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LAWSUITS SEEK PROOF OF LPR STATUS

Can USCIS delay issuance of green cards to complete background checks?

Padilla, et al. v. Ridge, et al. (S.D. Tex.), *Amor, et al. v. Ashcroft, et al.* (S.D. Fla.), and *Santillan, et al. v. Ashcroft, et al.* (N.D. Cal.)

There have been three "group" suits (and a number of individual suits) seeking to compel USCIS to issue evidence of LPR status to aliens who have been granted such status by an immigration judge in proceedings, regardless of whether background checks on the aliens have been completed. The first to be filed, in June of 2003 was *Padilla*, which involves a certified class limited to parts of Texas. July of 2004 saw two new suits: *Amor*, brought by 34 individual aliens in Florida, and *Santillan*, which sought certification of a nationwide class (excepting the plaintiffs in *Amor* and the class in *Padilla*).

The issue in each case is whether aliens who have been granted LPR status in immigration proceedings can be required to wait for documents evincing their new legal status while DHS completes background checks. The government contends that it is reasonable to require completion of background checks before issuance, and that there is no statutory or regulatory time limit for such issuance.

The arm of DHS which issues such documents, USCIS, is not a party to immigration court proceedings and does not have control over the timing of a grant of LPR status by EOIR. DHS frequently does not have the results of the background checks at the time of the grant of status by EOIR. Following the events of September 11, 2001, the importance of ensuring the identities and *bona fides* of aliens before issuance of evidence which can be used as travel documentation has resulted in waits of varying lengths of time for issuance of evidence of LPR status. Section 264(d) of the Immigration and Nationality Act, 8 U.S.C. § 1304(d), provides that the documents evidencing LPR status are to be issued at such time as shall be proscribed under regulations issued by the Attorney General. No regulations have been promulgated which deal directly with the issue presented in these cases, but the government has draft regulations under consideration.

Current Status and Major Litigation Developments

In *Padilla*, the Judge granted the motion for class certification in May 2004, and later granted plaintiff's motion to amend the class definition. In mid-August, the Judge granted plain-

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OIL Conference October 25-28, 2004

The Office of Immigration Litigation announces its tenth annual immigration law seminar October 25-28, 2004, in Washington, D.C. This conference is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law. It can also serve as a full review for experienced practitioners. Topics include: grounds of removal, applications for relief and protection from removal, administrative records, judicial review, habeas petitions, mandamus, TROs, stays, and writing adverse decision recommendations. The seminar will also include an ethics component. CLE credit will be available. Presenters will include OIL, DHS, and EOIR attorneys. The entire conference program is listed on OIL's website.

Those interested in attending should contact Kurt Larson (kurt.larson@usdoj.gov) as soon as possible as seating is limited. There is no charge for attendance at the seminar or for seminar materials, though attendees are expected to cover their own travel expenses if not based in Washington, D.C.

Contact: Kurt Larson, OIL
☎ 202-616-9321

Highlights Inside

LPR Status

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tiff's request for leave to file a fourth amended complaint (actually a fifth amended complaint), denied both sides' motions for summary judgment without prejudice, and allowed an additional 60 days for discovery. Of the fifty-six aliens listed in the various complaints, only three still await issuance of documents. The *Padilla* case now seems poised for a trial after the new year.

In *Amor*, the Judge refused to enter a temporary restraining order. On September 15, 2004, the court dismissed the case in accordance with the joint stipulations. The parties stipulated to dismissal with prejudice for the twenty six (26) plaintiffs to whom documents had been issued, and dismissal without prejudice for the eight individual plaintiffs (many of whom had not appeared at scheduled appointments to receive their documents) and the organizational plaintiff.

In *Santillan*, the argument on the pending motion for class certification took place on October 4, 2004, and the class was certified. All but three of the ten named plaintiffs have been issued evidence of their status. Preliminary discovery should begin shortly, with full discovery starting after the case management conference scheduled for early November.

Contact: Elizabeth Stevens, OIL
☎ 202-616-9752

Requests for certified administrative records (EOIR and DHS) for district court cases must be made through OIL. To request a record, please email your OIL paralegal contact or Judy Forrest at judy.forrest@ usdoj.gov. Notification should occur as soon as possible, as it can take several months to obtain a record.

UPDATE ON THE BIA

The Board of Immigration Appeals reports lots of progress and many important initiatives. First, the Board's average case-completions rate for a one-month period is fairly stable at approximately 4,000 cases per month. At the same time, as government attorneys are aware, streamlining has held up well upon review. Meanwhile, the Board has reduced its total pending caseload dramatically. Just over three years ago, the total pending caseload was 56,000. Today the total is around 32,000. The oldest cases at the Board have been reduced even more dramatically. For example, when the Attorney General announced the proposed BIA Reform regulation in February 2002, he pointed out that the Board had more than 34,000 cases pending that were more than 1 year old, and 10,000 cases over 3 years old. Today the Board has fewer than 50 pre-2001 cases, most of which are "on hold," and all cases older than FY 2003 amount to only about 2% of the total pending caseload. The Board's progress also includes improvements in detained case processing: in the third quarter of FY04, the Board exceeded its goal of 90% by completing 94% of its detained cases within 180 days of the Notice of Appeal.

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In addition, the Board now retains most completed records of proceedings for 120 days instead of returning them immediately to the Immigration Courts. This makes it possible for the Board, for the first time, to retrieve many ROPs on a moment's notice when a certification request or FOIA request is made, or when a motion to reopen or reconsider is filed. This has begun to increase the speed of the Board's service to the parties, OIL, and the federal courts.

Speaking of greater speed and efficiency, OIL now has instant electronic access to all the Board's decisions rendered after June 2004, as well as access to some earlier decisions as far back as 2000. The immigration courts and the federal courts can also access these decisions instantly instead of making requests for paper copies. The Board's Award-winning BIA Practice Manual and Questions and Answers has been recently updated and is available on the DOJ Website in the EOIR section (www.usdoj.gov/eoir/vll).

