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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Attorney General Finds That There Is No Constitutional Right To Effective Assistance Of Counsel In Removal Proceedings

On January 7, 2009, former Attorney General Mukasey issued a comprehensive decision on a number of issues relating to an alien's ability to raise a claim of ineffective assistance of counsel in immigration proceedings. Most notably, the Attorney General held that there is "no valid basis" for recognizing a constitutional right to effective assistance of counsel in such proceedings. This article summarizes the Attorney General's decision and sets out guidance for litigators in light of the new decision.

Background

Claims of ineffective assistance of counsel in immigration cases have increased dramatically in the last two decades. In recent years, the Department of Justice has vigorously contested the constitutional underpinnings of a right to effective assistance of counsel, arguing that there can be no such right in immigration proceedings given that aliens have no constitutional right to appointment of counsel at government expense. Although courts have been slow to address this specific argument, several circuits have recently agreed with the Department's position while others continue to recognize a constitutional right to effective assistance.

In the context of this growing circuit split and in light of ambiguity in decisions of the Board of Immigration Appeals ("BIA") on this question, the Attorney General on August 7,

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Supreme Court Hears Stay Standard Case

On January 21, the Supreme Court heard oral argument in ***Nken v. Filip***, __U.S.__, 2008 WL 4983521 (November 25, 2008). The question raised by the case is whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in INA § 242(f)(2), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief.

Traditionally, an alien seeking judicial review was entitled to an automatic stay of removal upon the filing of a petition for review. In 1996, Congress by enacting IIRIRA, amended that provision to provide for the expedited removal of criminal and other aliens from the United States. Instead of an automatic stay, the new § 242(b)(3)(B), states that "[s]ervice of the petition [for judicial review] . . . does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."

Additionally, § 242(f)(2) provides that "no court shall enjoin the removal of any alien pursuant to a final order

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Stay Standards Argued Before Supreme Court

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under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." Finally, to be sure that aliens would still get their day in court, under the IIRIRA judicial review scheme, an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States.

The government told the Supreme Court that "§ 242(f)(2) allows a court to take the time necessary to rule meaningfully on the stay application."

The majority of the courts that have considered the impact of the IIRIRA changes, have held that the ordinary preliminary injunction standard previously used for stays pending appeal continues to apply to such stays. Two courts have concluded otherwise, including the Fourth Circuit where the *Nken* case arose. See *Teshome-Gerbreegziabher v. Mukasey*, 528 F.3d 330, 331 (4th Cir. 2008); *Weng v. United States Attorney General*, 287 F.3d 1335 (11th Cir. 2002).

In the government's argument before the Supreme Court, Acting Solicitor General, Edwin Kneedler, argued that "[t]he statutory text, context and background of § 242(f)(2) all demonstrate that that section applies to orders granting a stay of removal pending a court of appeals decision on a petition for review. Indeed, if § 242(f)(2) does not apply to such an order barring removal, it is difficult to see what function it would serve."

However, the Solicitor General also told the Court that in the government's view, "§ 242(f)(2) allows a court to take the time necessary to rule meaningfully on the stay application. We do not believe Congress intended to divest the court of the ability to rule on the merits." He also stated that under the Hobbs Act, there remains "a provision for a temporary — for a court to issue a temporary stay upon a showing of irreparable injury to allow the status quo to be maintained pending the court's ruling on the interlocutory injunction."

Subsequent to the oral argument in *Nken*, and in the context of a similar stay request filed with the Supreme Court, the Solicitor General again informed the court that "in *Nken*, the government takes the position that a court of appeals has the authority to grant a temporary stay of removal in order to allow the court to receive a response and act upon the application for a stay . . . . This Court, in our view, may do the same, as it did in *Nken*, pending ultimate disposition on the merits of a stay application."

From the transcript of the oral argument in *Nken*

CHIEF JUSTICE ROBERTS: *Maybe I'm missing something but -- and, again, I don't know which way this cuts, but the dispute strikes me as very academic as a practical matter: Judges looking at whether someone is likely to prevail on the merits versus judges looking at whether the person has shown by clear and convincing evidence that he shouldn't be removed. The judge that's going to find one in one case, depending on the standard, and the opposite in the same case I can't visualize.*

By Francesco Isgro, OIL

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CIS Ombudsman Issues Report on T and U Visas

On January 29, 2009, the CIS Ombudsman, Michael T. Dougherty, issued a report recommending improvements in the processing of visas for victims of trafficking (T visas) and victims of certain criminal activity (U-visas). The Ombudsman was concerned that delays in the issuance of the regulations have created a backlog of these visa cases and that USCIS might not have allocated sufficient resources to timely process these cases.

Among the recommendations, the Ombudsman recommends that USCIS find alternatives to provide T visa applicants with work authorization, to issue guidance for U visa applicants who seek work authorization, and to provide adequate staff at the T and U visa unit. The report notes that five adjudicators are currently tasked with processing over 12,000 T and U cases.

The Ombudsman report is available on the DHS's web site at: http://www.dhs.gov.

E-Verify Rule Delayed

USCIS announced On January 30, 2009, it has delayed by 60 days, until April 3, 2009, the implementation of an interim final rule entitled "Documents Acceptable for Employment Eligibility Verification" published in the Federal Register on Dec. 17, 2008. The rule streamlines the Employment Eligibility Verification (Form I-9) process. The delay will provide DHS with an opportunity for further consideration of the rule and also allows the public additional time to submit comments.

IACC Replaced By DPCC—Deficient Performance Of Counsel Claims

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2008, directed the BIA to refer to him for review three BIA decisions denying motions to reopen proceedings based on prior counsel's alleged ineffectiveness before the immigration judge and BIA. The Attorney General invited briefing on a host of issues relating to ineffective assistance claims, including whether there is a constitutional right to effective assistance of counsel in removal proceedings.

The Attorney General issued a decision affirming the BIA's denial of the motions to reopen. *Matter of Compean, Bangaly & J-E-C-*, 24 I.&N. Dec. 710 (A.G. 2009). The Attorney General held that there is no constitutional right to effective assistance of counsel in removal proceedings and overruled the BIA's prior decisions in *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I.&N. Dec. 553 (BIA 2003), to the extent that they provide otherwise. *Compean*, *supra* at 727. The Attorney General, however, concluded that the Department of Justice (including his delegates, the BIA and immigration judges) has authority to reopen cases as a matter of administrative discretion based on an attorney's deficient performance. *Id.* at 727-730.

No Constitutional Right to Effective Assistance of Counsel in Removal Proceedings

The Attorney General first addressed the question of whether the Constitution guarantees aliens in removal proceedings the right to effective assistance of counsel. He began by noting that in *Lozada*, 19 I.&N. Dec. 637, the BIA suggested there may be such a constitutional right, and that in *Assaad*, 23 I.&N. Dec. 553, the BIA refused to overrule its decision in *Lozada* on this point. *Compean, supra* at 712-13. In light of the circuit split on this issue and the "resulting patchwork of rules governing motions to reopen removal proceedings in different parts of the country," the Attorney General ordered the BIA to refer these matters to him so he could address this issue. *Id.* at 13.

