U.S. Department of Justice
Washington, D.C. 20530

PROVIDED BY The leading immigration law publisher ILW.COM http://www.ilw.com

Immigration Litigation Bulletin

Vol. 12, No. 3 *March 2008*

LITIGATION HIGHLIGHTS

Inside

Supreme Court to hear "persecutor" case

Does "persecutor" bar apply to alien who involuntarily persecutes others?

On March 17, 2008, the Supreme Court granted a petition for certiorari to consider whether an asylum seeker from Eritrea engaged in persecution under INA § 208(b)(2)(A)(i), when during his military service he involuntarily served as a prison guard. *Negusie v. Gonzales*, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (*per curiam*), *cert. granted sub nom.* ***Negusie v. Mukasey***, No. 07-499, 2008 U.S. LEXIS 2444 (U.S. Mar. 17, 2008).

The petitioner, Negusie, an Eritrean citizen with dual Eritrean and Ethiopian heritage was forcibly conscripted into military service. After being discharged, he was recalled to service in 1998, when hostilities between Eritrea and Ethiopia escalated. Because petitioner objected to being recalled to duty and "declined to go to the front and fight," he was assigned to a naval base and after several months, he was arrested and taken to a prison camp. After two years of incarceration, petitioner was released from prison and returned to military service as a prison guard. For approximately four years, petitioner served as a prison guard "on a rotating basis."

As a guard, petitioner carried a gun and was generally responsible for keeping control over prisoners and preventing their escape. He caught prisoners who attempted to escape, and he stood guard over such prisoners while they were kept in the sun as a form of punishment. Petitioner was aware that prisoners died when left in the sun for more than two hours. Petitioner was also

(Continued on page 2)

En Banc Eighth Circuit finds lack of jurisdiction to review BIA's denial of sua sponte reopening

In ***Tamenut v. Mukasey***, __ F.3d __, 2008 WL 637617 (8th Cir. Mar. 11, 2008) (*per curiam*), the Eighth Circuit joined all other circuits in holding that it lacks jurisdiction to review the BIA's discretionary decision whether to exercise its *sua sponte* authority to reopen a removal proceeding.

The case involved an asylum seeker who had been denied asylum by the BIA in 2003, and that decision had been affirmed by the Eighth Circuit in *Tamenut v. Ashcroft*, 361 F.3d 1060 (8th Cir. 2004) (*per curiam*). Subsequently, petitioner filed a motion to reopen which the BIA denied on untimeliness grounds. Undaunted, he filed a second motion to reconsider and reopen, and also requested that the BIA reopen the proceedings *sua sponte*. The BIA denied the second motion again on untimeliness ground and also declined to reopen the proceedings on its own motion under 8 C.F.R. § 1003.2(a), noting that it would only do so under "exceptional situations."

Petitioner again sought review of

(Continued on page 2)

Persecutor bar before Supreme Court

(Continued from page 1)
responsible for "keep[ing] the prisoners from taking showers and obtaining ventilation and fresh air." Petitioner objected to and occasionally disobeyed orders to inflict punishment on prisoners. After approximately four years as a guard, petitioner abandoned his military service and hid himself inside a shipping container aboard a vessel bound for the United States.

The government contends that the statutory provision barring persecutors from obtaining asylum does not contain an exception for persons who acted involuntarily.

An immigration judge (IJ) denied petitioner's applications for asylum and withholding of removal concluding that he was barred from relief because he had "assisted or otherwise participated in the persecution of others" in his role as an armed prison guard. The IJ found, however, that petitioner was eligible for deferral of removal under CAT. On appeal the BIA the denial of asylum and withholding and dismissed DHS' appeal as to the grant of deferral of removal under CAT.

Petitioner then sought review of the denial of asylum and withholding by filing a petition for review in the Fifth Circuit Court of Appeals. In an unpublished *per curiam* opinion, that court denied the petition after noting that petitioner had conceded that the prisoners were persecuted on a protected ground. Following its own precedents, the court also held that "the question whether the alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." Instead, the court explained that the inquiry should focus on "whether the particular conduct can be considered assisting in the persecution of civilians." *Fedorenko v. U.S.*, 449 U.S. 490, 512 n.34 (1981). The court then found that the evidence did not compel a reversal of the finding that petitioner had assisted in persecution given his role as an armed prison guard and his knowledge about the forms of punishments used in the camp.

In his petition for certiorari petitioner argued that the statutory history and plain language of the INA's persecutor exception demonstrate the Congress never intended it to apply to asylum-seekers who have been compelled under threat of torture and death to participate in persecution. Petitioner also noted that there is a circuit split and "tension" on the question of whether "coercion" is relevant to the application of the "persecutor exception."

The government's opposition to certiorari contended that the Fifth Circuit correctly decided the issue because, *inter alia*, the statutory provision barring persecutors from obtaining asylum does not contain an exception for persons who acted involuntarily. Moreover, the government also pointed out that there have been only a few cases where the courts of appeals have considered the persecutor bar.

The case will be argued during the October 2008 term.

Contact: Donald Keener, OIL
☎ 202-514-2217

Ed. Note: See article on page 3 by OIL Trial Attorney, Katharine Clark, who discusses in greater detail the persecutor bar.

Sua Sponte denial not subject to judicial review

(Continued from page 1)
that decision and a panel of the Eighth Circuit held that it was bound by its earlier precedent in *Recio-Prado v. Gonzales*, 456 F.3d 580 (8th Cir. 2007), that the refusal to reopen was subject to judicial review. On the merits, however, it concluded that the BIA had properly denied Tamenut's request for *sua sponte* reopening. The government then sought rehearing en banc.

The en banc court preliminarily noted that there is a "basic presumption of judicial review " of agency action. It found that the INA does not expressly preclude judicial review of a denial of *sua sponte* reopening. The court then explained that "even where a jurisdiction-stripping statute does not preclude review of a particular agency action, we must still consider whether that agency action is 'committed to agency discretion by law' under § 701(a)(2) of the Administrative Procedure Act."

The court found that there are no statutory or regulatory factors to guide the BIA's exercise of its authority to reopen a proceeding sua sponte. The court noted that the regulation itself provides no guidance as to the BIA's appropriate course of action, sets forth no factors for the BIA to consider, places no constraints on the BIA's discretion, and "specifies no standards for a court to use to cabin the BIA's discretion." "The mere fact that the BIA has acknowledged the existence of its authority to reopen sua sponte in what it deems to be 'exceptional situations' is not sufficient to establish a meaningful standard for judging whether the BIA is required to reopen proceedings on its own motion," said the court.

Accordingly, the court held that the BIA's exercise of its *sua sponte* authority is committed to its discretion by law and thus, is unreviewable under the Administrative Procedure Act.

Contact: Jennifer Paisner, OIL
☎ 202-616-8268

Asylum litigation update

How persecution of others is treated in U.S. immigration laws

On March 17, 2008, the Supreme Court granted certiorari in *Negusie v. Gonzales*, 231 Fed.App'x. 325 (5th Cir. 2007), __ S.Ct.__, 2008 WL 695623 (U.S. Mar. 17, 2008). The Court thus indicated that, for the first time since 1981, it may address what constitutes assistance in the persecution of others.

Since the 1980s, federal courts have considered in a number of cases whether aliens in immigration proceedings and defendants in denaturalization suits "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 Minn. L. Rev. 97, 105 (1986) (quoting former section 241(a)(19) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a)(19) (1982)).

Courts generally emphasize the Supreme Court's holding in *Fedorenko v. United States*, that a contribution to persecution need not be voluntary to constitute assistance.

Most cases involving alleged persecutors now arise in the context of aliens seeking asylum, withholding of removal under the INA, and withholding of removal under the regulations implementing the Convention Against Torture ("CAT"). *See, e.g.*, *Negusie*, 231 Fed.App'x. 325; *Chen v. United States Attorney General*, 513 F.3d 1255 (11th Cir. 2008) (involving aliens alleged to be barred as persecutors from relief or protection under the INA). Aliens who are otherwise eligible for these forms of relief and protection become ineligible if they "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i); *see also* INA § 241 (b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i); 8 C.F.R. § 1208.16(d)(2).

Two Approaches to Cases Involving Alleged Persecutors of Others

Courts use one of two analytical approaches to decide cases implicating the "persecutor" language in the INA. Massey at 117-18. The first approach emphasizes the objective effect and magnitude of the individual's contribution to a group's efforts at persecution, while the second approach asks whether the individual personally participated in persecution with an intent to inflict harm on the victim on account of a protected ground. *Id*.