As the Board's caseload has grown, so has that of the Federal circuit courts. The rate of appeal (up from an historical 5 percent to close to 25 percent) primarily accounts for the upsurge in petitions for review. For example, monthly petitions for review once numbered about 125, but now range from 1,000 to 1,200. The Board's increased case completions account for a rise of about 200, and the remaining 800 to 1,000 new filings are due solely to the higher percentage of cases appealed.

New petitions for review have not dropped off despite the courts' rejection of challenges to the streamlining regulation. There is no evidence that the affirmance and reversal/remand rates of BIA decisions has changed significantly in the wake of the restructuring regulation. This indicates that the quality of the Board's adjudications has remained consistent and unaffected by its increased use of affirmances without opinions and single Board Member review as required by the regulation.

Contact: Ed Kelly, BIA
☎ 703-605-0353

China's One Baby Policy and the Definition of "Refugee"

In 1996, Congress amended the statutory definition of "refugee" at 8 U.S.C. § 1101(a)(42), by adding the following sentence:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 601, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-689 ("IIRIRA"). Congress also limited the number of asylum grants under the amended definition of refugee to 1000 persons each fiscal year. 8 U.S.C. § 1157(a)(5).

The Board of Immigration Appeals ("Board") interpreted and applied the 1996 amendment to the definition of refugee in *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996), and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). Within the last six months, two federal Circuit Courts have issued divergent precedent decisions addressing in particular the scope of the Board's holding in *C-Y-Z-*. *See Kui Rong Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004); *Cai Luan Chen v. Ashcroft*, — F.3d —, 2004 WL 1859807 (3d Cir. Aug. 20, 2004). This article will briefly discuss China's population control policy and the Board's relevant decisions regarding that policy before turning to a discussion of the courts' opinions in *Ma* and *Chen*.

China's Population Control Program

In 1979, faced with an explosive population growth resulting from the Maoist leadership's belief during the 1950s that a large population benefited production and socialist construction, the Chinese government adopted a "one couple, one child" population control policy that included as a goal zero growth by the year 2000. According to the State Department's country reports, the Chinese government uses a combination of public education campaigns, societal pressure, and a system of incentives and disincentives to encourage voluntary compliance. Incentives include better medical and educational benefits, preferential housing assignments, cash stipends, and longer maternity leave. Penalties range from economic sanctions (*i.e.*, fines), loss of employment or demotion, and withholding of social services.

The centralized State Family Planning Commission is responsible for state policy on family planning, but implementation and enforcement of the policy is left largely at the hands of provincial officials and local governments in China's thirty provinces, municipalities, and autonomous regions. Although the Chinese central government does not authorize coercion to obtain compliance with the population control policy, there are reports (and asylum applicants often complain) of local officials using physical force, imprisonment, and forced abortion or sterilization to meet the country's population control goals. *See*, e.g., Steven Mosher, *Broken Earth: The Rural Chinese* (1983). Exceptions to the "one couple, one child" policy are made for ethnic minorities and those living in rural areas.

The Board's Decisions in *Chang*, *X-P-T-*, and *C-Y-Z-*

The Board first addressed the issue of whether China's "one couple, one child" policy could serve as a basis for asylum under the immigration statute in its precedent decision *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989). The Board denied asylum to a male applicant who claimed that upon return to China, he would be forcibly sterilized by the government because he and his wife already had two children. The Board held that China's population control policies were not persecutory "even to the extent that involuntary sterilizations may occur," and would serve as a basis for asylum only if selectively implemented based on one of the five grounds protected under the asylum statute. *Id*. at 44.

Efforts to overturn *Chang* followed swiftly, see *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 862-63 (E.D. Va. 1994), *rev'd sub nom*. *Guo Chun Di v. Moscato,* 66 F.3d 315 (4th Cir. 1995) (discussing regulatory and congressional efforts), but without success until 1996, when the Board expressly recognized that IIRIRA's amendment to the statutory definition of "refugee" required it to grant asylum to a Chinese woman who had been forcibly sterilized after having three children. *Matter of X-P-T-*, 21 I&N Dec. 634, 638 (BIA 1996) ("We conclude, as a result of the amendments made by section 601 of the IIRIRA, that forcible sterilization is a basis for grants of asylum and withholding of deportation to China."). In *X-P-T-*, the Board explicitly overruled *Chang*. *Id*. at 634.

Six months later, the *en banc* Board decided *Matter of C-Y-Z-* and held that under the amended definition of "refugee," the spouse of a woman who had undergone forced sterilization under the China's population control program may establish past political persecution based upon his wife's

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sterilization:

> In view of the enactment of section 601(a) of the IIRIRA and the agreement of the parties that forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse, the applicant has established past persecution.

21 I&N Dec. at 919. The asylum applicant in *C-Y-Z-* based his claim on his wife's 1991 forced sterilization as well as his own arrest and one day detention when he protested enforcement of the one child policy. *Id.* at 915-16. The Board found the applicant eligible for asylum based on his wife's forced sterilization and did not reach his alternative basis for asylum. *See id.* at 918-19. In reaching its conclusion, the Board accepted the INS's express concession that "past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse," and its further explanation that "the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him." *Id.* at 917-18.

China's "prohibition against underage marriages is 'an integral part' of China's coercive population control program."

In view of the Board's interpretation of the amended refugee definition as also covering the spouse of a persecuted alien, asylum applicants who claimed to be either "traditionally married" or who were thwarted in their desire to get married by China's "high" minimum marriage age requirement, argued they were eligible for relief under *C-Y-Z-* because they suffered the same persecution (that is, the adverse impact on their ability to reproduce and raise children). The Board has not addressed the issue in a precedent opinion but it has issued short unpublished decisions rejecting such arguments on the ground that *C-Y-Z-* applies only to legally married couples. Two such Board decisions were appealed by the disappointed aliens and both the Ninth and Third Circuits have now weighed in on the Board's decision to limit *C-Y-Z-*, and come to different conclusions.