The Attorney General then reasoned that, under Supreme Court precedent, there is no constitutional right to effective assistance of counsel where -- as here and as in most civil proceedings -- there is no constitutional right to counsel in the first place. *Id.* at 714. Therefore, although the Fifth Amendment's Due Process Clause applies in removal proceedings, that Clause does not entitle an alien to effective assistance of counsel, much less the specific remedy of a second "bite at the apple" based on the mistakes of his own lawyer. *Id.*

> "The fact that aliens in removal proceedings have a statutory privilege to retain counsel of their choosing at no expense to the Government . . . does not change the constitutional analysis.

The Attorney General observed that, while several courts of appeals have suggested or held that there is a constitutional right to effective assistance, "the constitutional analysis" in these cases is "distinctly perfunctory," and "fails to establish that lawyers privately retained to represent aliens in removal proceedings are state actors for purposes of the Due Process Clause." *Id.* at 720. The Attorney General pointed out that "the Government is not responsible for the conduct of a privately retained lawyer in removal proceedings." *Id.* at 721.

In reaching the constitutional holding, the Attorney General relied heavily on two Supreme Court decisions: *Coleman v. Thompson*, 501 U.S. 722 (1991), and *Wainright v. Torna*, 455 U.S. 586 (1982). *Compean, supra* at 723-24. The Attorney General noted that in *Coleman*, the Supreme Court reasoned that, because "[t]here is no constitutional right to an attorney in state post-conviction proceedings" a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings and must bear the risk of attorney error. *Id.* at 723. The Attorney General concluded that these "relevant constitutional holdings" by the Supreme Court cannot be trumped by the aliens' summary claim that without a specific right to effective assistance "removal proceedings would be fundamentally unfair." *Id.* at 725. The Attorney General also observed that "[t]he fact that aliens in removal proceedings have a statutory privilege to retain counsel of their choosing at no expense to the Government . . . does not change the constitutional analysis, because a statutory privilege is not the same as a right to assistance of counsel, including Government-appointed counsel, under the Constitution." *Id.* at 726.

Administrative Framework For Deficient Performance Claims

While the Attorney General held that aliens have no constitutional right to effective assistance, he concluded that the Department of Justice has authority to reopen cases as a matter of administrative discretion based on an attorney's deficient performance. *Id.* at 727-30. Consistent with this holding, the Attorney General set forth an administrative framework for the BIA to adjudicate deficient performance claims which supercedes the prior framework set forth in *Lozada*.

Under the new framework, an alien must establish three substantive standards in support of a motion to reopen. First, the alien must show that his counsel's failures were

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Deficient Performance Of Counsel Claims

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"egregious," a requirement that the BIA previously set forth in *Lozada*. *Compean, supra* at 732.

Second, the alien must establish that he acted with due diligence in discovering and taking steps to address his lawyer's deficient performance. *Id.* at 732-33. In assessing due diligence, the Attorney General instructed the BIA to determine "objectively when a reasonable person should have discovered the possibility that he had been victimized by the lawyer's deficient performance, and when a reasonable person would have taken steps to cure it following discovery." *Id.*

Finally, the alien must establish that the deficient performance resulted in prejudice. *Id.* at 733-34. The Attorney General held that the appropriate standard for prejudice requires an alien to show it is *more likely than not* that, but for the lawyer's error, he would have been entitled to the ultimate relief he was seeking. *Id.* at 734. This is higher than the "reasonable probability" standard set forth in *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984), which was intended to vindicate a criminal alien's constitutional right to effective assistance of counsel. *Id.* The Attorney General reasoned that the higher standard is appropriate here where removal proceedings are civil, not criminal, and where there is no constitutional right at stake. *Id.* at 734. It is likely that the Attorney General's prejudice standard will be challenged in court.

The new administrative framework also requires an alien to satisfy several procedural requirements involving the filing of certain documents in support of the motion to reopen. *Id.* at 735-39. These requirements build upon and expand the evidentiary requirements set forth in *Lozada*.

Specifically, an alien must submit the following documents with his motion to reopen: (1) an affidavit explaining "with specificity what his lawyer did or did not do, and why he . . . was harmed as a result" (*id.* at 735); (2) a copy of the agreement with his attorney, if any (*id.* at 736); (3) a copy of his letter to former counsel setting forth the deficient performance allegation and a copy of counsel's response, if any (*id.*); (4) a signed complaint to the appropriate State bar disciplinary authorities (*id.* at 737); (5) any documents or evidence the alien alleges his attorney failed to submit to the immigration court or BIA (*id.* at 738); and (6) a statement by the alien's new attorney declaring prior counsel's performance "fell below the minimal standards of professional competence" (*id.* at 738-39).

The Attorney General held that the appropriate standard for prejudice requires an alien to show it is *more likely than not* that, but for the lawyer's error, he would have been entitled to the ultimate relief he was seeking.

Several of these documentary requirements existed previously under the *Lozada* framework, but several others are new and are intended to improve the adjudicatory process for these claims. For example, requiring aliens to attach a copy of their agreement, if any, with prior counsel, will better "enable the Board to determine whether the alleged error was actually within the scope of the lawyer's representation." *Id.* at 736. Requiring aliens to file copies of their lawyer's responses, if any, to their allegations of deficient performance insures that the BIA will have all of the facts necessary to render an informed judgment. *Id.* Requiring aliens to file disciplinary complaints with the BIA rather than with the actual state bar or disciplinary authorities will decrease the possibility of the filing of unfounded or frivolous claims. *Id.* at 737.

Additionally, requiring the alien to submit the documents or other evidence that his prior lawyer allegedly failed to submit will reduce delays and promote finality by better enabling the BIA to resolve these claims without remanding for an evidentiary hearing. *Id.* at 738. Finally, requiring the alien's current counsel to submit a certification attesting to prior counsel's deficient performance will also discourage meritless claims. *Id.* at 738-39.

The Attorney General held that the substantive and procedural standards set forth in his opinion are "mandatory," *i.e.*, they must be complied with and may not be excused, as several courts have allowed with respect to the *Lozada* requirements. *Id.* at 739. This issue is also likely to prompt litigation in the federal courts, especially in those circuits which had allowed "substantial compliance" of the *Lozada* requirements.

The Attorney General further instructed the BIA to apply its constitutional holding and administrative framework "even in circuits that have previously held that there is a constitutional right to effective assistance of counsel." *Id.* at 730 n.8. This will allow those circuits to reconsider the constitutional question without "the weight" of the *Lozada* decision. *Id.*

One other point in the opinion is worth noting. The Attorney General's decision clarified that the BIA has jurisdiction to reopen proceedings based on deficient performance claims where the alleged deficient performance occurred *after* the issuance of a removal order. *Compean*, *supra* at 739-41. The most common example of this type of claim is when the alien argues that his attorney failed to file a timely petition for review of the BIA's decision. *See, e.g.,*

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Effective Counsel

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Singh v. Gonzales, 499 F.3d 969 (9th Cir. 2007). Disagreeing with the Fourth Circuit's decision in *Afanwi v. Mukasey*, 526 F.3d 788 (4th Cir. 2008), the Attorney General held that "nothing in the statutes or regulations limits the grounds for reopening to events that occurred before the agency or prior to entry of the final administrative order of removal." *Id.* at 740. This does not mean, however, that the BIA will provide a remedy for all such claims. The Attorney General emphasized that there are some situations where a remedy would be clearly unwarranted, "such as when the deficient performance claim involved the quality of the lawyer's briefs or arguments before a court of appeals . . . ." *Id.* at 741.

