

The case involves a permanent resident alien who, on January 7, 2000, drove his car through a flashing red light in Miami and stuck another car injuring the driver and a passenger. The police officers who responded to the scene placed petitioner under arrest when he refused to take a sobriety test. The test, forcibly given later at a hospital confirmed that petitioner was intoxicated. Petitioner was then charged, *inter alia*, with two counts of driving under the influence and causing serious bodily injury by reason of the operation of the vehicle, in violation of Fla. Sta. Ann. § 316.193 (3)(c)(2). Petitioner pled guilty to the two DUI counts and was sentenced to two and a half years in prison.

In November 2000, the INS commenced removal proceedings against the petitioner on the basis that his DUI conviction constituted a crime of violence and therefore an aggravated felony under the INA. The IJ found petitioner removable as charged, and eventually the BIA, relying on *Le v. United States Attorney General*, 193 F.3d 1352 (11th Cir. 1999), dismissed the appeal. The Eleventh Circuit also applied *Le* to find that "a DUI that causes serious bodily injury to another is a crime of violence." On September 29, 2003, petitioner filed a petitioner for *certiorari* which the Court granted on February 23, 2004.

The Solicitor General argues that the Florida offense is a crime of violence under 18 U.S.C. § 16, because it "has as an element the use . . . of physical force against the person or property of another." He argues, contrary to petitioner's contentions that the "use" of physical force "need not be intentional, that causing serious bodily injury by the operation of a vehicle necessarily entails the use of 'physical force' against a person."

Section 16(a) does not mention intent, and the word "use," standing alone, does not require it. While dictionaries define "use" as the employment of something for an end or purpose, they also include definitions that do not have a volitional element. Whether "use" requires intent depends on the thing that is being used, and since physical force

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ICE's Office of the Principal Legal Advisor

Within the Department of Homeland Security (DHS), the legal program for the U.S. Immigration and Customs Enforcement (ICE) is the Office of the Principal Legal Advisor (OPLA). Under Section 442 of the Homeland Security Act, the Principal Legal Advisor represents DHS in "all exclusion, deportation, and removal proceedings." While U.S. Citizenship and Immigration Services (CIS) and U.S. Customs and Border Protection (CBP) also initiate removal proceedings, only OPLA is authorized to prosecute those cases. This year, OPLA trial attorneys expect to prosecute about 300,000 removal cases and to brief 42,000 BIA cases. They must also appear in more than 30,000 bond hearings, respond to approximately 12,000 motions to reopen, provide litigation support to the U.S. Attorney's Offices, and assist with reinstatements, administrative removals, and expedited removals. OPLA's 840 employees make it by far DHS' largest legal program.

1n addition to appearing before the Immigration Courts, OPLA provides legal advice to ICE's Assistant Secretary Michael J. Garcia, DHS General Counsel Joe Whitley, all of ICE's 36,000 operational clients at Air and Marine Operations (AMO), Detention and Removal Operations (DRO), Fed-

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can be applied either intentionally or accidentally, the term "use" in Section16(a) does not have a *mens rea* component.

Additionally, the Solicitor General contends that the Florida offense is also a crime of violence because under Section 16(b) it "is a felony . . . that, by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

The **Leocal** case is set for argument before the Supreme Court on October 12th. Other cases set for argument in October are: **Jama** on October 12th, and **Benitez** and **Martinez** on October 13th.

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Expanded Parole Authority for CBP Supervisors

Robert C. Bonner, U.S. Customs and Border Protection (CBP) Commissioner, announced on August 12, 2004, that he has afforded new discretion to CBP port directors and supervisors to grant a one-time parole to aliens who overstayed under the Visa Waiver Program, but who do not represent a threat for terrorism, criminal activity, or are likely to become economic migrants. Under the Visa Waiver Program, visitors for business or pleasure from designated countries may enter the United States for 90 days or less without having to obtain a visa. An alien who overstays his or her VWP authorized stay must obtain a visa for future visits, as does one who is granted the one-time parole.

INSIDE DHS

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eral Air Marshal Service (FAMS), Federal Protective Service (FPS), Intelligence, Investigations, and other headquarters offices. OPLA's attorneys provide operational components with legal training, representation in Equal Employment Opportunity Commission (EEOC), U.S. Merit Systems Protection Board (MSPB), and Federal Labor Relations Authority (FLRA) matters, and coordinate with the intelligence and law enforcement communities on terrorist removal cases, immigration matters, and customs enforcement. Additionally, OPLA assists OIL and the Offices of the United States Attorneys with federal litigation involving ICE.

DHS attorneys will handle over 300,000 removal cases this year.

OPLA's attorneys and support personnel are stationed at Headquarters in Washington, D.C. and in 26 Chief Counsel Offices in the field. The Headquarters Office consists of the following components: Office of Field Legal Operations, Commercial and Administrative Law Division, Customs Enforcement Law Division, Human Rights Law Division, Enforcement Law Division, National Security Law Division, Office of the Appellate Counsel, Training and Program Development Division, Knowledge Management Division, Ethics Office, and Legislative Counsel and Mission Support. Principal Legal Advisor William J. Howard is assisted by Deputy Principal Legal Advisor Barry C. O'Melinn.

Questions about OPLA operations should be directed to Special Counsel Nelson Perez at 202-514-2656.

By: Rob Fletcher, DHS
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POTPOURRI

On July 19, 2004, EOIR established the Headquarters Immigration Court (HQIC). The Court will be based at EOIR Headquarters in Falls Church, Virginia and will be staffed by two immigration judges, Charles Adkins-Blanch and David Neal. The judges will conduct hearings by video-teleconferencing and will assist other courts with their dockets. Judge Adkins-Blanch previously served as EOIR General Counsel. Judge Neal served as Special Counsel to the EOIR Director.

On August 2, 2004, DHS observed the first anniversary of SEVIS, the Student and Exchange Visitor Information System. SEVIS allows DHS and educational institutions to monitor and maintain information about foreign students and exchange visitors (F-1, M-1, and J-1 visa categories). In the program's first year, 8,737 schools and exchange visitor programs were certified to participate and more than 770,000 students and exchange visitors and more than 100,000 dependents were covered.

On August 10, 2004, DHS announced that it would extend the application of expedited removal to include aliens caught within 100 miles of the Mexican or Canadian borders if apprehended within the first 14 days in this country. This is the first extension of the expedited removal authority beyond official ports of entry. Aliens subject to expedited removal are detained and do not receive a hearing before an immigration judge unless they are found to have a credible fear of return. In addition, aliens holding border crossing cards will now be permitted to remain in the United States for up to 30 days, rather than 72 hours.