Since Massey classified these two approaches in 1986, every federal judicial circuit except the Third and Tenth has considered whether an alien in immigration proceedings was a persecutor of others. *See, e.g.*, *Chen*, 513 F.3d 1255; *Castaneda-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007); *Gao v. United States Attorney General*, 500 F.3d 93 (2d Cir. 2007); *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007); *Higuit v. Gonzales*, 433 F.3d 417 (4th Cir. 2006); *Miranda-Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006); *Negele v. Ashcroft*, 368 F.3d 981 (8th Cir. 2004); *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003); *Petkiewytsch v. INS*, 945 F.2d 871 (6th Cir. 1991). These courts have generally preferred the "objective-effect" approach identified in Massey's article. *See, e.g.*, *Negusie*, 231 Fed.App'x at 326 (holding that "the question whether the alien shared the authorities' intentions" is "irrelevant," and "the inquiry should focus 'on whether particular conduct can be considered assisting in the *persecution* of civilians'"); *Chen*, 513 F.3d at 1258 (holding that an alien assists in persecution if his or her actions are "active, direct and integral to the underlying persecution"). However, a few courts have followed the "personal participation" approach and analyzed the guilty knowledge of the alleged persecutor. *See, e.g.*, *Castaneda-Castillo*, 488 F.3d at 20-21 (holding that an alien is presumptively not subject to the bar to asylum based on persecution of others unless he had "prior or contemporaneous knowledge about the persecution, even if the objective effect of his actions was to assist in the persecution").

Two Increasingly Relevant Factors In The Persecutor Bar Analysis

In recent years, courts have evaluated two factors more frequently: (1) allegations that alleged persecutors acted under duress; and (2) claims that alleged persecutors engaged in redemptive efforts following the persecution. The Fifth Circuit analyzed both of these questions in *Negusie* and concluded that the alien's defenses of duress and redemption were unavailing. *Negusie*, 231 Fed. App'x at 326.

1. Duress

Courts generally emphasize the Supreme Court's holding in *Fedorenko v. United States*, that a contribution to persecution need not be voluntary to constitute assistance. *See, e.g.*, *Bah*, 341 F.3d at 351; *see also Fedorenko*, 449 U.S. 490, 512, n.34 (1981). However, several courts have considered duress-like factors in deciding whether a contribution to persecution constitutes assistance.

(Continued on page 4)

Past persecution presumption

For example, the Sixth Circuit held that a Nazi labor camp guard could not be removed under former INA § 241(a)(19), 8 U.S.C. § 1251(a)(19), in part because the Board determined that he was a "reluctant civilian guard" who served only under duress, after being told that he would be shot if he attempted to escape. *Petkiewytsch*, 945 F.2d at 880-81. The Eighth Circuit held that the Board failed to "apply the correct legal standard" in determining whether the persecutor bar applied to an alien who participated in a guerrilla firing squad, and the court remanded the case to the Board to consider voluntariness, duress, and coercion, among other factors relevant to the alien's personal culpability for participation. *Hernandez v. Reno*, 258 F.3d 806, 810, 814-15 (8th Cir. 2001). In remanding the case, the court specifically noted the lack of evidence that Hernandez "was not at all times compelled by fear of death." *Id*. at 815. The Ninth Circuit concluded that an alien did not participate in persecution when he escorted prisoners into interrogation rooms where they were tortured. *Im v. Gonzales*, 497 F.3d 990, 992 (9th Cir. 2007). The court noted that Im would have risked severe punishment if he refused to serve as a guard. *Id*. The Seventh Circuit, too, cited the risk of punishment an alien faced when it remanded to the Board for additional analysis of the assistance in persecution determination. *Doe*, 484 F.3d at 446.

The courts have directed their most recent scrutiny toward the effect of alleged persecutors' redemptive acts.

Applying the duress analysis in another way, courts have bolstered their findings that the persecutor bar applied by noting that aliens' participation in persecution *was* voluntary. *Chen*, 513 F.3d at 1260; *Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006); *Negele*, 368 F.3d at 984. Thus, while no court has expressed disagreement with the voluntariness holding of *Fedorenko*, courts have considered related, duress-like factors in cases involving alleged persecutors.

2. Redemptive Acts

The courts have directed their most recent scrutiny toward the effect of alleged persecutors' redemptive acts. In *Chen*, the Eleventh Circuit concluded that an asylum applicant assisted in persecution when she guarded women before they were subjected to forced abortions although, in a "single redemptive act," she enabled one woman to escape. *Chen*, 513 F.3d at 1260. The court based its conclusion on the Second Circuit's analysis in a similar case. *Xie*, 434 F.3d at 142-44.

In *Chen* and *Xie*, the "redemptive acts" defense failed, but courts have looked favorably on some aliens' efforts to thwart the success of their groups' persecutory missions. The Second Circuit held that an alien had a substantial possibility of success on the merits of his appeal, in part because he refused to arrest opponents of the group that had encouraged him to persecute others. *Ofusu v. McElroy*, 98 F.3d 694, 701 (2d Cir. 2001). The Seventh Circuit reasoned that an alien may not have participated in persecution in part because, after he was present at a massacre, he put forth "efforts (at personal risk) to bring the main perpetrators to justice." *Doe*, 484 F.3d at 451. While these cases show the increasing relevance of redemptive acts, it is difficult to predict what acts, if any, will prompt a finding that an alien has not assisted in persecution.

An alien's participation in persecution carries significant consequences under the INA, and the government generally has maintained that, under *Fedorenko*, evidence of duress or redemptive acts is irrelevant to the "assistance in persecution" analysis. The government's position on this point is likely to be developed and articulated more fully in *Negusie*. In litigating such cases, be mindful that the courts have begun to emphasize factors such as duress and redemptive acts in deciding whether an individual has assisted in persecution.

By Katharine Clark, OIL
☎ 202-305-0095

EOIR Extends Effective Date of the Immigration Court Practice Manual to July 1, 2008

The Executive Office for Immigration Review (EOIR) has announced that it has extended the effective date of the "Immigration Court Practice Manual" to July 1, 2008, in response to requests from members of the bar. The new date provides an additional 3 months for interested parties to become familiar with the Practice Manual.

The Practice Manual was published on February 28, 2008, and provides uniform procedures, recommendations, and requirements for persons who present cases before the immigration courts. When the Practice Manual goes into effect on July 1, 2008, local operating procedures for immigration courts will no longer be used.

The Immigration Court Practice Manual is currently available on EOIR's website at http://www.usdoj.gov/eoir/. EOIR will continue to update the manual online, as needed, to reflect legal and policy changes, as well as responses to comments from users.

Asylum litigation update

Emerging issue regarding the past persecution presumption

To recap, last month's article discussed two emerging issues about the past-persecution presumption in asylum and withholding cases: 1) Whose persecution triggers the presumption (the applicant's persecution or someone else's)? and 2) Does the presumption apply only to the original claim of persecution? This article discusses two remaining issues: 3) Is past FGM "continuing persecution" for purposes of the past-persecution presumption (like past forced sterilization or abortion), and what is the effect of *Mohammed v. Gonzales*, 400 F.3d 785, 800-01 (9th Cir. 2005) suggesting that it is? 4) If a claim of past persecution is raised, must an immigration judge decide that question rather than leave it unresolved?

The Law

Also to recap, the past-persecution regulation provides that an alien who proves past persecution on account of a qualifying ground is presumed to have a "well-founded fear" of future persecution on that same account (asylum), or that future persecution is "more likely than not" (withholding of removal). 8 C.F.R. §§ 1208.13(b)(1); 1208.16(b)(1). *See Marquez v. INS*, 105 F.3d 374 (7th Cir. 1997); *Matter of N-M-A-*, I&N Dec. 312 (BIA 1998). The DHS may rebut the presumption by showing a "fundamental change in circumstances" such that the applicant "no longer has a well-founded fear of persecution" (asylum), or that the applicant's life or freedom "would not be threatened" (withholding). 8 C.F.R §§ 1208.13(b)(1)(i)(A), 1208.16(b)(1)(i)(A). A "fundamental change in circumstances" refers to either changed country conditions or a change in the applicant's "personal circumstances." 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000); *Ixtlilco-Morales v. Keisler,* 507 F.3d 651, 655 (8th Cir. 2007). The DHS may also rebut the presumption by showing that the applicant could reasonably relocate elsewhere to avoid a risk of future persecution. 8 C.F.R. §§ 1208.13(b)(1)(i)(B), 1208.16(b)(1)(i)(B).

■ **Briefing Tip:** Rebuttal by changed personal circumstances or by reasonable relocation were added to the regulation in 2001, and can be overlooked by courts or aliens' attorneys when they are summarizing the law. Be sure you include them in your statement of the governing law.

> In *Matter of A-T-*, the BIA declined to treat past FGM as continuing persecution and rejected *Mohammed's* suggestion to the contrary.

Emerging Issue 3: For purposes of the past persecution presumption, does past FGM constitute continuing persecution like past sterilization, which cannot be rebutted? And what is the effect of the Ninth Circuit's decision in *Mohammed* expressing the view that FGM is continuing, unrebuttable persecution under the regulation?

Answer: In *Matter of A-T-*, the BIA reasonably construed that past FGM is not continuing persecution for purposes of the past-persecution regulation. The Ninth Circuit's suggestion otherwise in *Mohammed* is not binding, even in that Circuit, and has no effect given the BIA's reasonable construction to the contrary.

