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

Immigration Litigation Bulletin

Vol. 13, No. 3 *March 2009*

LITIGATION HIGHLIGHTS

■ **Asylum**

►Letter from father-in-law failed to establish a policy of forced sterilization (3d Cir.) **9**

►General ineffectiveness and corruption do not necessarily establish that government is unwilling or unable to protect asylum seeker (8th Cir.) **13**

►IJ properly required corroboration of asylum applicant's claim (8th Cir.) **12**

■ **Crimes**

►Conviction for reckless conduct is a CIMT (11th Cir.) **13**

►A conviction for fraud does not have a comparale statutory counterpart under § 212(a) (6th Cir.) **11**

■ **Jurisdiction**

►Alien properly exhausted issue by raising it in notice of appeal (3d Cir.) **9**

►Court finds jurisdiction to review BIA's decision to streamline (4th Cir.) **10**

►No equitable exception for failure to exhaust administrative remedies (5th Cir.) **11**

■ **Visas—Adjustment**

►In an employment-based visa petition, USCIS properly refused to consider depreciation in determining ability of employer to pay proffered wages (1st Cir.) **7**

Inside

En Banc Ninth Circuit Holds That *Chevron* Deference Owed To BIA's CIMT Determinations

In ***Marmolejo-Campos v. Holder***, __F.3d__, 2009 WL 530950 (9th Cir. Mar. 4, 2009) (Kozinski, *O'Scannlain*, Kleinfeld, Silverman, Tallman, Clifton; Bybee (concurrence, partial dissent); Berzon, Pregerson, Fisher, Paez (dissenting)), the *en banc* Ninth Circuit held that the BIA's determination that a particular conduct is "crime involving moral turpitude" (CIMT) "is governed by the same traditional principles of administrative deference we apply to the BIA's interpretation of other ambiguous terms in the INA." Accordingly, the court found that the BIA reasonably determined that petitioner's two convictions of aggravated DUI under Arizona law were crimes involving moral turpitude.

The petitioner, a Mexican citizen who became an LPR in 2001, pled guilty on two occasions of aggravated drunk driving under Arizona law. DUI is "aggravated" in Arizona if a person drives under the influence while the person's license or privilege to drive is suspended, canceled, revoked or refused.

Petitioner first pled guilty to committing such offense in 1997, when he admitted of driving with a .164 blood level without a driver's license. He pled guilty again for the same offense in 2002 for running a red light while intoxicated with .233 blood level, and at that time admitted that he knew that his driver license had been suspended or revoked. This last offense resulted in a 30-month prison term.

Following petitioner's last conviction, DHS instituted removal pro-

(Continued on page 2)

Wakkary Extends Ninth Circuit's "Disfavored Group" To Withholding - Litigation Guidance

This is the first in a series of two articles discussing the Ninth Circuit's "disfavored group" approach to proof of a future-persecution claim that the applicant fears being singled out individually for future persecution. This article discusses the scope and effect of the Ninth Circuit's recent decision in ***Wakkary v. Holder***, __F.3d__, 2009 WL 5995579 (9th Cir. March 10, 2009), which extends that court's "disfavored group" approach in asylum cases to withholding of removal cases.

Regulatory Framework And Ninth Circuit's "Disfavored Group" Approach For Assessing A Well-Founded Fear Of Future Persecution

By statute, in order to qualify for asylum an applicant must establish either "[past] persecution or a well-founded fear of [future] persecution on account of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42); 1158(b). An applicant for withholding of removal

(Continued on page 14)

BIA Entitled to Chevron Deference

(Continued from page 1)
ceedings and an IJ ordered him removed as an alien who after admission had been convicted of two or more CIMT's under INA §§ 237(a)(2)(A)(ii). The BIA affirmed that decision in an unpublished order relying on *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (en banc), where the BIA had held that a violation of Arizona's aggravated DUI statute is a CIMT. In *Lopez-Meza*, the BIA reasoned that although a simple DUI was not a CIMT, when that crime is committed by an individual who knows that he is prohibited from driving, the offense amounts to a CIMT. In petitioner's case, the BIA looked at the records of his convictions and determined that both offenses for which he had been convicted involved driving while intoxicated and therefore were CIMT's.

A divided panel of the Ninth Circuit affirmed the BIA's decision holding that petitioner's aggravated DUI convictions under the Arizona statute, with knowledge that he did not have a valid license to drive, were innately reprehensible acts which qualified as a CIMT's. 503 F.3d 922 (9th Cir. 2007). Judge Nelson vigorously dissented from the panel's opinion rejecting the BIA's view that a DUI offense, normally not a CIMT, could be classified as CIMT where the driver knew that he was not legally licensed to drive.

Writing for the *en banc* majority, Judge O'Scannlain reaffirmed the panel's holding and laid out a more comprehensive framework to guide the court's review of CIMT cases. The initial question, said the court, is what standard of review should be applied. The BIA's determination that an alien such as the petitioner committed a CIMT requires two separate inquiries. First the BIA must determine what offense the petitioner has been convicted of committing. Second, the BIA must determine whether such conduct is a CIMT under the INA. "It is well established that we give no deference to the BIA's answer to the first question," said the court because the BIA has no special expertise in construing state or federal criminal statutes. However, the BIA's answer to the question of whether a particular conduct amounts to a CIMT "requires a difference standard of review." The court acknowledged that its precedents "have not always been consistent," suggesting at times that deference was owed to the BIA, and at other times reviewing the determination *de novo*. "In light of this uncertainty, we set forth the following principles," said the court.

The term "moral turpitude" is "the quintessential example of an ambiguous phrase."

> *When the Board considers whether a certain crime involves "moral turpitude," it must interpret that term through a process of case-by-case adjudication. When reviewing an agency's interpretation of its governing statute, we follow the two-step framework famously set forth in Chevron. Initially, we determine whether "the intent of Congress is clear." If it is, both the court and the agency "must give effect to the unambiguously expressed intent of Congress." If the statute is "silent or ambiguous," however, we may not supply the interpretation of the statute we think best (as we would without an agency pronouncement), but must limit ourselves to asking "whether the agency's answer is based on a permissible construction of the statute."*

(citations omitted). The court added that the BIA's unpublished decisions are not normally accorded *Chevron* deference because they do not bind future parties, but they are nonetheless given varying degree of deference under *Skidmore*.

The court the found, that the term "moral turpitude" is "the quintessential example of an ambiguous phrase." Once the offense is established, it said, the BIA must determine whether it meets the definition of "moral turpitude." In so doing, the BIA" assesses the character, gravity, and moral significance of the conduct, drawing upon its expertise as the single body charged with adjudicating all federal immigration cases. This is precisely the type of agency action the Supreme Court instructs is entitled to *Chevron* deference." The court specifically overruled those case where it had not deferred to the BIA either directly or "impliedly."

The court then examined petitioner's case and concluded that the BIA had correctly applied the modified categorical approach in finding that petitioner's 1997 and 2002 aggravated DUI convictions both involved actual driving, and actual knowledge. Because the BIA's decision rested on *Matter of Lopez-Meza*, the court then considered whether that interpretation was entitled to deference. Petitioner contended that no deference was due because the interpretation in *Lopez-Meza* was in conflict with prior precedents. However, the court rejected that argument because the BIA had provided an explanation for its action. "Such explanation is not irrational, and it certainly does not leave us 'in doubt as to the reason for the change in direction,'" said the court. Moreover, under *Brand X*, the court concluded that the BIA had provided a reasoned explanation for its resolution of any tension between the holding in *Lopez-Meza* and prior prece-

(Continued on page 17)

Equitable Tolling Based on Attorney Performance

Claims for equitable tolling of the BIA's filing deadline for a motion to reopen based on alleged errors by an alien's attorney have become very common. The purpose of this article is to provide a few suggestions for defending the BIA's denial of reopening in such cases. Equitable tolling is a big subject, and this article does not address the specificity of pleading required for equitable tolling, jurisdiction over such claims, or claims for equitable tolling based on actions by non-attorneys. Instead, the article concentrates on two substantive requirements for equitable tolling based on attorney performance – attorney misconduct that tolls the filing deadline, and due diligence. The Attorney General's decision in *Matter of Compean, Bangaly, and J-E-C-*, 24 I&N Dec 710 (A.G. 2009), sets forth standards for the BIA to follow in making discretionary decisions as to equitable tolling based on deficient performance of counsel, but it is as yet unclear whether and to what extent those standards might affect review of equitable tolling in the courts of appeals.