This aspect of the Attorney General's decision may perhaps have most significance in the Ninth Circuit given that it has held that, despite the REAL ID Act of 2005, habeas jurisdiction remains available for review of these types of "post-order" claims. *See Singh, supra*. If, however, aliens have an available remedy for these claims with the BIA, as *Compean* holds, the government has a valid argument that, as a prudential matter, an alien should be required to file a motion to reopen with the BIA and, if denied, file a petition for review of that denial rather than seek habeas review. *See Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (requiring that "as a prudential matter . . . petitioners exhaust available judicial and administrative remedies before seeking relief under § 2241"). If you are responding to such a claim in district court, you should contact Papu Sandhu at OIL (202-616-9357) to obtain the most recent jurisdictional arguments on this issue.

By Papu Sandu, OIL
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Guidance to litigators in light of Campean

In light of Compean, attorneys should take the following steps:

1. Review cases (pending cases or new cases) for claims of deficient performance of counsel.

2. In cases where briefing is already completed, notify the court of the Attorney General's decision through a 28(j) letter. Contact Papu Sandhu at OIL (202-616-9357) for sample 28(j) letter.

3. In *all* new briefs, continue to argue/preserve our argument that there is no *constitutional* right to effective assistance of counsel in removal proceedings, and cite the Attorney General's decision in support of this point.

When describing a claim where an alien seeks to reopen proceedings based on an attorney's deficient performance, the litigator should use the phrase "deficient performance of counsel"

4a. Furthermore, in new briefs where the BIA's decision was issued *prior to* the Attorney General's decision, include a footnote which states that the alien's deficient performance claim should be adjudicated under the substantive and procedural standards in existence at the time of the BIA's decision (*i.e.*, the prior *Lozada* framework), and not under *Compean*'s new framework. Contact Papu Sandhu at OIL for sample footnote.

4b. In all new briefs where the BIA's decision was issued *after* the *Compean*, but the motion to reopen was *pending* at the time of the decision, argue that the new substantive requirements apply, but the procedural requirements do not. This is consistent with what the Attorney General directed the BIA to do in his opinion. *See Compean, supra* at 741 (requiring the BIA and IJs to apply *Compean*'s "substantive standards," but not procedural requirements to pending motions to reopen). Indeed, in resolving the specific cases before him, this is the rule he applied. *Id.* at 742 ("[w]ith respect to the instant cases, then, the substantive standards . . . apply, but the new filing requirements . . . do not").

4c. In all new briefs where *both* the BIA's decision and the motion to reopen post-date the *Compean* decision, apply the full decision.

5. For those cases pending in the courts of appeals where the sole ground of the BIA's denial of the deficient performance claim is that it lacked jurisdiction over the claim because the alleged deficient performance occurred after the issuance of a removal order, *we should move to remand these cases to the BIA* in light of the Attorney General's holding that the BIA has jurisdiction to address such claims. *Compean*, *supra* at 739-41.

6. Per the Attorney General's direction, when describing a claim where an alien seeks to reopen proceedings based on an attorney's deficient performance, the litigator should use the phrase "deficient performance of counsel," and avoid the phrase "ineffective assistance of counsel." *Compean*, *supra* at 730 ("To avoid confusion with what has heretofore been treated as a constitutional claim of ineffective assistance of counsel, I will refer to the claim recognized in this opinion as a 'deficient performance of counsel' claim.").

If you have any questions contact Papu Sandhu at 202-616-9357

FURTHER REVIEW PENDING: Update on Cases & Issues

Asylum — Persecutor Bar

On November 5 2008, the Supreme Court heard oral arguments 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 WL 695623 (U.S. Mar. 17, 2008). The question presented is: Does "persecutor exception" prohibit granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

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GMC - Family Unity Waiver

On December 18, 2008, the government argued before the en banc Ninth Circuit ***Sanchez v. Mukasey***, 521 F.3d 1106 (9th Cir. 2008). The issue in the case is whether the "family unity" alien-smuggling waiver of inadmissibility under INA § 212(d)(11), 8 U.S.C. § 1182(d)(11) may also be applied to waive the good moral character requirement for cancellation of removal, where the alien would otherwise be barred from cancellation because of alien smuggling involving a spouse, child or parent.

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Stay of Removal — Standard

On November 25, 2008, the Supreme Court granted petitioner's application for a stay of removal in ***Nken v. Mukasey***, __S. Ct.__, No. 08-681. The question before the Court is "whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in INA § 242(f)(2), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief." Acting Solicitor General Edwin Kneedler argued the case on January 21, 2009.

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EAJA – Prevailing Party

On November 14, 2008, the First Circuit granted granted the government's petition for rehearing en banc in ***Aronov v. Chertoff***, 536 F.3d 30 (1st Cir. 2008), and vacated its panel opinion. The question before the court is whether an alien who filed suit under INA § 336(b), 8 U.S.C. § 1447(b) to compel Citizenship and Immigration Services ("CIS") to adjudicate his application for naturalization is entitled to EAJA fees, where the district court merely entered a brief electronic order granting the parties' joint motion for remand and where the delay in adjudicating the application was the result of CIS's practice of awaiting the results of an FBI name check. The case was argued on January 7, 2009.

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Fourth Amendment Exclusionary Rule

On October 22, 2008, the government filed a petition for rehearing en banc in ***Lopez-Rodriguez v. Mukasey***, 536 F.3d 1012 (9th Cir. 2008). The question presented is: Must the exclusionary rule be applied in removal proceedings if the agents committed violations of the 4th Amendment deliberately or by conduct that a reasonable person should have known would violate the Constitution?

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VWP — Waiver, Due Process

On January 30, 2009, the Seventh Circuit granted the government's petition for rehearing en banc in ***Bayo v. Chertoff***, 535 F.3d 749 (7th Cir. 2008). The question presented is whether a waiver of the right to contest removal proceedings under the VWP is valid only if entered into knowingly and voluntarily, and is the alien entitled to a hearing on whether the waiver was knowing and voluntary?

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CIMT—DUI

On June 23, 2008, the en banc Ninth Circuit hear argument in ***Marmolejo-Campos v. Mukasy***, No. 04-76644. The question is whether a conviction for aggravated DUI (driving under the influence plus knowingly lacking a valid license) under Arizona Revised Statutes § 28-1383(A)(1) is a crime involving moral turpitude.

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Aggravated Felony—Conspiracy

The Supreme Court has granted a petition for certiorari filed in ***Nijhawan v. Mukasey***, __U.S.__, 2009 WL 104300 (U.S. Jan. 16, 2009). The question presented is presented is "whether petitioner's conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an 'offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,' 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded $100 million, and the judgment of conviction and restitution order calculated total victim loss as more than $680 million."