In *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007), the BIA concluded that because FGM is persecution that is inflicted only once, "the procedure itself will normally constitute a 'fundamental change in [personal] circumstances'" rebutting the regulatory presumption of future persecution. Therefore, the presumption is rebutted by the past act of FGM; there is no risk of future FGM; and an applicant is not eligible for withholding of removal. *Matter of A-T-*, 24 I&N Dec. 296. While *Matter of A-T-* pertained to FGM and the past-persecution presumption in the context of withholding of removal, asylum has the same presumption and rebuttal factors. 8 C.F.R. § 1208.13(b)(1). Therefore the same reasoning applies.

Aliens have argued, and the Ninth Circuit has suggested in *Mohammed*, 400 F.3d at 800-01, that past FGM should be treated as continuing persecution that can never be rebutted – like past sterilization – and automatically qualifies an applicant for asylum or withholding. This argument relies on *Matter of Y-T-L-*, 23 I. & N. Dec. 601, 606 (BIA 2003), in which the BIA construed past sterilization to be continuing persecution that cannot be rebutted under the past-persecution presumption and automatically entitles an alien to asylum. In *Matter of A-T-*, the BIA declined to treat past FGM as continuing persecution and rejected *Mohammed's* suggestion to the contrary. 24 I&N Dec. at 300-01.

■ **Briefing Tip:** If you have a challenge to the BIA's decision in *Matter of A-T-* declining to construe FGM as continuing persecution, we have arguments written by Michael Heyse and Margaret Perry defending the decision. This is OIL's briefing position: (1) The BIA's construction is reasonable and entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997) (agency's construction of its regulations is entitled to deference). (2) The construction is consistent with the BIA's long-standing treatment of enduring harm, such as loss of a limb, as past persecution, not as continuing

(Continued on page 6)

USCIS and FBI plan to eliminate backlog of FBI name checks

USCIS and the FBI have announced a joint plan to eliminate the backlog of name checks pending with the FBI. USCIS and the FBI established a series of milestones prioritizing work based on the age of the pending name check. The FBI has already eliminated all name check cases pending more than four years.

"This plan of action is the product of a strong partnership between USCIS and the FBI to eliminate the backlogs and to strengthen national security," said USCIS Director Emilio Gonzalez. By increasing staff, expanding resources, and applying new business processes, the goal is to complete 98 percent of all name checks within 30 days. USCIS and the FBI intend to resolve the remaining two percent, which represent the most difficult name checks and require additional time to complete, within 90 days or less. The goal is to achieve and sustain these processing times by June 2009. The joint plan will focus on resolving the oldest pending FBI name checks first. USCIS has also requested that the FBI prioritize resolution of approximately 29,800 pending name checks from naturalization applicants submitted to the FBI before May 2006 where the naturalization applicant was already interviewed. The target milestones for processing name checks is produced below.

Completion Goal	Category
May 2008	Process all name checks pending more than three years
July 2008	Process all name checks pending more than two years
Nov. 2008	Process all name checks pending more than one year
Feb. 2009	Process all name checks pending more than 180 days
June 2009	Process 98 percent of all name checks within 30 days and process the remaining two percent within 90 days.

Past persecution presumption

persecution. *See Matter of A-T,* 24 I &N Dec. at 301. (3) The BIA reasonably distinguished *Matter of Y-T-L-*'s continuing-persecution theory and declined to extend it to past FGM given the unique statutory context in *Matter of Y-T-L-*. As the BIA reasonably concluded, past FGM cases do not present the special statutory dilemma in *Y-T-L-*, in which the BIA was required to harmonize a unique statutory provision specifying that a particular type of conduct (past sterilization) qualifies for refugee status and therefore asylum, while routine application of the past-persecution regulation would defeat the claim. *See Matter of A-T-,* 24 I.&N Dec. at 300-01.

Congress did not single out FGM, or any other type of harm that carries lasting effects, for asylum and withholding eligibility in the same way it singled out forced sterilization. *Id*. (4) The Ninth Circuit's view in *Mohammed* that past FGM should be treated as continuing persecution for purposes of the past-persecution presumption has no binding effect. The court expressed this view in the context of an ineffective assistance of counsel case. 400 F.3d at 800-01. In that context the court did not, and could not, decide the merits of this question. *Zhang v. Gonzales*, 408 F.3d 1239, 1245-46 (9th Cir. 2005) (court's view in an ineffective assistance decision that a claim is a plausible basis for asylum is not a binding construction of the statute).

The BIA's subsequent interpretation of its own regulation is entitled to deference since it is neither "unreasonable or absurd," and thereby trumps *Mohammed* even in the Ninth Circuit. *Id*. *See also National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005) (court is required to accept agency's construction of a ambiguous or silent provision, even if agency's position differs from the court's).

Issue 4: If a claim of past persecution is raised, must an immigration judge decide that question rather than leave it unresolved?

Answer: Yes.

In *Matter of D-I-M-* 24 I&N Dec. 448 (BIA 2008), the BIA recently held that when evaluating an asylum claim alleging past persecution, the immigration judge must make a specific finding that the applicant has or has not suffered past persecution based on a statutorily protected ground and apply the past-persecution presumption at 8 C.F.R. § 1208.13(b)(1), if applicable.

By Margaret Perry, OIL
☎ 202-616-9310

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, on certiorari from 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?

Contact: Bryan Beier, OIL
☎ 202-514-4115

Asylum — Persecutor Bar

On March 17, 2008, the Supreme court granted certiorari in *Negusie v. Gonzales*, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (*per curiam*), *cert. granted sub nom.* ***Negusie v. Mukasey***, No. 07-499, 2008 U.S. LEXIS 2444 (U.S. Mar. 17, 2008). The question presented is: Does "persecutor exception" prohibit granting asylum to, and withholding of removal of, refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution? The government's brief is due on June 2, 2008.

Contact: Keith McManus, OIL
☎ 202-305-3567

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.

On February 25, 2008, the Ninth Circuit vacated its prior order as entered without jurisdiction and denied the petition for rehearing en banc as moot.

Contact: Alison R. Drucker, OIL
☎ 202-616-4867

Crimes — CIMT

The Ninth Circuit has granted the motion for supplemental briefing in ***Marmolejo-Campos v. Gonzales,*** 503 F.3d 922 (9th Cir. 2007), where the Ninth Circuit held that a Mexican alien's Arizona conviction for aggravated driving under the influence ("DUI") constituted a crime of moral turpitude. The Ninth Circuit subsequently granted, over the government's opposition, petitioner's motion for rehearing en banc.

Contact: Surell Brady, OIL
☎ 202-353-7218

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.

Contact: Alison R. Drucker, OIL
☎ 202-616-4867

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 raised is whether a minute order can be considered under the modified categorical approach.

Contact: Anne C. Gannon, AUSA
☎ 714-338-3548

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. On January 29, 2008, the government filed a brief responding to the following questions from the court: (1) does CAT require that the torturer specifically intend to inflict severe physical or mental pain or suffering, or is willful blindness considered and treated as specific intent? (2) is lack of prison medical facilities or resources to care for severely physically impaired or diseased prisoner to be considered and treated as tantamount to torture when the warden or jailer has no specific intent to inflict severe physical or mental pain or suffering? (3) is a statute, regulation, or other authority available to afford a remedy or humanitarian relief to severely impaired or diseased persons who will be imprisoned in the country of removal?

Contact: Thomas Dupree, DAAG
☎ 202-353-8679

Removal — Blake issue

The Ninth Circuit granted petitioner's motion for rehearing en banc in ***Abebe v. Gonzales***, 493 F.3d 1092 (9th Cir. 2007), and stated that the panel decision cannot be cited as a precedent. The issue is whether an alien who is charged with deportability on a ground that does not have a comparable ground of inadmissibility ineligible for § 212(c) relief. The BIA had held that the agency's longstanding "statutory counterpart" rule, as applied in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), rendered petitioner ineligible for § 212(c) relief because there is no statutory counterpart in INA § 212(a) to the sexual abuse of a minor ground of deportability.

Contact: Jennifer Levings, OIL
☎ 202-616-9707

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Upholds Agency's Denial Of Withholding Of Removal And CAT Protection For Failure To Prove Past Persecution Or A Likelihood Of Future Persecution**

In ***Sela v. Mukasey***, __ F.3d __, 2008 WL 664081 (1st Cir. Mar. 13, 2008) (*Lynch*, Tashima, Lipez), the First Circuit held that "isolated incident[s] without violence or detention" do not constitute persecution under the asylum regulations. The court stated that in order to establish past persecution, the totality of the asylum applicant's experiences must be more than mere discomfiture, unpleasantness, harassment, or unfair treatment. The court ruled that petitioner's report of general, sporadic violence toward Christians in Indonesia did not establish that it was more likely than not that the alien would suffer persecution upon his return to his native country.