Much of the case law on equitable tolling in immigration cases has developed in the Ninth Circuit, so that court's case law will be the primary focus of this article. The Ninth Circuit has held that the 90-day time limit for a motion to reopen may be equitably tolled based on attorney misconduct if an alien shows that: (1) the attorney engaged in sufficiently egregious conduct to toll the time period, and (2) the alien used due diligence in discovering the true facts of the case. *See Iturribarria v. INS*, 321 F.3d 889, 898-901 (9th Cir. 2003). The court has also indicated that the number bar on motions to reopen may be tolled. *See id*. at 897.

Once the filing deadline is tolled, a showing of prejudice resulting from the attorney misconduct is required for reopening. *See id.* at 901-02.

The first prong of the test for equitable tolling of the filing deadline is a showing of attorney misconduct that is egregious enough to toll the filing period. Aliens often argue that ordinary negligence, or compliance with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988), is, by itself, enough to meet the first prong, but this is far from the case, or at least it should be. Ninth Circuit case law provides ample grounds to argue that the attorney conduct at issue must go beyond mere negligence. For example, in its en banc decision in *Socop-Gonzales* (which involved a claim for equitable tolling based on incorrect advice by an INS official that resulted in the alien taking an action fatal to his claim), the court held that an alien must show circumstances that "go beyond 'a garden variety claim of excusable neglect'" in order to toll the deadline. *Socop-Gonzales v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001)(*en banc*) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 97 (1991)).

Equitable tolling is premised on the idea that the litigant was prevented from knowing the facts necessary to litigate her case through no fault of her own.

Equitable tolling is premised on the idea that the litigant was prevented from knowing the facts necessary to litigate her case through no fault of her own. *See Socop-Gonzales*, 272 F.3d at 1193 ("the party invoking tolling" must show "that his or her ignorance of the limitations period was caused by circumstances beyond the party's control"). In the context of attorney conduct, the "circumstances beyond the party's control" often involve deception on the part of the attorney, because it is the deception that prevents the alien from knowing the true facts of her case. *See, e.g., Ray v. Gonzales*, 439 F.3d 582, 590 (9th Cir. 2006) (finding equitable tolling where attorneys falsely assured alien that they were handling his case "appropriately and diligently"); *Singh v. Ashcroft*, 367 F.3d 1182, 1186 (9th Cir 2004) (finding equitable tolling where alien's claim was that he "was deceived" by his former attorney). The Second Circuit has held that attorney conduct must be egregious enough to violate an alien's due process rights in order to toll the filing deadline. *See Zhao v. INS*, 452 F.3d 154, 160 (2d Cir. 2006).

Aliens will frequently cite language from *Iturribarria, supra*, in arguing that equitable tolling is available for any error by an attorney, even if the error is mere neglect or an unsuccessful litigation strategy. *See Iturribarria*, 321 F.3d at 897 (equitable tolling may be available in cases of attorney "deception, fraud, or error"). The "deception, fraud, or error" quote, which is seen in so many petitioner's briefs, is countered to a great extent by another quote from *Iturribarria* that equitable tolling is appropriate when there is a "high degree of attorney malfeasance," and by the court's reliance on a case where the alien was "misled" by deficient performance "combined with deceptive behavior." *Id*. at 898 (*citing Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002)). The "deception, fraud, or error" language must also be interpreted in light of the *en banc* holding of *Socop-Gonzales* that garden-variety, excusable neglect is not a basis for equita-

(Continued on page 4)

Equitable Tolling

(Continued from page 3)
ble tolling. *See Socop-Gonzales*, *supra*. Moreover, the "error" language in *Iturribarria* is dicta. *See Iturribarria*, 321 F.3d at 898 (holding that allegations were that attorney had engaged in "high degree of malfeasance" and "lying"). Thus, an alien's reliance on the "error" language in *Iturribarria* need not go unchallenged when the alien is attempting to blur the distinction between negligence and the type of malfeasance that the Ninth Circuit has required for equitable tolling based on attorney performance.

Another aspect of the first prong of the test for equitable tolling is that the attorney misconduct logically must occur before the filing period has run in order to "toll" the running of the filing period. For example, attorney misconduct that occurred in the handling of a petition for review, after the time period to file a motion to reopen with the BIA had expired, could not logically toll the time period to file the motion to reopen with the BIA. Similarly, it is questionable whether attorney misconduct that occurred long before the filing period began to run could logically toll the running of the filing period, unless perhaps the conduct at issue was ongoing and continued into the filing period. So, an initial inquiry in defending these cases should be the period of time sought to be tolled and how the alleged tolling event relates to that period of time.

As to the second prong of the test for equitable tolling (due diligence), once a filing period has been tolled on equitable grounds the filing period begins to run when the alien, by the exercise of due diligence, discovers or should have discovered the relevant facts of the case that he or she was unable to discover previously. *See Socop-Gonzales* at 1193-94 (holding that deadline for filing motion to reopen was tolled until petitioner discovered that his final order of deportation had become effective). The Ninth Circuit has held that, where a filing period was tolled due to malfeasance by an alien's counsel and the alien met with new counsel less than one month after the BIA issued its decision, the filing period began to run when the alien met with new counsel. *See id.* at 899. Aliens will cite *Iturribarria* in arguing that a filing period remains tolled until they have met with new counsel, even if the meeting with new counsel does not occur until years after the final order of removal was issued. *Iturribarria* did not make any such holding, however, and instead specifically noted that the alien in that case "promptly met with new counsel." *See id*. In fact, the motion to reopen in *Iturribarria* was filed only six days out of time. *See id*. at 897. *Iturribarria* thus does not stand for the proposition that an alien can wait years after the BIA issues its decision before seeking the advice of new counsel and filing a motion to reopen. The Third Circuit has held that an alien's failure to follow up on his case for separate periods of 18 months and one year were, taken together, grounds for a finding of a lack of due diligence "as a matter of law." *See Mahmood v. Gonzales*, 427 F.3d 248, 252-53 (3d Cir. 2005).

There are differing rules in the courts of appeals as to the amount of time an alien has to file a motion to reopen once the attorney misconduct is discovered.

Aliens will sometimes argue in the Ninth Circuit that they showed due diligence in filing a motion to reopen *after* the deficient performance of former counsel was discovered, and ignore the time period *before* discovering the deficient performance. *Socop-Gonzales* makes it clear that the alien must show due diligence from the time of the tolling event (the deception or concealment) until the alien discovers or should have discovered the true facts of the case, at which time the period of tolling ends. *See Socop-Gonzales v, INS*, 272 F.3d 1176, 1193-96 (9th Cir. 2001)(en banc)(period of equitable tolling ends when alien discovers facts of case or should have discovered them through exercise of due diligence).

There are differing rules in the courts of appeals as to the amount of time an alien has to file a motion to reopen once the attorney misconduct is discovered. An alien in the Ninth Circuit has the entire 90-day filing period to file the motion to reopen once the alien, by due diligence, discovers or should have discovered the true facts of the case. *See Socop-Gonzales*, 272 F.3d at 1196. Thus, a motion to reopen can be untimely even where equitable tolling applies, if the new attorney waits more than 90 days to file the motion to reopen. The Second Circuit has recognized two periods of time where due diligence is required: the time from the tolling event until a reasonable person would have discovered the attorney's misconduct, and a separate time period from the discovery of the misconduct to the filing of the motion to reopen. *See Rashid v. Mukasey*, 533 F.2d 127, 130-31 (2d Cir. 2008). In *Tapia-Martinez v. Gonzales*, 482 F.3d 417 (6th Cir. 2007), the Sixth Circuit analyzed due diligence in relation to the filing of the motion to reopen. In circuits that apply due diligence to the period from discovery of the malfeasance to the filing of the motion to reopen, the government could potentially argue that due diligence requires filing the motion to reopen in less than 90 days after discovery of the attorney misconduct.

As can be seen from this brief

(Continued on page 17)

FURTHER REVIEW PENDING: Update on Cases & Issues

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. On March 26, 2009, the en banc court held that an applicant for cancellation who participated in family-only smuggling, cannot demonstrate good moral character. The court overruled the panel decision in *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005), which had held otherwise.

Contact: Manuel Palau, OIL
☎ 202-616-9027

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.

Contact: Toby Heytens, ASG
☎ 202-514-3385

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.

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

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? On March 27, 2009, the court denied the government's petition.

