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LITIGATION HIGHLIGHTS

Inside

First Circuit dismisses all legal challenges to ICE workplace enforcement action

In ***Aguilar v. U.S. ICE***, __F.3d__, 2007 WL 4171244 (1st Cir. Nov. 27, 2007) (Boudin, *Selya*, Howard), the First Circuit affirmed the dismissal for lack of jurisdiction of a complaint by a class of aliens who claimed that their statutory and constitutional rights had been violated as a result of a worksite enforcement action by officers of the Immigration and Customs Enforcement (ICE). The court found that the aliens' claims were subject to the judicial channeling provision under INA § 242(b)(9), 8 U.S.C. 1252(b)(9), and thus subject to the statutory exhaustion requirements, and that the government's actions had not violated any of their claimed substantive due process rights.

"The petitioners cannot skirt the statutory channel markers by lumping together a melange of claims associated with removal, each of which would be jurisdictionally barred if brought alone."

The events precipitating this lawsuit arose on March 6, 2007, when ICE officers executed search and arrest warrants at a leather goods factory in New Bedford, Massachusetts, suspected of employing large numbers of illegal aliens. ICE agents appeared unannounced at the factory, arrested five executives on immigration-related criminal charges, and took more than 300 rank-and-file employees into custody for civil immigration infractions. Because of a shortage of detention space in Massachusetts, many of the detainees were transported to other detention facilities, some as far away as Harlingen, Texas. These enforcement actions caused a media storm of criticism especially by the local social welfare agencies who were called to ensure the proper care of detainees, their families, and in particular their children.

On March 8, 2007, a lawsuit was filed against ICE and others, seeking the immediate release of detained aliens and an injunction against any further transfers out of Massachusetts. A district court temporarily halted the transfers. Subsequently, the detainees' complaint was amended and fashioned as a class action. The alien petitioners alleged that ICE's actions had violated certain of their constitutional and statutory rights, including: (i) the right to be free from arbitrary, prolonged, and indefinite detention; (ii) the right to a prompt bond hearing, that is, one held in Massachusetts prior to any transfer; (iii) the right to counsel; and (iv) the right of family integrity. Following the government's filing of a motion to

(Continued on page 2)

OIL completes move to Liberty Square

The Office of Immigration Litigation completed its move from National Place to Liberty Square on December 2007, The new building is located at 450 5th Street, N.W., Washington, D.C. 20001. The regular mailing address remains unchanged at: P.O. Box, 878, Washington, D.C. 20044.

Work-place enforcement action dismissed

(Continued from page 1)
dismiss for lack of jurisdiction, the district court dismissed the lawsuit and dissolved its prior order restraining the transfers of detained aliens. *See Aguilar v. U.S. Immigr. & Customs Enf. Div. of Dep't of Homeland Sec.*, 490 F.Supp.2d 42, 48 (D.Mass. 2007). Petitioners then appealed to the First Circuit.

"Zipper Clause" Bar

The First Circuit rejected as "wishful thinking" petitioners' contention that § 242(b)(9), the "zipper clause," only strips district courts of jurisdiction over challenges to ongoing removal proceedings and not over claims that are unaccompanied by any challenge to a particular removal proceeding. Petitioners' construction, noted the court, "belies the statute's plain meaning and runs contrary to Congress's discernible intent. . . The petitioners cannot skirt the statutory channel markers by lumping together a melange of claims associated with removal, each of which would be jurisdictionally barred if brought alone, and eschewing a direct challenge to any particular removal proceeding. Such claim-splitting-pursuing selected arguments in the district court and leaving others for adjudication in the immigration court-heralds an obvious loss of efficiency and bifurcation of review mechanisms. These are among the principal evils that Congress sought to avoid through the passage of section § 242(b)(9)."

However, the court also found that § 242(b)(9) "does not "swallow all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien." The provision must be read to "exclude claims that are independent of, or wholly collateral to, the removal process," it said, noting that "claims that cannot effectively be handled through the available administrative process fall within that purview." The court also noted that Congress under the REAL ID Act has stated that § 242(b)(9) should not be read as precluding habeas challenges to detention, which presumably would encompass challenges to the availability of bail.

Exhaustion Under§ 242(b)(9)

The court then considered whether § 242(b)(9) required exhaustion of petitioners' claims. First, the court found that petitioners had procedurally defaulted on their claims over the conditions-of-confinement because they were not raised below in the amended complain.

Second, the court held that petitioners' claims that they had been denied their right to counsel were subject to administrative exhaustion and therefore could not be heard by the court of appeals. Specifically, petitioners claimed that their detention and subsequent transfer by the government infringed their rights to counsel by barring their access to lawyers, interfering with preexisting attorney-client relationships, and making it difficult to secure counsel of their choosing. The court reasoned that an alien's right to counsel is part and parcel of the removal proceeding itself and so viewed, "an alien's right to counsel possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned." Therefore, explained the court "allowing aliens to ignore the channeling provisions of section 1252(b)(9) and bring right-to-counsel claims directly in the district court would result in precisely the type of fragmented litigation that Congress sought to forbid."

"A pattern and practice claim is not a freestanding cause of action but merely a method of proving an underlying legal violation."

The court also rejected petitioners' contention that requiring exhaustion of their right-to-counsel claims will give rise to a substantive constitutional question similar to that noted by the Supreme Court in *McNary v. HRC*, 498 U.S. 479 (1991). In that case, the Court held that the statute governing review of special agricultural worker program status determinations did not bar district courts from exercising jurisdiction over due process pattern and practice claims that challenged the program's characteristic procedures. The Court suggested that the claims were "collateral" to the review of program status determinations and, thus, not covered by the exhaustion requirements.

Here, the court found that the right to counsel claims did not give rise to potential constitutional problems of the kind that troubled the *McNary* Court. Unlike in *McNary*, the petitioners did not challenge the manner in which an entire removal program was being implemented nor did they claim that the INA's basic review procedures denied aliens the opportunity to call witnesses or challenge adverse evidence. Thus, unlike the scenario presented in *McNary,* a reviewing tribunal could fairly hear and determine the denial of counsel claims. Similarly, the court rejected petitioners' attempt to separate the class-wide pattern and practice claim from the individual claims. "Merely conglomerating individual claims and posturing the conglomeration as a pattern and practice claim does not have talismanic effects. A pattern and practice claim is not a freestanding cause of action but merely a method of proving an underlying legal violation," said the court. Finally, the court rejected petitioners' contention that the judicial review provisions of the INA would be suspect if they were required to channel the right to counsel claims into the immigration court, thus foreclosing the availability of a particular type of remedy such as declaratory

(Continued on page 17)

Pending Litigation

Liadov v. Mukasy: Timely Delivery of Notice of Appeal

Several circuit courts of appeals and the Board of Immigration Appeals ("BIA" or "Board") in *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), have addressed the issue of whether an overnight delivery service's failure to timely deliver a Notice of Appeal to the BIA can constitute an extraordinary circumstance excusing an alien's failure to comply with the 30-day time limit for filing an appeal. The courts and the BIA have approached the issue somewhat differently and the decision of the United States Supreme Court in *Bowles v. Russell*, __U.S.__, 127 S. Ct. 2360, 2366 (2007), could impact the analysis. The BIA's precedent decision on this issue in *Matter of Liadov* is currently pending review before the Court of Appeals for the Eighth Circuit in *Liadov v. Mukasey*, No. 06-3522 (8th Cir.).

In *Oh v. Gonzales*, 406 F.3d 611, 613-614 (9th Cir. 2005), the Ninth Circuit held that the BIA committed legal error and abused its discretion in finding that it did not have authority to extend the time in which an alien must file his Notice of Appeal from a decision of an Immigration Judge, and in stating, without elaboration, that Oh's case was not appropriate for exercise of the BIA's power in exceptional circumstances to *sua sponte* reconsider its decision. The Immigration Judge issued his decision on January 10, 2003, and the alien mailed her Notice of Appeal by overnight mail on February 4, 2003. *Id.* at 612. The BIA did not receive it until February 24, 2003. *Id.* Relying on the BIA's statements in its Practice Manual recommending the use of overnight delivery services and that in "rare circumstances" it may excuse late filings, and on the judicially created "unique circumstance" doctrine, which the Ninth Circuit interprets broadly, the court in *Oh* found that the BIA's refusal to reconsider her claim in these circumstances, based on "its erroneous assumption that it lacked authority to do so," was an abuse of discretion. *Id.* at 613. The Court also found that the BIA's legal error in misconstruing the jurisdictional nature of its own filing deadline appears to have constrained its understanding of its discretionary authority as well, and therefore, the Court could not rely on the BIA's "cryptic" statement without elaboration that Oh's case was not appropriate for exercise of the BIA's power in exceptional circumstances to *sua sponte* reconsider a decision." *Id.* at 613-614. The court remanded the case to allow the BIA to exercise its discretion as to whether to accept Oh's late-arriving notice of appeal as a "rare circumstance," "with some reasoned explanation should the BIA reject her proffered excuse." *Id.* Following *Oh*, the Second Circuit in *Sun v. U.S. Dep't of Justice*, 421 F.3d 105 (2d Cir. 2005), took a similar broad interpretation of the application of the judicially created "unique or extraordinary circumstances doctrine" and agreed with the Ninth Circuit that an overnight delivery service's failure to timely deliver a Notice of Appeal can constitute a unique or extraordinary circumstance excusing an alien's failure to file a timely appeal. The court did not find that such an extraordinary circumstance existed in that case, but rather remanded the record for the BIA to reconsider the issue.