Contact: Elizabeth A. Greczek, OIL
☎ 202-307-4693

■ **Massachusetts Crime Of Indecent Assault And Battery On A Person Fourteen Or Older Is A Crime Of Violence**

In ***Ramirez v. Mukasey***, __ F.3d __, 2008 WL 682602 (1st Cir. Mar. 14, 2008) (Lynch, *Gibson*, Howard), the First Circuit held that the Massachusetts crime of Indecent Assault and Battery on a Person Fourteen Years of Age or Older is a crime of violence under 18 U.S.C. § 16(b). Because the alien received a two-year suspended sentence, his conviction also qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). The Second Circuit previously reached the identical result in *Sutherland v. Reno*, 228 F.3d 171 (2d Cir. 2000), and the First Circuit had already followed *Sutherland* in answering a very similar question in *United States v. Leahy*, 473 F.3d 401 (1st Cir.), *cert. denied*, 128 S. Ct. 374 (2007). The court therefore concluded that it could not reverse "without contradicting *Leahy*," and in any event, it saw "no reason to disagree with *Sutherland*."

Contact: Manning Evans, OIL
☎ 202-616-2186

SECOND CIRCUIT

■ **Case Remanded Where BIA Denied A Motion To Reopen Under *Matter Of Velarde* Solely Because DHS Opposed the Motion And BIA Did Not Explain Its Reasoning**

In ***Melnitsenko v. Mukasey***, 517 F.3d 42 (2d Cir. Feb. 6, 2008) (Feinberg, Winter, *Straub*), the Second Circuit held that the BIA abused its discretion when it affirmed the denial of a motion to reopen to adjust status on the sole basis that the government opposed the motion. DHS had opposed the motion to reopen because petitioner had previously refused to provide argument or evidence in support of her claim and refused to answer questions during her removal hearing, which DHS found did not warrant consenting to petitioner's subsequent request for a favorable exercise of discretion. Accordingly, the BIA held that under *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002) (*en banc*), a marriage-based adjustment of status application must be denied if DHS opposes it.

"*Matter of Velarde* did not propose "the imposition of a mechanism by which the DHS . . . may unilaterally block a motion to reopen for any or no reason, with no effective review by the BIA."

The court disagreed. The court concluded that the BIA's action amounted to a rubber stamp of the DHS position, and required the BIA to provide adequate reasons for its denial in order to provide the court with a meaningful opportunity to review it. The court explained that *Matter of Velarde* did not propose "the imposition of a mechanism by which the DHS . . . may unilaterally block a motion to reopen for any or no reason, with no effective review by the BIA." Noting that petitioner seemed to satisfy all other requirements of *Matter of Velarde* with the exception of DHS consent, the court said "allowing the DHS to defeat a motion to reopen for no reason at all is certainly contrary to the purpose of the amendment identified by the BIA - that aliens who have entered into marriages after the commencement of removal proceedings should be given 'one opportunity' to present clear and convincing evidence of the bona fides of marriage."

The court affirmed, however, the IJ's determination that petitioner's 3 hour stop at a border checkpoint in Vermont where officers fingerprinted, photographed, and interrogated her did not constitute an "egregious" Fourth Amendment violation as defined by *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006). Accordingly, the court rejected petitioner's request to suppress a Form I-213 and declined to address the constitutionality of this particular border checkpoint.

Contact: Paul Fiorino, OIL
☎ 202-353-9986

■ **"Young, Certain To Be Homeless Deportees Subject To Arrest And Prolonged Detention" Do Not Constitute A Particular Social Group in Ukraine**

In ***Savchuk v. Mukasey***, __ F.3d __, 2008 WL 564959 (2d Cir. Mar. 4, 2008) (McLaughlin, Parker, Wesley) (*per curiam*), the Second Circuit held that the BIA correctly concluded that "young, certain to be homeless deportees subject to arrest and prolonged detention" do not constitute a particular social group for asylum. The court agreed with the BIA's conclusion that the putative group pro-

Summaries Of Recent Federal Court Decisions

(Continued from page 8)
posed by the petitioner did not possess the characteristics required by *Matter of Acosta* and its progeny. The court also agreed with the First and Ninth Circuits and held that the alien's New York State adult convictions for offenses he committed as a juvenile met the definition for "conviction" under 8 U.S.C. § 1101(a)(48)(A), rendering him removable.

Contact: Erica B. Miles, OIL
☎ 202-353-4433

■ **Second Circuit Holds That REAL ID Act's Repeal Of Habeas Jurisdiction Is Constitutional, But Creates A 30-Day Grace Period For Petitions For Review That Would Otherwise Be Untimely If Filed Within 30 Days Of Enactment Of REAL ID**

In ***Ruiz-Martinez v. Mukasey***, 516 F.3d 102 (2d Cir. Feb. 14, 2008) (*Miner*, Cabranes, Crotty (District Court Judge)), the Second Circuit held that the REAL ID Act's repeal of habeas jurisdiction did not violate the Suspension Clause because aliens have an adequate and effective remedy to seek judicial review of removal orders through petitions for review in the courts of appeals. The court determined that a 30-day grace period was appropriate such that aliens who filed a habeas petition within 30 days of the REAL ID Act would be deemed to have timely filed under the Act.

In so holding, the court cited *Kolkevich v. Att'y Gen.*, 501 F.3d 323 (3d Cir. 2007), for its reasoning that Congress had no intention to deprive any alien of judicial review of a removal order - even the "small class of aliens who received final orders of removal more than 30 days prior to the enactment of" the REAL ID Act, such as the petitioners in this case. Finally, the court reaffirmed that the 30-day time limit for filing petitions for review is jurisdictional and not subject to equitable tolling.

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

■ **Second Circuit Denies Petition For Review In Ineffective Assistance Case**

In ***Omar v. Mukasey***, 517 F.3d 647 (2d Cir. 2008) (Kearse, Calabresi, Katzmann) (*per curiam*), the Second Circuit held that it had jurisdiction to review the denial of a motion to reopen a cancellation claim based on ineffective assistance of counsel, notwithstanding the fact that it would necessarily have to consider the agency's underlying discretionary determination that petitioner was ineligible for cancellation of removal. The court also held that the petitioner's claim – which was based on the alleged ineffective assistance of a non-lawyer who did not actually represent him before the immigration judge – was not "insubstantial and frivolous" because the court has yet to determine whether ineffective assistance claims can be brought based on the deficient performance of non-attorneys. The court denied the petition for review after finding that the BIA had not abused its discretion in denying the motion to reopen.

> The Second Circuit has yet to determine whether ineffective assistance claims can be brought based on the deficient performance of non-attorneys.

Contact: Elizabeth Wolstein, AUSA
☎ 202-637-2800

■ **Second Circuit Holds Immigration Judge Must Explicitly Find Alien Knowingly Proffered Fraudulent Documents**

In ***Corovic v. Mukasey***, __ F.3d __, 2008 WL 612695 (2d Cir. Mar. 7, 2008) (*Cabranes*, Sack, and Hall), the Second Circuit held that the IJ's adverse credibility determination was not supported by substantial evidence. The court concluded that, where an alien directly contests knowingly submitting a fraudulent document, the IJ must "make an explicit finding" that the alien knew the document was fraudulent to make an adverse credibility determination on that basis. The court also held that a consular report, obtained in violation of 8 C.F.R. § 208.6, cannot be the sole basis for finding a document to be fraudulent.

Contact: Ada E. Bosque, OIL
☎ 202-514-0179

■ **Second Circuit Holds That Government Proved Alien Was Convicted Of A Crime Involving Moral Turpitude**

In ***Singh v. DHS***, 517 F.3d 638 (2d Cir. 2008) (*Straub*, Hall, Haight), the Second Circuit held that a "conditions of probation" document issued by the New York court that sentenced the alien for second degree assault was sufficient, in conjunction with a "certificate of disposition" and a "rap sheet," to demonstrate the fact of the conviction underlying his removal order. The court also held that the alien failed to exhaust his argument that an alleged lack of specificity in his Notice to Appear violated his due process rights. The court ruled that although the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(C), for criminal aliens, did not apply to the alien's challenge to the denial of a continuance, the immigration judge did not abuse his discretion in denying him a continuance.

Contact: Beau Grimes, OIL
☎ 202-305-1537

THIRD CIRCUIT

■ **Third Circuit Affirms Construction Of INA's National Security Bar To Withholding, But Remands Cases For Clarification On Plain Language Of The "Is a Danger" Element**

In ***Yusupov v. Attorney General***, __ F.3d __, 2008 WL 681851 (3d Cir. Mar. 14, 2008) (*Ambro*, McKee, Ackerman), the Third Circuit rejected in part

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

the BIA's reliance on the Attorney General's construction in an earlier decision, *Matter of A-H-*, 23 I&N Dec. 774 (BIA 2005), of INA § 241(b)(3)(B), to deny withholding to two alien supporters of Uzbekistan IMU. The court upheld the *A-H-* construction of "reasonable grounds to believe" and "danger to the security of the United States," but rejected the "may pose a danger" construction in *A-H-* as contrary to the provision's plain language, "is a danger." The court then remanded the case to the BIA.