Contact: Andrew MacLachlan, OIL
☎ 202-514-9718

Aggravated Felony—$10,000

On September 15, 2008, the government filed a petition for rehearing en banc in ***Kawashima v. Gonzales***, 503 F.3d 997 (9th Cir. 2007). To sustain a charge of removability for the aggravated felony of fraud or deceit with a loss exceeding $10,000 (8 U.S.C. § 1101(a)(43)(M)(i) based on conviction for signing a false tax return, must the government prove, using only the categorical approach, not the modified categorical approach, that the alien was convicted of an offense with the elements of fraud or deceit and loss over $10,000? (The statute of conviction did not require proof of amount of loss.) To be used as grounds of removal, must criminal convictions include conviction of each element specified in the removal ground (e.g., here, the $10,000 loss element)?

Contact: Jennifer Keeney, OIL
☎ 202-305-2129

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 visa waiver program (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?

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

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."

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

Summaries Of Recent BIA Decisions

Since the Attorney General's decisions in *Matter of Silva-Trevino* and *Matter of Compean*, the Board has issued five precedent decisions - two addressed criminal removability issues; two addressed the authority of immigration judges regarding detention; and one addressed attorney discipline.

In ***Matter of Louissaint***, 24 I&N Dec. 754 (BIA 2009), the Board applied *Silva-Trevino* and ruled that a conviction for burglary of an occupied dwelling in violation of section 810.02(3)(a)of the Florida Statutes is a crime involving moral turpitude. Applying the traditional categorical analysis described by the Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Board concluded that there is no "realistic probability" that the statute would be applied to reach conduct that does not involve moral turpitude because the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently reprehensible conduct committed with some form of scienter, as required by *Silva-Trevino*.

The Board held that a Florida conviction for burglary of an occupied dwelling is categorically a conviction for a crime involving moral turpitude.

The Board distinguished *Matter of M-*, 2 I&N Dec. 721 (BIA; A.G. 1946), because it did not involve burglary of an occupied dwelling. The Board therefore held that a Florida conviction for burglary of an occupied dwelling is categorically a conviction for a crime involving moral turpitude.

In ***Matter of Zorilla-Vidal***, 24 I&N Dec. 768 (BIA 2009), the Board held that a conviction for criminal solicitation under a state's general purpose solicitation statute is a conviction for a violation of a law "relating to a controlled substance" under 8 U.S.C. § 1227(a)(2)(B)(i), where the record of conviction reflects that the crime solicited is an offense relating to a controlled substance, reaffirming *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992). The Board held that a Sixth Circuit decision addressing the same Florida statute in the sentencing context did not represent controlling nationwide law on the meaning of "relating to a controlled substance" in 8 U.S.C. § 1227(a)(2)(B)(i).

The Board limited its holding to jurisdictions outside of that of the Ninth Circuit, which found in *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997), that the plain language of the statute precluded the construction placed upon it by *Beltran*.

Two of the Board's other precedent decisions this year have addressed detention issues. In ***Matter of M-A-S-***, 24 I&N Dec. 762 (BIA 2009), the Board held that detention may be imposed as a condition of a grant of voluntary departure.

The Board held that although the regulations do not mention continued detention in discussing the authority of an immigration judge to grant voluntary departure, 8 C.F.R. § 1240.26(c)(3) does authorize an immigration judge to set "such conditions as he or she deems necessary to ensure the alien's timely departure from the United States[,]" and that the requirement that an immigration judge set a voluntary departure bond does not entitle the alien release from detention upon setting and payment of such a bond.

In ***Matter of Aguilar-Aquino***, 24 I&N Dec. 747 (BIA 2009), the Board addressed the meaning of the term "custody" in 8 C.F.R. § 1236.1(d)(1), which permits an immigration judge to consider requests by an alien within seven days of release from custody to ameliorate conditions placed on the release. Aguilar-Aquino requested the immigration judge to order his release from an electronic monitoring device and home confinement, conditions imposed by the Department of Homeland Security for his release from detention.

The Board held that "custody," as the term is used in 8 C.F.R. § 1236.1(d)(1), requires actual physical restraint or confinement within a given space. Because Aguilar-Aquino had been released from custody, and he had not appealed of the conditions on that release within seven days, the Board held that the immigration judge lacked jurisdiction to consider the Aguilar-Aquino's request for amelioration of the terms of his release under 8 C.F.R. § 1236.1(d)(1).

The Board's first decision of the year, ***Matter of Rosenberg***, 24 I&N Dec. 744 (BIA 2009), rejected a claim by an attorney who was at the time suspended from practice before the Ninth circuit court of Appeals that he should not be suspended by the Board because he remained in good standing before the California State Bar. "It is not in the interest of justice to set aside the immediate suspension order, given the heavy burden of proof on the respondent concerning the merits of the attorney discipline case," said the Board

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Upholds Denial Of Albanian National's Application For Asylum, Withholding Of Removal, And CAT

In *Uruci v. Holder*, __F.3d__, 2009 WL 416974 (1st Cir. Feb. 20, 2009) (*Howard*, Stahl, Besosa, (D.J.)), the First Circuit upheld the BIA's determination that information regarding country conditions in Albania, taken from State Department Country Reports, was sufficient to rebut the presumption of petitioners' well-founded fear of persecution. The principal petitioner claimed that he had suffered persecution in Albania because of his political opinion and membership in a particular social group. Specifically, petitioner alleged that, as a member of the Democratic Party, he had suffered persecution by the Socialist Party and thus held a well-founded fear of future persecution.

The IJ denied asylum finding that conditions in Albania had changed to such an extent that petitioner's fear of future persecution was no longer reasonable. The BIA affirmed the decision on that basis.

The court agreed with the BIA that the State Department Reports indicated a fundamental change in circumstances in Albania. In particular, the court said that the IJ had "appropriately focused on facts relevant to [petitioner's] specific claim of persecution based on his membership in the Democratic Party." The court also rejected petitioner's contention that the IJ had ignored contrary evidence from Amnesty International, concluding that the IJ had not erred by finding that the report from Amnesty International was insufficient to rebut the determination of the State Department.

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

First Circuit Holds Sri Lankan Asylum Applicant Failed To Show Past Persecution On Account Of His Tamil Ethnicity

In *Ratnasingam v. Holder*, __ F.3d __, 2009 WL 331962 (1st Cir. Feb. 12, 2009) (*Lynch*, Boudin and Lipez), the First Circuit held that an ethnic Tamil male from Sri Lanka failed to demonstrate past persecution based on several encounters with the army and members of the "Tamil Tigers" separatist group. The court found that none of the incidents rose to the level of persecution, and the motives behind them were unknown.

Presenting a green card and foreign passport to an examining immigration officer at the border is proper evidence of alienage.

Moreover, the court also found that the evidence in the record did not demonstrate a pattern and practice of persecution of young Tamil males. The court also affirmed the BIA's denial of petitioner's motion to reopen, where the underlying evidence failed to show intensified persecution of young Tamil males.

Contact: Manuel A. Palau, OIL
☎ 202-616-9027

First Circuit Rules That Presenting Foreign Passport At The Border Is Evidence Of Alienage, And Denies Alien The Opportunity To Seek § 212(c) Relief

In *Nadal-Ginard v. Holder*, __F.3d__, 2009 WL 456411 (1st Cir. Feb. 25, 2009) (*Howard*, Tourella, Siler), the First Circuit held that the BIA correctly concluded that presenting a green card and foreign passport to an examining immigration officer at the border is proper evidence of alienage. The court also determined that blurred photocopies of the alien's green card and Spanish passport constituted adequate evidence. The court denied the alien's request to seek former § 212(c) relief *nunc pro tunc*, despite his twice having been admitted after his conviction, because he was convicted after a trial.

Contact: Michael Heyse, OIL
☎ 202-305-7002

First Circuit Upholds Agency's Refusal To Consider Depreciation In Determining Inability To Pay Proffered Wage

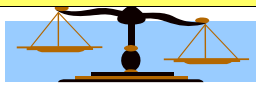
In *River Street Donuts v. Napolitano*, __F.3d__, 2009 WL 531874 (1st Cir. Mar. 4, 2009) (Torruella, Stahl, *Garcia-Gregory*), the First Circuit held that the refusal of the Administrative Appeals Office (AAO) to add depreciation to the appellant's net income when determining its ability to pay the proffered wage was not arbitrary, capricious, or an abuse of discretion. The court noted that the AAO's practice has been consistent since 2003, and its decisions since then have recognized that, while depreciation was not a current cash expense, neither was it available to pay wages.