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ IJ's Failure To Order Competency Evaluation Did Not Violate Petitioner's Due Process Right To Fundamentally Fair Hearing

In *Munoz-Monsalve v. Mukasey*, 551 F.3d 1 (1st Cir. 2008) (Lynch, *Selya*, Howard), the First Circuit held that it is the advocate's role, rather than the IJ's responsibility, to raise the issue of an alien's mental competence. The petitioner, a native and citizen of Colombia, was apprehended in October 200, while attempting to enter the United States using his brother's passport. Following a credible fear interview he was referred to the immigration court. At his hearing petitioner gave testimony conflicting with prior statements he had made to immigration officials. The IJ did not find petitioner credible and on that basis denied asylum.

The court rejected petitioner's contention that his due process rights had been violated because the IJ, *sua sponte*, should have held a competency evaluation. The court, noting first that "not every trial error sinks to the level of due process violation," found that because petitioner was represented by counsel, counsel should have raised the alleged incompetence at the immigration hearing, requested a competency evaluation, or have filed a motion to reopen before the BIA to present evidence of incompetency. The court then concluded that the record did not show that petitioner was incompetent, despite the allegations in his appeal brief claiming that he had suffered a head wound as a result of a gun shot. "An attorney's conclusory statements regarding his client's mental incompetence, proffered for the first time in an appellate brief, are not a substitute for proof," said the court.

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■ That Haitian Asylum Applicants Failed To Establish Past Persecution And Well-Founded Fear of Future Persecution

In *Ravix v. Mukasey*, 552 F.3d 42, 2009 WL 57820 (1st Cir. Jan. 12, 2009) (Boudin, Selya, Stahl) (*per curiam*), the First Circuit ruled a couple, a husband and wife from Haiti, failed to prove that either was subjected to past persecution or had a well-founded fear of future persecution. The court held that their claims were insufficient to warrant reversal of the BIA's decision where the incidents of alleged past harm appeared to be either harassment or were not specifically targeted at either alien. The court also affirmed the BIA's conclusion that petitioners did not show a well-founded fear of future persecution where members of their extended family remain in Haiti unharmed.

"The court held that it lacked jurisdiction over the BIA's determination that the alien failed to exercise due diligence to toll the filing deadline for a motion to reopen."

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■ First Circuit Holds That It Lacks Jurisdiction Over The Petitioner's Equitable Tolling Claim

In *Ouk v. Mukasey*, 551 F.3d 82 (1st Cir. 2008) (*Lynch*, Howard, Garcia-Gregory), the First Circuit held that it had jurisdiction to review the BIA's determinations that petitioner had received proper notice of his removal hearing and that he had failed to demonstrate exceptional circumstances to excuse his failure to appear.

The petitioner had been ordered removed to his native Cambodia when he did not appear at his January 22, 2004, removal hearing. He had previously filed, in May 2003, an application for asylum and had been notified of the hearing date. The order of removal was sent to the same address, but was returned. In 2006, petitioner filed a motion to reopen. The IJ rejected the motion, finding, *inter alia*, that petitioner had been given proper notice and that he had not established ineffective assistance of counsel, and thus had failed to show exceptional circumstances under 8 C.F.R. § 1003.23(b)(4)(ii). The BIA affirmed, also finding that petitioner failed to show that he exercised the due diligence necessary to equitably toll the deadline for reopening beyond 180 days.

Noting that equitable tolling may not even apply, the First Circuit held that it lacked jurisdiction over the BIA's determination that the alien failed to exercise due diligence to toll the filing deadline for a motion to reopen.

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■ First Circuit Affirms Finding Of Removability Where The Alien Falsely Claimed To Be A United States Citizen

In *Valenzuela-Solari v. Mukasey*, 551 F.3d 857 (1st Cir. 2008) (*Lynch*, Selya, Boudin), the First Circuit affirmed the IJ's decision finding the alien removable for making a false claim of United States citizenship. The petitioner, who had entered the United Unites as a visitor in 2001, overstayed his visa. In 2006 he traveled to the U.S. Virgin Islands for a vacation. However, when he presented himself as a U.S. citizen at the airport in St. Thomas for his return trip to the continental

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Summaries Of Recent Federal Court Decisions

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United States he was detained and questioned about his citizenship.

The court held that the credible testimony of the two Customs and Border Protection officers to whom the false claim was made outweighed the alien's contrary assertion that he never told them he was a United States citizen. The court similarly held that the record did not compel it to credit the alien's alternative explanation that, had he indeed made such a claim, it was simply an honest mistake caused by his limited understanding of English.

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■ **Reporting Criminal Conduct To Authorities Is Not Necessarily The Expression Of A Political Opinion**

In ***Amilcar-Orellana v. Mukasey***, 551 F.3d 86 (1st Cir. 2008) (*Lynch*, Selya, Boudin), the First Circuit upheld the BIA's decision denying relief and protection to an El Salvadoran alien who identified and testified against suspected gang members. The court determined that there was no evidence that petitioner's cooperation with police was motivated by a political opinion, or that a political opinion was imputed to him, and held that the alien could not establish eligibility for asylum on the basis of a personal dispute. The court also concluded that the record evidence, including State Department country reports, showed that the government of El Salvador is attempting to control gang activity.

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■ **First Circuit Holds That It Lacks Jurisdiction To Review The Decision That An Asylum Application Was Untimely**

In ***Rashad v. Mukasey***, __F.3d__, 2009 WL 129683 (1st Cir. Jan. 19, 2009) (Torruella, Stahl, *Garcia-Gregory*), the First Circuit held that it lacked jurisdiction to review the BIA's decision finding that petitioner's asylum application was untimely filed.

The court also held that petitioner's claim that the agency denied him due process because it did not "fully evaluate" his claim of an exception to the one-year bar was not a colorable constitutional claim.

The Second Circuit finding INA § 245(i) ambiguous, deferred to the BIA's interpretation in *Matter of Briones*.

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SECOND CIRCUIT

■ **Aliens With More Than One Year Of Prior Unlawful Presence Are Ineligible To Adjust Status**

In ***Mora v. Mukasey***, 550 F.3d 231 (2d Cir. 2008) (McLaughlin, Sack, *Livingston*), the Second Circuit gave *Chevron* deference to the BIA's interpretation in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), finding that aliens inadmissible under INA § 212 (a)(9)(C)(i)(I), 8 U.S.C. §1182(a)(9)(C)(i)(I), because they entered the United States unlawfully after accruing more than one year of prior unlawful presence, are precluded from adjusting their status under INA § 245(i), 8 U.S.C. § 1255(i).

The petitioners, husband and wife, entered the United States unlawfully in 1994 and 1999 respectively. They left the country together for a trip to Mexico in April 2002, got married there, and reentered the United States without inspection a month later. In August 2005 they were placed in removal proceedings because they were in the U.S. without having been admitted or paroled. INA § 212(a)(6)(A)(i). The principal petitioner then sought adjustment of status under INA § 245(i), based on an approved visa petition. The IJ, and subsequently the BIA, concluded that the principal petitioner was ineligible for a § 245(i) adjustment because he was inadmissible under INA § 212(a)(9)(C)(i)(I).