Contact: Michael Lindemann, OIL
☎ 202-616-4880

■ **Adopted Children Cannot Obtain Same Visa Preference As Natural Siblings**

In ***Kosak v. Aguirre***, __ F.3d __, 2008 WL 597928 (3d Cir. Mar. 6, 2008) (*Hardiman*, McKee, Chagares), the Third Circuit upheld the BIA's determination that adopted children may not obtain visa preferences in favor of their biological siblings. Section 203(a)(4) of the INA provides preferences for "qualified immigrants who are the brothers or sisters of citizens of the United States." 8 U.S.C. § 1153(a)(4). In *Matter of Li*, 21 I&N Dec. 13 (BIA 1995), the BIA interpreted the statute to preclude preferences for natural siblings of adoptees because adoption severs the legal relationship between the natural parent and child for immigration purposes.

In light of the congressional silence and ambiguity since the statute does not define "brother" and "sister," the court applied *Chevron* deference to the BIA's interpretation and found that the interpretation was a permissible construction of the statute. "The BIA construction [of the statute)] represents a 'reasonable accommodation' of the 'conflicting policies' of keeping families together, and preventing natural parents from obtaining benefits through children they put up for adoption," said the court.

Contact: Mary Catherine Frye, AUSA
☎ 215-861-8323

FOURTH CIRCUIT

■ **Fourth Circuit Overturns Finding That Coerced Insertion Of An IUD Does Not Constitute Past Persecution**

In ***Lin v. Mukasey***, 517 F.3d 685 (4th Cir. 2008) (*Williams*, Traxler, Flanagan), the Fourth Circuit reversed and remanded the BIA's determination that an IUD forcibly inserted on a five-year basis did not constitute persecution.

> "The BIA has yet to provide a published, precedential opinion addressing whether, and under what circumstances, the forced insertion and continued usage of an IUD constitutes persecution."

Petitioner claimed persecution under China's family planning laws on the basis that she had been forcibly inserted with an IUD for a five-year period after the birth of her first child. Further, she claimed the she feared retaliation by the Chinese government for leaving the country illegally via the use of "snakeheads". An IJ denied all relief and protection, finding that petitioner had not presented credible testimony. The BIA affirmed. The BIA found that, even if credible, petitioner had not established past persecution because "the temporary nature if the IUD insertion" removes it from the definition of "involuntary sterilization" under INA § 101(a)(42)(A). Further, the BIA found that petitioner failed to show a reasonable fear of future persecution because petitioner's husband in China had not been sterilized and for lack of corroborating documents.

Before the Fourth Circuit, petitioner argued that the BIA erred in its determination that the forcible insertion of the IUD did not constitute persecution, basing her argument on *Qiao Hua Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005), where the court left open the question of whether forcible insertion of an IUD "and continuous usage of the IUD" constituted persecution. The court agreed, holding that the BIAs' "cursory statement" that an IUD was "temporary" was insufficient for judicial review of the BIA's decision that the alien did not suffer past persecution. The court explained that "it is unclear from the BIA's stark invocation of the word 'temporary' how the BIA factored the 'temporary' nature of the IUD insertion and usage into its overall persecution calculus, i.e., whether forced IUD insertion and continued usage is never persecution or whether it is not persecution only because it did not deprive [petitioner] of a significant portion of her reproductive life." "The BIA has yet to provide a published, precedential opinion addressing whether, and under what circumstances, the forced insertion and continued usage of an IUD constitutes persecution," said the court. Because the court would "run the risk of violating fundamental separation-of-powers principles if we attempted to divine the BIA's thoughts on this matter and tried to build a legal conclusion in a veritable vacuum where the BIA interpretation should always first exist," it remanded the case. Further, the court held that the BIA failed to apply a separate legal analysis to petitioner's CAT claim, and rather denied CAT protection because petitioner had not met her lower burden of proof for asylum. Lastly, the court declined to reach the issue of whether single-member review by the BIA warrants *Chevron* deference.

Judge Traxler dissented, stating that he would have upheld the BIA's finding that an IUD insertion alone was not persecution.

Contact: Mona Maria Yousif, OIL
☎ 202-616-4287

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

FIFTH CIRCUIT

■ Fifth Circuit Rejects Challenges To NTA And Upholds Finding Of Ineligibility For Adjustment Of Status During Removal Proceedings For Arriving Aliens

In *Chambers v. Mukasey*, __ F.3d __, 2008 WL 615907 (5th Cir. Mar. 7, 2008) (Jones, Davis, *Garza*), the Fifth Circuit upheld the BIA's conclusion that the Notice to Appear (NTA) was not substantively defective, and also concluded that petitioner had waived her challenge to the service of the NTA by failing to object to it before the IJ and pleading to its charges. The court also upheld the BIA's finding that petitioner as an "arriving alien" was ineligible for adjustment of status because her adjustment application had not been "previously filed" within the meaning of 8 C.F.R. § 1245.2(a)(1)(ii). The court further denied a stay of removal pending petitioner's pursuit of her adjustment application.

Determinations regarding the validity of marriage for I-130 petitions are not discretionary within the meaning of § 1252(a)(2)(B)(i), and are subject to review by courts.

Contact: John Hogan, OIL
☎ 202-616-5937

■ Fifth Circuit Holds That District Court Had Jurisdiction To Review The Denial Of An I-130 Application

In *Ayanbadejo v. Chertoff*, 517 F.3d 273 (5th Cir. Feb. 8, 2008) (Wiener, Barksdale, Dennis) (*per curiam*), the Fifth Circuit held that the district court had jurisdiction to review the discretionary denial of petitioner's I-130 application. The court determined that even though all judgments regarding relief under 8 U.S.C. § 1255, including review of I-145 applications, are categorized as discretionary and non-reviewable by 8 U.S.C. § 1252(a)(2)(B)(i), I-130 applicants are authorized by 8 U.S.C. § 1154(a)(1)(A)(i) and are not mentioned in § 1252(a)(2)(B)(i). Thus, the court concluded that determinations regarding the validity of marriage for I-130 petitions are not discretionary within the meaning of § 1252(a)(2)(B)(i), and are subject to review by courts. "Categorizing I-I30 petition determinations as discretionary based on authority found in an implementing *regulation* would contradict the plain statutory language of 8 U.S.C. § 1252(a)(2)(B)(ii), which specifies that courts are only stripped of authority to review decisions designated as discretionary by the *statute*," the court said. The court reversed the district court's judgment to the extent it dismissed the I-130 petition for lack of jurisdiction.

Contact: Samuel Longoria, AUSA
☎ 713-567-9000

■ Federal Bank Fraud Conviction Is Aggravated Felony But Does Not Preclude § 212(h) Waiver For Aliens Who Adjusted Status After Admission

In *Martinez v. Mukasey*, __ F.3d __, 2008 WL 642565 (5th Cir. Mar. 11, 2008) (King, *Barksdale*, Dennis), the Fifth Circuit held that a lawful permanent resident alien who was convicted of bank fraud under 18 U.S.C. § 1344 had committed an aggravated felony under INA § 101(a)(43)(M)(i). The court also held that the plain language of INA § 212(h) does not bar his eligibility for a waiver of inadmissibility on account of his aggravated felony, because it applies to only those aggravated-felon LPR's who had been admitted to the U.S. as LPR's and not to those who, like petitioner in this case, were granted adjustment to LPR status after admission.

Contact: Robert N. Markle, OIL
☎ 202-616-9328

SEVENTH CIRCUIT

■ Seventh Circuit Holds That Possession Of A Firearm By A Felon Constitutes An Aggravated Felony

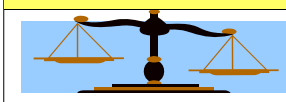
In *Negrete-Rodriguez v. Mukasey*, __ F.3d __, 2008 WL 553518 (7th Cir. Mar. 3, 2008) (*Manion*, Rovner, Sykes), the Seventh Circuit held that an Illinois conviction for unlawful possession of a firearm by a felon was an aggravated felony under the INA, insofar as the conviction constituted a firearms-related offense as defined in INA § 101(a)(43)(E)(ii), 8 U.S.C. § 1101(a)(43)(E)(ii). The court ruled that the INA's requirement that a state offense be "described in" 18 U.S.C. § 922(g)(1) (relating to firearms offenses) did not include a federal "jurisdictional requirement" of interstate commerce. The court affirmed the "reasonable interpretation" of the BIA in its published decision on the subject, *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002).

Contact: Richard Zanfardino, OIL
☎ 202-305-0489

■ Seventh Circuit Holds That Mailing The Wrong Agency Decision To The Alien Tolls The Deadline For Filing A Motion To Reopen

In *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. Feb. 19, 2008) (Manion, *Evans*, Sykes), the Seventh Circuit held that the BIA abused its discretion in declining to equitably toll the filing deadline for petitioner's untimely motion to reopen where petitioner had submitted evidence that the wrong BIA decision had been mailed to petitioner's attorney. The court held that this alone is "strong evidence" that he did not receive the proper BIA decision. Therefore, in light of the evidence that the BIA may have violated its regulations by mailing the improper BIA decision and because petitioner exercised due diligence, the court found that the deadline for filing a

(Continued on page 12)



Summaries Of Recent Federal Court Decisions

(Continued from page 11)

motion to reopen should have been tolled in order for the alien to apply for adjustment of status.