Contact: Gisela A. Westwater, OIL
☎ 202-532-4174

First Circuit Affirms IJ's Adverse Credibility Determination Under The REAL ID Act

In *Rivas-Mira v. Holder*, __F.3d__, 2009 WL 323469 (1st Cir. Feb. 11, 2009) (*Selya*, Lynch, Boudin), the First Circuit held that the "heart of the matter rule is dead" under the REAL ID Act and affirmed an IJ's adverse credibility determination based on the totality of petitioner's omissions and inconsistencies.

(Continued on page 8)



Summaries Of Recent Federal Court Decisions

(Continued from page 7)

Petitioner, a citizen of El Salvador, claimed he was persecuted by members of a gang linked to union organizers for refusal to join a union of Bocadeli employees. At the core of petitioner's claim was an account of how gang members pulled over a bus he was riding on and shot him in the arm and chest for refusing to join the Bocadeli union.

The court held that in post-REAL ID Act asylum cases, "the heart of the matter rule is dead."

Following petitioner's testimony, an IJ found him not credible, citing numerous inconsistencies between petitioner's testimony and written documents. Specifically, the IJ cited the omission of any union-related violence in petitioner's asylum application and statements to border officials, and inconsistent statements between his testimony and asylum application regarding his periods of employment for Bocadeli and time spent recuperating from the shooting. The BIA affirmed.

The court upheld the adverse credibility determination. Initially, the court noted that because petitioner's asylum application was filed after May 11, 2005, the provisions of the REAL ID Act governing an applicant's credibility applied to the case. Accordingly, the "earlier rule" requiring that all inconsistencies go to the "heart of the matter" was inapplicable.

Further, the court rejected petitioner's attempt to "circumvent [the REAL ID Act] by arguing that the new test includes a rationality requirement, thus rendering it functionally equivalent to the old 'heart of the matter' rule." While the court noted that petitioner's argument was taken from a footnote in *Lin v. Mukasey*, 521 F.3d 22, 28 n.3 (1st Cir. 2008), which, indeed, opined that there may be a "rationality requirement" to the REAL ID Act requiring that "credibility determinations nonetheless must be reasonable and take into consideration the individual circumstances of the applicant, it regardless held that the "'heart of the matter' rule is dead." The court continued, however, that even "[i]f the new statute imposes a rationally requirement, that requirement would be satisfied here." The court agreed with the inconsistencies cited by the IJ and rejected petitioner's contention that "the trauma of the attack prevented him from discussing the matter fully during initial stages of the asylum process" as "petitioner had no difficulty in describing the attack in great detail."

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

SECOND CIRCUIT

■ Second Circuit Holds That Alien Is Bound By Attorney's Concession Of Removability

In ***Hoodho v. Holder***, __F.3d__, 2008 WL 279654 (2d Cir. Feb. 6, 2009) (*Cabranes*, Livingston, and Eaton), the Second Circuit held that the alien was bound by his attorney's tactical decision to concede removability: "[where] the record evidence does not plainly contradict the concession of an attorney, we see no basis to second guess the decision of an [Immigration Judge] to accept that concession . . . . [A] plausible concession of removability is an unremarkable feature of removal proceedings."

The court concluded that petitioner did not establish "egregious circumstances" to negate acceptance of the attorney's concession even though "in hindsight, it might have been preferable for an alien to have contested removability."

Contact: Alex Goring, OIL
☎ 202-353-3375

■ Alien Whose Deportation Proceedings Commenced Before April 24, 1996, May Seek Relief Under Former INA § 212(c) For Convictions That Postdate Its Elimination

In ***Garcia-Padron v. Holder***, __F.3d__, 2009 WL 468202 (2d Cir. Feb. 26, 2009) (Kearse, *Raggi*, and Livingston), the Second Circuit held that petitioner could apply for relief under former INA § 212(c), notwithstanding that his conviction for petit larceny occurred after the effective date of the IIRIRA. The petitioner, a citizen of the Dominican Republic, and an LPR since 1972, had been convicted of numerous crimes including a conviction of attempted robbery in 1992, which gave rise to the removal proceedings. In 1998, during the pendency of the proceedings, petitioner was convicted of petit larceny. An IJ ordered petitioner removed as an alien who had been convicted of multiple CIMT's and denied his request for a § 212(c) waiver on the basis of statutory ineligibility as a result of the petit larceny conviction. The BIA dismissed the appeal, finding that the 1998 conviction rendered petitioner ineligible for § 212(c) relief.

The court concluded that IIRIRA § 309(c) and 8 C.F.R. § 1212.3(g) preserved petitioner's eligibility for relief under former § 212(c) because his deportation proceeding commenced prior to the effective date of IIRIRA and the Antiterrorism and Effective Death Penalty Act. The court explained that "the plain language of IIRIRA section 309(c)(1) is concerned only with the date on which a petitioner's deportation proceeding was initiated. . . The statute instructs that if that date is before April 1, 1997, the amendment repealing section 212(c) 'shall not apply.'"

Contact: Jesse M. Bless, OIL
☎ 202-305-2028

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

Case Remanded For Agency To Reconsider Whether Chinese Asylum Applicant Was Firmly Resettled In The Dominican Republic

In ***Liao v. Holder***, __F.3d__, 2009 WL 563651 (2d Cir. Mar. 4, 2009) (*Calabresi*, Sotomayor, Parker), the Second Circuit held that the BIA incorrectly determined that a Chinese asylum applicant was firmly resettled in the Dominican Republic, and therefore ineligible for asylum. The court concluded that a temporary residence visa, without more, did not establish under the "totality of the circumstances" that an asylum seeker has been firmly resettled. The court further determined that the petitioner had demonstrated that she nevertheless qualified for an exception to firm resettlement for asylum applicants whose entry into another country was a "necessary consequence" of her flight from persecution.

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

THIRD CIRCUIT

■ **Third Circuit Upholds BIA's Interpretation Of The "One Central Reason" Mixed Motives Standard**

In ***Ndayshimiye v. Att'y Gen. of the United States***, __F.3d__, 2009 WL 440909 (3d Cir. Feb. 24, 2009) (Scirica, *Fuentes*, Hardiman), the Third Circuit upheld the BIA's interpretation of the "one central reason" standard requiring an asylum applicant to show that a protected ground was not "incidental, tangential, [or] superficial" to another motive for harm.

The petitioner and his wife, citizens if Rwanda and of Tutsi ethnicity, sought asylum claiming that they had suffered persecution as a result of a 2004 land dispute with petitioner's aunt. Petitioners had been born in Burundi after their Rwandan parents had fled there in the 1960's and had returned to Rwanda in 1996. The IJ denied asylum applying the pre-REAL ID Act, mixed motive test, and finding that land dispute was a "family dispute."

On appeal, the BIA affirmed in a published precedential decision in *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007), and concluded that any persecution had been motivated by a land dispute and that petitioner's Burundi background played only an "incidental" role. Relying on dictionary definitions of "incidental" and "tangential," the BIA construed the amended § 208 "one central reason" standard to require an applicant for asylum to show that a protected ground is more than "incidental, tangential, superficial, or subordinate to another reason for harm."

The "one central reason" standard in the Third Circuit requires an applicant for asylum to show that a protected ground is more than "incidental, tangential, or superficial."

The Third Circuit reviewed the BIA's interpretation of the "one central reason" standard, and found that it was in error "only to the extent that it would require an asylum applicant to show that a protected ground for persecution was not 'subordinate' to any unprotected motivation." The court held that the term "subordinate" was "inconsistent with the plain language of the statute." Despite this error, however, the court concluded that the BIA's determination was supported by substantial evidence where the record demonstrated that petitioners' Burundian nationality was no more than an incidental factor in their alleged harm.

Contact: Julie M. Iversen, OIL
☎ 202-616-9857

■ **Third Circuit Holds That Alien Properly Exhausted An Issue By Raising It In The Notice Of Appeal**

In ***Hoxha v. Holder***, __F.3d__, 2009 WL 500568 (3d Cir. Mar. 2, 2009) (Scirica, McKee, *Smith*), the Third Circuit ruled that the alien exhausted his claim by raising it in his notice of appeal to the Board of Immigration Appeals, even though he did not address it in his brief in support of the appeal. The court reasoned that the description in the notice of appeal was sufficiently detailed to apprise the Board of the issue, and that filing a brief with the Board is optional. The court concluded that as long as the description in the notice of appeal is sufficiently detailed so that the Board is on notice of the issue, the alien has properly exhausted his claim.