Detaining Aliens Under Special Circumstances

Tuan Thai arrived in the United States in May 1996 as a lawful permanent resident. Soon afterwards, he was convicted for punching a woman numerous times, choking her and binding her with cable around her ankles and wrists, threatening to beat her slowly until she died, and stuffing a microphone into her mouth and turning up the radio. Thai was later convicted for raping another woman over the course of several months, threatening that he would put cocaine in her vagina, harm her children, and kill her, monitoring her telephone calls, physically beating her, and calling her from jail with threats to burn down her home. After serving a prison sentence for the rape conviction, the Bureau of Immigration and Customs Enforcement (ICE) detained Thai and initiated removal proceedings, charging him with having been convicted of an aggravated felony under INA § 101(a)(42)(A). In November 2002, an IJ found Thai removable. Thai waived appeal and the removal order became final on that date.

In March 2003, because Thai could not be repatriated to Vietnam and because he posed a special danger to the public, ICE decided to continue Thai's detention beyond the expiration of the removal period, as authorized by INA § 241(a)(6) and interpreted by *Zadvydas v. Davis*, 533 U.S. 678 (2001), and corresponding regulations. In *Zadvydas*, the Supreme Court held that continued civil detention pending an alien's removal is permissible beyond a presumptively reasonable six-month period "where a special justification, such as harm threatening mental illness" outweighs the individual's constitutionally-protected interest in avoiding physical restraint. *See id.* at 690. Consistent with that decision, DOJ promulgated regulations governing determinations of whether there was a significant likelihood that an alien would be removed in the reasonably foreseeable future and whether special circumstances justified the continued detention of such aliens. *See* 8 C.F.R. §§ 1241.13, 1241.14; 66 Fed. Reg. 56967. "Special circumstances" include, among others, those situations in which an alien's release poses a special danger to the public because the alien has been convicted of a crime of violence, the alien is likely to engage in future acts of violence because of a mental disorder, and no conditions of release would reasonably be expected to ensure the safety of the public. *See* 8 C.F.R. § 1241.14(f), *et seq*.

Regulations Regarding the Continued Detention of Aliens Subject to Final Orders of Removal.

Application of the aforementioned regulation requires the coordinated efforts of three executive departments: DHS, DHHS, and DOJ. The regulation is designed specifically to identify only those aliens who, because of a mental disorder, pose a special risk of harm to the public and not just a danger to the themselves. Only after the Public Health Service (PHS), a division of the DHHS, recommends that an alien is likely to engage in future acts of violence based on a mental disorder, can ICE's Assistant Secretary, the highest-level immigration official in DHS, determine that the alien may pose a special danger to the public and authorize his continued detention. With the Assistant Secretary's written authorization, ICE files a Form I-863 with the Immigration Court having jurisdiction over the alien's custody. This action refers the matter to hearing before an IJ for review of ICE's continued detention determination. ICE bears the burden of demonstrating the alien's special dangerousness in these proceedings.

At the reasonable cause hearing (the first step in the referred matter), the alien is provided a list of free legal service providers and an interpreter, may be represented by an attorney or other representative of his choice at no expense to the government, and is allowed a reasonable opportunity to examine and present evidence and to cross-examine ICE's witnesses. During this hearing, ICE must show that there is reasonable cause to conduct a merits hearing and may offer any evidence that is material and relevant. With certain limited exceptions, the IJ must render a decision within five days of the close of the record. If the IJ finds that ICE met its burden, he or she will schedule a merits hearing to determine whether the alien's custody should be continued because his release would pose a special danger. The alien cannot appeal this decision to the BIA. If the IJ finds that ICE did not meet its burden, the IJ will dismiss the proceedings. ICE has two days to file an appeal of the dismissal. If ICE reserves appeal, the IJ's order is stayed until expiration of the time to appeal. If ICE timely appeals, the IJ's order is abated pending the BIA's final decision. However, if ICE does not timely appeal, the stay will expire. A single BIA member will decide ICE's appeal based on the record and will give the appeal expedited consideration. If the BIA finds that ICE met its burden of showing reasonable cause, the BIA will remand the case to the IJ for a merits hearing. However, if the BIA finds that ICE did not meet its burden, the BIA will dismiss the proceedings.

At the merits hearing (the second step), the alien is provided the right to cross-examine the author of any medical or mental health report that was used as a basis for a determination that the alien is specially dangerous. During this hearing, ICE must show by clear and convincing evidence that the alien should remain in custody because his release would pose a special danger to the public. The IJ may receive into evidence any material and relevant information. In making a determination, the IJ must consider the alien's prior criminal history; the alien's previous history of recidivism; evidence regarding the alien's current mental condition or personality disor-

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DETAINING ALIENS UNDER SPECIAL CIRCUMSTANCES

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der and the likelihood that the alien will engage in acts of violence in the future; and the nature and seriousness of the danger to the public posed by the alien's release; and may also consider other factors. The IJ must render a decision as soon as practicable. If the IJ determines that ICE met its burden, the IJ must order the continued detention of the alien. If the IJ determines that ICE did not meet its burden, the judge will dismiss the proceedings. Either party may appeal an adverse decision to the BIA. ICE, however, has only five days to appeal a dismissal. Like the reasonable cause hearing, if ICE reserves appeal, the IJ's order is stayed until expiration of the time to appeal; however, if ICE does not timely appeal, the stay will expire. The BIA must render a decision as soon as practicable.

Continued detention is permissible "where a special justification, such as harm threatening mental illness" outweighs the individual's constitutionally-protected interest in avoiding detention.

If an IJ or the BIA issues a final order dismissing the review proceedings, ICE shall promptly release the alien on conditions of supervision. An IJ or the BIA cannot review the conditions of release. In instances where the IJ or the BIA orders the alien's continued detention, ICE must provide ongoing, periodic review of that detention. If ICE determines that the alien is not likely to commit future acts of violence or that ICE will be able to impose adequate conditions of release, ICE must release the alien. If ICE determines that continued detention is necessary, ICE must provide written notice to the alien stating the basis for such determination, provide a copy of the evidence relied upon, and advise the alien of his right to move to set aside the prior review proceedings.

The alien may also request a review of his or her custody status because of changed circumstances, but can only do so six months after the last final order continuing his detention. The alien's request must be in writing and directed to the ICE's Headquarters Post-Order Detention Unit (HQPDU). In this case, the alien bears the initial burden of establishing a material change in circumstances such that his release would no longer pose a special danger to the public. If ICE denies the alien's request for release, the alien may file a motion with the Immigration Court to set aside the determination in the prior review proceedings. The IJ shall consider any evidence submitted by the alien or relied upon by ICE and shall provide an opportunity for ICE to respond to the motion. If the IJ determines that the alien has provided good reason to believe that, because of a material change in circumstances, releasing the alien would no longer pose a special danger, the IJ shall set aside the determination in the prior review proceedings and schedule a new merits hearing. If the IJ determines that the alien did not meet the requirements for a material change, the motion shall be denied. Neither the IJ nor the Board may *sua sponte* set aside a determination in prior review proceedings. The alien may appeal an adverse decision to the Board.

Federal Court Litigation Regarding the Continued Detention Regulations.