The court noted the BIA's finding that, pursuant to *Singh v. Gonzales*, 469 F.3d 863 (9th Cir. 2006), petitioner had failed to submit any other evidence or an affidavit from his former counsel disclaiming receipt, but explained that *Singh* had been superceded by *Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007), and that the only evidence presented in *Singh* was a cover letter, whereas here petitioner presented a cover letter and the incorrect decision. Finally, the court also found that petitioner had exercised due diligence as receipt of the wrong decision "did not put petitioner 'on notice' [] that a decision had been rendered in his case."

Judicial review of "questions of law" under INA § 242(a)(2)(D) does not extend beyond pure questions of law.

Contact: Benjamin Zeitlin, OIL
☎ 202-305-2807

■ **Seventh Circuit Holds That INA § 242(a)(2)(D) Does Not Restore Jurisdiction When The Governing Rules Of Law Are Undisputed**

In ***Viracacha v. Mukasey***, __ F.3d __, 2008 WL 553613 (7th Cir. Mar. 3, 2008) (*Easterbrook*, Manion, Kanne), the Seventh Circuit declined to follow the Ninth Circuit's decision in *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007), and reiterated that judicial review of "questions of law" under 8 U.S.C. § 1252(a)(2)(D) does not extend beyond pure questions of law.

The petitioner, a Colombian citizen and his family, overstayed their visitors visa and three years after their arrival to the United States applied for asylum. The IJ denied the request because it was untimely filed, but granted withholding of removal on the ground that they would be persecuted by the FARC if returned to Colombia. The BIA affirmed the decision but remanded the case to the IJ for a background check to ensure eligibility for withholding. The court ruled that a final order determining that an alien is removable, and then granting withholding of removal, is a final order of removal for purposes of 8 U.S.C. § 1252(a)(1) & (b). Thus, a remand by the BIA to the immigration judge for the appropriate background checks to ensure eligibility for withholding of removal was a final order of removal for purposes of judicial review.

The court rejected petitioner's contention that it had jurisdiction to review the IJ's finding of no changed circumstances justifying the untimely filing of the asylum application. The court noted that both the BIA and the IJ stated with precision the rules for exceptions to the one-year deadline. "The IJ found that petitioner had deliberately refrained from making a timely application for asylum, and that any change in conditions in Colombia since then is not material. The first is a conclusion of fact and the second is an application of law to fact; neither rests on or reflects a legal mistake," said the court.

Contact: Luis E. Perez, OIL
☎ 202-353-8806

■ **Seventh Circuit Holds That Equitable Tolling Does Not Reset The Ninety Day Deadline For Filing A Motion To Reopen**

In ***Gao v. Mukasey***, __ F.3d __, 2008 WL 638061 (7th Cir. Mar. 11, 2008) (*Posner*, Wood, Evans), the Seventh Circuit held that the BIA did not err in declining to equitably toll the filing deadline for petitioner's untimely motion to reopen, because equitable tolling does not reset the ninety day filing period for motions to reopen. Instead, an alien must exercise due diligence in filing a motion to reopen once ineffective assistance of counsel is discovered. Here the petitioner did not file his motion to reopen with the IJ within the 90 day regulatory period. Instead he filed on the 106th day. Petitioner argued that his delay should be excused because he did not discover that he had a basis for reopening until he met with a new lawyer and learned that his previous lawyer had given him ineffective legal assistance, and it was not until a month after the 90-day clock started to run that he knew he had a claim for relief. He argued that the 90-day clock should have started to run then, and not earlier when the order of the immigration judge that he sought to reopen was entered. The court also observed that equitable tolling will rarely be available when a claimant can obtain an extension of time for complying with a deadline.

Contact: John W. Blakeley, OIL
☎ 202-514-1679

■ **Seventh Circuit Holds That Drug Paraphernalia Possession Conviction Is Offense "Relating To" A Controlled Substance**

In ***Barraza v. Mukasey***, __ F.3d __, 2008 WL 656897 (7th Cir. Mar. 13, 2008) (*Easterbrook*, Posner, Wood), the Seventh Circuit held that conviction of possessing drug paraphernalia (marijuana pipe) is an offense "relating to" a controlled substance pursuant to INA § 212(a)(2)(A)(i)(II), rendering petitioner inadmissible. The court ruled no *Chevron* deference was due to the BIA's conclusion that petitioner was ineligible for a § 212(h) waiver, and held that because petitioner's paraphernalia "relates to" a single offense of simple possession of 30 grams or less of marijuana, his conviction falls within the ambit of § 212(h). The case was remanded to the agency to determine whether the alien merits a

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)
§ 212(h) waiver.

Contact: Carmel Morgan, OIL
☎ 202-305-0016

■ **Seventh Circuit Affirms Denial Of Relief To Alien Terrorist**

In ***Hussain v. Mukasey***, __ F.3d __, 2008 WL 596296 (7th Cir. Mar. 6, 2008) (*Posner*, Cudahy, Evans), the Seventh Circuit affirmed the BIA's decision sustaining fraud charges against a Pakistani national who was a member of a terrorist organization. The court found him ineligible for cancellation of removal as being "deportable under" the INA's terrorism provisions, even though he was not charged under these provisions. The court also found him ineligible for asylum and other relief because he had provided material support to the terrorist organization, MQM-H, even if his support was confined to the group's nonterrorist activities. The court found it irrelevant that MQM-H had no political agenda and did not "harbor any hostile designs against the United States," and concluded that the material support provisions were "broad" but not "vague." "The statute may go too far, but that is not the business of the courts," it said.

The court found that the material support provisions were "broad" but not "vague." "The statute may go too far, but that is not the business of the courts."

Contact: Douglas E. Ginsburg, OIL
☎ 202-305-3619

■ **Seventh Circuit Upholds Denial Of Second Motion To Reopen And Rescind An *In Absentia* Deportation Order**

In ***Derezinski v. Mukasey***, 516 F.3 619 (7th Cir. Feb. 20, 2008) (*Posner*, Wood, Evans), the Seventh Circuit upheld the denial of a motion to reopen and rescind a 1994 *in absentia* deportation order. The court held that the BIA's denial was proper because petitioner's eleven-year delay in responding to the original deportation order, due to his fugitive status, was a compelling ground to refuse to entertain a repetitious motion to reopen. The court reasoned that the alien failed to present any evidence other than his own sworn statement to support his claim of non-receipt of the notice of the date and time of the hearing, and that his delay supported an inference that he willfully refused to attend his original deportation hearing. The court noted that "nothing is simpler than submitting an affidavit in which one attests that one didn't receive a particular piece of mail," but encouraged the government to nonetheless "backstop service of a notice to appear by certified mail . . . with a letter by regular mail." "If a certified mailing followed by a regular mailing does not elicit a response, the inference that the alien is evading service becomes overwhelming likely," the court said.

Contact: Peter H. Matson, OIL
☎ 202-616-3558

EIGHTH CIRCUIT

■ **Eighth Circuit Holds That The BIA May Decline To Consider A Question Of Law That Was Not Raised Before The Immigration Judge**

In ***Pinos-Gonzalez v. Mukasey***, __ F.3d __, 2008 WL 583677 (8th Cir. Mar. 5, 2008) (Murphy, *Hansen*, Gruender), the Eighth Circuit held that the BIA could decline to consider an alien's argument that his conviction for a particular offense was not a crime of moral turpitude, where the alien failed to raise that argument in his proceedings before the immigration judge, and had conceded that the offense rendered him ineligible for cancellation of removal. "Where the agency properly applies its own waiver rule and refuses to consider the merits of an argument that was not raised in the initial hearing, we will not permit an end run around those discretionary agency procedures by addressing the argument for the first time in a petition for judicial review," said the court. The court concluded that 8 C.F.R. § 1003.1(d)(3)(ii) (which states that the BIA *may* review questions of law de novo), is permissive rather than mandatory, and that the BIA retains the authority to create procedural rules governing its own proceedings. The court also rejected petitioner's argument that the refusal over the BIA to consider de novo his argument regarding eligibility for cancellation violated his due process rights. The court found that because petitioner "has no constitutionally protected liberty or property interest in the discretionary relief of cancellation of removal, he cannot establish a due process right in the proceedings to obtain that relief."

Contact: Stuart Nickum, OIL
☎ 202-616-8779

■ **Eighth Circuit Upholds Adverse Credibility And Visa Waiver Program Findings**

In ***Zine v. Mukasey***, 517 F.3d 535 (8th Cir. Feb. 19, 2008) (*Loken*, Gruender, Benton), the Eighth Circuit upheld a denial of withholding to an Algerian petitioner who entered the United States under the Visa Waiver Program (VWP) using a fraudulent French passport. The court held that the BIA did not abuse its discretion in denying the motion to reopen where petitioner was seeking to reopen an asylum-only proceeding to pursue adjustment of status because the immigration judge lacked jurisdiction to consider the adjustment of status application. The court, citing decisions from the Sixth and Tenth Circuits, explained that when an alien fraudulently enters pursuant to the VWP, under 8 U.S.C. § 1187(b)(2), the

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)
alien waives removal proceedings and can apply only for asylum.