Before the Second Circuit petitioner contended that because § 245(i) expressly makes adjustment of status available to aliens who are present in the country unlawfully, it implicitly waives § 212(a)(9)(C)(i)(I) as a ground for inadmissibility. Petitioner relied on *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2006), and *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). The court found that *Acosta* no longer appeared to be good law since the Ninth Circuit, in *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), had deferred to the BIA's interpretation in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006)(holding that an alien who is inadmissible pursuant to section § 212(a)(9)(C)(i)(II) is ineligible for § 245(i) adjustment).

The court also found problematic petitioner's reliance on *Padilla-Caldera* because that case was decided before the BIA's ruling in *Matter of Briones*. In *Briones* the BIA determined for the first time in a published opinion that, even though aliens who are inadmissible under § 212(a)(6)(A)(i) may be eligible for adjustment of status under § 245(i) by operation of § 212(a)'s savings clause, aliens who are inadmissible also under § 212(a)(9)(C)(i)(I) are not.

The Second Circuit, applying the guidance in *Chevron* first found § 245(i) ambiguous and then held that the BIA's interpretation in *Briones*, namely to deny § 245(i) adjustment to aliens inadmissible under § 212(a)(9)(C)(i)(I) was not an unreasonable interpretation of the statute.

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"As the agency's analysis indicates, the language, structure, and lineage of the relevant statutes reasonably give rise to the inference that Congress considers aliens who repeatedly enter the country unlawfully to be more culpable than one-time offenders, and therefore to be less deserving of relief under section 1255(i)," said the court.

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The court found that the BIA engaged in improper fact-finding in violation of 8 C.F.R. § 1003.1(d)(3)(iv), when it found in the first instance that there was no national policy of forcible sterilization.

■ Second Circuit Rejects BIA's Reasons For The Denial Of Asylum Of Chinese Applicant

In ***Lin v. Mukasey***, __F.3d__, 2009 WL 141502 (2d Cir. Jan. 22, 2009) (Sotomayor, *Livingston*, Carman), the Second Circuit held that substantial evidence did not support the BIA's denial of asylum to an applicant from China who claimed that if retuned there, he would be forcibly sterilized for having more than one U.S-born child. To support his claim, petitioner had submitted a number of documents tending to show that people who violated the birth control policy of Fujian Province had been sterilized and fined. The IJ denied asylum and withholding, finding among other reasons, that it was unlikely that petitioner would return to China with his U.S. born children and questioning whether the family would remain intact. On appeal, the BIA affirmed and further found that "there is no national policy to sterilize Chinese citizens who have broken the population control law by virtue of having children in other countries," and that it was unlikely petitioner would return to china with his U.S. children.

The Second Circuit held that there was no substantial evidence to support the BIA's finding that petitioner would return to China without his family. The court also found that the BIA engaged in improper fact-finding in violation of 8 C.F.R. § 1003.1(d)(3)(iv), when it found in the first instance that there was no national policy of forcible sterilization without citing to any record evidence in support of its proposition.

Finally, the court rejected the BIA's conclusion that petitioner submitted insufficient evidence that he would be forcibly sterilized because the court could not determine to what extent this conclusion was based on the two other grounds it had rejected.

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■ Second Circuit Holds That An Alien Is Bound By His Attorney's Admission Of Removability

In ***Roman v. Mukasey***, __ F.3d __, 2009 WL 129899 (2d Cir. Jan. 21, 2009) (Jacobs, Miner, Sotomayor)(*per curiam*), the Second Circuit held that the IJ was not prohibited from relying on the alien's own admissions as the sole evidence establishing removability. The petitioner, a citizen from the Dominican Republic and an LPR, had been charged with inadmissibility as an "arriving alien" who had been convicted of a controlled substance violation under INA § 212(a)(2)A)(i)(II). Through his attorney, petitioner conceded the charge, but was granted a continuance to pursue a state court order vacating that conviction. Following a 10-month delay and no sign of a vacation order, the IJ ordered petitioner removed as charged. The BIA affirmed that decision.

The court preliminarily noted that it had jurisdiction over the petition because it raised a legal question, namely, whether the IJ was prohibited from relying on petitioner's admission as the sole evidence establishing removability. The court found that the IJ's actions were authorized under the regulations and that petitioner did not argue that those admissions were inaccurate.

Accordingly, the court held that counsel's decision to admit the allegations in the Notice to Appear and the "basis for [the] charge of removal" was a tactical decision that was binding on the petitioner and satisfied the government's evidentiary burden.

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■ Immigration Judge Erred By Failing To Consider The Date Of Entry On The Notice To Appear

In ***Zheng v. Mukasey***, __F.3d__, 2009 WL 71192 (2d Cir. January 13, 2009 (Kearse, *Pooler*, Cote), the Second Circuit held that the IJ violated petitioner's due process rights by failing to give any consideration to the date of entry on the Notice to Appear in his determination that the his asylum application was untimely.

According to the Notice to Appeal, petitioner entered the United States on December 15, 2004. Petitioner filed his asylum application on March 18, 2005. The IJ had found that petitioner had not met his burden of demonstrating that the application had been filed within the required one year of his arrival and found petitioner not credible. In particular, the IJ noted that petitioner, who claimed to have flown from Bejing, making a brief stop in France, and then to Mexico, had not provided any evidence of his trip rejecting petitioner's testimony that he had lost his travel documents in the Mexican desert. While petitioner admitted to the entry date in the NTA, neither the parties nor the IJ referenced the NTA date.

The court found that in challenging the timeliness finding, peti-

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tioner "raised a valid constitutional claim, as the failure of the IJ to give "*any* consideration to such undeniably probative piece of evidence amounts to a denial of the traditional standards of fairness that due process demands."

The court also held the IJ's credibility determination was based on improper considerations due to "heavy reliance" on the false assumption that petitioner was required to prove that he faced persecution at the hands of Chinese national authorities, and the IJ's attention to the "irrelevant issue" of whether petitioner "had truthfully expressed a desire to father additional children.'"

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■ **Distribution Of A Small Amount Of Marijuana Is Not Categorically An Aggravated Felony**

In ***Martinez v. Mukasey***, 551 F.3d 113 (2d Cir. 2008) (*Calabresi*, Winter, Newman), the Second Circuit held that two misdemeanor convictions for distribution of small amounts of marijuana did not categorically constitute a federal drug trafficking offense and an aggravated felony under the Controlled Substances Act's "baseline" sentencing provision.

The petitioner, a citizen of the Dominican Republic and an LPR, was twice convicted of criminal sale in the fourth degree, a misdemeanor, in violation of N.Y Penal Law § 221.40. The IJ and BIA held that those convictions were aggravated felonies, and found petitioner ineligible for cancellation. Following a remand in light of the Supreme Court decision in *Lopez v. Gonzales*, the BIA again found that petitioner had been convicted of an aggravated felony and to the extent that the convictions fell within the mitigating exception under 21 U.S.C. § 841(b)(4), petitioner had not met his burden to show that his state crime was the equivalent of a federal misdemeanor.

"The very basis of the categorical approach is that the sole ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute."

The Second Circuit found that under the categorical approach, petitioner's "conviction could have been for precisely the sort of non-renumenaritive transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841 (b)(4)'. Thus, the court reasoned that the BIA had erred by requiring petitioner to prove that his conduct did not qualify as an aggravated felony rather than looking at the minimal conduct necessary to sustain such a conviction. "The very basis of the categorical approach is that the sole ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute," said the court.