> "Postal or delivery delays do not affect existing deadlines, nor does the Board excuse untimeliness due to such delays, except in rare circumstances."

In *Matter of Liadov*, the aliens had until February 12, 2004, to file their Notice of Appeal, and the BIA found it was not placed in overnight mail until February 10, 2004, at the earliest. 23 I&N Dec. at 991. The Federal Express tracking slip indicated that it was sent for "Priority Overnight" delivery on February 11, 2004, guaranteed for delivery on February 12th, the filing deadline. *Id.* It was not delivered until February 13, 2004. *Id.* The BIA noted that the regulations, 8 C.F.R. § 1003.38(b), provide that a Notice of Appeal shall be filed directly with the Board within 30 calendar days after an Immigration Judge renders a decision. *Id.* Furthermore, in cases involving applications for asylum, the time for filing administrative appeals is also set by statute. *Id.* Section 108(d)(5)(A)(iv) of the Immigration and Nationality Act ("INA") provides that "any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 240, whichever is later." *Id.* The BIA also indicated that its Practice Manual at http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm, similarly emphasizes the importance of timely filings. *Id.*

The BIA noted in *Matter of Liadov* that the Practice Manual clearly states that an appeal or motion is not deemed filed until it is received by the BIA, and that the BIA does not observe the "mailbox" rule. *Id.* at 992 (citing Practice Manual § 3.1(a)(i), at 31 (July 30, 2004)). The BIA observed that the Practice Manual "encourages parties to use courier and overnight delivery services to ensure timely filing, but . . . leaves open the possibility that delivery delays could, in 'rare circumstances,' excuse untimely filings." *Id.* (citing Practice Manual, § 3.1(b)(iv), at 34). The BIA noted, however, that the Practice Manual also states that "the Board

(Continued on page 4)

Timely filing of appeals: delivery of notice

(Continued from page 3)
strongly recommends that parties file as far in advance of the deadline as possible." *Id.* (citing Practice Manual, § 3.1(b), at 33). The BIA further found that the Practice Manual cautioned that "the failure of a courier or overnight delivery service does not excuse parties from meeting filing deadlines." *Id.* (citing Practice Manual § 3.1(a)(iv), at 32). In addition, the BIA noted that the Practice Manual also provides that "[p]ostal or delivery delays do not affect existing deadlines, nor does the Board excuse untimeliness due to such delays, except in rare circumstances." *Id.* (citing Practice Manual § 3.1(b)(iv), at 34). The Practice Manual also states that "[p]arties should anticipate all Post Office and courier delays, whether the filing is made through first class mail, priority mail, or any overnight or other guaranteed delivery service." *Id.* The BIA found that "although a delivery delay might excuse untimeliness in a rare case, such as where the delivery was very late or caused by 'rare' circumstances, the Practice Manual makes clear that, in general, such delays do not affect deadlines." *Id.* The BIA found that in the *Liadov* case, "where the appeal was placed with an overnight courier service, at most, 48 hours before the filing deadline, we do not find the fact that delivery was a day or 2 past the 'guaranteed' date to be a 'rare' circumstance that would excuse the late filing. Such delays are not 'extraordinary' events." *Id.* The BIA noted that filing deadlines are as critical to the smooth and fair administration of the BIA as they are to the courts. *Id.* The BIA also noted that in 1996, it extended the deadline for filing appeals from 10 to 30 days. *Id.* The BIA stated that parties must take the filing period seriously, and that the filing deadline was not extended to simply "push the window" of last-minute filings 20 days forward. *Id.*

The BIA in *Matter of Liadov*, found that "the regulations governing appeals to the Board, the statute governing administrative appeals in asylum cases, and the authority of the Supreme Court all require that filing deadlines be strictly enforced and thus that appeals be timely filed." 23 I. & N. Dec. at 993. The BIA determined that neither the statute nor the regulations grant it the authority to extend the time for filing appeals, and that it "therefore [did] not agree with the [Ninth Circuit's] suggestion" in *Oh*, that it has the authority to extend the appeal time. *Id.* Rather, the BIA concluded that where a case presents exceptional circumstances, it may certify a case to itself under 8 C.F.R. § 1003.1(c). *Id.* (citing generally *Matter of J-J-*, 21 I & N Dec. 976 (BIA 1997)). The BIA found, however, that short delays by overnight delivery services are not in and of themselves "rare" or "extraordinary" events, and appellants must take such possibilities into account. *Id.* The BIA noted that in *Oh*, the untimeliness of the alien's appeal could have been deemed to have resulted from "rare circumstances," which might warrant its taking the case on certification, particularly as the case did not involve an attempted "last-minute" filing. In the *Liadov* case, however, the BIA found that although the Liadovs missed their appeal deadline by only one day, they had not established any "rare" or "extraordinary" events that required waiting until the last day or two of the mandated filing period to place their appeal in the hands of an overnight delivery service and in relying so completely on the delivery company's overnight guarantee. *Id.* The BIA therefore declined to take the case under its certification authority.

> "The regulations governing appeals to the Board, the statute governing administrative appeals in asylum cases, and the authority of the Supreme Court all require that filing deadlines be strictly enforced and thus that appeals be timely filed."

Several interesting issues are pending before the Eighth Circuit in the *Liadov* case. In *Atiqullah v. INS*, 39 F.3d 896 (8th Cir. 1994), the Eighth Circuit held that generally, the time limit for filing a notice of appeal to the BIA is mandatory and jurisdictional, but carved out a judicially created exception in that case, finding that "in unique circumstances, if 'a party is misled by the words or conduct of the court, an appellate tribunal may have jurisdiction to hear an otherwise untimely appeal." In *Liadov*, the government argued that *Atiqullah* involved different circumstances, and should not be extended to the *Liadov* case because any misleading there was done by a third party carrier, not by the Immigration Court or agency, and that the BIA's Practice Manual was not misleading. The government argued that the judicially created unique circumstances doctrine should be narrowly construed to apply only where there has been some form of official misleading by the agency, not to the acts of a third party, such as a courier or overnight delivery service. Also at issue is whether, if the judicially created unique circumstances doctrine applies, does it apply to expand or toll the appeal period, or is it satisfied by the BIA's ability to take a case on certification under 8 C.F.R. § 1003.1(c), where it finds "rare" or "unique" circumstances warrant its excusing the untimeliness and taking the case in the exercise of its discretion. In the latter instance, the issue arises as to whether the court has jurisdiction to review the BIA's discretionary decision to decline to certify a case to itself. The government argued that this authority is like the Board's discretionary authority under 8 C.F.R. § 1003.2(a) to decide whether to *sua sponte* reopen or reconsider a case, which most courts have found they lack jurisdiction to review because there are not standards set forth in the regulations against which to measure this authority. In the Eighth Circuit, the government initially lost this latter issue in

(Continued on page 17)

FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

On January 7, 2008, the Supreme Court heard oral arguments in ***Dada v. Mukasey***, No. 06-1181, an unpublished Fifth Circuit decision. The question presented is:

> Does the filing of a motion to reopen removal proceedings automatically toll the period within which an alien must depart the United States under an order granting voluntary departure?

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Particularly Serious Crime

On December 17, 2007, following a settlement by the parties, the Supreme Court dimissed the cert petition in ***Ali v. Achim***, No. 06-1346. The government had sought review of the following questions:

(1) Do only aggravated felonies count as particularly serious crimes (PSC) under the withholding of deportation bar?
(2) Are PSC determinations in the asylum and withholding context discretionary under 8 U.S.C. 1252(a)(2)(B)(ii) and hence unreviewable?
(3) Does the REAL ID "question of law" exception to jurisdictional bars at 8 U.S.C. 1252(a)(2)(D) permit review of a claim that the BIA misapplied its precedent?

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Asylum — Disfavored Group

On May 11, 2007, the Solicitor General filed an opposition to a petition for certiorari in ***Sanusi v. Gonzales***, 188 Fed. Appx. 510 (7th Cir. July 24, 2006). The question presented is whether an alien who has demonstrated membership in a disfavored group must also show individual singling out for persecution to establish it is more likely than not that life or freedom would be threatened.

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Jurisdiction — Sua Sponte Reopening

In ***Tamenut v. Gonzales***, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case.