The Ninth Circuit's Decision in *Kui Rong Ma*

Kui Rong Ma claimed that when he was nineteen years old, he and his girlfriend, Lei Chiu, were married "traditionally" and, two months later, Chiu became pregnant. The couple attempted to gain legal recognition of their "marriage" by registering it with the local government office but, because Ma was only nineteen years old and the minimum marriage age for males is twenty-two, their registration application was not approved. Family planning officials subsequently performed an abortion on Chiu to end her pregnancy. Ma sought asylum in the United States based on Chiu's forced abortion.

An IJ granted Ma asylum and the INS appealed, arguing that Chinese law does not recognize "traditional" marriages as valid and, therefore, *C-Y-Z-* does not apply. A divided panel of the Board agreed with the INS. The Board acknowledged that under *C-Y-Z-*, a person may establish asylum eligibility based on the forced sterilization or abortion of that person's spouse, but it declined to extend that holding to cover a person who is not the legally recognized spouse of the persecuted individual. The Board also found that Ma's "inability to marry [Chiu] was based on his age, and [he] did not establish that his legal incapacity to marry had any direct connection to a coercive family planning policy."

The Ninth Circuit granted Ma's petition and reversed the Board's decision. 361 F.3d 553. The court found that when Congress amended the refugee definition at 8 U.S.C. § 1101(a)(42) to include individuals who have been subjected to forced abortion or sterilization, the intent was "to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together." 361 F.3d at 559 (quoting the House Report). Because China's "prohibition against underage marriages is 'an integral part' of China's coercive population control program," the court concluded, the Board's decision not to extend refugee protection to Ma "contravenes the purpose and policies of the statutory amendment." 361 F.3d at 560 (quoting *Li v. Ashcroft*, 356 F.3d 1153, 1160 n.5 (9th Cir. 2004) (*en banc*)). The court acknowledged the general rule in immigration cases (and under its own case law) that the validity of a foreign marriage is governed by the law of the place of celebration, but concluded that because China's setting of a minimum marriage age was "an integral part" of its population control program, "permit[ting] asylum decisions to be made in reliance on the legitimacy of the program, would contravene the purpose of Congress's amendment to the refugee statute."

The Third Circuit's Decision in *Cai Luan Chen*

Like Ma, Cai Luan Chen argued that he should be granted asylum under *C-Y-Z-,* but he based his claim on his fiancee's forced abortion. Chen admitted he and his fiancee were not married because they were both underage (he was 19, she was 18), but asserted that but for China's inflated minimum marriage age requirement, they would have married. Because he and the alien in *C-Y-Z-* suffered exactly the same persecution regardless of their marital status, he argued, the Board's refusal to extend its holding in

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C-Y-Z- to cover him was arbitrary, capricious, and irrational.

The Third Circuit disagreed, stating that "[w]hile limiting *C-Y-Z-* to married persons may produce undesirable results in some cases, the BIA's interpretation, which contributes to efficient administration and avoids difficult and problematic factual inquiries, is reasonable." 20004 WL 18590807 at *1. The court acknowledged that the use of marital status "as a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance of a forced abortion or sterilization on another person[,]" is both over- and under-inclusive but found that neither circumstance is sufficient to render the Board's use irrational. The court found that the Board's adoption of marital status as the defining characteristic was reasonable because marriage can be proven easily and reliably with objective documentary evidence, and allowed it to avoid the numerous practical difficulties and potential fraud that would accompany a decision to include non-spouses within the reach of the amended refugee statute.

Congress intended to provide relief to a limited group.

The court also rejected Chen's argument that the inflated marriage age was qualifying persecution for purposes of the amended refugee definition because it prevented him from marrying and was instituted as a part of the population control policies. The court observed that each of the states in this country impose minimum marriage age requirements and that such laws are "recognized as legitimate and desirable under international human rights law." *Id.* at *7. Under these circumstances, the court found that the Board was not irrational in finding that the Chinese government's decision to set its minimum marriage ages at 23 and 25, is not persecutory.

The Third Circuit acknowledged that its decision "may appear to be in tension" with Ma. *Id.* at *8. It sought to dispel this tension, however, by pointing out that by the time the Board issued its decision in Ma's case, Ma had reached the minimum marriage age for males and had submitted evidence that the Chinese government considered his marriage valid. Thus, *Ma* was properly read as limited to "'*husbands* whose marriages would be legally recognized, but for China's coercive family planning policies.'" 2004 WL 18590807 (quoting *Ma*, 361 F.3d at 561). Chen, by contrast, had conceded that he was unmarried.

To the extent that *Ma*'s reasoning could be applied to aliens similarly situated to Chen, however, the Third Circuit disagreed with the Ninth Circuit's conclusion that limiting *C-Y-Z-* to married couples was contrary to Congress's intent and, therefore, undeserving of *Chevron* deference. The Third Circuit observed that there is no basis for concluding that Congress intended to afford relief "to *every* person who is a victim of *any* rule or practice that forms a part of the Chinese population control program, 2004 WL 18590807 at *8 (emphasis in original); rather, all indications are that Congress had the more modest purpose of providing relief to a limited class. The court pointed out that under the 1996 amendment to the refugee definition, a showing of persecution is still required, that "with the exception of forced abortions and sterilizations," Congress left the task of defining "persecution" to the Board's interpretive authority, and, most significantly, Congress imposed a yearly cap that "clearly reveals an intent to carefully limit the scope of relief made available by the amendment." These factors led the court to conclude that, contrary to the Ninth Circuit's view, the Board's refusal to extend *C-Y-Z-* may reasonably be viewed as furthering Congress's goal of providing protection to a limited class.

Proceeding With Caution

The *Chen* Court's reasoning provides the government with strong authority for urging a narrow reading of *Ma* that limits the Ninth Circuit's decision to circumstances where both of the following factors are present: (1) but for the minimum marriage age law, the applicant would have been legally married to the spouse; and (2) the couple did enter into a traditional marriage. The asylum applicant bears the burden of producing evidence establishing these two factors but nothing prevents government litigators from also placing into the record copies of China's laws relating to the official recognition of marriage. For example, Article 7 of the 1980 Marriage Law of the People's Republic of China states:

> Both the man and the woman desiring to contract a marriage shall register in person with the marriage registration office. If the proposed marriage is found to conform with the provisions of this Law, the couple shall be allowed to register and issued marriage certificates. The husband and wife relationship shall be established as soon as they acquire the marriage certificates.