The court noted the government's argument that petitioner failed to exhaust his withholding of removal claim, but, recognizing that "our prior decisions are inconsistent on the question whether the failure to raise an issue before the BIA is a jurisdictionally-fatal failure to exhaust an administrative remedy," declined to address the issue because the case was already dismissed on the merits. "Resolving the parties' conflicting contentions would embroil us in unsettled questions of immigration law," explained the court.

"Resolving the parties' conflicting contentions would embroil us in unsettled questions of immigration law."

Contact: Andrew Oliveira, OIL
☎ 202-305-8570

■ **Eighth Circuit Affirms Adverse Credibility Findings Against Guatemalan Asylum Applicant**

In ***Carmenatte-Lopez v. Mukasey***, __ F.3d __, 2008 WL 553210 (8th Cir. Mar. 3, 2008) (*Wollman*, Gibson, Benton), the Eighth Circuit affirmed the finding that a Guatemalan asylum applicant failed to establish past persecution or fear of future persecution on account of an imputed political opinion. The alien alleged that armed men sought him because he had helped with funeral arrangements for a victim of a grenade attack, reported the attackers to police, and could testify against them. The court held that the record lacked evidence that the grenade attack was politically motivated or that the armed men imputed any political beliefs to the alien.

Contact: Peter F. Sekus, AUSA
☎ 612-664-5600

NINTH CIRCUIT

■ **Ninth Circuit Holds That The BIA Cannot Deny An Arriving Alien's Motion To Reopen Because It Lacks Jurisdiction Over Adjustment Applications**

In ***Kalilu v. Gonzales***, 516 F.3d 777 (9th Cir. Feb. 14, 2008) (Nelson, Reinhardt, Bea) (*per curiam*), the Ninth Circuit held that the BIA abused its discretion when it denied petitioner's motion to reopen to adjust status on the jurisdictional ground that the immigration court lacks jurisdiction to adjudicate an arriving alien's adjustment application. Under 8 C.F.R. § 1245.1, .2, the BIA found that such applications must be filed with the USCIS, not the immigration court.

The court found, however, that 8 C.F.R. § 1245.1, .2 are "rendered worthless where the BIA . . . denies a motion to reopen (or continue) that is sought in order to provide time for USCIS to adjudicate a pending application" because "if an alien is removed, he is no longer eligible for adjustment of status [under 8 U.S.C. § 1182(a)(9)(A)(ii)]." Further, the court found that the BIA's decision to deny reopening on jurisdictional grounds is "contrary to the Board's general policy of favorably exercising its discretion to grant such motions as set forth in *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002). This decision conflicts with the recent holding in *Scheerer v. United States Att'y Gen.*, __F.3d__, 2008 WL 131466 (11th Cir. 2008).

The court also remanded the agency's determination that the alien had filed a frivolous asylum application, so the BIA could reconsider its determination in light of *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), which was decided subsequent to the BIA's decision in this case.

Contact: Holly Smith, OIL
☎ 202-305-1241

■ **Ninth Circuit Holds That Alien Who Arrived Two Hours Late To His Hearing Did Not "Fail To Appear" Because The Immigration Judge Was Still In The Courtroom**

In ***Perez v. Mukasey***, 516 F.3d 770 (9th Cir. Feb. 14, 2008) (B. Fletcher, *Reinhardt*, Rymer), the Ninth Circuit held that an immigration judge erred by ordering an alien removed in absentia, even though the alien arrived two hours late for his hearing, the alien's attorney had already left the courthouse, and the judge had concluded business for the day. The majority held that, because the judge was still in the courtroom when the alien arrived, the in absentia order was improper because the alien did not "fail to appear." Accordingly, the court found moot petitioner's alternative argument that the overheating of his vehicle constituted exceptional circumstances excusing his failure to appear, but noted that mechanical failures of an automobile might constitute an "unanticipated occurrence" beyond the control of the alien.

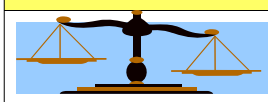
Judge Rymer, in dissent, argued that the majority extended the Ninth Circuit precedent *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999), and *Romani v. INS*, 146 F.3d 737 (9th Cir. 1998), which permits aliens to be slightly tardy, too far. Further, Judge Rymer noted that petitioner appeared ineligible for any relief.

Contact: Mike Truman, OIL
☎ 202-616-9345

■ **Ninth Circuit Holds That Government Is Not Estopped By Its Employee's Unauthorized Issuance Of Residency Documentation**

In ***Shin v. Mukasey***, __ F.3d __, 2008 WL 564982 (9th Cir. Mar. 4,

(Continued on page 15)



Summaries Of Recent Federal Court Decisions

(Continued from page 14)

2008) (*Bea*, Nelson, Oberdorfer (District Court Judge)), the Ninth Circuit held that the Government is not estopped from removing an alien who obtained her permanent residence documentation through the illegal conspiracy in which bribes were exchanged for fraudulent green cards issued by Leland Sustaire, a supervisory officer at the former Immigration and Naturalization Service. The court reasoned that notwithstanding the alien's claim that she was unaware of the bribery and relied to her detriment on the fraudulent green card, the threshold requirement for applying equitable estoppel against the government was not satisfied because Sustaire's acts were unauthorized. "The government cannot be saddled with the felonious, unauthorized issuance of residency documentation by a thieving employee," said the court.

"The government cannot be saddled with the felonious, unauthorized issuance of residency documentation by a thieving employee."

Contact: Sarah Maloney, OIL
☎ 202-616-1436

■ **Failure To Register As A Sex Offender Is Not A Crime Involving Moral Turpitude**

In ***Plasencia-Ayala v. Mukasey***, 516 F.3d 738 (9th Cir. Feb. 7, 2008) (Beezer, Farris, *Thomas*), the Ninth Circuit held that a lawful permanent resident from Mexico, who had pled guilty to the offense of open or gross lewdness in violation of Nevada law and subsequently pled guilty to failing to register with the local law enforcement agency as a convicted sexual offender, was not removable for having committed two crimes involving moral turpitude because failure to register as a sex offender was not a crime involving moral turpitude.

An IJ had ordered petitioner removed finding his convictions constituted crimes involving moral turpitude. Specifically, the IJ found that failure to register as a sex offender was "morally turpitudinous" because the dangerousness of sex offenders and risk of recidivism. The IJ also denied cancellation of removal as a matter of discretion. The BIA affirmed petitioner's removability, agreeing with the IJ that failure to register constituted a CIMT because petitioner willfully attempted to avert being labeled as a sex offender. Petitioner filed a petition for review of this decision. In the meantime, because the BIA failed to address petitioner's cancellation of removal claim in this decision, it subsequently granted a motion to reconsider filed by petitioner. In this decision, the BIA affirmed the denial of cancellation of removal. Further, the BIA relied on *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), to determine that under the modified categorical approach, petitioner's failure to register pursuant to Nev.Rev.Stat. § 179D.550 had the requisite "willful" mens rea in order to constitute a CIMT.

In the Ninth Circuit, petitioner challenged whether his conviction for failure to register constituted a CIMT. Before reaching this issue, however, the court addressed the government's argument that the BIA's order granting the motion to reconsider vacated the BIA's previous order, resulting in lack of jurisdiction due to no final order of removal. The court rejected this argument, citing *Sarmadi v. INS*, 121 F.3d 1319 (9th Cir. 1997), for the rule that "the BIA's decision to grant or deny a motion to reconsider is treated as a separate and independent 'final order' for which the alien can seek judicial review" and because the BIA expressly affirmed its prior decision without a significantly different analysis, "there is little reason to require 'the petitioner to raise the identical issue again in a petition to review on the motion to reconsider.'" Turning to petitioner's conviction for failure to register, the court held that a conviction under Nev.Rev.Stat. § 179D.550 is not for a "base or depraved act" committed with "evil intent." The court distinguished the BIA's holding in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), involving a California statute regarding failure to register as a sex offender, on the basis that there was no direct or particularized injury and the breach of the duty to notify did not demonstrate moral depravity. The court found that "while a sex offender's breach of duty to notify may deprive law enforcement and others of valuable information, it does not demonstrate moral depravity," adding, "it is the sexual offense that is reprehensible, not the failure to register."

Contact: Liza S. Murcia, OIL
☎ 202-616-4879

■ **Ninth Circuit Remands Case To BIA To Consider Whether Individuals Under Twenty-One Years Of Age Are Minors**

In ***Al-Mousa v. Mukasey***, __ F.3d __, 2008 WL 586217 (9th Cir. Mar. 5, 2008) (*Fletcher,* Canby; Rawlinson, dissenting), the Ninth Circuit remanded the case for the BIA to decide whether individuals under twenty-one are minors under 8 C.F.R. § 1208.4(a)(5)(ii). The court accepted that the petitioner had not exhausted his claim to the BIA that his status as a minor excused him from timely filing his asylum application. The court opined that if the BIA determines that the petitioner was a minor at the time of his application, this "disability" may provide an exception to the timely filing and exhaustion requirements. In a dissenting opinion, Judge Rawlison would have held that the court lacked jurisdiction to consider the issue for failure to exhaust.