Contact: Monica Antoun, OIL
☎ 202-305-2066

■ **Third Circuit Affirms *Matter of C-W-L-* And Finds That A Letter From The Alien's Father-In-Law Failed To Establish A Policy Of Forced Sterilization In China For Violations Of Its Family Planning Laws**

In ***Liu v. Att'y Gen. of the United States***, __F.3d__, 2009 WL 250102 (3d Cir. Feb. 4, 2009) (Sloviter, *Greenberg*, Irenas), the court held that the birth of children in the United States was a change in personal circumstance that did not provide an exception to the time and number limitation on motions to reopen. In so doing, the court affirmed the conclusions reached by the BIA in *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), and the Second Circuit in *Jin v. Mukasey*, 538 F.3d 143 (2d Cir. 2008), that 8 U.S.C. § 1158 (a)(2)(D), which allows the filing of successive asylum applications due to changed circumstances, must be read in harmony with 8 U.S.C. § 1158(a)(2)(C), limiting the alien to one asylum application, and 8 U.S.C. § 1229a(c)(7)(C), which requires the filing of motions to reopen within

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)
ninety days of the final order's date or allege changed conditions in the country of nationality.

Moreover, the court held that petitioner otherwise failed to establish changed country conditions in China regarding the imposition of forced sterilization for violations of family planning laws. The court explained that most all the supporting documents petitioner had submitted had already been found insufficient by the BIA in *Matter of J-W-S-* and that an anecdotal letter from her father-in-law was likewise insufficient in light of the State Department Reports.

Contact: Ed Duffy, OIL
☎ 202-353-7728

FOURTH CIRCUIT

■ **Fourth Circuit Holds It Has Jurisdiction To Review BIA's Streamlining Decision and Finds BIA's Interpretation Of "At Least One Central Reason" Reasonable**

In ***Quinteros-Mendoza v. Holder***, __F.3d__, 2009 WL 325439 (4th Cir. Feb. 11, 2009) (Michael, *Motz*, King), the Fourth Circuit held that it has jurisdiction to review the BIAs' decision to issue a single-member decision, but determined that the issue of whether to remand for a three-member decision in this case was rendered moot because the Board had subsequently issued a precedential decision on the issue presented here. *See Matter of J-B-N-*, 24 I. & N. Dec. 208 (BIA 2007). The court also held that the Board's interpretation of the "at least one central reason" standard was reasonable, and that the Board's decision in this case was supported by substantial evidence.

Petitioner, a citizen of El Salvador, claimed asylum because a gang called The Maras had regularly extorted money from him and, on three of these occasions, accompanied their demand for money with a demand that petitioner stop attending his church. An IJ denied asylum, finding that, under the REAL ID Act, the gang's "central reason" for threatening petitioner was on account of personal animosity and money, rather than religion or political opinion. In a streamlined single-member opinion, the BIA affirmed.

Before the court, petitioner alleged that the BIA misconstrued the "central reason" language of the REAL ID Act and erred by failing to refer his case to a three-member panel. The court disagreed with both counts, but before doing so, engaged in an analysis of whether or not it had jurisdiction to address the BIA's decision to streamline a case.

"Contrary to the Government's contention, the agency's own regulations do not provide the BIA with the claimed unreviewable discretion" in deciding which cases to streamline.

The court, noting a circuit split on the issue, found that it had jurisdiction. The court explained that nothing in Congress' general delegation of enforcement of the immigration laws to executive agencies under 8 U.S.C. § 1103(a)(3) explicitly or implicitly committed the decision to streamline cases to agency discretion and that, "contrary to the Government's contention, the agency's own regulations do not provide the BIA with the claimed unreviewable discretion." The court noted that the use of the term "may" in the streamlining regulation at 8 C.F.R. § 1003.1(e)(6) and a rule to be codified at 8 C.F.R. § 1003.1(e)(9) stripping the court of jurisdiction, but held that, as of now, the language of 8 C.F.R. § 1003.1 (e)(6) is "not cast in such discretionary terms as to preclude meaningful review of them." Nonetheless, the court then held that because the BIA had issued a three-panel decision in *Matter of J-B-N* addressing the "central reason" issue, petitioner's challenge to the BIAs' streamlining in his case was moot, and that the BIA properly found the gang's central motivation to be one of extortion for money.

Contact: Margaret Perry, OIL
☎ 202-616-9310

FIFTH CIRCUIT

■ **Fifth Circuit Holds That Alien's Nonreceipt Of Notice Of Removal Hearing Because He Did Not Keep Mailing Address Current Does Not Require Rescission Of Removal Order**

In ***Gomez-Palacios v. Holder***, __F.3d__, 2009 WL 388943 (5th Cir. Feb. 18, 2009) (King, *Benavides*, Clement), the Fifth Circuit held that Gomez-Palacios was not entitled to rescission of his removal order where his failure to receive notice of the time of his removal hearing was the result of not complying with his obligation to keep the Immigration Court apprised of his current mailing address. Such a failure is grounds for denying rescission of a removal order under 8 U.S.C. § 1229a(b)(5)(C)(ii), and the BIA therefore did not abuse its discretion in denying the alien's appeal from the IJ's denial of his motion to reopen removal proceedings.

Petitioner, a citizen of Honduras, entered the United States without inspection. Consequently, the former INS personally served him with an NTA and petitioner provided an address in Vacaville, CA. A notice of hearing was subsequently sent to petitioner's address, but was returned as undeliverable. An IJ initially ordered petitioner removed in absentia when he failed to appear, but upon discovering a change of address form previously mailed by petitioner, *sua sponte* reopened proceedings. A notice of hearing then went out to the new address but, as before, was returned as undeliverable and petitioner was again ordered removed in absentia.

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

More than four years later, petitioner filed a motion to reopen with an IJ claiming that he never received notice of his hearing. The IJ denied the motion on the basis that notice had been sent to petitioner's last known address and petitioner had failed to provide a current address. The Board affirmed, holding that because petitioner neglected to provide a current mailing address or otherwise explain the unsuccessful delivery.

Before the court, the government asserted that as long as delivery has been attempted to the last address provided by the alien, the requirement of notice under 8 U.S.C. § 1229a(b)(5)(C)(ii) has been satisfied. The court found the government's argument overbroad and contrary to precedent, but nonetheless held that an alien who "neglects his obligation to keep the immigration court apprised of his current mailing address" is not entitled to rescission of an in absentia order of removal for failure to receive notice. Further, the court rejected petitioner's contention that NTA's contain inadequate warnings, finding that NTA's provide explicit warnings.

Contact: Kathryn McKinney, OIL
☎ 202-532-4099

■ **Fifth Circuit Determines That It Lacks Authority To Fashion A General Equitable Exception Excusing An Alien's Failure To Exhaust Administrative Remedies**

In ***Omari v. Holder***, __ F.3d __, 2009 WL 531688 (5th Cir. Mar. 4, 2009) (Garwood, Dennis, *Prado*), the Fifth Circuit ruled that because exhaustion of administrative remedies is a statutory mandate under section 242(d) of the Immigration and Nationality Act, 8 U.S.C. § 1252(d), an alien's failure to exhaust an issue deprived the court of jurisdiction over that issue. The court concluded that parties must take some affirmative action and "fairly present" an issue to the BIA to satisfy the exhaustion requirement. Because the exhaustion requirement was jurisdictional, the court found that it lacked the authority to equitably excuse an alien's failure to exhaust.

Contact: Leslie McKay, OIL
☎ 202-353-4424

SIXTH CIRCUIT

■ **Sixth Circuit Rules That Government Failed to Establish A Nexus Between Petitioner's Intelligence Gathering And Persecution Of Others, Or That She Acted With Scienter**

In ***Diaz-Zanatta v. Holder***, __F.3d__, 2009 WL 529173 (6th Cir. Mar. 4, 2009) (*Batchelder*, Kennedy, Daughtrey), the Sixth Circuit held that the BIA erred by applying the persecutor bar to the petitioner because of her service as a Peruvian intelligence officer. The court concluded that case law concerning Nazi concentration camp guards is fundamentally distinct from non-Nazi guard cases, and adopted the following two requirements for applying the persecutor bar: 1) there must be a nexus between the alien's actions and the persecution of others; and 2) the alien acted with scienter. The court noted that mere association with persecutors is inadequate to trigger the bar.