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THIRD CIRCUIT

■ **Third Circuit Holds That BIA Erred By Relying On Sentencing Document To Determine Whether Conviction Constituted An Aggravated Felony**

In ***Evanson v. Attorney General***, 550 F.3d 284 (3d Cir. 2008) (Sloviter, *Fuentes*, Aldisert), the Third Circuit held that the BIA erred by relying on information found only in the sentencing document to determine that the alien's convictions for possession of marijuana with intent to deliver and criminal conspiracy constituted an aggravated felony. The court, utilizing the hypothetical federal felony test and the illicit trafficking element test, further held that the BIA should have applied the modified categorical approach, which limits consideration of the judgment of sentence and the charging document. The government had conceded that the modified categorical approach was applicable but had argued that the criminal information was an appropriate document to consider. The court held however, that such a document can be considered only where the petitioner was actually convicted of those charges.

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■ **An Alien Widow Does Not Remain An Immediate Relative When Her U.S. Citizen Spouse Dies Within Two Years Of Marriage**

In ***Robinson v. Napolitano***, __F.3d__, 2009 WL 223856 (3d Cir. Feb. 2, 2009) (*Sloviter*, Fuentes, (Nygaard, dissenting)), the Third Circuit reversed the district court's judgment and ruled that an alien must be an "immediate relative" at the time of the I-130 adjudication, rather than the time of filing, and granted the government's motion to dismiss. The petitioner's United States citizen spouse had filed an I-130 relative visa petition but died before it was adjudicated. USCIS subsequently informed the petitioner that the visa petition was automatically terminated because she was no longer an "immediate relative" because her spouse died before they had been married for two years. The district court had set aside that determination, and had ordered USCIS to process the I-130 and the adjustment application and to declare that petitioner was an "immediate relative."

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■ **Third Circuit Denies Government's Petition To Rehear En Banc Holding That Five-Year Statute Of Limitations On Rescinding Adjustment Also Applies To Removal Proceedings**

On February 4, 2009, the Third Circuit denied the government's peti-

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tion for en banc rehearing (No. 07-2164) of the panel's determination in ***Garcia v. Attorney General***, 545 F.3d 252 (3d Cir. 2008) (McKee, Fuentes, *Weis*), that 8 U.S.C. § 1256(a) – a statute that prohibits rescinding adjustment of status more than five years after an alien was granted adjustment of status – should be extended to bar the government from initiating removal proceedings based on an alien's misrepresentations during the adjustment process. The government argued that the panel's decision directly conflicts with decisions in the Fourth and Ninth Circuit, and with a prior, unpublished opinion of the court. The government also argued that the panel erred by disregarding the plain text of the statute, and in holding that its ruling in *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996), governed and was dispositive of the issue.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds That It Lacks Jurisdiction To Review The Board's Refusal To Reopen Proceedings *Sua Sponte***

In ***Mosere v. Mukasey***, 552 F.3d 397 (4th Cir. 2009) (*Williams*, Michael, Copenhaver), the Fourth Circuit held that the BIA did not abuse its discretion in rejecting petitioner's motion to reopen as untimely. The petitioner, a native of Sierra Leone, entered the United States as a visitor in 1990. When she overstayed her visa, she was placed in removal proceedings. Petitioner's husband filed an I-130 on her behalf but later confessed that she had paid him $1200 for the marriage and the two had never lived together. In 1996, an IJ ordered petitioner removed but granted her voluntary departure. Petitioner never departed. Instead on December 3, 2007, she filed a motion to reopen claiming that she could not return to Sierra Leone because of the civil war and also noting that her son had filed an I-130 petition on her behalf.

The court held that it did not have jurisdiction to review the BIA's refusal to reopen the alien's case *sua sponte* because there are no meaningful standards by which to evaluate the BIA's decision

The court held that the motion to reopen, filed more than eleven years after the entry of the removal order, had been properly denied as untimely under 8 C.F.R. § 1003(c)(2).

The court, in concert with every other court to have considered the issue, also held that it did not have jurisdiction to review the BIA's refusal to reopen the alien's case *sua sponte* because there are no meaningful standards by which to evaluate the BIA's decision.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds That Substantial Evidence Supported The Immigration Judge's Pre-REAL ID Act Adverse Credibility Determination**

In ***Zhao v. Mukasey***, __F.3d__, 2009 WL 103219 (6th Cir. Jan. 16, 2009) (Martin, Gilman, *Dowd* (sitting by designation)), the Sixth Circuit upheld an adverse credibility finding against an a Chinese citizen who sought withholding of removal and CAT protection on the basis of his opposition to his wife's forced abortion. The court found that the record provided numerous omissions and inconsistencies relating to the heart of his claim. In particular, the court noted that the "IJ who "wrote a twenty-three page analysis supporting her finding . . . took great care to fully explain her analysis and the basis of her decision."

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SEVENTH CIRCUIT

■ **Seventh Circuit Asserts Jurisdiction Over BIA Order Vacating Reopening**

In ***Potdar v. Mukasey***, 550 F.3d 594 (7th Cir. 2008) (*Ripple*, Manion, Kanne), the Seventh Circuit vacated its prior judgment in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007). After granting rehearing to determine whether the reopening denial nullified the statutory right to apply for adjustment of status, the court ruled that it had jurisdiction pursuant to *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), over the order vacating reopening, and that a request for termination before the IJ during reopened proceedings amounted to a request for a continuance, and remanded to consider the effect of the agency's denial of his application.

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■ **Seventh Circuit Holds That Procedural Due Process Claims Must First Be Exhausted**

In ***Ghaffar v. Mukasey***, 551 F.3d 651 (7th Cir. 2008) (Easterbrook, *Rovner*, Williams), the Seventh Circuit held that it lacked jurisdiction to review the petitioner's due process claims that the IJ exhibited bias during the hearing and that the his wife's testimony was not included in the record because he had failed to raise these claims before the BIA. The court concluded that it was well within the BIA's power to remedy these types of procedural claims, so these types of claims must be administratively exhausted before being raised to the court. The court also affirmed the

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BIA's denial of petitioner's motion to remand to consider his ineffective assistance of counsel claim because he had failed to comply with the *Lozada* requirements.

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■ Motion To Toll Running Of VD Period Pending Appeal Must Show Likelihood Of Success

In *Stepanovic v. Mukasey*, 511 F.3d 653 (7th Cir. Dec. 21, 2007) (Flaum, Ripple, Rovner) (*per curiam*), the Seventh Circuit denied petitioner's motion for stay of the voluntary departure period. The court held that "a petitioner seeking a stay of voluntary departure must demonstrate that he is likely to succeed on the merits." The court found that petitioner's "three-paragraph motion does nothing more than make a general request for a stay," and that the attached counsel's affidavit even failed to state what type of relief petitioner had sought below. "Without more information, this court cannot assess the likelihood that [petitioner] could succeed in demonstrating that the BIA erred by dismissing his appeal," said the court.