The Court of Appeals for the Ninth Circuit was the first, and to date, the only federal appellate court to consider whether INA § 241(a)(6), as construed by the Supreme Court in *Zadvydas*, authorizes the continued detention of an alien based on a determination that the alien's mental disorder makes him specially dangerous. *See Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004). The Ninth Circuit held that it did not, and by holding such, invalidated the regulation that governs Thai's continued detention. *See id.* at 798-99. The Ninth Circuit explained that *Zadvydas*'s "special justifications" and "harm-threatening mental illnesses" language was not a statement of what INA § 241(a)(6) authorizes, but rather was an explanation of why the Supreme Court felt it was necessary to construe the statute narrowly. *See id.* at 795. At bottom, the Ninth Circuit found that the Supreme Court only meant to allow the continued detention of aliens when "matters of national security" are implicated. *See id.* at 796.

The Government believes that the Ninth Circuit misread *Zadvydas* and erroneously invalidated a federal regulation, and has sought rehearing *en banc* of the *Thai* decision. In its rehearing petition, the Government argued that the Supreme Court in *Zadvydas* made clear that dangerous, mentally-ill aliens, like Thai, could be detained beyond the presumptively reasonable six-month removal period and that a federal regulation permitting such detention should be accorded deference. It is further pointed out that the Ninth Circuit's decision in *Thai* could have an adverse impact on public safety because it would permit the release of other dangerous mentally-ill aliens who are currently detained within that Circuit. The Ninth Circuit ordered Thai to respond to the petition for rehearing. On August 13, 2004, the case was referred to the Ninth Circuit judges to determine if the panel's decision should be given *en banc* consideration.

To date, there are approximately fifteen aliens with final orders of removal who cannot be returned to their native countries, but who have been found to pose a special danger due to their violent criminal histories coupled with a mental disorder that make future acts of violence likely. These aliens are at different points of the continued detention review process. In addition, some of these aliens have

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Summaries Of Recent Federal Court Decisions

ADJUSTMENT OF STATUS

First Circuit Holds That Alien Who Fails To Object To Admission Of Affidavit At Deportation Hearing Cannot Challenge Its Admission On Appeal.

In ***De Ocasio v. Ashcroft***, 375 F.3d 105 (1st Cir. July 14, 2004) (Torruella, Howard, Stearns), the First Circuit in a *per curiam* decision affirmed the IJ's denial of the alien's application for adjustment of status.

Relying in part on an affidavit submitted by the alien's ex-husband who refused to testify because he feared criminal prosecution, the IJ concluded that the petitioner's prior marriage to a United States citizen was fraudulent. The court found that it was unnecessary to address the alien's challenge to the IJ's admission of the affidavit because De Ocasio failed to object to the admission of the affidavit at her hearing and thus forfeited her right to complain about its admission.

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Eighth Circuit Holds That Approved Visa Petition Establishes *Bona Fides* Of Marriage.

In ***Patel v. Ashcroft***, 375 F.3d 693 (8th Cir. July 13, 2004) (*Bye*, Heaney, Smith), the Eighth Circuit reversed the Board's denial of the alien's motion to remand for adjustment of status based on her marriage to a United States citizen. The court noted that the case had a "labyrinthine procedural history," including the denial of an asylum application and appeal to the Board; a remand for adjustment of status through a visa petition filed by Patel's father who was subsequently ordered removed and the visa petition dissolved; and Patel's marriage to a United States citizen whose visa petition was granted while the case was on appeal to the Board and Patel's subsequent motion to remand.

The court determined that the Board erroneously concluded that Patel was required to support her motion to remand with evidence beyond the visa petition approval notice, and held that where DHS has approved the visa petition, the approval notice constitutes clear and convincing evidence to prove that the marriage is *bona fide*.

The Court noted that the case had a "labyrinthine procedural history."

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Eighth Circuit Rejects Equitable Estoppel Argument Where Alien Failed to Show Affirmative Misconduct.

In ***Varela v. Ashcroft***, 368 F.3d 864 (8th Cir. 2004) (Arnold, Gibson, *Riley)*, the Eighth Circuit upheld the BIA's decision finding Varela statutorily ineligible for adjustment of status and rejecting her equitable estoppel claim. Varela claimed that the INS should be equitably estopped from denying her visa petition for two reasons. First, she claimed that the INS erroneously advised her to depart the United States voluntarily while her initial visa application was pending. Second, she argued that the INS then failed to forward her adjustment application to the consular office in Mexico for processing.

In denying her claim, the court concluded that the IJ properly ordered her deported to Mexico because she could not establish that an immigrant visa was "immediately available" to her since her original visa petition was denied, and she presented no evidence that another had been filed. The court also held that Varela could not prove an equitable estoppel claim because she failed to show that a government actor committed "affirmative misconduct" in her case, as required by *Miranda*.

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ASYLUM

Eighth Circuit Sustains Denial Of Nigerian Asylum Application Based On "Pattern Or Practice" Of Persecution.

In ***Agada v. Ashcroft***, 368 F.3d 867 (8th Cir. 2004) (Wollman, Fagg, *Hansen*), the Eighth Circuit denied Agada's petition for review of the denial of asylum, withholding of removal, or protection under the CAT. Agada worked as a radio journalist for the Radio Nigeria and was an officer of the Nigerian Union of Journalists. After he reported that the government had secretly enrolled Nigeria in the Organization of Islamic States, Agada was demoted and accused of embezzlement. The IJ and the BIA denied asylum. Before the court, Agada argued that the IJ and BIA failed to analyze his case as involving a "pattern and practice" of persecution of journalists.

The Eighth Circuit concluded that the IJ clearly considered Agada's claim that journalists were persecuted by the Nigerian government, and "properly applied the pattern or practice regulation to Agada's case." The court noted that "[t]he need for evidence of personal persecution does not disappear merely because the applicant claims that he is a member of a group against whom the government has a pattern of persecution." The court also concluded that the IJ's consideration of evidence relating to the likelihood of future persecution to Agada as an individual was appropriate because the evidence of a pattern or practice of persecution against jour-

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nalists was not particularly egregious.

Seventh Circuit Affirms Immigration Judge's Adverse Credibility Finding In Nigerian Asylum Case.

In ***Balogun v. Ashcroft***, 374 F.3d 492 (7th Cir. July 1, 2004) (*Ripple*, Manion, Wood), the Seventh Circuit concluded that the IJ's adverse credibility finding, which was based in part on discrepancies between the alien's airport interview and testimony, was supported by substantial evidence. The court emphasized that multiple misrepresentations to immigration officials, which do not necessarily relate to the basis for asylum, may serve as "a factor in the credibility calculus; lying in a sworn statement is not irrelevant to credibility."

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Third Circuit Asks Congress, DOJ, and DHS To Consider "Stale Administrative Records" In Asylum Cases Where Country Conditions Have Changed After The Agency's Decision.