Case law concerning Nazi concentration camp guards is fundamentally distinct from non-Nazi guard cases.

Contact: Michael Heyse, OIL
☎ 202-305-7002

■ **Sixth Circuit Holds That INA § 212 (a) Does Not Contain A Statutory Counterpart For A Conviction For Fraud Or Misuse Under 18 U.S.C. § 1546(a)**

In ***Koussan v. Holder***, __F.3d__, 2009 WL 330999 (6th Cir. Feb. 12, 2009) (Martin, *Daughtrey*, Kethledge), the Sixth Circuit held that a conviction under 18 U.S.C. § 1546(a) for fraud and misuse of visas, permits, and other documents did not have a comparable statutory counterpart in INA § 212(a). The court gave "substantial deference" to the BIA's interpretation in *Matter of Jimenez-Santillano*, 21 I&N Dec. 567 (BIA 1996), where the BIA had concluded that § 1546(a) and the willful misrepresentation grounds of inadmissibility at INA §212 (a)(6)(C)(i), "are neither 'comparable,' substantially identical,' nor equivalent.'" The court also rejected petitioner's contention that his ground for deportation was comparable to the CIMT ground for exclusion, deferring to the BIA's interpretation in *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984).

Contact: Vanessa O. Lefort, OIL
☎ 202-305-7043

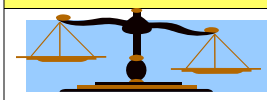
SEVENTH CIRCUIT

■ **Seventh Circuit Upholds Denial Of Suspension Of Deportation, Ruling That Last-Minute Evidence Did Not Violate Due Process**

In ***Duad v. Holder***, __F.3d__, 2009 WL 331289 (7th Cir. Feb. 12, 2009) (Bauer, Cudahy, *Wood*), the court held that it lacked jurisdiction to review the agency's decision that the petitioner failed to show the requisite hardship to qualify for suspension of deportation and that the last-minute submission of evidence by DHS caused no prejudice as the alien was on notice of the issues, the new material (from a state child protective services agency) was reliable and did not introduce new issues, and the record supported the agency's decision even without the new material.

Petitioner, a citizen of Malaysia, overstayed her visa. In deportation proceedings, petitioner sought suspension of deportation. In order to demonstrate that petitioner did not

(Continued on page 12)



Summaries Court Decisions

(Continued from page 11)

warrant suspension of deportation, the government submitted documentary evidence showing that petitioner had previously committed marriage fraud, and was once charged with homicide and successfully sued for wrongful death in connection with the death of a child in her daycare operation. Specifically, the government submitted a decision of the Board discussing the marriage fraud and a letter from the Illinois Department of Children and Family Services recommending revocation of her daycare license. An IJ found that petitioner failed to establish the requisite extreme hardship to herself or her U.S. citizen children, and ordered her deported. The IJ explained that negative equities – such as the marriage fraud and daycare incident - outweighed equities in petitioner's favor such as her age and the conditions in Malaysia. The BIA affirmed.

Before the court, petitioner contested the documents submitted to the IJ as violation of her due process rights. She alleged that the letter from child protection services prejudiced her because it was unreliable hearsay and because her lawyer did not receive a copy of the letter until the morning of the hearing. The court disagreed, explaining that nothing in the documents showed indicia of unreliability, and that petitioner knew about the letter long before the government submitted it such that "the letter did not introduce an entirely new theory or line of inquiry into the case." The court also found that "the contested materials played little or no role in the IJ's decisionmaking process." The court then held that it lacked jurisdiction to review the BIA's hardship determination.

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

EIGHTH CIRCUIT

■ **Eighth Circuit Affirms Adverse Credibility Finding And Denial Of Application For Asylum**

In ***Clemente-Giron v. Holder***, __F.3d__, 2009 WL 306079 (8th Cir. Feb. 10, 2009) (Wollman, Smith, *Gruender*), the Eighth Circuit affirmed the adverse credibility finding against an asylum applicant from El Salvador, because of numerous material inconsistencies. In her affirmative asylum application, petitioner claimed that Salvadoran police persecuted her because of her religious beliefs and political opinion. That application was not granted and she renewed her asylum claim in removal proceedings. At the hearing she presented additional allegations including a rape incident.

The court held that the IJ was entitled to require corroboration in light of the adverse credibility finding, including corroboration of the rape claim.

The IJ determined that petitioner was not credible and noted in particular how she had referenced additional incidents of persecution at each successive step of the asylum process. The BIA affirmed the denial of asylum also finding that the inconsistencies were central to petitioner's asylum claim.

The court, in denying the petition, concluded that the IJ was not compelled to accept petitioner's explanation for the omission of her rape claim. The court further held that the IJ was entitled to require corroboration in light of the adverse credibility finding, including corroboration of the rape claim. Accordingly, the court affirmed the denial of asylum, withholding of removal, and CAT protection.

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

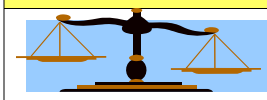
■ **Eighth Circuit Affirms Adverse Credibility Finding Against Cameroonian Asylum Applicant**

In ***Ntangsi v. Holder***, __F.3d__, 2009 WL 291045 (8th Cir. Feb. 9, 2009) (Murphy, Hansen, *Riley*), the Eighth Circuit affirmed an adverse credibility finding, noting that the inconsistencies cited by the agency went to the heart of the applicant's claim for asylum. The court then held that the IJ did not err by requiring corroboration in light of the adverse credibility finding where the evidence did not compel the conclusion that the requested corroboration was unavailable. Accordingly, the court affirmed the denial of asylum, withholding of removal, and CAT protection.

Petitioner, a citizen of Cameroon, claimed that she was beaten and raped by the ruling party in Cameroon due to her father and uncle's participation in the Social Democratic Front (SDF) and a day in June 1999 when she marched in front of a college wearing an SDF uniform. Before an IJ, petitioner testified in support of her application and submitted a letter from her father and a letter from a nurse that treated her injuries. The IJ found her testimony not credible, noting that petitioner's testimony regarding her father's mistreatment (specifically, retaliatory firing from his job and forced periods of unemployment) conflicted with a United States Embassy investigative report as well as two other documents submitted by DHS regarding her father. Further, the IJ found that petitioner failed to corroborate her claim with a letter her uncle wrote that allegedly spurned the ire of the ruling party or a letter from the convent where she allegedly fled to for two months.

Petitioner appealed and, following a remand, further evidence was submitted showing that the nurse's letter petitioner submitted was likely fraudulent. Thus, the IJ again found petitioner not credible for essentially the same reasons as before. The BIA

(Continued on page 13)



Summaries Court Decisions

(Continued from page 12)
affirmed and dismissed an argument by petitioner challenging the use of the Embassy's report.

The court affirmed the adverse credibility determination. The court explained that petitioner's inconsistent statements regarding her father's mistreatment went to the heart of her claim as it "casts doubt on [petitioner]'s claim she and her family were ever harmed." Further, the court said, the agency also properly found inconsistent petitioner's account of her alleged injuries in light of the nurse's fraudulent statement. The court also upheld the agency's corroboration finding, rejected petitioner's contention that the requested documents – letters from her uncle and the convent – were unavailable. According to the court, petitioner failed to explain why she made no effort whatsoever to obtain these documents and "there is every reason to believe that [petitioner] would be able to contact [the convent]" and that the uncle's letter could be reasonably obtained from the "well-recognized newspaper" that it supposedly appeared in.

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

The court ruled that the admission of a State Department investigative report violated the asylum applicant's right to due process because it lacked sufficient evidence of reliability and trustworthiness.

■ **Eighth Circuit Holds That General Problems Of Ineffectiveness And Corruption Do Not, Alone, Require A Finding That The Government Is Unable Or Unwilling To Protect**

In ***Khilan v. Holder***, __ F.3d __, 2009 WL 538389 (8th Cir. Mar. 5, 2009) (Melloy, Beam, Gruender) *per curiam*, the Eighth Circuit concluded that the record evidence did not establish that the Indian government condoned persecution of individuals that opposed or were targeted by Kashmiri separatists. The court further held that evidence of general problems of ineffectiveness and corruption did not, standing alone, require a finding that the government was "unable or unwilling" to protect an individual where the evidence specific to the alien indicated the contrary to be true.