(at http://www.unescap.org/pop/database/law_china/ch_record003.htm (accessed on Jan. 9, 2004) (emphasis added)). Article 11 of the Regulations on Marriage Registration of the People's Republic of China, reiterates that "[t]he relationship of husband and wife is established when the parties acquire a marriage certificate," which

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is issued upon marriage registration. Available at http://www.qis.net/chinalaw/prclaw45.htm (accessed on Jan. 9, 2004). These portions of Chinese law would go far to rebut an asylum applicant's claim that "traditional" marriages, "de facto" marriages, or "common law" marriages are legally recognized.

It should be kept in mind, however, that although the Third Circuit in *Chen* accorded deference to the Board's interpretation of the statute and affirmed *C-Y-Z-*, the court's opinion signaled some doubt as to whether the Board's interpretation is a permissible reading of the statute as a threshold matter. The court noted that the Board did not explain the basis of its conclusion in *C-Y-Z-* and observed that, to the extent the Board was reading the statutory phrase "a person who has been forced to abort a pregnancy" as referring to either of the two people who contributed to the pregnancy, such a reading seems "forced" as the plain language is "most naturally read as referring only to a person who has personally undergone" that procedure. And, the court made a point of noting that it was only assuming for the sake of argument that the Board's interpretation in *C-Y-Z-* is permissible as there was no need to decide that issue to resolve the questions presented in *Chen*. The court's carefully tempered endorsement of *C-Y-Z-* suggests that it is preserving the option of revisiting *C-Y-Z-*'s interpretation of the refugee statute in the appropriate case and that it will require strong reasons from the Board for the court to accept its reading of the statute.

Contact: M. Jocelyn Lopez Wright, OIL
☎ 202-616-4868

Contributions to the ILB are welcomed!

Recent Board of Immigration Appeals Decisions

Matter of K-A-,
23 I&N Dec. 661 (BIA 2004)

In *Matter of K-A-,* 23 I&N Dec. 661 (BIA 2004), the Board held that the IJ did not err in granting an asylee's applications for adjustment of status and a waiver of inadmissibility. The case involved a Nigerian who entered the U.S. in 1992 and was granted asylum in 1995. K-A-, a mother of two U.S. citizen children (one of whom suffers from cerebral palsy), was convicted in 2001 of second-degree criminal possession of a forged instrument, and sentenced to imprisonment for at least one year. DHS charged her with removability for having committed a CIMT and an aggravated felony, and sought to terminate her status. K-A- sought to apply for adjustment under INA § 209(b) and a waiver under INA § 209(c).

"The Statute, by its terms, does not provide for *automatic* termination of asylee status; rather, it authorizes — but does not compel — the Attorney General to act."

An IJ asserted jurisdiction over the applications and granted adjustment and a waiver, in the exercise of discretion, based on the hardship to K-A-'s severely disabled child. DHS appealed, asserting original jurisdiction over the applications and arguing that the IJ lacked jurisdiction because such applications may only be considered by the IJ if they have been *renewed* following administrative denial by DHS. Alternatively, DHS argued that the IJ erred in adjudicating the respondent's applications when her asylee status was subject to termination based on the aggravated felony conviction.

The Board rejected both of DHS' arguments. First, the Board concluded that the IJ had exclusive jurisdiction, pursuant to 8 C.F.R. §§ 1209.2 and 1240.11(a), to adjudicate the waiver application once the asylee had been placed in removal proceedings. Second, the Board found that, pursuant to INA § 208(c)(2) and 8 C.F.R. § 1208.24, an IJ *may* determine whether a basis for termination of asylum exists and, if one does, *may* terminate that status. "The statute, by its terms, does not provide for *automatic* termination of asylee status; rather, it authorizes – but does not compel – the Attorney General to act." Consequently, the Board held that the IJ committed no reversible error in deferring the DHS's request for termination of K-A-'s asylee status pending adjudication of her applications. Accordingly, the DHS appeal was dismissed.

***Matter of Cisneros*,**
23 I&N Dec. 668
(BIA 2004)

In *Matter of Cisneros,* 23 I&N Dec. 668 (BIA 2004), the Board held that an alien who returned to the U.S. following a deportation is eligibility for cancellation under INA Section 240A(b), if he has acquired the requisite period of continuous physical presence after reentry. In reaching this conclusion, the BIA ruled that accrual of physical presence ends when the NTA is served in the current proceedings, not at the time of service of the charging document in any prior proceeding. The BIA noted that the statute provides for reinstatement of prior orders of deportation for an alien who reenters illegally and generally precludes the opportunity to apply for relief. However, after analyzing the purpose of the "stop-time" rule set forth at Section 240A(d)(1), as well as the overall design of the statute and Congressional concerns, the BIA concluded that when a prior order is not reinstated, the alien can seek cancellation of removal if at least 10 years have elapsed since his return.

By: Thomas Ragland, OIL
☎ 202-514-4096

Summaries Of Recent Federal Court Decisions

ADJUSTMENT OF STATUS

In ***Perez-Enriquez v. Ashcroft***, — F.3d —, 2004 WL 2002567 (9th Cir. Sept. 9, 2004) (Holcomb, *Callahan*, Bertelsman), the Ninth Circuit dismissed Perez-Enriquez's petition for review of the Board's decision that he was inadmissible at the time of adjustment. Perez-Enriquez was granted temporary legal status under the SAW program in 1988. In 1989, he was convicted, on a guilty plea, of possession of narcotics. In 1990, he automatically adjusted to legal permanent resident status. Perez-Enriquez was served with a Notice to Appear in 2000 based on his conviction in 1989. He challenged his inadmissibility on the ground that he actually adjusted his status at the time of his application in 1988, not in 1990 when he became an LPR, as the government asserted.