In ***Berishaj v. Ashcroft,*** 378 F.3d 314 (3rd Cir. August 5, 2004***)*** (*Becker*, Ambro, Greenberg), the Third Circuit reversed the denial of asylum to an ethnic Albanian from Montenegro. The court rejected the agency's adverse credibility findings, as well as the alternative, holding that country conditions had improved and the alien no longer had a well-founded fear of persecution. The court criticized the statutory scheme and the government's method of litigating and adjudicating asylum claims because they often result in judicial review of stale records. The court directed the clerk to forward its decision to Congress, the Attorney General (and others in DOJ), the Chair of the Board of Immigration Appeals, and DHS.

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Habeas review does not extend to findings of fact or exercises of discretion.

Eleventh Circuit Rejects Claim That Prison Conditions In Haiti Constitute Torture.

In ***Cadet v. Bulger,*** 377 F.3d 1173 (11th Cir. July 20, 2004) (*Hull*, Anderson, Pryor), the Eleventh Circuit concluded that habeas jurisdiction remains available to criminal aliens raising Torture Convention claims. Cadet argued that after passengers died on his father's board in Haiti, the passengers' families killed his father and would harm Cadet if he returned there. The IJ found that there was insufficient evidence to show that the passengers' families were government officials or that the Haitian government would acquiesce in the alleged torture. The IJ *sua sponte* addressed the Haitian policy of detaining returned criminal deportees and found it to be a lawful sanction. The Board affirmed, finding that although prisoner conditions in Haiti are poor, the conditions are not directed at criminal deportees and are not sufficient to show government acquiescence in torture.

Cadet sought habeas review of the denial of CAT protection. The District Court denied the petition, finding that it lacked authority to review findings of fact by the IJ and the BIA and agreeing with the administrative determinations of law.

The Eleventh Circuit noted that the scope of habeas review only extends to constitutional issues and errors of law and does not include review of administrative fact findings or the exercise of discretion. The court then affirmed the district court's decision that indefinite detention of criminal deportees in Haitian prisons is a lawful government sanction rather than torture, as that term is defined by the CAT.

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Ninth Circuit Sustains Asylum Denial To Former Romanian Military Member Subject To Extensive Police Investigation.

In ***Dinu v. Ashcroft,*** 372 F.3d 1041 (9th Cir June 18, 2004) (Wallace, *Kozinski*; Thomas, dissenting), the Ninth Circuit affirmed the IJ's denial of Dinu's application for asylum. The alien, a citizen of Romania, was arrested and taken to the local police station where police tried to force him to sign a false confession by beating him and threatening him with death. He was continually re-arrested nearly every month and he was interrogated, beaten, and threatened by police. The IJ found Dinu's testimony credible, but denied his petition because he concluded that he had not been persecuted on account of political opinion. The Board summarily affirmed.

The Ninth Circuit concluded that an inference of political persecution arises only "where there appears to be no other logical reason for the persecution at issue," but in this case, the alien offered his past duty in the military during the revolution as the reason why he was continually arrested. Additionally, the court stated that "being innocent provides no immunity from police investigation." Therefore, the court held that neither the heavy-handed and drawn-out nature of the police investigation of Dinu, nor his credible testimony of his innocence, was sufficient to give rise to the presumption that this investigation was mere pretext to persecute Dinu on account of political opinion.

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Ninth Circuit Concludes that Guatemalan Alien Subject To Gang Rape Suffered Past Persecution.

In ***Garcia-Martinez v. Ashcroft,*** 371 F.3d 1066 (9th Cir. June 14, 2004) (Thompson, Tashima, *Rawlinson*), the Ninth Circuit reversed the IJ's determination that Garcia's rape by Guatemalan soldiers was a random criminal act, and instead concluded that it was part of an orchestrated campaign to punish a village erroneously perceived as a guerilla stronghold. It found that systematically targeting a village as a whole was sufficient to compel the conclusion that the alien's gang rape by soldiers was motivated, at least in part, by imputed political opinion.

Detention of Haitian criminal deportees is "a lawful government sanction," not torture.

The court remanded to determine whether the presumption that the alien will be subjected to future persecution, triggered by the alien's ability demonstrate past persecution, was rebutted by evidence of changed country conditions, and whether the alien is eligible for humanitarian asylum. The court concluded that a DOS report on country conditions, standing alone, is not sufficient to rebut the presumption; instead the Board must undertake an individualized analysis of how the changed country conditions would affect a particular alien's claim.

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Seventh Circuit Affirms Adverse Credibility Finding In Polish Asylum Case.

In ***Korniejew v. Ashcroft,*** 371 F.3d 377 (7th Cir. June 14, 2004) (*Ripple,* Manion, Wood), the Seventh Circuit affirmed the BIA's decision denying Korniejew's application for asylum based on discrepancies in her testimony that led to a finding of incredibility.

Petitioner is a Polish citizen who alleged religious persecution on account of her religion. The IJ denied asylum because of discrepancies between her affidavit and her testimony, as well as other shortcomings in her case. The Board affirmed the IJ's decision stating that there were "material inconsistencies between her asylum application and testimony." Korniejew claimed that her testimony was credible and that the inconsistencies cited by the IJ and BIA were either illusory or negligible.

The court concluded that the failure to mention her alleged kidnapping by skinheads during her asylum hearing was significant because she contended that it was her most recent personal encounter with people threatening her, it was the only time she was held overnight, and it contributed to her decision to leave for the United States. The court further concluded that the discrepancy in her testimony as to whether she graduated from college in Poland or was expelled because she was Jewish constituted sufficient evidence to support the adverse credibility determination.

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Third Circuit Concludes That IJ Improperly Excluded Unauthenticated Documents

In ***Liu v. Ashcroft***, 372 F.3d 529 (3rd Cir. June 24, 2004) (Sloviter, *Alito*, Oberdorfer), the court reversed the Board's denial of a couple's application for asylum and withholding of deportation. The petitioners are citizens of China who claimed persecution on account of their Christian faith and the fact that the wife had been forced to undergo two abortions. Petitioners argued that the Chinese government refused to certify the abortion certificates pursuant to 8 C.F.R. § 287.6, however, the IJ required their certification and effectively excluded them at trial. The IJ denied asylum, finding the petitioners not credible due to internal inconsistencies in their testimony. The Board summarily affirmed.

The Third Circuit held that the regulation requiring the certification of foreign official records was not an absolute rule, so the records could not be excluded based solely on an applicant's failure to comply with the regulation. The Court agreed with the Lius that the IJ improperly applied § 287.6, and that if the evidence had been properly introduced, the IJ might have found the petitioners to be credible.

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Eighth Circuit Affirms Adverse Credibility Finding Based On Discrepancies Between Asylum Interview And Hearing Testimony.

In ***Prokopenko v. Ashcroft,*** 372 F.3d 941 (8th Cir. June 16, 2004) (*Murphy,* Heaney, Magill), the Eighth Circuit affirmed the IJ's denial of Prokopenko's applications for asylum, withholding of removal, and CAT protection as he had not demonstrated a well-founded fear of future persecution on account of his religion or ethnicity in the former Soviet Georgia.