On July 19, 2007, the court ordered that the case be submitted to the en banc court without oral argument.

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Constitution — Denial of 212(c) Relief Violates Equal Protection Clause

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

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Visas — "Immediate Relative"

The government has filed an appeal in ***Robinson v. Secretary DHS***, No. 07-2977 (3d Cir.). The question raised is whether the spouse of a United States citizen qualifies as an "immediate relative" as defined in INA 101(b)(2)(A)(I) when the citizen dies after the filing of an I-130 visa petition but before the petition was adjudicated and before the couple had been married for two years.

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Criminal Alien — Conviction Modified Categorical Approach

The government has filed a petition for rehearing en banc in ***U.S. v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007). The question is whether a minute order can be considered under the modified categorical approach

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Constitution — Ineffective Assistance of Counsel, REAL ID Act

On November 8, 2007, the government filed a petition for rehearing en banc in ***Singh v. Gonzales***, 499 F.3d 969, 980 (9th Cir. 2007). The questions raised are: Does the district court have jurisdiction over an ineffective assistance of counsel claim that counsel failed to file timely petition for review, or does 8 USC §§ 1252(a)(5) & (b)(9) preclude district court jurisdiction? Is there a Fifth Amendment constitutional due process right to effective counsel in immigration removal proceedings?

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Convention Against Torture Definition of "Torture"

On December 7, 2007, the Third Circuit granted *sua sponte* rehearing en banc in ***Pierre v. Attorney General***, No. 06-2496, a case transferred pursuant to the REAL ID Act from the District of New Jersey. The case involves the definition of torture in the context of prison conditions and whether torture requires specific intent.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds That Threats Made During Child Custody Battle Between Estranged Parents Do Not Compel A Finding Of Persecution**

In *Lumanauw v. Mukasey*, __ F.3d __, 2007 WL 4280547 (1st Cir. Dec. 7, 2007) (Torruella, *Cyr*, Lynch), the First Circuit held that the record did not compel a finding that petitioner had established eligibility for withholding of removal. The petitioner, an Indonesian Christian had a child with her ex-fiancé, a Muslim. A contentious child custody battle ensued, during which the petitioner's ex-fiancé threatened her and their child, and men wearing military uniforms went to petitioner's house demanding the child. The IJ denied the asylum request because it had been untimely filed and denied withholding finding, *inter alia*, that the threats were motivated by his legitimate parental interest and not "by any professed oppugnancy to the petitioner's Christian beliefs." The BIA affirmed the IJ's decision.

The First Circuit denied the petition finding that there was no "conclusive evidence" that the petitioner's ex-fiancé's actions were motivated to any extent by petitioner's Christian beliefs. "The IJ fairly inferred, therefore, that this was essentially a child custody battle between estranged parents, and one which likely would have occurred even if petitioner had been a Muslim," said the court.

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■ **First Circuit Affirms IJ's Adverse Credibility Determination Because It Was "Particularized, Record-Noted, And Closely Reasoned"**

In *Segran v. Mukasey*, __F.3d__, 2007 WL 4171217 (1st Cir. Nov. 27, 2007) (Torruella, *Selya,* Cyr), the court affirmed a denial of asylum based on adverse credibility findings because it was supported by numerous inconsistencies between petitioner's testimony, asylum application, and interview with an asylum officer.

The petitioner, a citizen of Liberia, claimed persecution on account of his membership in the Gio tribe and his refusal to carry out assassinations on behalf of the SSS, a force loyal to former Liberian leader Charles Taylor. The IJ denied asylum on the basis of adverse credibility findings, citing numerous inconsistencies. First, petitioner testified that he was recruited into the SSS when an SSS detachment stopped him and his brother and demanded they join the ranks, killing his brother right in front of him when he refused to join. Petitioner had previously stated to the asylum officer that he was alone during this encounter. Second, he testified that while a soldier in the SSS he received a bullet wound and was hospitalized for four months, while in his asylum application he merely alluded to "a wound" requiring only two or three weeks hospitalization. Third, petitioner testified that he was beaten and detained by the SSS in October 2000 when he refused to assassinate some enemies, which the IJ found suspect because petitioner's visitor's visa was issued in August 2000. When asked to explain the discrepancy, petitioner stated that regardless of "any events that occurred after August 2002, he thought 'it was unsafe.'" Additionally, the IJ noted that in his visa application he had stated that the purpose of the visit was to attend his mother's funeral – and petitioner admitted his mother was not dead – and that petitioner could not recall several significant dates concerning his marriage and births of his children. The BIA affirmed the IJ's adverse credibility determination.

"The petitioner cannot slough off the agency's adverse credibility determination either as purely conclusory or as an unfounded exaltation of trivial errors."

The court affirmed the IJ's adverse credibility determination, finding that the determination was "particularized, record-noted, and closely reasoned." Specifically, the court found that "[i]t beggars credulity that [the murder of petitioner's brother] would have been inadvertently omitted from the petitioner's original account." While petitioner argued that the inconsistencies were minor or, in the alternative, due to the person who prepared his asylum application, the court found that "while scriveners' errors and bureaucratic bungling might explain some of the lesser inconsistencies mentioned by the IJ, the major inconsistencies are enough to bulwark the adverse credibility determination." Indeed, said the court, "the petitioner cannot slough off the agency's adverse credibility determination either as purely conclusory or as an unfounded exaltation of trivial errors." The court also dismissed the claim that petitioner feared persecution as a member of the Gio tribe as it, too, depended on his credibility.

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■ **First Circuit Affirms Agency's Determination That Unwed Petitioner With One Child Did Not Have A Well-Founded Fear Of Persecution Under China's Family Planning Laws**

In *Wang v. Mukasey*, __F.3d__, 2007 WL 4200761 (1st Cir. Nov. 29, 2007) (Lynch, *Lipez*, Barbadoro), the court affirmed the agency's determination that petitioner did not have a well-founded fear of persecution under China's family planning laws. The court also found that the BIA had properly relied on the 2004 State Department Report.

Petitioner claimed that, due to the fact that she had one child, wanted more children, and had no

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

husband, she would face persecution in China under the family planning laws as an unwed mother. To support her claim, petitioner submitted the 2004 Country Report. An IJ denied her claim, finding that while China persecutes "Chinese nationals who break the coercive family planning policy," petitioner did not demonstrate that she, in particular, would be persecuted for being single and having a child. The BIA affirmed, adding that petitioner would not presently be subject to persecution as she only has one child. The BIA also characterized as speculative petitioner's claim that she would be persecuted if she had additional children.

The court affirmed the denial of asylum. The court found that "the BIA justifiably concluded that the State Department's 2004 Report 'indicates that only social compensation fees have been levied on unwed mothers and that in some instances these fees have been abolished and relaxed in other instances.'" The court rejected petitioner's argument that her expressed intention to have additional children was improperly dismissed as speculative under the Second Circuit's opinion in *Lin v. Gonzales*, 445 F.3d 127 (2d Cir. 2007), because "[w]e understand the IJ and BIA to have found that persecution based on additional *births* was speculative, not the births themselves" (emphasis added). The court did not reach petitioner's claim of changed circumstances because she failed to adequately address the issue in her brief.

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SECOND CIRCUIT

■ BIA Erred By Failing To Consider That Petitioner's Refusal To Provide Computer Services To FARC Constituted Imputed Political Opinion

In ***Delgado v. Mukasey***, __F.3d__, 2007 WL 4180134 (2d Cir. Nov. 28, 2007) (*Calabresi*, Raggi, Hall), the court reversed the agency's denial of asylum to a Colombian petitioner because the BIA failed to consider petitioner's claim of imputed political opinion and erred as a matter of law by finding that kidnapping can not constitute persecution.

> "Kidnapping is a very serious offense . . . the critical issue is whether a reasonable inference may be drawn from that evidence that the motivation for the conduct was to persecute on account of a protected ground.

Petitioner claimed that the FARC kidnapped and threatened to kill her unless she used her computer skills to set up a computer network. The FARC later released her – when the computer equipment failed to arrive – but warned her that if she didn't return they would kill her. Petitioner fled town and filed an incident report which the police "did not give much importance." An IJ denied asylum and withholding of removal because he found that petitioner had not been kidnapped on account of a protected ground. The IJ also denied CAT relief because he found the FARC did not act with the consent or acquiescence of the government. The BIA affirmed, adding that, contrary to petitioner's argument, petitioner had been kidnapped because of her computer skills and not on account of her political opinion. Further, the BIA found that kidnapping did not rise to the level of persecution under its precedent *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997), and that the record was "devoid of evidence" that the Colombian government acquiesced to torture.