The Ninth Circuit deferred to the Board's position and held that adjustment of status occurs when adjustment is granted, not at the time of application. Therefore, Perez-Enriquez was inadmissible at the time of adjustment on account of his conviction.

Contact: Deborah Misir, OIL
☎ 202-305-7599

ASYLUM

In ***Awale v. Ashcroft***, — F.3d —, 2004 WL 2026782 (8th Cir. Sept. 13, 2004) (*Loken*, Smith, Dorr), the Eighth Circuit granted Awale's petition for review and remanded. Awale, a native of Somalia and member of the minority Galgale clan, was raped and her father shot by members of the controlling Hawiye clan. Following these incidents, Awale moved from Mogadishu to Baidoa where she lived without harm for four years. Baidoa was then overrun by the Hawiye clan and Awale fled to the United States. The Board held that Awale did not have a well-founded fear of future persecution since she was able to live in Baidoa for four years without incident and could therefore relocate within Somalia.

The Eighth Circuit rejected the government's assertion that Awale could safely relocate in Somalia and discounted its reliance on the State Department's country report which stated that conditions in Somalia had improved. The court held that while conditions may have improved in Somalia, strife remained in Baidoa, and the lack of a central government capable of controlling the inter-clan conflicts would impair Awale's ability to relocate within Somalia.

The Eighth Circuit rejected the government's assertion that Awale could safely relocate in Somalia.

In ***Camposeco-Montejo v. Ashcroft***, — F.3d —, 2004 WL 2072038 (9th Cir. Sept. 17, 2004) (Thompson, *Tashima*, Rawlinson), the Ninth Circuit reversed the Board's denial of Camposeco-Montejo's application for asylum and withholding of removal. The IJ found that Camposeco-Montejo, a native of Guatemala, had been firmly resettled in Mexico for 16 years and was therefore ineligible for asylum.

The Ninth Circuit held that the IJ erred in holding that the petitioner had received an offer of permanent resettlement in Mexico, relying on evidence that holders of an F3 card, such as petitioner, were ineligible for permanent residency. Furthermore, the court held that while petitioner's residence in Mexico was lengthy, it was not undisturbed, as his ability to travel and attend school were restricted.

Contact: Anthony Norwood, OIL
☎ 202-616-4883

In ***Lin v Ashcroft***, — F.3d —, 2004 WL 2102821 (7th Cir. Sept. 22, 2004) (*Wood*, Evans, Williams), the Seventh Circuit vacated the IJ's determination that Lin was not credible and not entitled to asylum, withholding of removal, or relief under CAT. The court was persuaded that Lin's testimony that she was subjected to forced abortions as well as forced birth control constituted past persecution. While the court declined to extend asylum rights to all women of childbearing age in China because they all are potentially subjected to coercive family planning policies, under the particular circumstances Lin had shown, she was entitled to relief.

Contact: Carl McIntyre, OIL
☎ 202-616-4882

In ***Narayan v. Ashcroft***, —- F.3d —, 2004 WL 2062555 (9th Cir. Sept. 16, 2004) (*Hawkins*, Thomas, Bea), the Ninth Circuit granted Narayan's petition for review of the denial of asylum and withholding of removal. Narayan claimed that he had been stabbed more than once in Fiji, and the police refused to investigate. The IJ and Board found while Narayan, a Fijian of East Indian decent, was a member of a protected social group, the inaction by the police did not rise to the level of persecution and denied his claims.

The court held that a reasonable fact finder would have found that Narayan had suffered past persecution and was therefore eligible for asylum. Furthermore, the court held that the Board erred in failing to separately address Narayan's motion to remand and remanded for further proceedings.

Contact: Norah Ascoli Schwarz, OIL
☎ 202-616-4888

In ***Ndom v. Ashcroft***, — F.3d — 2004 WL 2021275 (9th Cir. Sept. 10, 2004) (Nelson, Fletcher, *Berzon*), the Ninth Circuit granted Ndom's petition

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for review of his application for asylum and withholding of removal. Ndom, a native of Senegal, claimed he had been persecuted at the hands of the government due to his presumed membership in the MDFC, a revolutionary group. Ndom was arrested twice, detained for 25 days, and threatened with his life by government soldiers. The IJ and BIA denied his asylum claim on the basis that he lacked a well-founded fear of future persecution and because the fact that he was arrested with other villagers indicated that his treatment was not due to his membership in a protected group.

The Ninth Circuit held that a year is a 365 day period.

The Ninth Circuit disagreed and held that Ndom's detention and the threats against him were sufficient to establish past persecution. The court further held that the government's questioning and belief that Ndom was a member of the MDFC was sufficient indicia of a political motive for his persecution.

Contact: Keith Bernstein, OIL
☎ 202-514-3567

In ***Reyes-Reyes v. Ashcroft***, — F.3d —, 2004 WL 2047563 (9th Cir. Sept. 13, 2004) (*McKeown*, Bybee, Breyer), the Ninth Circuit granted Reyes-Reyes' petition for review of the denial of his applications for asylum, withholding of removal, and CAT protection. The IJ denied the application for asylum because it was not filed within the 1 year deadline and because Reyes-Reyes did not show that the government of El Salvador had tortured him because he was a male homosexual with a female identity. The Board affirmed.

The court held that while the IJ's denial of the asylum claim was not reviewable, the IJ erred in redefining torture under CAT to only encompass torture at the hands of the government. The Ninth Circuit held that the government need not participate in the torture, mere acquiescence will suffice under the parameters of CAT. The court remanded the denial of withholding of removal on similar grounds.

Contact: Shelley Goad, OIL
☎ 202-616-4864

In ***Romilus v. Ashcroft***, — F.3d —, 2004 WL 2059565 (1st Cir. Sept. 14, 2004) (Torruella, Rosenn, *Howard*), the First Circuit denied Romilus' petition for review of the Board's decision to deny asylum, withholding of removal, and CAT protection. Romilus, a native of Haiti, claimed persecution on account of political opinion. Romilus presented evidence of two altercations with a soldier over the sale of a cow, the robbery of his home, and the disruption of an OPJP political rally by armed, masked men. The IJ found that the altercations with the soldier were of a personal nature, the robbery was economically motivated, and that there was no evidence that the armed men disrupted the rally for political reasons, and denied the applications for relief or protection.