Petitioner claimed that he was stopped twice by police and taken to the station where he was beaten because he was Russian. The IJ found much of the alien's testimony incredible as it was inconsistent with what he previously told an asylum officer. The IJ also found that it was unlikely that Prokopenko would be persecuted on account of his religion because neither he nor his relatives who still live in Georgia have ever been active in

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the church. The Board summarily affirmed.

The court concluded that the IJ properly referred to the asylum officer's report as only a record of the statements the alien made at the interview, and that an asylum officer's adverse credibility determination of an alien deserves deference. Therefore, the court held there was substantial evidence to support the IJ's finding that the alien did not demonstrate a well-founded fear of future persecution.

Seventh Circuit Holds That A Beating Which Causes A Miscarriage Constitutes Persecution.

In ***Vladimirova v. Ashcroft***, 377 F.3d 690 (7th Cir. July 26, 2004) (Cudahy, *Ripple*, Williams), the Seventh Circuit held that the IJ incorrectly ruled that, in order to constitute persecution, an act must involve a threat to the life or freedom of the victim. The court noted that persecution consists of more than harassment, but need not constitute threats to life or freedom. The court further held that the beatings of the alien, which were so severe as to cause her to miscarry, rose to the level of persecution.

[A] beating so severe that it caused a miscarriage . . . certainly rises above the level of mere harassment and qualifies as proof of past persecution.

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BIVENS CLAIMS

Ninth Circuit Reverses District Court, Holding That Immigration Officers Sued Under Bivens Are Entitled to Qualified Immunity.

In ***Wong v. INS***, 373 F.3d 952 (9th Cir. June 25, 2004) (Goodwin, Hug, *Berzon*), the Ninth Circuit affirmed in part and reversed in part a district court's denial of an INS motion to dismiss. Petitioner, a citizen of Hong Kong and a Tao minister who later became the head of the Wu-Wei Tien Tao Association, applied for permanent residence in 1992 and 1994. In 1999, she travelled to Hong Kong. Upon her return, she again applied for adjustment of status, but was arrested by INS officers who denied her application and placed her in detention where she was searched and allegedly denied vegetarian meals. Petitioner sued the INS officials and the U.S. for damages for constitutional violations under *Bivens* and violations of the Religious Freedom and Restoration Act (RFRA). She claimed that the INS officials violated the First and Fifth Amendments to practice her religion and associate with others, the RFRA, and the Fourth and Fifth Amendments to be free from unreasonable searches and seizures. The government filed a motion to dismiss for lack of subject matter jurisdiction, failure to state a claim, and qualified immunity.

The Ninth Circuit concluded that the detention-related claims were insufficient to establish a constitutional violation and must be dismissed for failure to state a claim. It also concluded that Wong's due process claim must be dismissed because the INA does not establish any liberty interest in the parole process protected by the Fifth Amendment because the process is within the discretion of the Attorney General. The court also held that Wong failed to state a claim under RFRA because she failed to allege that any defendants were involved with the detention conditions. As the Fifth and Fourteenth Amendments protect all persons present in the U.S., the court held that Wong's allegations of invidious discrimination from the INS officials' actions, with respect to the revocation of her temporary parole status and the rejection of her adjustment of status applications, were sufficient to make a Fifth Amendment discrimination claim.

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CONVENTION AGAINST TORTURE

Eleventh Circuit Holds That BIA Properly Denied Convention Against Torture Claim Where Peruvian Police Did Not "Acquiesce" In Harm Inflicted By Terrorist Group.

In ***Reyes-Sanchez v. Ashcroft,*** 369 F.3d 1239 (11th Cir. May 12, 2004) (*Tjoflat*, Marcus, Musgrave), the Eleventh Circuit affirmed the BIA's denial of CAT protection, finding that Reyes failed to demonstrate that the Peruvian government would acquiesce in the harm he alien feared upon return. Reyes claimed that a Peruvian terrorist group, the MRTA, was persecuting his family and, although the police investigated, they never apprehended anyone.

The IJ denied the alien's request for asylum but granted him CAT withholding. The BIA sustained the INS appeal and the court affirmed because, even assuming that Reyes had proved he would suffer harm in Peru, he failed to demonstrate that the government would acquiesce in the harm. Although the Peruvian police were unsuccessful in apprehending those who robbed and assaulted Reyes, the court concluded that this did not constitute "acquiescence." Moreover, the court held that the BIA was entitled to "rely heavily" on DOS reports stating that the Peruvian government actively combats the terrorist group.

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CRIMES

Eighth Circuit Holds That Conviction Under Minnesota Terroristic Threat Statute Is CIMT.

In ***Chanmouny v. Ashcroft***, 376 F.3d 810 (8th Cir. July 16, 2004) (Murphy, Smith, *Colloton*), the Eighth Circuit affirmed the IJ's conclusion that the alien's conviction for terroristic threats under Minnesota Statute 609.713, subd. 1, was a crime involving moral turpitude requiring a vicious motive or evil intent. Chamouny argued that the criminal statute was divisible, that he was convicted under the portion requiring only recklessness, and thus was not convicted of a crime involving moral turpitude.

The Eighth Circuit found that the record of conviction established that Chanmouny acted with "the purpose to terrorize" and his crime did involve moral turpitude. The court then agreed with the Fifth and Ninth Circuits that the record of conviction, including a transcript of the plea colloquy, may be reviewed to determine whether an alien was convicted of a crime involving moral turpitude under a divisible statute.

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First Circuit Holds That It Has Jurisdiction to Consider Petition Where Alien Admitted Committing Aggravated Felonies, But Was Not Found Removable On That Basis.

In ***Hernandez-Barrera v. Ashcroft***, 373 F.3d 9 (1st Cir. June 9, 2004) (*Lipez*, Campbell, Stahl), the First Circuit held that it had jurisdiction to consider the petition for review and that the Board erred by failing to make a finding as to the alien's claim of past persecution when evaluating his eligibility for asylum. Hernandez was charged with deportability for entering the United States without inspection, and subsequently applied for asylum.

> An asylum officer's adverse credibility determination deserves deference.

The court held that the Board's finding that the alien lacked a well-founded fear of future persecution was insufficient to demonstrate his ineligibility for asylum because it did not consider whether he suffered past persecution nor did it engage in an "individualized analysis" of the impact of changed country conditions on the alien. Hernandez claimed persecution in El Salvador during the 12-year civil war, however, the war has ended and the country is now rebuilding.

Although the alien admitted committing several aggravated felonies, he was not charged with deportability on that basis, and the final order of deportation was not based on the alien's aggravated felony convictions. The court stated that it had jurisdiction to review the case because IIRIRA does not bar judicial review of a final order of deportation or exclusion that is not "by reason of" a covered criminal offense.

Ninth Circuit Holds That Court Cannot Look Beyond the Record of Conviction to Determine Whether the Alien's Crime Was A Crime of Domestic Violence

In ***Tokatly v. Ashcroft***, 371 F.3d 613 (9th Cir. June 14, 2004) (*Reinhardt,* Silverman, Clifton), the Ninth Circuit vacated the order of removal and granted the petition for review of a decision that found the alien removable for having been convicted of a crime of domestic violence. The government acknowledged that the "violence" part of domestic violence was limited by *Taylor*, but argued that the IJ should be able to rely on evidence outside of the record to determine "whether the injury caused by the defendant in fact involved a "domestic" offense under § 237(a)(2)(E)(i)."