The Second Circuit reversed. The court found that the BIA failed to consider petitioner's claim that she had been persecuted on account of imputed political opinion. The court explained that because petitioner "testified that she would be targeted by the FARC in the future for betraying them, which, when coupled with the government's unwillingness to control the FARC, could well qualify as persecution for an imputed political opinion (opposition to the FARC)." "Given this evidence," the court said, "it did not necessarily follow that, because Petitioner's original kidnapping had not been politically motivated, her refusal to provide further technological assistance did support a well-founded fear of future persecution on account of imputed political opinion." The court also found that *Matter of V-T-S-* did not stand for the proposition that kidnapping does not constitute persecution. "To the contrary," the court said "*V-T-S-* acknowledges that kidnapping is a very serious offense" and "emphasizes [] that 'seriousness of conduct' is not, by itself, 'dispositive of persecution; 'the critical issue is whether a reasonable inference may be drawn from that evidence that the motivation for the conduct was to persecute'" on account of a protected ground. Finally, the court found that the record did, in fact, contain some evidence of government acquiescence to torture as petitioner claimed the police ignored her incident report. The court did not reach an ineffective assistance of counsel issue and declined petitioner's request to define experts in computer science as a particular social group.

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■ Second Circuit Grants Rehearing And Rules It Lacks Jurisdiction To Review Untimely Asylum Application Finding

In ***Liu v. INS***, __ F.3d __, 2007 WL 4208776 (2d Cir. Nov. 30, 2007) (*per curiam*) (Calabresi, Straub), the Second Circuit granted rehearing and vacated its January 30, 2007 decision. The panel had held previously that it had jurisdiction to consider the BIA's finding that an asylum application was

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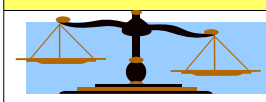

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

untimely when the BIA "unambiguously mischaracterized" evidence, because "an unambiguous mischaracterization of the record raises a question of law." On rehearing, the court held that under 8 U.S.C. § 1252(a)(2)(D), it lacks jurisdiction over fact-finding disputes such as the one in this case, and therefore dismissed the petition with respect to the asylum denial.

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■ **Second Circuit Affirms IJ's Adverse Credibility Determination Based On Chinese Petitioner's Inherently Implausible Testimony**

In ***Yan v. Mukasey***, __F.3d__, 2007 WL 4233379 (2d Cir. Dec. 4, 2007) (Calabresi, Raggi, Hall) (*per curiam*), the court found substantial evidence supported an IJ's adverse credibility determination based on finding that petitioner's story was inherently implausible.

Petitioner, a native of China, requested asylum from China's family planning laws. He claimed that Chinese authorities forced his wife to have an abortion and threatened to sterilize him. The details of his testimony, however, resulted in an IJ's adverse credibility determination based on the finding that petitioner's story was inherently implausible. Among other details, the IJ based the implausibility finding on the following facts. First, that petitioner improbably testified that he took two vacations by himself in two consecutive months that cost him a total of 7,900 yuan - when he only made 800 yuan per month – and the first vacation was taken only a few days after the date he stated his wife underwent a forced abortion and was at home for days bleeding. The IJ rejected petitioner's explanation that he only took the first vacation because it was "nonrefundable." Additionally, the IJ noted that the second expensive vacation occurred right after petitioner claimed family planning officials slapped him with a 10,000 yuan fine. Second, that while petitioner claimed he went into hiding after he received the fine and threat of sterilization, his vacations took him through Guangzhou airport multiple times, where his identity would likely be checked. The BIA affirmed the adverse credibility determination without opinion.

Before the Second Circuit, petitioner claimed that the IJ failed to provide an adequate explanation for the implausibility finding, impermissibly evaluated his testimony from the IJ's own point of view, and relied on events that did not go to the heart of his asylum claim. The court disagreed. First, the court found the IJ's explanations "more than adequate," as the IJ "explained in detail which of [petitioner]'s actions and explanations for his actions caused the IJ to find the testimony as a whole improbable." The court noted that at one point the IJ stated "if my wife was sick in bed, I wouldn't be going traveling to other countries," but found that "[a]ny reasonable person would understand why the IJ here concluded that it is implausible that a man whose wife had just undergone the physical and emotional trauma of a forced abortion would, only days later, travel alone to another country to participate in a vacation with a tour group for no asserted purpose other than pleasure." Indeed, the court said, while "[petitioner] explained that he had paid for the ticket before the abortion, and that the money was not refundable[,] just a few days later, [petitioner] took an even more expensive vacation trip [] right after authorities had supposedly imposed a significant fine for the aborted pregnancy." Moreover, the court affirmed the IJ's inference that by traveling through Guangzhou airport, petitioner subject himself to detection. Finally, the court found that the events went to the heart of petitioner's claim – indeed, the events "had everything to do with [petitioner]'s claim," the court said.

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> The court found insufficient the BIA's simple statement that "none of the background information submitted with the motion specifically mentions respondent by name."

■ **BIA Erred By Failing To Consider Documents Petitioner Submitted With His Motion To Reopen Despite The Documents' Similarity To The *Shou Yung Guo* Documents**

In ***Gao v. Mukasey***, __F.3d__, 2007 WL 4075825 (2d Cir. November 19, 2007) (Katzmann, Wesley) (*per curiam*), the court reversed the BIA's denial of a Chinese petitioner's untimely motion to reopen because the BIA had failed to consider documents petitioner submitted to support his claim that circumstances in China had changed to the extent that he would now be forcibly sterilized due to birth of a second child while in the United States.

The court found that the BIA's statement that "none of the background information submitted with the motion specifically mentions respondent by name" showed that the BIA "did not specifically address the documents [petitioner] submitted to show changed country conditions." The court noted that petitioner's documents bore a "strikingly similar" resemblance to the *Shou Yung Guo* documents that the BIA had previously found insufficient to show changed country conditions (*Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007)), but found enough differences in the documents to support a remand.

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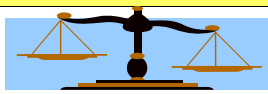
(Continued on page 9)



Summaries Of Recent Federal Court Decisions

(Continued from page 8)

■ **Second Circuit Holds That An Abortion Is Not Forced When Chinese Government Is Unaware Of A Pregnancy And Makes No Specific Threat That Would Amount To Persecution**

In ***Xiu Fen Xia v. Mukasey***, __ F.3d __, 2007 WL 4270805 (2d Cir. Dec. 7, 2007) (*Jacobs*, Kearse, Pooler), the Second Circuit upheld findings that the asylum applicant's abortion was not "forced" within the meaning of 8 U.S.C. § 1101(a)(42) because the Chinese government was completely unaware of her pregnancy and did not know she had an abortion. The court adopted the holding in *Matter of T-Z-*, 24 I&N Dec. 163, 169-70 (BIA 2007), that the distinction between "submission to pressure" and "force" requires evidence as to the pressure actually exerted on a particular case. The court also ruled that remand was not required in this case because the intervening decision in *Matter of T-Z-* does not represent "a change in policy" by the BIA. Rather, *Matter of T-Z-* amounts to a formal articulation of the standard that the BIA actually applied in its resolution of this case.

"There is no 'manifest injustice' exception to § 1252(d)'s exhaustion requirement. Insofar as our earlier opinions have held to the contrary, those opinions are overruled."

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■ **Second Circuit Holds That The INA's Statutory Exhaustion Requirement Is Jurisdictional And Cannot Be Excused For "Manifest Injustice"**

In ***Grullon v. Mukasey***, __ F.3d __, 2007 WL 4166014 (2d Cir. Nov. 27, 2007) (*Jacobs*, B.D. Parker, Hall), the Second Circuit held that 8 U.S.C. § 1252(d)(1) requires aliens to exhaust an appeal to the BIA before petitioning for review in the federal courts of appeals. Additionally, in light of the Supreme Court's recent decision in *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007), the court overruled its earlier opinions which applied a "manifest injustice" exception to excuse an alien's failure to appeal to the BIA because "*Bowles* broadly disclaims the 'authority' of the federal courts 'to create equitable exceptions to jurisdictional requirements.'" "There is no 'manifest injustice' exception to § 1252(d)'s exhaustion requirement. Insofar as our earlier opinions have held to the contrary, those opinions are overruled," said the court. The court then dismissed the criminal alien's transferred habeas petition for lack of jurisdiction.

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■ **Second Circuit Holds That Petitioner Failed To Show Due Diligence In Pursuing Ineffective Assistance Claim**

In ***Wang v. BIA***, 508 F.3d 710 (2d Cir. 2007) (Cabranes, Katzmann, Hall) (*per curiam*), the Second Circuit affirmed a decision by the BIA denying a Chinese asylum applicant's untimely motion to reopen predicated on ineffective assistance of counsel and changed country conditions. The court held that petitioner failed to exercise due diligence in filing his motion to warrant equitable tolling of the ninety-day time limitation, where his motion was not filed until eight months after he learned of the BIA's decision dismissing his appeal. The court explained that "there is no magic period of time — no per se rule — for equitable tolling premised on ineffective assistance of counsel. Rather, the nature of the analysis in each case is a two-step inquiry that first evaluates reasonableness under the circumstances — namely, whether and when the ineffective assistance "[was], or should have been, discovered by a reasonable person in the situation." Consequently, the petitioner bears the burden of proving that he has exercised due diligence in the period between discovering the ineffectiveness of his representation and filing the motion to reopen. The court also held that the alien failed to demonstrate changed country conditions in China to warrant an exception to the time limitation.