The court affirmed, finding insufficient evidence that any harm Romilus suffered was due to his political beliefs and stating the INA does not protect aliens from personal animosity. Furthermore, three of the incidents occurred before Romilus joined OPJP, making it impossible that they were committed due to his political beliefs. Regarding the disruption of the political rally, the court found that there was insufficient evidence indicating the attackers intended to suppress OPJP's political aspirations.

Contact: Jamie Dowd OIL
☎ 202-616-4866

In ***Zakirov v. Ashcroft***, —- F.3d —, 2004 WL 2072038 (9th Cir. Sept. 17, 2004) (Arnold, *Gibson*, Riley), the Ninth Circuit denied Zakirov's petition for review of the denial of asylum and withholding of removal. Zakirov, a Tartar, claimed that he had been persecuted on account of his nationality and feared returning to the Russian Federation. The court held that being insulted and threatened by individuals due to his nationality did not rise to the level of persecution. Zakirov only reported one incident to police, and despite knowing the identity of his attacker, did not inform the police. Furthermore, the incidents occurred outside of Tartarstan, where his family resided without incident, therefore it was presumed Zakirov could return to Tartarstan and be free from persecution.

Contact: Rena Curtis, OIL
☎ 202-616-4219

CANCELLATION OF REMOVAL

In ***Langandon v. Ashcroft,*** — F.3d —, 2004 WL 2002565 (9th Cir. Sept. 9, 2004) (Nelson, Fletcher, *Berzon*), the Ninth Circuit granted Langandon's petition for review of the BIA's denial of cancellation. Langandon entered the United States on May 14, 1987, and was served with an NTA on May 13, 1997. The IJ and BIA held that he had not resided in the United States for 10 years continuously and thus did not qualify for cancellation.

The court disagreed and held that a "year" constitutes a 365 day period, and includes the first day of the period. Therefore petitioner's 10-year period of continuous physical presence was completed on May 13, 1997, and the Board erred in denying cancellation on the basis that he was statutorily ineligible. The case was remanded to determine whether petitioner should receive the requested relief.

Contact: Earle Wilson, OIL
☎ 202-616-4277

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In ***Morales-Morales v. Ashcroft***, —- F.3d —, 2004 WL 2050126 (7th Cir. Sept. 15, 2004) (Flaum, *Wood*, Williams), the Seventh Circuit granted Morales-Morales' petition for review of the Board's denial of cancellation of removal and remanded for further proceedings. Petitioner, a citizen of Mexico who had resided in the United States since her illegal entry in 1986, briefly returned to Mexico in 1999 and attempted to reenter on five separate occasions. Petitioner was returned to the border following the first four attempted entries and arrested on the fifth. The IJ denied cancellation of removal, holding that petitioner's brief absence from the United States broke the 10 year period of continual residence and rendered her ineligible.

The court held that petitioner had not been absent for more than 90 days at a time, nor for 180 aggregate days, and was therefore eligible for cancellation of removal. Furthermore, the court held that the return of petitioner following her first four attempts to reenter did not qualify as voluntary departure under the threat of deportation or removal proceedings, therefore *Romalez* did not apply and there was no break in the period of continuous physical presence. The court distinguished the 5th, 8th, and 9th Circuit decisions in *Mireles-Valdez v. Ashcroft*, 349 F.ed 213 (5th Cir. 2003), *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2004), and *Palomino v. Ashcroft*, 354 F.3d 942 (8th Cir. 2004), and the Board's decision in *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002), on their facts.

Contact: Jason Patil, OIL
☎ 202-616-3852

CRIMES

In ***Burrell v. United States***, — F.3d —, 2004 WL 2039420 (2nd Cir. Sept. 14, 2004) (Jacobs, Sack, *Raggi*), the Second Circuit affirmed a decision by the District Court for the Eastern District of New York to deny Burrell's motion to vacate his conviction for assault and weapons possession, and lifted the stay on his deportation order. Burrell, a Jamaican national, was convicted in 1995 of being a felon in possession of a firearm and was ordered deported. Burrell argued that he was innocent of the 1995 offense because the trial court erroneously relied upon his *Alford* plea to an earlier charge of weapons possession, which the state of Connecticut did not recognize as a conviction.

An Alford plea can qualify as a predicate conviction.

The Second Circuit held that an *Alford* plea (a plea in which the defendant does not admit guilt, but admits that the case against him is so strong that he is prepared to accept a guilty plea nonetheless) can qualify as a predicate conviction. The court held that there is no distinction between *Alford* pleas, pleas of *nolo contendre*, and standard guilty pleas in the disposition of criminal cases; all result in convictions, therefore Burrell could not establish his innocence.

Contact: Paul T. Weinstein, AUSA
☎ 718-254-7000

In ***Knapik v. Ashcroft***, — F.3d — ,2004 WL 2072103 (3rd Cir. Sept. 17, 2004) (*Ambro*, Becker, Greenberg), the Third Circuit reversed the Board's decision that his conviction for attempted reckless endangerment was a crime of moral turpitude. While intoxicated, Knapik drove at an excessive rate of speed against the flow of traffic. Upon completion of his jail term, Knapik was ordered removed for committing a crime of moral turpitude. On appeal, the BIA held that attempt offenses are crimes of moral turpitude if the underlying crime is one of moral turpitude.

The court held that the BIA did not err in finding that reckless endangerment was a crime of moral turpitude. However, the court held that the crime of attempted reckless endangerment does not exist. The court reasoned that it is impossible to attempt to be reckless because an attempt requires intent, and recklessness by definition involves the lack of intent.