The court held that it may not look beyond the record of conviction to determine whether an alien's crime was one of domestic, but must adhere to a categorical or modified categorical methodology in order to determine whether an alien's prior conviction constitutes a basis for removal. The court concluded that the IJ wrongfully relied on testimony outside of the conviction record, including the alien's admission to the domestic nature of the crime, to determine whether the crime was domestic violence.

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Fifth Circuit Holds That Oklahoma Sexual Battery Conviction Is Crime Of Violence

In ***Zaidi v. Ashcroft***, 374 F.3d 357 (5th Cir. June 21, 2004) (Jolly, Davis, Jones), the Fifth Circuit, in a *per curiam* opinion, held that an alien's conviction for sexual battery under Oklahoma law constituted a "crime of violence" within the meaning of 8 U.S.C. § 1103(a)(43), and thus an aggravated felony under 8 U.S.C. §1227(a)(2)(A)(iii). Zaidi, a native and citizen of Pakistan, pled *nolo contendere* to two counts of sexual battery in Oklahoma for inappropriately touching two women through their clothes while the women were either passed out or partially awake in a dorm room after drinking. Petitioner argued that the Oklahoma sexual battery statute may be violated in several ways and he did not use any "destructive or violent force," so his actions should not be considered a "crime of violence."

The court concluded that the defi-

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nition of sexual battery under Oklahoma law creates a "substantial risk that physical force may be used against another" because it "presupposes a lack of consent," so it "necessarily carries with it a risk of physical force." Therefore, the offense of sexual battery is a "crime of violence" and an "aggravated felony," and the court lacked jurisdiction to review the final removal order.

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HABEAS CORPUS

First Circuit Holds That Equitable Tolling May Delay § 2244(d)(1) Habeas Limitations Period, But Reverses District Court's Application of Equitable Tolling To Alien's Petition.

In ***Neverson v. Farquharson,*** 366 F.3d 32 (1st Cir. 2004) (*Lynch*, Lipez, Howard), the First Circuit held that 28 U.S.C. § 2244(d)(1), which imposes a one year limitation period on habeas corpus petitions by state prisoners, is subject to the defense of equitable tolling. The presumption that equitable tolling is available is rebutted in principally two situations: deadlines that define the court's jurisdiction, and where there are other indications that Congress intended to preclude it. The court concluded, as have all other circuits which have addressed this question, that neither exception applied to petitioner's case.

Nevertheless, the court concluded that the district court abused its discretion in resorting to equitable tolling in this case because neither the district court's decision to dismiss, rather than stay, the alien's mixed petition, nor its failure to advise the alien of his options under *Rose v. Lundy* actually prevented the alien from filing a timely habeas petition. Before AEDPA, an alien was not under an obligation to act promptly in seeking habeas relief; however, "one of AEDPA's main purposes was to compel habeas petitions to be filed promptly after conviction and direct review." In addition, the court emphasized that there was no merit to the alien's underlying habeas claims.

"[W]e believe that the risk that physical force will be used to complete the offense of sexual battery is substantial."

JURISDICTION

Seventh Circuit Holds That The Fugitive Disentitlement Doctrine Applies To Immigration Cases

In ***Sapoundjiev v. Ashcroft***, 376 F.3d 727 (7th Cir. July 22, 2004) (*Easterbrook*, Manion, Kanne), the Seventh Circuit joined the Second, Third, and Ninth Circuits in holding that the fugitive disentitlement doctrine applies to immigration cases. The aliens were granted a temporary stay of removal, but failed to surrender themselves pursuant to a bag-and-baggage letter. The court rejected the claims that: (1) because immigration officials knew where the family lives, they were not fugitives, and (2) aliens are entitled to ignore bag-and-baggage letters because immigration custody prevents meaningful review of their appellate arguments. The court vacated the stay of removal and dismissed the petition for review.

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MOTIONS TO REOPEN OR RECONSIDER

Seventh Circuit Reviews Reopened Immigration Proceedings Under IIRIRA's Transition Rules.

In ***Bronisz v. Ashcroft***, 378 F.3d 632 (7th Cir. August 5, 2004) (Cudahy, *Ripple*, Williams), the Seventh Circuit held that although immigration proceedings were reopened and a hearing was held on the alien's application for suspension of deportation during the period that the permanent rules had become effective, the transition rules controlled the court's review. The court concluded that a grant of reopening simply vacates the order and reinstates the previous immigration proceedings as if no final order of deportation was entered, and that IIRIRA's transition rules precluded consideration of the alien's petition for review from the IJ's denial of discretionary relief.

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Ninth Circuit Reverses Denial Of Alien's Motion To Rescind *In Absentia* Deportation Order.

In ***Chete-Juarez v. Ashcroft***, 376 F.3d 944 (9th Cir. July 19, 2004) (Goodwin, *Pregerson*, Tallman), the Ninth Circuit held that the Board abused its discretion in determining that there were no exceptional circumstances that warranted rescission of Chete-Juarez's *in absentia* deportation order. Chete-Juarez was found deportable and denied suspension by an IJ. She appealed to the BIA and, while her case was on appeal, she moved and submitted a change of address which was not received by the immigration court. The BIA reversed and remanded for another hearing on the suspension application. The IJ notified petitioner of the hearing and the notice as returned "unclaimed." Chete-Juarez failed to appear for the hearing and was ordered deported *in absentia*.

When a former neighbor provided her with a copy of a second notice to report for deportation, she filed a motion to reopen, claiming exceptional circumstances. The IJ denied the motion and the BIA affirmed without opinion. The Ninth Circuit reversed, finding exceptional circumstances because Chete had appeared at previous hearings, she had no reason not to appear, and she likely would have been granted

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relief.

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Eighth Circuit Holds That Board Abused Its Discretion By Denying Alien's Motion to Reconsider.

In ***De Jimenez v. Ashcroft***, 370 F.3d 783 (8th Cir. June 7, 2004) (Melloy, *McMillan*, Bowman), the Eighth Circuit held that the Board abused its discretion by denying the alien's motion to reconsider the denial of her prior motion to reopen and rescind the exclusion order entered against her *in absentia.* Although the appeal was of the motion to reconsider, the court reasoned that in reviewing the motion to reconsider, it could revisit any relevant issues addressed by the BIA's denial of the petitioner's motion to reopen.

The court came to three conclusions. First, the alien's asserted reasons for failing to appear were not based solely on heavy traffic, as the Board held. Second, the Board erroneously refused to consider the evidence submitted by petitioner to establish reasonable cause for her failure to appear. Finally, the court concluded that the alien's failure to first present her reasons for failure to appear to the IJ was the result of incorrect instructions given to her by the immigration court. Accordingly, the court remanded with instructions to permit petitioner a reasonable opportunity to file a motion to reopen in the immigration court.