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■ **BIA And IJ Erred By Failing To Consider Petitioner's Claim That A Pattern Or Practice Of Persecution Of Christians Exists In Indonesia**

In ***Mufied v. Mukasey***, __F.3d__, 2007 WL 4105381 (2d Cir. Nov. 20, 2007) (Jacobs, *Katzmann*, Hall), the court remanded an Indonesian petitioner's withholding of removal claim because neither the IJ nor BIA considered his argument that a pattern or practice of persecution of Christians existed in Indonesia. While the IJ and BIA addressed petitioner's testimony in regard to whether it was more likely than not he, personally, would face persecution in Indonesia on account of his Christian faith, the agency did not address petitioner's claim that persecution of Christians in Indonesia was systemic, organized, or pervasive. The court declined the "government's invitation to assume that the IJ made findings on the existence of a pattern or practice *sub silentio* merely because she considered evidence relevant to that question [the country reports] for another purpose [withholding of removal]." The court noted that "in unpublished orders, we have relied on [*Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005)] to deny petitions for review brought by other Chinese Christians from Indonesia" claiming a pattern or practice of persecution, but declined to do so in this particular case because petitioner was a Christian of an ethnicity other than Chinese and, further, because the court was "unsure how systemic, pervasive, or organized

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

persecution must be [pursuant to *Matter of A-M-*] before the Board would recognize it as a pattern or practice. Indeed, we are unsure even as to what indices the Board had in mind to guide us in assessing whether persecution is systemic, pervasive, or organized at all." Finally, the court also found remand appropriate because "a lot is at stake" in finding whether a pattern or practice of persecution of Christians in Indonesia exists.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds That Conviction For Criminal Possession Of Stolen Property Under New York Law Is A Theft Offense**

In ***Burke v. Gonzales***, __ F.3d __, 2007 WL 4295386 (5th Cir. Dec. 10, 2007) (*per curiam*) (Jolly, Higginbotham, Elrod), the Fifth Circuit held that criminal possession of stolen property in the third degree in violation of N.Y. Penal Law § 165.50, qualifies as a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G), and is an aggravated felony. The court ruled that a "theft offense" is defined as a taking of property or an exercise of control over property without consent, with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is "less than total or permanent."

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■ **Fifth Circuit Holds That It Lacks Jurisdiction Over A Premature Petition For Review**

In ***Moreira v. Mukasey***, __ F.3d __, 2007 WL 4296381 (5th Cir. Dec. 10, 2007) (Davis, *Stewart*, Owen), the Fifth Circuit held that it lacked jurisdiction to consider a petition for review which was filed after entry of the Immigration Judge's order of removal, but before the BIA had ruled on the alien's appeal, even though the BIA subsequently affirmed the removal order. The court reasoned that there was no final order of removal to review when the alien filed his petition for review, and the court did not have jurisdiction to review the IJ's decision independently.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That There Is Only One Date Of Admission Under INA § 237(a)(2)(A)(i)**

In ***Zhang v. Mukasey***, __ F.3d __, 2007 WL 4191756 (6th Cir. Nov. 29, 2007) (*Batchelder*, Gilman, Varlan, (D.J.)), the Sixth Circuit held that petitioner's adjustment of status did not constitute an admission for purposes of determining whether she was removable under INA § 237(a)(2)(a)(i). The court held that there is only one "first lawful admission," as defined by INA § 101(a)(13)(A), and it is based on physical, legal entry into the United States, not on the attainment of a particular legal status.

> There is only one "first lawful admission," as defined by INA § 101(a)(13)(A), and it is based on physical, legal entry into the United States, not on the attainment of a particular legal status.

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■ **Sixth Circuit Holds That The BIA Did Not Abuse Its Discretion In Denying Continuance And Reopening**

In ***Ilic-Lee v. Mukasey***, __ F.3d __, 2007 WL 4063893 (6th Cir. Nov. 19, 2007) (Merritt, Rogers, *McKeague*), the Sixth Circuit held that the BIA did not abuse its discretion in affirming the Immigration Judge's denial of a continuance for the DHS to reopen adjustment of status proceedings where the alien's motion was pending for 14 months, the IJ provided reasons the petitioner would not prevail, the petitioner had time but did not submit supporting evidence, and DHS opposed the motion. The court further held that the IJ lacked jurisdiction to reopen where the petitioner had appealed her removal order. The court found that the BIA had not abused its discretion in denying reopening, given the weakness of the evidence of a bona fide marriage.

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EIGHT CIRCUIT

■ **Eighth Circuit Holds That Investigation Into Asylum Claims Did Not Violate Asylum Confidentiality Regulation**

In ***Averianova v. Mukasey***, __ F.3d __, 2007 WL 4293027 (8th Cir. Dec. 10, 2007) (Colloton, Arnold, *Gruender*), the Eighth Circuit held that an adverse credibility determination was supported by the fact that the asylum applicant had presented false birth certificates from Uzbekistan that purported to show they were Jewish. The petitioner, a mother and her daughter, sought asylum because of alleged persecution on account of their Jewish ethnicity and religious beliefs. To support their claim, petitioners submitted a number of documents including birth certificates. Following an investigation, the INS discovered that the documents had been altered and that petitioners were Russian. Petitioners then sought to rebut those fidings by having a Tashkent tribunal amend their father's ethnicity from "Russian" to "Jewish." The IJ then denied asylum and withholding find-

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

ing that the fraudulent documents had adversely affected their credibility. The IJ refused to extend comity to the Tashkent tribunal. The BIA affirmed explaining further that it would not grant comity to a decision of a foreign tribunal where fraud and manipulation of the immigration laws were present.

The Eight Circuit affirmed the adverse credibility finding and, under the circumstances of the case, refused to find that the action of the Tashkent court constituted sufficient corroborating evidence to compel a finding that petitioners were credible. In the alternative, the court found that even if the court document established that the principal petitioner's father was Jewish, that was not sufficient to show past persecution or a well-founded fear of future persecution on account of their religion. The court also rejected petitioners' contention that the former INS had violated the asylum confidentiality provision when the INS provided their names and date of births to Ubzek officials. The court held that even if these were disclosures subject to the 8 C.F.R. § 208.6 confidentiality provision, they did not give rise to a reasonable inference that they had applied for asylum. Finally, the court held that even assuming the regulation was violated, petitioners were not entitled to relief because they "did not present sufficient evidence that they would be subject to persecution as asylum applicants."

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■ **IJ And BIA Properly Determined That Petitioner's Claim Of Persecution By Guatemalan Guerillas Was Vague And Speculative**

In ***Zacarias-Velasquez v. Mukasey***, __F.3d__, 2007 WL 4233155 (8th Cir. Dec. 4, 2007) (*Melloy*, Beam, Shepherd), the court upheld an IJ and BIA's determination that petitioner did not experience past persecution or have a well-founded fear of persecution by the guerillas in Guatemala. The court also held that it lacked jurisdiction to consider petitioner's challenge to the IJ's discretionary determination that he failed to establish exceptional and extremely unusual hardship to his United States citizen daughter.

Petitioner testified as to four instances of alleged persecution by Guatemalan guerillas. First, that guerillas had injected his father with a substance that resulted in his father's death - though petitioner admitted that he based this off what his mother told him, as he was living in the United States at the time of the alleged injection, and did not know whether the injection was meant to harm his father. Second, he testified that his mother's house burned down three years before he left Guatemala, but he didn't know the identity of the arsonist. Third, that "some group" tried to recruit him, but testified that the group was more of a "criminal group in the neighborhood than an anti-government group." Finally, that his family received threats from an unidentified source. When asked what persecution he feared if returned to Guatemala, petitioner stated he basically was "afraid of encountering troubles [] from people thinking he has money since he came from the United States" and admitted that "the problem with the guerillas has come down a lot." An IJ denied asylum, finding that petitioner's testimony was vague and speculative. Further, the IJ found that the guerillas are no longer an active military force following the 1996 peace accords ending the Guatemalan civil war. The IJ also denied cancellation of removal for lack of hardship. The BIA affirmed, additionally denying a due process claim made by petitioner that translation problems prejudiced his testimony as well as IJ bias.

"Even if the guerillas did recruit [petitioner], he did not allege that his refusal to join them was an expression of political opinion or 'that guerillas will persecute him because of his political opinion, rather than because of his refusal to fight with them.'"