Contact: Nicole Nardone, OIL
☎ 202-616-4900

In ***Singh v. Ashcroft***, — F.3d —, 2004 WL 2072113 (3rd Cir. Sept. 17, 2004) (Ambro, *Becker*, Greenberg), the Third Circuit granted Singh's petition for review of a final order of removal. Singh was convicted of Unlawful Sexual Contact in the Third Degree for touching the breast of his cousin, a minor, and the government argued that his conviction constituted an aggravated felony, and he was therefore removable.

The court applied the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), which requires the adjudicator to look only to the statutory definitions of the offense. Under the categorical approach, the court held that § 767 of the Delaware Criminal Code makes no reference to age, therefore Singh's conviction did not constitute sexual abuse of a minor and was not an aggravated felony.

Contact: Anthony Nicastro, OIL
☎ 202-616-9358

In ***United States v. Damrah***, — F.Supp.2d —, 2004 WL 2032512 (N.D.Ohio Sept. 13, 2004) (*Gwin*), the court denied Damrah's motions for a judgment of acquittal and for a new trial. Damrah was charged with illegally obtaining citizenship by lying on his application. He had been granted citizenship in 1994. Following the attacks of September 11, 2001, videos shot in 1991 surfaced showing Damrah soliciting funds for Palestinian groups responsible for the killing of Israelis during the first Intifada. The government charged Damrah with ille-

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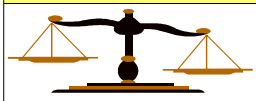

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gally obtaining citizenship, alleging that he made false statements by indicating that he had not engaged in religious persecution and by failing to state he was affiliated with the Palestinian Islamic Jihad, the Islamic Committee for Palestine, and the Al-Kifah Refugee Center. The jury returned a guilty verdict. Damrah challenged the verdict on the grounds that the words "persecution" and "affiliation" were fundamentally ambiguous and therefore legally insufficient to support the verdict.

The court held that all the charged grounds were legally sufficient, finding that while the word "persecution" was not defined by statute and that the persecution question followed a question about membership in the Nazi party, a reasonable applicant would have distinguished between the two, and that in any case, praising attacks on religious groups rises to the level of persecution. The court also held that the trial court's jury instruction explaining the term "affiliation" as "less than membership but more than mere sympathy" was sufficient to remove any ambiguity. The court concluded that the government's evidence was sufficient to support a guilty verdict and denied Damrah's motion for acquittal and request for a new trial.

Contact: James Moroney, AUSA
☎ 216-622-3600

In ***United States v. Torres***, — F.3d —, 2004 WL 1964498 (3rd Cir. Sept. 7, 2004) (Alito, *Chertoff*, Debevoise), the Third Circuit affirmed the Eastern District of Pennsylvania decision finding Torres guilty of reentering the United States after having been deported. Torres appealed the conviction, claiming that his prior removal order was flawed and therefore could not support a conviction for unlawful reentry. Torres argued that at no time in his hearing did the IJ inform him of any forms of discretionary relief from removal, rendering his removal unconstitutional. The court held while the IJ erroneously believed Torres to be ineligible for relief, the oversight did not render his hearing "fundamentally unfair," and the challenge to his removal order failed.

Contact: Anita Eve, AUSA
☎ 215-861-8577

Zadvydas protections against the indefinite detention of aliens do not apply to the 90 day removal period.

HABEAS CORPUS

In ***Ferreira v. Ashcroft***, — F.3d —, 2004 WL 2002564 (9th Cir. Sept. 9, 2004) (Hug, Fletcher, *Tashima*), the Ninth Circuit reversed the District of Arizona's denial of Ferreira's habeas petition on the basis that he was an aggravated felon. Ferreira, convicted of possession of methamphetamine and thereafter placed in removal proceedings, sought cancellation of removal and his application was denied on the ground that he was ineligible, having been convicted of an aggravated felony. The court concluded that Ferreira's conviction was not an aggravated felony because it was not punishable by imprisonment for more than year and did not contain a trafficking element, therefore the District Court erred in denying his habeas petition.

Contact: Joan Ruffennach, AUSA
☎ 602-514-7505

In ***Khotesouvan v. Morones***, — F.3d —, 2004 WL 2029921 (9th Cir. Sept. 13, 2004) (*Hall*, Kleinfeld, Callahan), the Ninth Circuit affirmed the District of Oregon's dismissal of petitioners' habeas claims. Petitioners were ordered removed to Vietnam or Laos but repatriation was not foreseeable. Petitioners claimed that their continued detention served only as punishment and violated due process. Petitioners filed habeas claims within their 90 day removal periods. The court distinguished this case from *Zadvydas*, holding that the protections against indefinite detention in the face of unlikely removal do not apply to the 90 day removal period, which is by statute a definite period.

Contact: Kenneth Bauman, AUSA
☎ 503-727-1025

JURISDICTION

In ***Adeyemo v. Ashcroft***, — F.3d —, 2004 WL 1965664 (7th Cir. Sept. 2, 2004) (Coffey, Manion, *Kanne*), the Seventh Circuit granted Adeyemo's petition for review of the BIA's decision to deny his appeal on the grounds that he received sufficient notice of deportation proceedings. Petitioner claimed that he never received the Order to Show Cause and that the signature on the certified mail receipt did not belong to him or any other responsible person at his address. The court held that an illegible signature on a return receipt card was insufficient to create an presumption of actual delivery to Adeyemo or a responsible person at his address.

Contact: Larry Cote, OIL
☎ 202-353-9923

MOTIONS TO REOPEN

In ***Prekaj v. INS***, — F.3d —, 2004 WL 1969489 (6th Cir. Sept. 8, 2004) (Krupanksy, Gilamn, *Mays*), the Sixth Circuit denied the Prekajs' petition for review of a denial of asylum. Petitioners failed to provide a written brief as indicated on their Notice of Appeal form and their appeal was summarily dismissed by the Board. Six months later (and three months after the

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90-day filing window), petitioners filed a motion to reopen, claiming that they had attempted to obtain counsel and that counsel was unable to file the brief on time. The court held that it is not an abuse of discretion for the Board to enforce the deadline for motions to reopen and affirmed.