Contact: Aliza Bessie Alyeshmerni, OIL
☎ 202-305-1060

■ **Eighth Circuit Holds That Petitioner's Due Process Rights Were Violated By Admission Of State Department Report That Lacked Indicia Of Reliability**

In *Banat v. Holder*, __ F.3d__, 2009 WL 564958 (8th Cir. Mar. 6, 2009) (Riley, *Hansen*, Melloy), the Eighth Circuit ruled that the admission of a report resulting from an investigation conducted by the State Department violated the asylum applicant's right to due process because it lacked sufficient evidence of reliability and trustworthiness. The court noted that the report failed to identify the investigator, his credentials, or his methodology. The court also held that the investigation was unreliable because it contained multiple levels of hearsay as it was not written by the investigator.

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

NINTH CIRCUIT

■ **Ninth Circuit Clarifies Application Of The "Deemed Credible" Rule Where Agency's Adverse Credibility Determination Is Reversed**

In ***Soto-Olarte v. Holder***, __F.3d__, 2009 WL 426409 (9th Cir. Feb. 23, 2009) (W. Fletcher, Noonan, *Gould*), the Ninth Circuit ruled that substantial evidence did not support the IJ's credibility finding because petitioner had not been provided with sufficient opportunity to explain the material inconsistencies in the record, and to the extent an explanation had been offered, neither the BIA nor the IJ addressed it "in a reasoned manner." The court held that an alien should not be deemed credible on remand in these circumstances because to do so would lead to the irrational result of requiring the agency to credit the alien's testimony no matter how absurd or implausible his additional testimony may be.

Contact: Song Park, OIL
☎ 202-616-2189

ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That A Georgia Conviction For "Reckless Conduct" Is A Crime Involving Moral Turpitude**

In ***Keungne v. United States Atty Gen.***, __F.3d__, 2009 WL 604370 (11th Cir. Mar. 10, 2009) (Birch, Hull, Fay), *per curiam*, the Eleventh Circuit held that reckless conduct that consciously disregards a substantial and unjustifiable risk that it will cause bodily harm or endanger the bodily safety of others constitutes moral turpitude, and Section 16-5-60(b) categorically satisfies that definition. The court rejected arguments that recklessness did not involve moral turpitude unless there was actual physical injury, and that BIA precedent required actual injury.

Contact: Andy MacLachlan, OIL
☎ 202-514-9718

Contributions to the Immigration Litigation Bulletin Are Welcomed!

Ninth Circuit "Disfavored Group

(Continued from page 1)

must establish that his "life or freedom would be threatened in [the] country [of removal] because of" one of these five protected characteristics. 8 U.S.C. § 1231(b)(3). The Attorney General is charged by Congress with administering and interpreting the immigration laws. 8 U.S.C. §§ 1103 (a). He has promulgated regulations that provide that in the absence of an applicant establishing past persecution, he or she must prove, objectively, either a "reasonable possibility" of future persecution for asylum, or that future persecution is "more likely than not" for withholding of removal. 8 C.F.R. §§ 1208.13(b)(2), 1208.16(b)(2). Pertinent to the Ninth Circuit's "disfavored group" approach, the regulations provide two means by which an applicant can make the objective showing of a possibility or likelihood of future persecution in the absence of past persecution. First, an applicant can prove a reasonable possibility (asylum) or likelihood (withholding) of being "singled out individually" for future persecution. 8 C.F.R. §§ 1208.13(b)(2)(iii); 1208.16(b)(2)(i). Courts -- particularly the Ninth Circuit — have used a number of different short-hand terms to refer to this requirement -- describing it as a claim or showing that the applicant would be "specifically targeted" or "individually targeted," or has an "individualized threat" or "individualized risk" of future persecution, or faces "individualized persecution." *See Lolong v. Gonzales*, 484 F.3d 1173, 1179-81 and n.4 (9th Cir. 2007) (en banc); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004); *Kotasz v. INS*, 31 F.3d 847, 852-53 and n.6 (9th Cir. 1994). Using these different phrases rather than the actual language of the regulation can lead to some confusion, since it is not always clear that the court is referring to the "singled out individually" requirement for future persecution under the regulations. The second way an applicant can make the objective showing of future persecution in the absence of past persecution is to make a "pattern or practice" showing -- that is, to demonstrate that "there is pattern or practice . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 8 C.F.R. §§ 1208.13(b)(2)(iii); 1208.16(b)(2)(i). If an applicant makes a "pattern or practice" showing of future persecution, he or she is not required to independently prove that "he or she would be singled out individually for persecution." 8 C.F.R. §§ 1208.13(b)(2)(iii); 1208.16(b)(2).

The First and Third Circuits have rejected the Ninth Circuit's "disfavored group" approach.

In *Kotasz*, 31 F.3d at 853-54 and *Sael*, 386 F.3d 922 at 925, the Ninth Circuit created a sliding-scale "disfavored group" approach for an alien seeking to show a "well-founded fear" based on a claim of being "singled out individually" in the future for persecution. The Ninth Circuit held that if an applicant is a member of a "significantly disfavored group" that is subject to widespread discrimination and less widespread periodic or haphazard incidents of violence or persecution, *see Sael*, 386 F.3d at 925, 927, the applicant can show he faces being "singled out individually" for future persecution by offering "less evidence of individualized persecution," *Kotasz*, 31 F.3d 853, or "demonstrat[ing] a 'comparatively low' level of individualized risk" of future persecution. *Sael*, 386 F.3d at 927.

The First and Third Circuits have rejected the Ninth Circuit's "disfavored group" approach. *Kho v Keisler*, 505 F.3d 50, 55 (1st Cir. 2007); *Lie v. Gonzales*, 396 F.3d 530, 538 (3d Cir. 2005). The Seventh Circuit has declined to apply that approach, and cited the Third Circuit's rejection with approval. *Firmanshjah v. Gonzales*, 414 F.3d 598, 607 n.6 (7th Cir. 2005).

The *Wakkary* Decision Extending The "Disfavored Group" Approach To Withholding Claims

Until recently the Ninth Circuit applied its "disfavored group" approach only in asylum cases. However, in *Wakkary v. Holder*, _ F.3d _, 2009 WL 5995579 (9th Cir. March 10, 2009), the court extended this approach to withholding of removal cases as well. In so doing the court rejected an unpublished, non-precedential decision of the Board taking the position that the "disfavored group" approach applies only to asylum cases in the Ninth Circuit, not to withholding cases. *Wakkary* also responded to criticisms by the First, Third, and Seventh Circuits rejecting the "disfavored group" approach as an unsound and improper "judicially created alternative to the statutory and regulatory scheme, "*Kho*, 505 F.3d 55, that "lower[s] the threshold of proof" for a well-founded fear of future persecution. *Firmanshjah*, 414 F.3d 607 n.6. *See also Lie*, 396 F.3d 583. *Id*. *12. *Wakkary* takes the position that the "disfavored group" approach does not lower the standard of proof for likelihood of future persecution, but merely creates a "commonsense evidentiary proposition" directing the agency "what sort of evidence can be used to meet that standard . . . and in what proportions." *Id.***12, 13. *Wakkary* holds that in asylum and withholding cases in the Ninth Circuit, the agency must use the court's "disfavored group" approach to determine if an alien established the requisite likelihood that he would be "singled out individually" for future persecution, whether it be in the context of asylum or withholding. *Id*. * 11. Thus, *Wakkary* explains, if an applicant shows membership in a "disfavored group," he or she can qualify for asylum or withholding by producing a "'lesser' or 'comparatively low'. . . proportion" of evidence that he or she faces a spe-

(Continued on page 15)

Ninth Circuit "Disfavored Group"

(Continued from page 14)
cific, individualized risk of future persecution. *Id.* (citations omitted).

In *Wakkary* the court remanded the case to the Board for further proceedings consistent with the court's decision. *Id*. *13. The court observed that remand was necessary under *INS v. Ventura*, 537 U.S. 12 (2002), because the agency had not applied the "disfavored group" approach to the withholding claim in the first instance, nor had it applied that approach in assessing the asylum claim, because it was erroneously denied by the agency as untimely, rather than on the merits. *Id*. at *14-15. The court also observed that had the agency denied the asylum claim on the merits by applying the "disfavored group" approach, remand would not be necessary. *Id*. The court explained that if the applicant did not establish the likelihood of future persecution required for asylum using the "disfavored group" approach, it necessarily follows that the applicant could not establish the higher likelihood of future persecution required for withholding of removal using the "disfavored group" approach. *Id*.