The Eighth Circuit affirmed. The court agreed that petitioner's "testimony about what the guerillas may have done to his family was vague and speculative. According to [petitioner]'s testimony, neither the guerillas nor any other group ever harmed or even detained him." Further, the court found that "[e]ven if the guerillas did recruit [petitioner], he did not allege that his refusal to join them was an expression of political opinion or 'that guerillas will persecute him because of his political opinion, rather than because of his refusal to fight with them,'" citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The court also affirmed that petitioner had not been denied due process, as petitioner "was still able to testify fully before the court, and only occasionally had to repeat himself. The IJ's questioning did not prejudice [petitioner] because the IJ solicited pertinent information."

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■ **An Applicant Seeking To File A Successive Asylum Application Following A Final Order Of Removal Must Meet The Requirements Of A Motion To Reopen**

In ***Zheng v. Mukasey***, __F.3d__, 2007 WL 4233167 (8th Cir. Dec. 4, 2007) (*Loken,* Arnold, Colloton), the court joined the Third and Seventh Circuits in holding that an alien under a final order of removal who files successive asylum application must meet the standards for a motion to reopen under 8 C.F.R. § 1003.2(c).

Petitioner, a citizen of China, filed for asylum claiming she feared persecution under China's family planning laws and because of her prior political activities. An IJ denied the claim, the BIA affirmed the denial, and the Eighth Circuit dismissed her petition for re-

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

view. Subsequently, petitioner filed a motion with the BIA requesting leave to file a successive asylum application pursuant to 8 U.S.C. § 1158(a)(2)(D) and 8 C.F.R. § 1208.4(a)(4), on the basis that she recently had a fourth child. The BIA treated the motion as a motion to reopen, and denied it as untimely and because petitioner submitted no evidence of changed country conditions which would excuse the untimeliness.

Before the Eighth Circuit, petitioner argued that the BIA erred as a matter of law by applying the requirements of a motion to reopen to her request to file a successive asylum application. The court rejected this argument. The court found that 8 U.S.C. § 1158(a)(2)(D) bars successive asylum applications unless the applicant demonstrates "changed circumstances which materially affect the applicant's eligibility for asylum." The court then cited the regulation implementing 8 U.S.C. § 1158(a)(2)(D), 8 C.F.R. § 1208.4(a)(4), construing "changed circumstances" to include "activities the applicant becomes involved in outside of the country of feared persecution that place the applicant at risk." However, the court said, because petitioner had requested leave to file a successive asylum application after issuance of a final order of removal, the BIA reasonably applied the standards for a motion to reopen. In so holding, the court explained that an applicant has the opportunity to file an untimely or successive asylum application prior to the final order of removal without the application of 8 C.F.R. § 1003.2(c), but following a final order of removal, nothing in the regulations reflected a "clear intent to *weaken* the requirements of a motion to reopen." While petitioner cited a proposed version of 8 C.F.R. § 1208.4 – Fed. Reg. 444, 463 (Jan. 3, 1997) - providing that "changed circumstances arising after the denial of the application but before the aliens' departure or removal from the United States shall only be considered as part of a motion to reopen," the court noted that the final version of the regulation deleted this language.

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NINTH CIRCUIT

■ **IJ Improperly Based An Adverse Credibility Determination On Speculative Reasoning That Documents Submitted Were Inauthentic**

In ***Lin v. Gonzales***, 434 F.3d 1158 (9th Cir. 2007) (Hawkins, *McKeown,* Clifton), the court reversed an IJ's adverse credibility finding based on petitioner's "suspicious documents" because "the IJ's speculation as to what an official document should look like, conjecture about the significance of the missing details in the documents, and musing as to format of the document cannot be regarded as" substantial evidence.

While "[w]e readily acknowledge that an IJ need not accept all documents as authentic nor credit documentary submissions without careful scrutiny, the rejection must be premised on more than a guess or surmise."

Petitioner claimed persecution under China's family planning policy. To support his claim he submitted a marriage certificate, a "Family Planning Operation Certification" documenting his wife's sterilization, and a "Notice of Fine" stating that petitioner's family had seven days to pay a very substantial fine. An IJ denied asylum because, although finding petitioner's testimony credible, the documents submitted were suspicious. Specifically, the IJ found that the Family Planning Operation Certification suspicious because "the resident identification number is blank" and despite being an official document, the "identification and even [petitioner's wife's] birth date is not listed since the document simply states that she is 25 years old." Moreover, the IJ also discredited the document because of lack of authenticity and because there was "no evidence that [petitioner]'s wife is employed and, therefore, it is difficult to see why shoe would have a certification issued." The IJ found that the other documents also contained missing biographical information. Further, the IJ cited the State Department's warning of widespread forgery in South China. Thus, the IJ found petitioner not credible and further, denied asylum as a matter of discretion because petitioner had given up his second child for adoption because the petitioner wanted a boy instead of a girl. The BIA affirmed, finding that the questionable documents supported an adverse credibility determination.

The court reversed. The court said that while "[w]e readily acknowledge that an IJ need not accept all documents as authentic nor credit documentary submissions without careful scrutiny[,] the rejection must be premised on more than a guess or surmise." Regarding the Family Planning Operation Certification, the court held that "[a] review of this record reveals that the IJ's suspicions derive from nothing more than her personal and subjective view as to what the documents should look like." Indeed, the court said "the difficulty with [the IJ's] analysis is that it rests on speculation as to what the document should look like and whether the absence of a few details renders a document suspect." The court continued "[t[o be sure, informality or incompleteness in an official document could indicate that it is a forgery. On the other hand, what if the document format is not atypical for the issuing agency, a local family planning bureau located on a small rural island in China?" In so holding, the court noted that the IJ "did not indicate that the missing details were unusual or indicative of forgery based upon her review of numerous Family Planning Operation Certifications or other documents

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

from the Pingtan Family Planning Bureau. Nor did the IJ point to some other obvious discrepancy or indicia that would allow one to discredit the document based on logic of common sense." Further, the court found speculative the IJ's reliance on the State Department report. Regarding the missing information on the marriage certificate and Notice of Fine, the court found that "nothing in the record, other than the IJ's unsupported subjective view, suggests that the missing details or format of the documents are unusual or indicative of a trumped-up document. The corollary to the IJ's position is that if every item was filled in, then the document would appear authentic. This approach is, in fact, counterintuitive. Someone wanting to forge a document would likely want to make sure to dot every 'i' and cross every 't' – or at least the equivalent in Chinese – to make the document appear as complete as possible" and that missing information was actually more likely to be authentic as "bureaucracy does not always yield perfect results." Finally, the court remanded petitioner's challenge to the IJ's discretionary denial of asylum because the BIA did not address the issue.

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■ **IJ Erred As A Matter Of Law By Refusing To Allow Petitioner To Authenticate Foreign Public Documents With His Testimony**

In ***Petrosyan v. Gonzales***, __F.3d__, 2007 WL 4168985 (9th Cir. Nov. 27, 2007) (*Fisher,* Clifton, Martinez), the court held that an IJ committed legal error by refusing to allow petitioner to submit documents in support of his asylum claim on the basis that the documents had not been officially certified as authentic.

Petitioner, a citizen of Armenia, claimed asylum on the basis that his objections to injustices committed by the Armenian government regarding the death of his son made him a target for persecution. At his asylum hearing, petitioner attempted to introduce several documents that he claimed supported his application. Specifically, he submitted two letters from the Armenian Ministry of Internal Affairs and National Security and a death certificate for his son. DHS counsel objected to the documents under the authentication standard set forth in 8 C.F.R. § 287.6(c). The IJ, noting that a public document could be authenticated under either 8 C.F.R. § 287.6 (c) or, pursuant to *Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001), by "any recognized procedure," found that petitioner's offer to authenticate the documents through his testimony did not qualify as a recognized procedure. In addition to the lack of authentication, the IJ cited numerous inconsistencies between the petitioner's testimony and asylum application. Accordingly, the IJ denied the application on the grounds of adverse credibility. The BIA summarily affirmed the decision.

> "Requiring an asylum petitioner to obtain a certification from the very government he claims has persecuted him or has failed to protect him from persecution would in some cases create an insuperable barrier to admission of authentic documents."

The court remanded, finding that the IJ committed legal error by failing to allow petitioner an opportunity to authenticate the documents with his testimony. The court stated that while "established authentication methods for foreign public documents generally requires a government certification" and acknowledged that *Khan* did not "explicitly address whether an IJ may consider the petitioner's own testimony in ruling on authentication," the court held that "any recognized procedure" includes petitioner's testimony. The court found their conclusion supported by both "the Federal Rules of Civil Procedure and the Federal Rules of Evidence" in that neither requires certification as the exclusive means of authenticating a foreign public document. Further, the court reasoned that "[r]equiring an asylum petitioner to obtain a certification from the very government he claims has persecuted him or has failed to protect him from persecution would in some cases create an insuperable barrier to admission of authentic documents." Lastly, the court found that, despite the additional discrepancies cited by the IJ between petitioner's asylum application and testimony, remand was necessary because the IJ's "findings were premised in part on his doubts regarding" statements in the documents.