Contact: Susan Houser, OIL
☎ 202-616-9320

PROCEDURAL MATTERS

In ***Subhan v. Ashcroft***, — F.3d —, 2004 WL 1965668 (7th Cir. Sept. 7, 2004) (*Posner*, Rovner, Wood), the Seventh Circuit granted Subhan's petition for review of the BIA's decision to deny a third continuance to obtain certificates to complete an application for adjustment of status. Petitioner had been previously granted two six-month continuances in order to obtain certificates from the Illinois and federal Departments of Labor, but to no avail.

The Seventh Circuit held that the IJ's decision to deny a third continuance did not constitute a denial of the application for adjustment of status, therefore the decision was reviewable. The court concluded that the IJ violated the LIFE act when he denied Subhan a continuance without giving a reason consistent with the statute (indeed without giving any reason) and the case was remanded.

Contact: James Hunolt, OIL
☎ 202-616-4876

REINSTATEMENT

In ***Arreola v. Ashcroft***, — F.3d — 2004 WL 1977663 (9th Cir. Sept. 8, 2004) (Pregerson, Beam, *Paez*,), the Ninth Circuit viewed Arreola's petition for review as a petition for habeas corpus and transferred the case to the District Court for the Northern District of California.

Arreola petitioned for review of a reinstatement order. Arreola was convicted of a DUI offense and subsequently found removable for having committed an aggravated felony. Arreola was removed and subsequently reentered the United States. Following his removal, the Ninth Circuit held that a DUI offense was not an aggravated felony. Citing this case, Arreola argued that his original removal order was invalid and that its reinstatement violated his due process rights.

The reinstatement provision satisfies due process as long as the underlying deportation proceeding itself satisfies due process.

The court held that the reinstatement provision satisfies due process as long as the underlying deportation proceeding itself satisfied due process. The court found it did not have jurisdiction to hear the habeas claim arising from the original deportation proceeding and transferred the case to the District Court.

Contact: Papu Sandhu, OIL
☎ 202-616-9357

In ***Lattab v. Ashcroft***, — F.3d —, 2004 WL 2059762 (1st Cir. Sept. 14, 2004) (*Seyla*, Dyk), the First Circuit denied Lattab's petition for review of a reinstatement order. Lattab, a native of Algeria, was granted voluntary departure after overstaying in 1997. He failed to depart by the prescribed date, but did leave one month later, effectively "self-deporting." In 2003, while trying to renew an employment visa, it was discovered he had a prior deportation order, which the government sought to reinstate. Lattab claimed that the reinstatement provision was impermissibly retroactive, violated due process, and was inapplicable to his case.

The court held that a statute is impermissibly retroactive only if it would change the legal consequences of actions actually taken prior to the statute's effective date. As Lattab did not attempt to adjust his status until two years after the change in law, he could not successfully argue that he had an expectation that he could change his status. The court found that Lattab admitted all the facts necessary to warrant reinstatement, therefore he could not succeed on his due process claim. The court also noted that questions regarding policy judgments underlying reinstatement are for Congress, not the courts, to decide.

Contact: Papu Sandhu, OIL
☎ 202-616-9357

VOLUNTARY DEPARTURE

In ***Lopez-Chavez v. Ashcroft***, —- F.3d — , 2004 WL 2003729 (7th Cir. Sept. 9, 2004) (Coffey, Kane, *Wood*), the Seventh Circuit denied Lopez-Chavez's motions for a stay pending review and for a stay of voluntary departure. Petitioner mailed an application for adjustment to INS which was denied because a visa was not immediately available. Rather than returning the application to petitioner, INS used the information therein to initiate removal proceedings, and petitioner challenged his removal on the ground that the INS violated its regulations in using his application.

The court held that IIRIRA did not divest the court of the power to grant a stay of voluntary departure pending judicial review. Furthermore, the court held that INS was in fact enforcing its regulations by not returning the application to the petitioner, thus there was no merit in petitioner's stay requests.

Contact: M. Jocelyn Lopez Wright, OIL
☎ 202-616-4868

CASES SUMMARIZED

INSIDE OIL

OIL is proud to welcome two new Honor Grads this month: Eric Marsteller and Melissa Neiman-Kelting.

Eric Marsteller received his B.A. in History from Tulane University in 2000 and his J.D. from the George Washington University Law School in 2004. Mr. Marsteller served as a volunteer intern with OIL in the summer of 2002 and the spring of 2003. He is awaiting his results from the Virginia Bar. Mr. Marsteller works on Jocelyn Wright's team.

Melissa Neiman-Kelting received her B.A. degree in French from Illinois Wesleyan University in Bloomington, Illinois in 1999 and her J.D. from George Washington University Law School in Washington, D.C. in 2004. Between undergraduate and law school, she worked for Indiana University in the Tax Department. Ms. Neiman-Kelting served as a volunteer intern at OIL during the fall of 2002. She took the Maryland bar in July of 2004. Ms. Neiman-Kelting is assigned to Mark Walter's team.

POTPOURRI

Beginning September 30, DHS will require visitors from 27 more countries to be fingerprinted and photographed when they enter the United States. Visitors from countries such as Britain, France, Australia, Japan, New Zealand, and Singapore will still be permitted to enter the United States without a visa. DHS estimates that 33,000 people daily will be effected.

Since the launch of the Arizona Border Control (ABC) initiative March 16, 2004, DHS agents have apprehended more than 351,700 illegal immigrants at the Arizona border. Narcotics seizures have risen from 165,057 lbs. in 2003 to 359,604 lbs. in 2004. Rescues of intending immigrants have more than doubled.

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:

julia.wilcox@usdoj.gov

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"

If you are not on our mailing list or for a change of address, please contact karen.drummond@usdoj.gov

Peter D. Keisler
Assistant Attorney General

Jonathan Cohn
Deputy Assistant Attorney General
United States Department of Justice
Civil Division

Thomas W. Hussey
Director

David J. Kline
Principal Deputy Director
Office of Immigration Litigation

Julia Doig Wilcox
Senior Litigation Counsel
Editor

Jeff Leist
Legal Intern