Contact: Colette Winston, OIL
☎ 202-514-7013

(Continued on page 16)

Summaries Of Recent Federal Court Decisions

(Continued from page 15)

■ **Citizenship Cannot Be Conferred By Equitable Estoppel When Statutory Requirements Are Not Met**

In ***Mustanich v. Mukasey***, __ F.3d __, 2008 WL 638359 (9th Cir. Mar. 11, 2008) (Farris, *Smith*, Jr., Holland), the Ninth Circuit held that citizenship could not be conferred by equitable estoppel when the statutory requirements for citizenship, as mandated by Congress, were not strictly satisfied. The court also denied the petitioner's motion to transfer the case to the district court for an evidentiary hearing on his claim to citizenship, concluding that there was no genuine issue of material fact to justify the transfer.

Contact: Patrick Glen, OIL
☎ 202-305-7232

■ **Ninth Circuit Interprets Settlement Language in *Barahona* Broadly**

In ***Navarro v. Mukasey***, __ F.3d __, 2008 WL 564988 (9th Cir. Mar. 4, 2008) (*Pregerson*, Gould, and Clifton), the Ninth Circuit held that the settlement reached in *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002), covered aliens for whom the IJ simply conducted scheduling hearings in between the dates specified in the settlement agreement. The court rejected the assertion that the settlement only covered merits hearings set for dates within the specified period. The court held that the BIA abused its discretion by not reopening the proceedings to allow additional hearings on the aliens' applications for suspension of deportation.

Contact: Russell Verby, OIL
☎ 202-616-4892

■ **Providing False Statement To Police Officer To Evade Service Of Court Process Or To Evade The Proper Identification By An Investigating Officer Is Not A CIMT**

In ***Blanco v. Mukasey***, __ F.3d __, 2008 WL 553869 (9th Cir. Mar. 3, 2008) (*Fisher*, Hawkins, Pregerson (concurring)), the Ninth Circuit held that petitioner's conviction under California Penal Code § 148.9(a) for providing a false statement to a peace officer is not a crime involving moral turpitude. The court concluded that because the offense does not require an intent to defraud, it is not categorically a crime of moral turpitude. The court held that because "the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude."

> The "significance of an omission must be determined by the context, and rigid rules cannot be substituted for common sense."

Contact: Alison Drucker, OIL
☎ 202-616-4867

TENTH CIRCUIT

■ **Tenth Circuit Holds That Omissions Alone May Be Sufficient For Adverse Credibility Finding**

In ***Ismaiel v. Mukasey***, __ F.3d __, 2008 WL 466251 (10th Cir. Feb. 22, 2008) (*Hartz*, O'Brien, Holmes), the Tenth Circuit held that omissions alone may be sufficient to support an adverse credibility finding. In this case, the petitioner, a Sunni Muslim from Syria claimed for the first time during his hearing that he had been tortured by Syrian authorities on two occasions. The IJ did not believe the claim and denied asylum, withholding, and CAT. The BIA affirmed finding that this major omission and other contradictions in the record supported the IJ's finding. On appeal petitioner argued that omission without more could not serve as the basis of an adverse credibility finding, and cited in support Ninth Circuit and Second Circuit case law where the omission had to involve the "heart of the asylum claim." The court rejected that approach, noting that the "significance of an omission must be determined by the context, and rigid rules cannot be substituted for common sense. Experienced litigators do not limit their challenges to adverse credibility to matters of the heart of the cases," said the court. Here, the court concluded that if the torture had actually occurred, "it would defy common sense" for the petitioner to have omitted the incidents in his asylum application. The court upheld the denial of petitioner's CAT claim because the BIA properly concluded that he had failed to satisfy his burden of proof.

Contact: Angela Liang, OIL
☎ 202-353-4028

■ **Tenth Circuit Dismisses Petition For Review Of Fugitive Alien Under The Fugitive Disentitlement Doctrine**

In ***Martin v. Mukasey,*** 517 F.3d 1201 (10th Cir. Feb. 26, 2008) (Tymkovich, McKay, *Seymour*), the Tenth Circuit dismissed a British national's petition for review pursuant to the fugitive disentitlement doctrine. The court deemed petitioner a fugitive because he failed to appear at a scheduled appointment with the government and did not provide the government with his current address. The court, in an issue of first impression, applied the fugitive disentitlement doctrine to discourage other aliens from fleeing to evade the finality of a lawful removal order and to maintain the integrity of the judicial system. The court noted that every circuit that has considered the issue has concluded that the fugitive-disentitlement doctrine applies in immigration cases. The court further rejected the alien's constitutional challenge and found that the circumstances warranted dismissal.

Contact: Anh-Thu P. Mai, OIL
☎ 202-353-7835

Naturalization Through Military Service

Members and certain veterans of the U.S. Armed Forces are eligible to apply for United States citizenship under special provisions of the INA. Generally, qualifying service is in one of the following branches: Army, Navy, Air Force, Marine Corps, Coast Guard, and certain reserve components of the National Guard and the Selected Reserve of the Ready Reserve.

Qualifications

A member of the U.S. Armed Forces must meet certain requirements and qualifications to become a citizen of the United States. This includes demonstrating good moral character, knowledge of the English language, knowledge of U.S. government and history (civics), and attachment to the United States by taking an Oath of Allegiance to the U.S. Constitution.

Qualified members of the U.S. Armed Forces are exempt from other naturalization requirements, including residency and physical presence in the United States. These exceptions are listed in INA §§ 328 and 329. All aspects of the naturalization process, including applications, interviews and ceremonies are available overseas to members of the U.S. Armed Forces.

An individual who obtains U.S. citizenship through his or her military service and separates from the military under "other than honorable conditions" before completing five years of honorable service may have his or her citizenship revoked.

Service in Wartime

All immigrants who have served honorably on active duty in the U.S. Armed Forces or as a member of the Selected Ready Reserve on or after September 11, 2001, are eligible to file for immediate citizenship under the special wartime provisions in Section 329 of the INA. This section also covers veterans of designated past wars and conflicts.

Service in Peacetime

Section 328 of the INA applies to all members of the U.S. Armed Forces or those already discharged from service. An individual may qualify for naturalization if he or she has served honorably for at least one year, obtained lawful permanent resident status, filed an application while still in the service or within six months of separation.

Posthumous Benefits

Section 329A of the INA provides for grants of posthumous citizenship to certain members of the U.S. Armed Forces. Other provisions of law extend benefits to surviving spouses, children, and parents. A member of the U.S. Armed Forces who served honorably during a designated period of hostilities and dies as a result of injury or disease incurred in, or aggravated by, that service (including death in combat) may receive posthumous citizenship.

The service member's next of kin, the Secretary of Defense, or the Secretary's designee in USCIS must make this request for posthumous citizenship within two years of the service member's death.

Under section 319(d) of the INA, a spouse, child, or parent of a U.S. citizen, who dies while serving honorably in active-duty status in the U.S. Armed Forces, can file for naturalization if the family member meets naturalization requirements other than residency and physical presence.

For other immigration purposes, a surviving spouse (unless he or she remarries), child, or parent of a member of the U.S. Armed Forces who served honorably on active duty and died as a result of combat, and was a citizen at the time of death (including a posthumous grant of citizenship) is considered an immediate relative for two years after the service members dies and may file a petition for classification as an immediate relative during such period. A surviving parent may file a petition even if the deceased service member had not reached age 21.

Contact: Barry Pettinato, OIL
☎ 202-353-7742

INDEX TO CASES SUMMARIZED IN THIS ISSUE

INSIDE OIL

OIL congratulates and bids farewell to Senior Litigation counsels **Quynh Vu Bain** and **Jeffrey J. Bernstein** who have been appointed Immigration Judges by the Director of EOIR.

Ms. Bain is a graduate from the Dickinson College and the Dickinson School of Law. Prior to joining OIL in 1996, she was a trial attorney with the former INS. During her tenure at

OIL she was detailed to the Office of the Deputy Attorney General where she served as counsel to the Deputy Attorney General from 2001 to 2003. She then joined the Torts Branch where she served as a Trial Attorney until September 2006, when she returned to OIL and was promoted to Senior Litigation Counsel.

Mr. Bernstein is a graduate of Pennsylvania State University and Duquesne University School of Law. He joined the Department in 1981 as a trial attorney in the Commercial Litigation Branch. He joined OIL in 1995 and was later promoted as Senior Litigation counsel. Prior to joining the Department, Mr. Bernstein was counsel at the Department of Labor, Office of the Solicitor, Black Lung Benefits Division.

MARK YOUR CALENDAR

OIL's 12th Annual Immigration Litigation Conference will be held at the National Advocacy Center on August 4-8, 2008. Additional information to follow.

On March 14, Lucky Team 7 ("the **O'Scadrons**'"), along with The **Royal Radfords** of Team 5, and the **Wrighteous**, shillelagh-wielding members of Team 8, hosted a choir practice to celebrate St. Patrick's Day.

OIL attorneys and staffers enjoy St. Patrick's Day festivities

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

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

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

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 would like to receive the *Immigration Litigation Bulletin* electronically send your email address to: karen.drummond@usdoj.gov