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EIGHTH CIRCUIT

■ Eighth Circuit Upholds Denial Of Asylum And Denial Of Motion To Reopen

In ***Khrystotodorov v. Mukasey***, 551 F.3d 775 (8th Cir. 2008) (*Hansen*, Melloy, Riley), the Eighth Circuit upheld the BIA's denial of asylum because petitioner failed to corroborate his claims and thus was not found credible.

The petitioner, his wife, and daughter, all citizens of Ukraine, sought protection on account of on persecution on account of their Baptist religion. The IJ not convinced by petitioner's story of claimed persecution by members of the Ukrainian National Assembly-Ukrainian National Self Defence continued the asylum hearing to give petitioner an opportunity to provide corroborating evidence. In the end, however, the IJ was not satisfied with lack of corroborating evidence and also found a "significant variance" between petitioner's testimony and the information contained in the country background reports. Accordingly, the IJ found petitioner not credible and denied asylum withholding and CAT protection on that basis. Shortly thereafter, petitioner submitted a motion to reopen proffering additional evidence. The IJ denied the motion, and the BIA finding no clear error affirmed the decisions.

"A motion to reopen is not designed to provide a second chance to bolster the record with evidence that could have been presented earlier."

The court, applying pre-REAL ID Act case law, found that the IJ's opinion correctly articulated concerns with the overall credibility of petitioner's claim of past religious persecution and concluded that additional corroboration was lacking in several specific areas of concern central to the claims, including general background evidence corroborating the persecution of Baptists by the UNA-UNSO and the group's tie to the government.

The court also upheld the BIA's denial of petitioner's motion to reopen because the evidence submitted was previously available. "A motion to reopen is not designed to provide a second chance to bolster the record with evidence that could have been presented earlier," said the court.

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■ Eighth Circuit Affirms That It Lacks Jurisdiction Over An Untimely Asylum Application And Holds That It Lacks Authority To Reinstate Voluntary Departure

In ***Al Milaji v. Mukasey***, 551 F.3d 768 (8th Cir. 2008) (Wollman, Beam, *Benton*), the Eighth Circuit reaffirmed that it lacked jurisdiction over untimely asylum applications. The petitioner, a Syrian citizen, entered the United States in 2000 and applied for asylum in 2003. He claimed that the Syrian government had tortured him during this compulsory military service. The IJ denied asylum relief because it was time-barred. Additionally, the IJ denied withholding and CAT because petitioner's testimony was not credible, finding that it conflicted with information he had provided on his asylum application. The BIA affirmed that decision but granted 60 days of voluntary departure.

When petitioner filed a petition for review before the expiration of the 60 days of VD, he also sought a stays of removal and voluntary departure. The court denied those requests. Petitioner then filed a motion to reopen based on a marriage to a U.S. citizen. The BIA denied that motion citing the absence of evidence of a bona fide marriage. Petitioner then filed with the BIA a motion to reconsider. When that was denied he denied he timely filed for judicial review. The court consolidated the two petitions.

Preliminarily, the court held that, in the absence of a constitutional claim or error of law, it lacked jurisdiction to review the denial of asylum based on the untimeliness finding. The court then affirmed the adverse credibility finding because there were substantive inconsistencies on key issues of petitioner's asylum claim. In a footnote, the court noted that it applied the pre-REAL ID Act standards in its review of the credibility finding.

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The court also held that it lacked jurisdiction to review the denial of the motion to reopen because petitioner had not appealed it within 30 days. The court, however, considered the denial of the motion to reconsider. The court rejected petitioner's argument that the BIA had improperly denied the motion to reopen because DHS had not opposed it. The court noted that under *Matter of Velarde-Pacheco*, DHS's opposition is but one of the five grounds for denying a motion to reopen. Here, the court found that the BIA properly concluded that there was no convincing evidence that the marriage was bona fide.

Finally, the court held that it lacked the authority to reinstate an expired period of voluntary departure. The court explained that "IIRIRA confers authority on the Attorney General, an executive branch official, to grant voluntary departure," and regulations grant executive branch officials the authority to reinstate voluntary departure. "Nothing in INA § 240B confers authority on this court to reinstate an expired order of voluntary departure," said the court.

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■ **Eighth Circuit Dismisses The Alien's Challenge To The Discretionary Denial Of His Application For Adjustment Of Status For Lack Of Jurisdiction**

In ***Dukuly v. Mukasey***, __F.3d__, 2009 WL 173206 (8th Cir. January 27, 2009) (*Wollman*, Smith, Gruender), the Eighth Circuit held that it lacked jurisdiction to review the BIA's discretionary denial of petitioner's application for adjustment of status.

The petitioner, a citizen of Liberia, entered the United States in 1996. In 2003 he filed an asylum application that ultimately was determined by DHS to contain fraudulent information. Petitioner then withdrew the application and then, upon having admitted to fraud, sought a waiver. The IJ granted the waiver but decided to deny his application for adjustment as a matter of discretion. The BIA affirmed.

The court found that petitioner had not raised any constitutional claims or questions of law and consequently it lacked jurisdiction to review the discretionary denial of adjustment. The court rejected petitioner's contention that the denial was unduly punitive or arbitrary. The court noted that the IJ weighed humanitarian considerations against the gravity of lying to the United States government. Finally, the IJ's decision to grant a fraud waiver in deference to the petitioner's citizen wife was not arbitrary because it was an effort to temper justice with lenity by allowing petitioner to return in the future.

The court held that "the time limits for filing a petition for review are mandatory and jurisdictional and not subject to equitable tolling."

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■ **Eighth Circuit Holds That REAL ID Act § 106 Is An Adequate Substitute For Habeas Review And Denies Untimely Petition For Review For Lack Of Jurisdiction**

In ***Skurtu v. Mukasey***, 552 F.3d 651 (8th Cir. 2008) (Wollman, *Smith*, Gruender), the Eighth Circuit held that the district court properly transferred the alien's petition for review to the court of appeals because constitutional challenges are challenges to the removal order.

The petitioner a citizen of Moldova, was ordered removed as an alien who had been convicted of an aggravated felony. More than 100 days after the BIA's order, he filed an action challenging the removal order in the United States District Court for the District of Columbia. That court transferred the action to the District Court for the Eastern District of Missouri, which subsequently construed the action as a petition for review and transferred it to the Court of Appeals.

The court found that petitioner's complaint challenged the IJ's ultimate order of removal and fell within the purview of the REAL ID Act. The court reaffirmed that § 106 of the REAL ID Act was an adequate substitute for habeas review. The court then dismissed the untimely petition for review for lack of jurisdiction noting that "the time limits for filing a petition for review are mandatory and jurisdictional and not subject to equitable tolling."

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NINTH CIRCUIT

■ **Ninth Circuit Holds That Aiding And Abetting An Attempted Escape From Custody Does Not Constitute Obstruction Of Justice**

In ***Salazar-Luviano v. Gonzales***, 551 F.3d 857 (9th Cir. 2008) (Bright, *Hawkins*, Tashima), the Ninth Circuit held that the petitioner's attempt to aid and abet the escape of several illegal aliens from their lawful custody by the United States Border Patrol did not obstruct justice within the meaning of the INA. The petitioner, a Mexican citizen and an LPR since 1976, had been convicted of six misdemeanor crimes, including his 1987 conviction for aiding and abetting attempted escape from custody. The IJ determined that the conviction constituted an aggravated felony under INA § 101(a)(43)(S) precluding his eligibility for cancellation. The BIA affirmed noting that aiding and abetting "is a specific intent crime."