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Ninth Circuit Holds That Prejudice Will Be Presumed From Attorney's Failure To File Timely Appeal With The Board.

In ***Siong v. INS***, 376 F.3d 1030 (9th Cir. July 23, 2004) (Reinhardt, Tashima, Berzon), the Ninth Circuit held that the Board abused its discretion in denying Siong's motion to reopen because the alien established plausible grounds for relief and demonstrated prejudice from his former counsel's failure to file a timely notice of appeal.

The court reasoned that because Siong did not receive the in-depth review of the IJ's decision that he would be entitled to on direct appeal, and because no transcript of proceedings was prepared, prejudice from counsel's failure to file a timely notice of appeal would be presumed. Because the alien also demonstrated that the Board could have determined that he was eligible for relief based on the record before it, the court remanded the case for further proceedings.

MOTIONS TO STAY REMOVAL

Tenth Circuit Denies Alien's Motion To Stay Removal.

In ***Singh v. Ashcroft***, 375 F.3d 1007 (10th Cir. July 7, 2004) (Briscoe, Lucero), the Tenth Circuit denied the alien's motion for stay of removal as improperly presented and inadequately supported. The court emphasized that the alien did not substantively develop his argument in favor of a stay, and therefore failed to show that he was likely to succeed on the merits. The court also noted that the alien made no argument that he would suffer irreparable harm upon removal.

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Third Circuit Holds That Standard For Reviewing Motions To Stay Removal Is Preliminary Injunction Standard.

In ***Douglas v. Ashcroft***, 374 F.3d 230 (3d Cir. July 8, 2004) (*Sloviter*, McKee, Becker), the Third Circuit joined the First, Second, and Sixth Circuits in holding that the proper standard of review for motions to stay removal is the four-part test used for adjudicating motions for preliminary injunction. The court then held that it lacked jurisdiction to consider the alien's removal order because one of the two grounds for removal was his conviction for sexual misconduct and the crime was an aggravated felony.

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NATURALIZATION

Ninth Circuit Upholds Authority Of DHS To Deny Naturalization Application Because Removal Proceedings Are Pending.

In ***De Lara Bellajaro v. Schiltgen***, —- F.3d —-, 2004 WL 1941090 (9th Cir. Sept. 1, 2004), (*Rymer*, Trott, Thomas), the Ninth Circuit found that 8 U.S.C. § 1429 limits the scope of judicial review and relief available under 8 U.S.C. § 1421 (c) when DHS denies an application for naturalization because the alien is in removal proceedings. The Ninth Circuit, agreeing with the Sixth Circuit's decision in *Zayed v. United States* (below), rejected the government's position that the court lacks jurisdiction altogether, but agreed with our alternative position that any jurisdiction the district court has is limited to review of the finding that removal proceedings are pending and, if so, that no relief is available to an alien seeking naturalization while in proceedings.

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Sixth Circuit Upholds The Priority Of Removal Proceedings Over Naturalization Proceedings

In ***Zayed v. United States***, 368 F.3d 902 (6th Cir. May 24, 2004) (*Nelson*, Gilman, Rogers), the Sixth Circuit held that Congress did not intend to alter the priority of removal proceedings over naturalization proceedings, and that the relevant statutory scheme limits the scope of judicial review and the availability of meaningful relief for aliens in naturalization proceedings when those aliens are also in removal proceedings.

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The INS denied the alien's application for naturalization. Seeking relief, the alien filed a petition for review. The agency then moved to dismiss her petition for lack of subject matter jurisdiction based on 8 U.S.C. § 1429 and the petition was dismissed without prejudice. The Sixth Circuit affirmed the district court's dismissal because the Attorney General has the exclusive power to naturalize aliens and § 1429 bars using that power while removal proceedings are pending. The court also suggested that "an alternative form of relief suggested by Gatliffe "did not apply because the alien was not eligible for naturalization but for the removal proceedings.

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REINSTATEMENT

Tenth Circuit Finds No Jurisdiction To Review Underlying Removal Order In Reinstatement Case.

In ***Garcia-Marrufo v. Ashcroft***, 376 F.3d 1061 (10th Cir. July 21, 2004) (*Hartz*, McKay, Porfilio), the Tenth Circuit affirmed a reinstatement order by the former INS, finding that the court lacked jurisdiction to consider the alien's challenge to his underlying order of removal. The court also rejected the alien's due process challenge to the reinstatement procedures because he failed to demonstrate any prejudice. Finally, the court denied the alien's request for remand based upon alleged irregularities in the administrative record.

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Eighth Circuit Holds That Reinstatement Statute Cannot Be Properly Applied To Preclude Alien's Application For Adjustment Of Status Where Alien Had Pending Application For Employment Authorization.

In ***Lopez-Flores v. Dep't of Homeland Security***, 376 F.3d 793 (8th Cir. July 15, 2004) (Wollman, Fagg, *Hansen*), the Eighth Circuit held that Lopez was eligible to apply for adjustment of status despite the bar to immigration "relief" found at 8 U.S.C. § 1231(a)(5). Following *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002), the court reasoned that applying § 1231(a)(5)'s bar to the alien was impermissibly retroactive because he had a reasonable expectation that an adjustment of status defense would be available to him in a subsequent deportation proceeding based on his pending employment authorization application.

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RES JUDICATA

District Court Holds That *Res Judicata* Applies To Removal Proceedings

In ***Murray v. Ashcroft***, 321 F.Supp.2d 385 (D. Conn. June 9, 2004), the district court held that the doctrine of *res judicata* applies in removal proceedings. The petitioner, a lawful resident alien and a citizen of Jamaica, was placed in removal proceedings on the basis that his two convictions for possession of marijuana constituted an aggravated felony. An IJ ordered petitioner removed as charged, but the BIA reversed. The INS then filed a new charge, alleging that the marijuana convictions subjected petitioner to removal as an alien convicted of a controlled substance offense under INA § 237(a)(2)(B)(i). The IJ found petitioner removable on the new charge and denied a motion to terminate based on *res judicata*. The BIA affirmed that decision.

The district court held that *res judicata* applied in petitioner's case because the second charge lodged by the INS was "based on the same nucleus of operative facts that were known or should have been known when the removal charge based on conviction of an aggravated felony was brought at his first proceeding." Thus, because the second charge of removability was barred by *res judiciata*, the court found that the order of removal against the petitioner was invalid.

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VOLUNTARY DEPARTURE

Eighth Circuit Denies Alien's Motion To Stay Voluntary Departure Period

In ***Molathwa v. Ashcroft***, 374 F.3d 661 (8th Cir. July 8, 2004) (*Riley*, Melloy, Colloton), the Eighth Circuit denied Molathwa's motion to stay his expired voluntary departure period. The court concluded that because Molathwa's voluntary departure period was already expired at the time he filed his motion for stay, granting the motion would have the impermissible effect of extending his period for voluntary departure. The court expressly declined to decide whether it could stay a voluntary departure period if the motion for stay were filed prior to expiration of an alien's voluntary departure period.