Judge Clifton dissented. He would have found a remand to be futile, as the IJ heard petitioner's attempt to authenticate the documents with testimony, but simply did not give the testimony any weight.

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■ **Submission Of An Asylum Application in 1991 Constituted A Written Intent To Opt-in To The ABC Settlement**

In ***Chaly-Garcia v. United States***, __F.3d__, 2007 WL 4198175 (9th Cir. Nov. 29, 2007) (Schroeder, Silverman, *Graber*), the court reversed the Northern District of California's ruling that plaintiff was not a class member of the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991) ("ABC"). The court found that plaintiff's submission of an asylum application in 1991 constituted a written statement of intent to apply for benefits under the ABC settlement.

On the same day the ABC settlement was approved on January 31, 1991, petitioner, a citizen of Guate-

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

mala and member of the ABC class, submitted an asylum application to an INS officer and orally informed the officer that he intended to take advantage of the ABC settlement. His asylum application was not processed until July 14, 2003, but in the meantime plaintiff requested employment authorization six times, identifying himself as an ABC class member four of those times. Upon processing of the application, the DHS determined that plaintiff was ineligible for ABC benefits because he had not provided written intent to receive ABC benefits, as required by the ABC Agreement. The District court agreed, ruling that "plaintiff's asylum application, which did not include any written statement indicating his desire to opt-in to the ABC settlement, [did] not satisfy the notice-of-intent requirement."

The Ninth Circuit disagreed. The court found that plaintiff's asylum application constituted an intent to exercise his right to opt-into the ABC settlement agreement as the ABC Agreement stated that a class member need only in "a writing indicat[e] an intent 'otherwise to received the benefits of this agreement." The court reasoned that the asylum application "demonstrated his membership in the ABC class" and the application had been submitted after the regulations of October 1, 1990, took effect – which was "one of the primary benefits of the ABC Agreement." The court rejected the government's argument that the asylum application did not explicitly reference the ABC agreement and therefore did not show intent as the Agreement only required a request for "the benefits of the Agreement" and that "any piece of writing" could be used to indicate intent.

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■ **Ninth Circuit Remands Petitioner's U Visa Application In Light Of New Regulations**

In ***Sanchez v. Mukasey***, __F.3d__, 2007 WL 4233679 (9th Cir. Dec. 4, 2007) (Fletcher, Reinhardt, Rymer) (*per curiam*), the court remanded petitioners' application for a U Visa because at the time the BIA rejected the application, neither the petitioners nor the BIA had the benefit of regulatory guidance regarding U Visas.

Petitioners had based their U Visa applications on the fact that they committed a criminal offense. The BIA denied the applications because the offense was not charged in the criminal complaint. Subsequent to the BIA's decision, the DHS issued regulations governing U Visas and, in the preamble to the regulations at 72 *Fed. Reg.* 53018 (Sept. 17, 2007), stated that inclusion of the qualifying crime in the indictment or complaint is not a predicate to U Visa relief. Thus, the court remanded the case in light of the new regulations. While the court noted that under the new regulations neither the IJ nor BIA have jurisdiction over issuance of a U Visa, the court instructed the BIA to treat the remand as a "request for a continuance" so that USCIS could adjudicate the U Visa.

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■ **Ninth Circuit Finds That IJ Denied Petitioner His Statutory Right To Counsel By Failing To Grant A Continuance**

In ***Mendoza-Mazariegos v. Mukasey***, __F.3d__, 2007 WL 4259510 (9th Cir. Dec. 6, 2007) (*Pregerson*, Gould, Clifton), the court remanded petitioner's application for cancellation of removal on the grounds that an IJ had denied petitioner his statutory right to counsel by refusing to grant petitioner's request for a continuance so that his new counsel could acquaint himself with the case.

> The court found that the IJ had denied petitioner his statutory right to counsel by refusing to grant his request for a continuance so that his new counsel could acquaint himself with the case.

Petitioner, a citizen of Mexico, initially appeared in proceedings in Arizona pro se and indicated an intent to apply for cancellation of removal. His case was subsequently transferred to Los Angeles in 1998 whereupon petitioner obtained counsel. Over the next five years, conflicts between the IJ's schedule and petitioner's counsel resulted in numerous continuances. When petitioner finally appeared for a merits hearing on September 18, 2003, he informed the IJ that he had retained new counsel the prior day, explaining that repeated attempts to contact his former counsel had never been answered. Consequently, petitioner requested a short continuance so that his new counsel could familiarize himself with the case. The IJ denied the request for three reasons. First, the IJ stated that petitioner had been given more than four years to present his case and failed to prosecute his claim. Second, that petitioner was negligent in pursuing his case with his former attorney and in deciding to hire a new attorney. The IJ based his negligence determination on the fact that petitioner's former attorney had told the IJ, ex parte, that it was, in fact, petitioner who had never returned his phone calls – though petitioner claimed the former attorney was lying. Finally, the IJ noted that granting a further continuance would push the case

(Continued on page 15)

Summaries Of Recent Federal Court Decisions

(Continued from page 14)

back another two years. The IJ then denied cancellation of removal in a decision that the court said "lasted mere minutes" on the basis that petitioner's lack of a criminal background check made verifying his good moral character impossible. The BIA affirmed, noting that petitioner failed to cooperate with counsel and had two years to prepare his application.

The court reversed and remanded, finding that the IJ had violated petitioner's statutory right to counsel because the reasons the IJ gave for denying the continuance were not supported by the record. First, the court found that although numerous delays had occurred in petitioner's case, "none of the previously granted continuances were requested by [petitioner] because he was unprepared. Instead, the continuances were the result of, among other things, a mistake by the Arizona IJ, a change in venue to Los Angeles, a conflict on [former] attorney Paek's calendar, a conflict on the IJ's calendar, and a priority case that took precedence over [petitioner]'s case." Thus, according to the court, petitioner "was not requesting 'another' continuance, as the IJ suggested. Rather, having found himself abandoned by his retained attorney, [petitioner] was trying to preserve his right to counsel." Second, the court found that petitioner was not negligent in deciding to hire a new attorney. The court noted that petitioner had admitted during his hearing that he was negligent, but found the admission the result of badgering by the IJ. Further, the court did not find the fact that petitioner waited until the day before his merits hearing to fire his former counsel to be proof of negligence. Rather, the court said, "like many similarly situated aliens, even when unsatisfied with the quality of representation, [petitioner] was reluctant to leave attorney Paek because of the fear that the departure would negatively affect his chances for relief . . . When attorney Paek's office was not responsive, [petitioner] was reluctant to give up on him because 'it was very difficult having lost all that money they charged me.' Quite reasonably, the prospect of hiring another attorney was daunting for someone of [petitioner]'s modest means." The court went on to criticize the IJ for believing former counsel's claims that he had attempted numerous times to contact petitioner to no avail, hinting that petitioner's testimony was more believable because he was "facing deportation and permanent separation from his family" and would thus not "completely fail[] to prepare his case by ignoring his lawyer's attempts to contact him." Finally, the court found the fact that granting a continuance would result in another two year delay is "an unacceptable justification" because petitioner "should not be blamed for the fact that two minor scheduling conflicts required that his case be delayed three years."

The court found that petitioner was presumptively prejudiced by her attorney's boilerplate brief, which made arguments inapplicable to her case.

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■ **Ninth Circuit Holds That BIA Abused Its Discretion When It Failed To Presume Prejudice Resulting From Prior Counsel's Ineffective Assistance**

In ***Grigoryan v. Gonzales***, __ F.3d __, 2007 WL 4095601 (9th Cir. Nov. 19, 2007) (Pregerson, Reinhardt, Tashima) (*per curiam*), the Ninth Circuit held that the BIA abused its discretion in denying reopening when it failed to consider additional evidence and briefing as to ethnic persecution. The court found that petitioner was presumptively prejudiced by her attorney's boilerplate brief, which made arguments inapplicable to her case and suggested therein that the petitioner's asylum application was stronger than her testimony. The record indicated that petitioner's former counsel was disciplined by his licensing state for misconduct as to this petitioner. The court held that the BIA failed to address the offered evidence suggesting possible future persecution due to ethnicity and remanded the case for further consideration.

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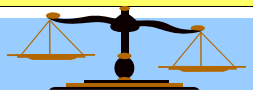
■ **BIA Properly Denied Petitioner's Motion To Reopen In Order To Pursue Section 212(c) Relief Pursuant To *St. Cyr* Because Petitioner Had Been Previously Deported**

In ***Avila-Sanchez v. Mukasey***, __F.3d__, 2007 WL 4225793 (9th Cir. Dec. 3, 2007) (*Fernandez,* Wardlaw, Collins), the court upheld the BIA's denial of petitioner's motion to reopen pursuant to *St. Cyr* because petitioner had been previously deported.