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The Ninth Circuit found that attempted escape from custody does not categorically qualify as an aggravated felony under § 101(a)(43)(S). The court held that because no legal proceedings had been commenced against the apprehended aliens, there could be no obstruction of justice, which requires a pending judicial proceeding. Accordingly, the case was remanded to consider petitioner's application for cancellation.

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■ **Ninth Circuit Holds That It Lacks Jurisdiction To Review BIA's Refusal To Administratively Close Proceedings**

In *Diaz-Covarrubias v. Mukasey*, __F.3d__, 2009 WL 50117 (9th Cir. Jan. 9, 2009) (Callahan, *Ikuta*, Shadur), the Ninth Circuit held that it lacks jurisdiction to review the BIA's refusal to administratively close proceedings. The court applied the reasoning in *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002), where it had held that it lacked jurisdiction to review the BIA's refusal to reopen the proceedings *sua sponte*. The court found that there is neither a statutory nor regulatory basis for administrative closures, and that the BIA has not set forth any meaningful standard for exercising its discretion to implement administrative closure. The court then held that because there is no sufficiently meaningful standard for evaluating the BIA's decision not to administratively close a case, it lacks jurisdiction to review a claim that the BIA abused its discretion in not doing so.

The court noted that the Sixth Circuit had reached a contrary result in in *Garza-Moreno v. Gonzales*, 489 F.3d 239 (6th Cir. 2007), but explained that "the Sixth Circuit did not address the question whether there were meaningful standards to apply" under *Heckler v. Chaney*, 470 U.S. 821 (1985).

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■ **Ninth Circuit Holds That The Computation Of The One-Year Asylum Deadline Begins The Day After Applicant's Arrival**

The court found that the plain meaning of INA § 208 is that an application be filed "within one year after the date of the alien's arrival in the United States."

In *Minasyan v. Mukasey*, __F.3d__, 2009 WL 115368 (9th Cir. Jan. 20, 2009) (Reinhardt, Miner, *Berzon*), the Ninth Circuit held that the BIA erred by denying petitioner's asylum application as untimely. The petitioner, and Armenian citizen, was admitted to the United States as a visitor on April 9, 2001. He did not depart when his visa expired. Instead, on April 9, 2002, he filed an application for asylum claiming persecution on account of his political activity for speaking out against government corruption. The Asylum Officer denied the application as untimely filed and referred the case to an IJ, who also denied asylum because the application had been filed one day late. As subsequent motion to reconsider was denied by the IJ and affirmed by the BIA.

The court held that the BIA had abused its discretion in denying the motion for reconsideration because "its interpretation of the one-year period for filing an asylum application runs directly counter to the plain meaning of the statute." The court found that the plain meaning of INA § 208 is that an application be filed "within one year after the date of the alien's arrival in the United States." This reading of the statute accords with the common legal usage said the court. "The Government has not provided us with any reason to calculate the statutory deadline for filing an asylum application differently."

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That *Res Judicata* Does Not Bar Alien's Removability Where He Was Resentenced For Violating The Conditions Of Community Control**

In *Singh v. Attorney General*, 553 F.3d 1309 (11th Cir. 2008) (Anderson, Birch, Hull), the Eleventh Circuit upheld the BIA's conclusion that *res judicata* did not bar the alien from being charged as removable based on a subsequent re-sentencing. The petitioner, who previously, had been convicted of burglary and sentenced to 364 days' imprisonment, 2 years' community control, and 3 years of probation, had been granted cancellation of removal. Subsequently, the sentence was amended to to 6.6 years' imprisonment for violating the conditions of community control.

The court found that when petitioner was resentenced to a term of more than one year, that gave rise to a new cause of action and the doctrine of *res judicata* was no longer a bar to the government's institution of removal proceedings.

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Contributions to the Immigration Litigation Bulletin Welcomed

INSIDE DHS

DHS Secretary Janet Napolitano has appointed UVA School of Law Professor ***David Martin*** as the Principal Deputy General Counsel of the Department of Homeland Security.

According to Martin, Napolitano was a student in the very first class he taught at Virginia. "I was a rookie professor and she was a rookie law student," he said. "That small section was tolerant of my mistakes and I tried to return the favor. I have always felt especially close to the students in that class."

Martin had kept in touch with Napolitano over the years, and the two of them worked on projects together when he was INS General Counsel and she was the U.S. attorney for Arizona.

Martin served as the INS General Counsel from 1995 to 1998.

Before joining UVA, Martin served for two years as special assistant to the assistant secretary for human rights and humanitarian affairs at the Department of State.

President Obama has announced his intention to nominate ***Ivan K. Fong*** as General Counsel for the U.S. Department of Homeland Security (DHS). Fong is currently the Chief Legal Officer & Secretary for Cardinal Health, Inc., and served previously as Deputy Associate Attorney General for the Department of Justice, playing a key role in directing the federal government's role in civil litigation and enforcement matters.

Barry O'Melinn, Deputy Principal Legal Advisor at ICE, has been appointed as the Acting Principal Legal Advisor of ICE.

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who actually managed to have her picture taken with the First Lady, Michelle Obama.

OIL's Karen Drummond and First Lady Michelle Obama

Mary Coates Receives 35-year of Service Pin

Staff Assistant Mary Coates receives 35-year pin from Deputy Director David McConnell. Mary has been with OIL since its founding in February 1983. Prior to joining OIL she had been a secretary in the Criminal Division for ten years.

INSIDE OIL

OIL welcomes back ***Kristen Giuffreda Chapman***. Kristen left OIL 2001 when she became an Assistant United States Attorney for the Eastern District of New York. She is a graduate of Wellesley College and American University's Washington College of Law. Kristen began her career at the Department of Justice in an immigration and asylum policy office at Main Justice before joining former INS headquarters' Office of International Affairs.

OIL welcomes two new attorneys, Aric Anderson and Imran Zaidi.

Aric Anderson joined OIL in January 2009. He had been a Summer Law Intern at OIL in 2002. Since that time, he has received his J.D. from The Catholic University of America, Columbus School of Law, clerked for Judge Rhesa Barksdale of the U.S. Court of Appeals for the Fifth Circuit, and practiced in the DC office of Steptoe & Johnson, where he was active in the firm's litigation and regulatory practices.

Imran Zaidi is a graduate of George Washington University Law School. He received his B.A. in political science from The Johns Hopkins University. Prior to joining OIL, Imran worked as a contract attorney for various DC firms and also as a translator (Urdu) for Guantanamo detainees.

The Liberty Square Building became the home of the Presidential Transition Team. Many OILers got a peek at who-is-who in the new Administration. Some even ventured in the Transition Team Press Conference Room to get even closer. OIL's Paralegal, Karen Drummond, was one of the lucky few

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Photo by Erika Madrigal

Aric Anderson, Kristen Giuffreda, and Imran Zaidi.

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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

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