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Eighth Circuit Holds That It Has Equitable Power To Stay Voluntary Departure Period.

In ***Rife v. Ashcroft***, 374 F.3d 606 (8th Cir. July 7, 2004) (*Loken*, Bowman, Wollman), the Eighth Circuit upheld the IJ's conclusions that: (1) the Rifes were firmly resettled in Israel after leaving Azerbijan; (2) the Rifes did not have a well-founded fear of future persecution in Israel; and (3) the Rifes failed to establish a clear probability of future persecution in Azerbaijan. The court also determined that it had authority to stay a grant of voluntary departure, and would apply the standard applicable to motions for stay of removal. It advised the aliens to file separate motions for stay of removal and of voluntary departure.

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WAIVER

Third Circuit Holds That 212(c) Relief Is Available To Aliens Who Rejected Plea Agreements And Elected To Go To Trial.

In ***Ponnapula v. Ashcroft***, 373 F.3d 480 (3d Cir. June 28, 2004) (Rendell, Barry, *Becker*), the Third Circuit affirmed the district court's order granting Ponnapula's petition for a writ of *habeas corpus*. Ponnapula, who was indicted for grand larceny, turned down a misdemeanor plea offer because his counsel advised him that even if he went to trial and was convicted of a felony he would likely still be eligible for relief under section 212(c) of the INA. The court rejected the government's argument that this appeal was controlled by *INS v. St. Cyr*, 533 U.S. 298 (2001), and concluded that *St. Cyr* is "simply one application" of the general rule against interpreting statutes to have a retroactive effect. The court then held that IIRIRA's repeal of section 212(c) is impermissibly retroactive with respect to aliens, like Ponnapula, who affirmatively turned down plea agreements in reliance on the potential availability of 212(c) relief.

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ANNUAL IMMIGRATION SEMINAR

OIL announces that its Tenth Annual Immigration Law Seminar will be held in Washington DC on October 25-28, 2004. The seminar is intended to offer a basic introduction to immigration litigation and includes an ethics component. Those interested in attending should notify Kurt Larson at kurt.larson@usdoj.gov. There is no charge for the seminar, but attendees are responsible to pay for their own travel expenses.

SPECIAL CIRCUMSTANCES

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filed petitions for habeas corpus, especially in light of the *Thai* decision.

Recommendations With Respect to Application of the Continued Detention Regulations in the Context of "Specially Dangerous" Aliens.

For the most part, aliens who are considered "specially dangerous" will first come to ICE's attention while still serving a prison sentence. Such aliens will finish their prison sentences, and then be released into ICE custody. Before the alien's release from prison, however, it is likely that an IJ will have ordered the alien removed with such order becoming final because the alien waived appeal. It is from the date of the final order that *Zadvydas*'s presumptively reasonable six-month removal period begins.

To ensure that continued detention proceedings are timely commenced prior to expiration of the removal period and that "specially dangerous" aliens are not released into the community, the following should be kept in mind. First, state criminal officials should identify inmates who may be "specially dangerous" aliens as early as possible and communicate this information to their local immigration points-of-contact, including ICE Deportation and Removal Officers (DROs). In turn, the local immigration officials should coordinate with ICE HQPDU, through their local Chief Counsel offices, with respect to scheduling the alien for a PHS medical and mental evaluation. This evaluation is necessary so that the Assistant Secretary can make a determination of whether the alien's detention should be continued, and if so, refer the case to EOIR. Second, in habeas cases, the Assistant United States Attorneys should coordinate with their respective Office of Immigration Litigation (OIL) and ICE points-of-contact, the latter of which will be in touch with ICE HQPDU. In these cases, both federal litigation and EOIR proceedings may occur in tandem. It is critical that all parts of the Government work together.

Finally, there are three other categories of aliens who cannot be removed to their native countries and for whom "special circumstances" justify their continued detention. They include those: 1) with highly contagious diseases; 2) whose release would cause serious adverse foreign policy consequences; and 3) who pose a significant national security or terrorism risk. *See* 8 C.F.R. § 1241.14(b), (c), (d). If it appears that an alien falls within one of these classes, immigration officials and Assistant United States Attorneys are urged to coordinate both at the local and national level with respect to the applicable procedures. Information can be found in the regulations and corresponding Federal Register Supplementary Information. *See* 8 C.F.R. § 1241.14(b), (c), (d); 66 Fed. Reg. 56967.

As a Side Note.

In March 2004, ICE transferred Thai to Columbia Care Center in South Carolina, a federal contract facility accredited by the National Commission on Correctional Health Care. It offers its patients comprehensive psychiatric services and treatment, and educational and recreational services. In addition, patients may participate in GED preparation, ESL, and computer training classes. Thai was subsequently released from Columbia Care into the custody of ICE Northwest Detention Center in Washington.

ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any ideas for improving this publication, please contact Julia Doig Wilcox at:

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INSIDE OIL

OIL welcomes the following four new attorneys this month.

Kristin Cabral has now had three tours with OIL, from 1993-1997 (joining under the Honors Program), 2000, and beginning again in 2004. She received a B.A. in political science with honors and high distinction from the University of Michigan in 1988, and a J.D., *cum laude*, from Harvard Law School in 1991. She clerked for the Honorable Horace W. Gilmore of the U.S. District Court for the Eastern District of Michigan from 1991 to 1993.

Saul Greenstein graduated from Brooklyn College, *cum laude*, in 1994 with a B.A. in English Literature and received his J.D. from the Benjamin N. Cardozo School of Law in 1997. He was appointed a Judicial Law Clerk for Newark Immigration Court under the Honors Program, and then as the Attorney Advisor for New York Immigration Court, and also worked for the INS and DHS.

Song Park graduated from the University of Maryland where she received a B.A. in Political Science and a B.A in Spanish. She received her J.D. from the University of Maryland School of Law in 1999. She came to OIL from the Board of Immigration Appeals, where she worked as a staff attorney for two years. Prior to the Board, Ms. Park spent two years with the INS.

Jonathan Potter received a B.S. in Business Administration from Valparaiso University in 1982, a J.D. from Valparaiso University in 1985, an L.L.M. in Environmental Law from the National Law Center, George Washington University, and an L.L.M. in Military Law from the Army's Judge Advocate Generals School. Mr. Potter worked for the Valparaiso University School of Law, the U. S. Army's Judge Advocate General's Corps, the Office of the Corporation Counsel for D.C., and served as an AUSA in the N.D. Indiana.

INSIDE EOIR

MaryBeth Keller was appointed EOIR General Counsel in July 2004. She received her B.A. in 1984 from the Catholic University of America, and her J.D. in 1987 from the University of Virginia School of Law. Prior to joining the Office of the General Counsel, Ms. Keller served at the BIA as senior panel attorney and staff attorney.

The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Julia Doig Wilcox at 202-616-4893 or at Julia.Wilcox@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

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

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