Petitioner was deported in 1998 after the BIA denied him section 212(c) relief on the basis that petitioner was an aggravated felon. Petitioner illegally returned to the United States later that year. In 2005, petitioner was placed in proceedings again and ordered removed by an IJ. Subsequently, petitioner filed a motion to reopen with the BIA on the basis of *St. Cyr*. The BIA granted the motion, but did so without the knowledge that petitioner had previously been deported

(Continued on page 16)



Summaries Of Recent Federal Court Decisions

(Continued from page 15)

– which would make him ineligible to seek reopening on the basis of *St. Cyr*. Petitioner then appealed the removal order of 2005 and requested the BIA consolidate the two cases. The BIA dismissed this appeal. Petitioner then motioned for the BIA to reconsider the dismissal and again requested consolidation. On January 23, 2006, the BIA dismissed the motion to reconsider and held that the they erred by previously granting the motion to reopen based on *St. Cyr* because petitioner had been previously deported.

Before the Ninth Circuit, petitioner argued that the BIA erred in finding him ineligible for reopening under *St. Cyr* based on a prior order of deportation because the prior order of deportation was based on an erroneous interpretation of law, namely, the interpretation that *St. Cyr* overruled, that an aggravated felon was ineligible for section 212(c) relief. The court rejected this argument. The court explained that the case was almost identical to its prior holding in *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001), which found that although the BIA's original determination was erroneous, "the BIA's action was in accord with the rules that then existed and those were not overturned until two years later." The court also rejected petitioner's claim that his equal protection rights were violated as the government had a rational basis "in discouraging aliens who have already been deported from illegally reentering."

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■ **Ninth Circuit Defers To BIA Decision And Holds That *Perez-Gonzales* Is No Longer Precedent**

In ***Duran-Gonzalez v. DHS***, __ F.3d __, 2007 WL 4209273 (9th Cir. Nov. 30, 2007) (Canby, Hall, *Callahan*), the Ninth Circuit vacated the district court's preliminary injunction ordering DHS to refrain from denying I-212 waiver applications for a class of aliens who are inadmissible pursuant to INA § 212(a)(9)(C)(i)(II) and who have filed (or will file) I-212 waiver applications in conjunction with applications for adjustment of status under INA § 245(i). The court of appeals, applying *Nat'l Cable and Telecomm'ns Ass'n v. Brand X Internet Svcs*, 545 U.S. 967 (2005), in an immigration case for the first time, deferred to the BIA's decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), and determined that its earlier decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), no longer was good law. The court vacated the injunction and remanded to the district court for further proceedings consistent with its opinion.

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■ **Ninth Circuit Holds That Solicitation To Possess Drugs For Sale Is A Crime Involving Moral Turpitude**

In ***Barragan-Lopez v. Mukasey***, __ F.3d __, 2007 WL 4125266 (9th Cir. Nov. 21, 2007) (Hug, Fletcher, W. *Clifton*), the Ninth Circuit held that an alien's state conviction for possession of marijuana for sale constitutes a crime involving moral turpitude, and thus a deportable offense under 8 U.S.C. § 1227(a)(2)(A)(i). The court rejected the alien's claim that it should not consider the underlying drug trafficking offense in deciding the applicability of 8 § 1227(a)(2)(A)(i), and should look only to the state solicitation statute, which does not, standing alone, describe a crime involving moral turpitude. The court distinguished its prior decisions holding that solicitation to commit a drug trafficking offense does not constitute a controlled substance or an aggravated felony offense.

An alien's state conviction for possession of marijuana for sale constitutes a crime involving moral turpitude.

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■ **Ninth Circuit Upholds Denial Of Petitioner's Motion To Reopen**

In ***Toufighi v. Mukasey***, __F.3d__, 2007 WL 4336189 (9th Cir. Dec. 13, 2007) (Berzon, Ikuta, *Singleton*), the Ninth Circuit affirmed a BIA decision denying an Iranian national's motion to reopen based on his marriage to a United States citizen, the birth of their citizen children, and alleged changed country conditions in Iran. The court held that the BIA did not abuse its discretion when it denied the portion of the motion seeking adjustment of status because it was untimely. The court also held that, because the BIA reasonably interpreted the IJ's decision as an express rejection of the petitioner's claim that he had converted to Christianity, the BIA did not abuse its discretion when it concluded that petitioner's evidence of changed country conditions was not material to his claim.

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NOTE AND REMINDER

If you need to check the status of cases in the immigration courts or at the Board of Immigration Appeals, call 800-898-7180.

Work-place enforcement action dismissed

(Continued from page 2)
or injunctive relief. The court found that Congress has wide latitude in choosing which remedies are appropriate for the violation of a particular constitutional right and that the remedies left open by § 242(b)(9) are neither inadequate nor ineffective to protect petitioners' rights."

Right to Family Integrity

Third, the court found that petitioners' substantive due process claims, which alleged violations of the Fifth Amendment right of parents to make decisions as to the care, custody, and control of their children were collateral to removal and, thus, outside the channeling mechanism of § 242(b)(9).

The court disagreed with the government's "sprawling construction" that the timing and placement of an alien's detention was entrusted to the unfettered discretion of the Attorney General and thus not subject to judicial review under INA § 242(a)(B)(ii). The court held that "if a statute does not explicitly specify a particular authority as discretionary, section 1252(a)(2)(B)(ii) does not bar judicial review of an ensuing agency action." Holding otherwise said the ocurt, "would be inconsistent with the express purpose of section 1252(b)(9) -- which is to channel claims, not to bar them — but also would contradict the presumption favoring judicial review of administrative actions."

On the merits of the claim, the court agreed with the government's alternate argument that petitioners had failed to state a cause of action on which relief could be granted. The court explained that a government action can offend substantive due process where the behavior of the government officer is so egregious, so outrageous that it may shock the contemporary conscience. Here, the court found that the facts alleged by the petitioners suggested "no more than negligence or misordered priorities" and not conduct that shocked the conscience. Moreover, said the court, any "interference with the right to family integrity alleged here was incidental to the government's legitimate interest in effectuating detentions pending the removal of persons illegally in the country . . . That a detention has an impact on the cohesiveness of a family unit is an inevitable concomitant of the deprivation of liberty inherent in the detention itself. So long as the detention is lawful, that so-called deprivation of the right to family integrity does not violate the Constitution."

In its conclusion, the court suggested to ICE to use "this chiaroscuro series of events as a learning experience in order to devise better, less ham-handed ways of carrying out its important responsibilities."

By Francesco Isgro, OIL

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

Mailing of Notice of Appeal

(Continued from page 4)
the *sua sponte* context in *Tamenut v. Gonzales*, 477 F.3d 580 (9th Cir. 2007), but the government's *rehearing en banc* petition was granted, the opinion was vacated, and the case is pending the court's decision *en banc*. Another issue before the Eighth Circuit in *Liadov* is to what extent the United States Supreme Court's decision in *Bowles* applies in the administrative context. The Second Circuit Court of Appeals in *Khan v. U.S. Dept. Of Justice*, 494 F.3d 255 (2d Cir. 2002), has rejected its application to the administrative immigration appeals context, at least where no asylum application is involved, because no appeal period is specifically set by statute. In *Liadov*, however, the 30-day appeal period set by statute for filing asylum appeals is implicated. The *Liadov* case also raises the issue of whether the BIA's regulations violate due process, by not allowing an appeal to be construed as timely filed where the alien can present proof from an overnight delivery service, such as a tracking receipt, that the appeal notice was sent by overnight delivery service for next day delivery within the 30-day filing deadline, but the delivery service failed to deliver it timely, not due to the fault of the alien.

By Michele Sarko , OIL
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INSIDE OIL

In 2007 OIL welcomed the following baby OILers:

- ***Kryin Deon Briggs-London***
July 22, 2007, 4 lbs 6 oz, 18 inches
- ***Jordin Lyric Robinson***
October 1, 2007, 6 lbs 3 oz
- ***Colin Timothy O'Connor***
October 3, 2007, 8 lbs 1 oz
- ***Jaion Tylen Anderson***
October 23, 2007, 7 lbs 12 oz, 20.5 inches
- ***Marin Elizabeth Blaya***
October 25, 2007, 8lbs 3 oz, 20.5 inches
- ***Maia Noelle Monroe***
November 13, 2007, 7 lbs 2 oz, 51 cms
- ***Colgan "Cole" McKay Zanfardino***
December 5, 2007, 7 lbs 20.5 inches
- ***Reagan Christiana Moss***
December 8, 2007, 7 lbs 3 oz
- ***Teague Clifford Flynn***
December 9, 2007, 7 lbs 9 oz
- ***Camilla Anne Durant***
December 16, 2007, 6 lbs 3 oz, 18.5 inches

DAVE'S ANNUAL WHITE ELEPHANT AFFAIR

OIL held Dave's Annual White Elephant Affair on December 18, 2007, at Liberty Square.

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

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

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

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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