The court noted that the "disfavored group" approach has little relevance to past persecution claims, since the applicant does not have the burden of independently proving the risk of future persecution given the automatic, regulatory past-persecution presumption.

Wakkary raises the following questions for attorneys litigating asylum and withholding cases in the Ninth Circuit: (1) What constitutes a "disfavored group" under the Ninth Circuit's approach? (2) To what issue or issues in an asylum or withholding claim is the "disfavored group" approach relevant? (3) What is the effect of *Wakkary* on cases pending, or to be briefed, in the Ninth Circuit?

What Constitutes A "Disfavored Group" Under *Wakkary*

In *Wakkary* the Court gave the following descriptions of what constitutes a "disfavored group." It is "a group of individuals . . . all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted." *Wakkary*, *1. It is a group whose members are "widely disfavored, discriminated against, and, in a substantial number of instances, persecuted" on account of a shared protected characteristic. *Wakkary*, *9. It is a group whose members experience "widespread" "discrimination that affects a very large number of individuals" and "a certain portion of those individuals suffer treatment that rises to the level of persecution." *Id*. *Wakkary* also identified the following groups that the Ninth Circuit has concluded were compellingly shown to be "disfavored groups" given country condition evidence in particular cases: "stateless Palestinians born in Kuwait," *id*. at *10, *citing El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004); "ethnic Albanians in Kosovo," *id*., *citing Hoxha v. Ashcroft*, 319 F.3d 1179, 1182-83 (9th Cir. 2003); "ethnic Indians in Fiji," *id., citing Singh v. INS,* 94 F.3d 1353, 1359-60 (9th Cir. 1996); and Chinese Christian Indonesians. *Id., citing Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). These are not categorical rulings. They are determinations about a factual question that was made on the basis of the evidence in each particular case. Accordingly, the question whether an alien established a "disfavored group" depends on the evidence in each case, and is subject to review under the highly deferential compelling evidence standard. *See* 8 U.S.C. § 1252(b).

Given the descriptions of the meaning of a "disfavored group" in *Wakkary*, it appears that in order for an applicant to establish that he is a member of such a group, he must produce country conditions evidence showing that: (1) he is part of a group of individuals who have the same protected characteristic (their race, religion, nationality, membership in a particular social group, or political opinion), and (2) there is widespread discrimination against the group, affecting a large number of its members, plus some "mistreatment," and "persecution" of an unclear portion of the members -- either a "substantial number" or "a certain portion."

The "Disfavored Group" Approach Applies Only To A Claim Or Argument That The Applicant Fears Being Singled Out Individually For Future Persecution

Wakkary clarified that the "disfavored group" approach is only relevant to making an objective showing of a "well-founded fear" of future persecution, or that future persecution is "more likely than not," based on a non-pattern or practice claim or argument that the applicant is likely to be "singled out individually" for future persecution. *See Wakkary*, **11-12. *Wakkary* traced the development of the approach showing that it has been a means of proving this aspect of the regulations. *Id*. at **9-10. The court noted that the "disfavored group" approach has little relevance to past persecution claims, since the applicant does not have the burden of independently proving the risk of future persecution given the automatic, regulatory past-persecution presumption. *Id.* at n. 10. In addition, in *Lolong v. Gonzales*, 484 F.3d 1173, 1179-81 and n. 4 (9th Cir. 2007) (en banc), the Ninth Circuit made clear that the "disfavored group" approach applies only to a claim or argument that an alien fears being "individually targeted" for future persecution – not to a pattern or practice claim of future persecution. And in *Kotasz,* the court explained that its concept of "disfavored group" "should not be confused" with the term "particular social group," which pertains to a different and "considerably more circumscribed" concept. *Kotasz*, 31 F.3d 852 n.7. Thus, any arguments by petitioners in the Ninth Circuit that the

(Continued on page 16)

Ninth Circuit "Disfavored Group"

(Continued from page 15)

"disfavored group" approach applies to past persecution claims, or to what constitutes a "particular social group," or to whether persecution is "on account of" a qualifying ground, or to any question other than "well-founded fear" or whether future persecution is "more likely than not," are incorrect and inconsistent with *Wakkary*, *Lolong*, or *Kotasz*.

Cases pending in the Ninth Circuit that either have been briefed, or are awaiting briefing, should be reviewed to ensure that they can still be defended.

Effect of *Wakkary* / Possible Remand Of Some Cases

Since *Wakkary* extended the "disfavored group" approach to withholding claims, cases pending in the Ninth Circuit that either have been briefed, or are awaiting briefing, should be reviewed to ensure that they can still be defended.

Remand would be appropriate in a case where *Wakkary* cannot be distinguished, that is: (1) the case involves a claim of asylum and withholding based on feared future persecution; (2) the agency did not decide the merits of the asylum claim (and therefore did not deny asylum by applying the "disfavored group" approach); (3) the applicant claimed before the Board that the IJ erred in failing to apply the "disfavored group" approach in determining eligibility for withholding; and (4) the Board held that the "disfavored group" approach does not apply to withholding -- so that as a result, there is no decision by the agency in the first instance applying the "disfavored group" approach to the asylum or withholding claim.

In addition remand would not be warranted if *Wakkary* can be distinguished. *Wakkary* could be distinguished for several reasons: (1) an alien never submitted country condition evidence to support a disfavored group claim; (2) the IJ denied asylum as untimely or for some other procedural reason, but then made an independent alternative decision on the merits of asylum, finding an applicant failed to establish a "well-founded" fear of persecution using the "disfavored group" approach; or (3) the withholding (or asylum) claim was rejected for an independent, dispositive reason that makes the "disfavored group" question moot.

Possible rulings that would moot a failure to apply the "disfavored group" approach would be as follows. A ruling that an applicant failed to show conduct "on account of" one of the grounds. A ruling that an alien (in a non-government persecution/ non past-persecution claim) failed to meet his burden of showing he could not reasonably relocate elsewhere. See 8 C.F.R. §§ 1208.13(b)(2)(ii) and (3); 1208.16(b)(2) and (b)(3)(i) (providing that in order to establish a "well-founded fear" of persecution or that it is "more likely than not," an alien in a non-government persecution/ non-past-persecution case has the burden of proving he could not relocate). And a ruling that an applicant failed to show the future conduct he fears is by the government or persons the government is "unable or unwilling to control." This is because in order to establish either past or future persecution, an applicant must show that the conduct is by the government or persons the government is unable or unwilling to control.

If you have questions about the effect of *Wakkary* in other circuits or whether they should join the First and Third circuits in rejecting the "disfavored group" approach, please contact Margaret Perry.

By Margaret Perry, OIL
☎ 202-616-9310

NOTE: The second article, in next month's newsletter, will examine in more depth the rationale for the Ninth Circuit's "disfavored group" approach, along with the soundness of decisions in other circuits rejecting that approach. The next article will also show that the Board of Immigration Appeals has authority to issue a binding precedential decision rejecting the "disfavored group" approach should the Board choose to do so. This is a position the Board has taken in decisions in the First, Third, and Seventh Circuits, which those courts have affirmed in published decisions rejecting the "disfavored group" approach.

Deferred Enforced Departure Extended for Liberians

USCIS has automatically extended through Sept. 30, 2009, employment authorization for Liberian nationals covered under Deferred Enforced Departure (DED). This is in response to President Obama's recent announcement extending DED through March 31, 2010 for qualified Liberians and those persons without nationality who last habitually resided in Liberia.

Although DED was scheduled to end for Liberian nationals on March 31, 2009, President Obama determined that there are compelling foreign policy reasons to continue to defer enforced departure from the United States for eligible Liberian nationals presently living in the United States under the existing grant of DED for 12 months, through March 31, 2010.

The president's determination continued the exclusion of some individuals from DED, including certain criminals, persons subject to the mandatory bars to Temporary Protected Status, and persons whose removal is in the interest of the United States.

Chevron deference to BIA

(Continued from page 2)

dents. Accordingly, the court concluded that the BIA's "determination that "DUI offenses committed with knowledge that one's driver's license has been suspended or otherwise restricted are crimes involving moral turpitude - - is a reasonable interpretation of the INA. The deferential standard that governs our review requires no more."

Judge Bybee, in a separate opinion, concurred with the majority that the BIA was entitled to *Chevron* defense, but agreed with the dissent that *Lopez-Meza* could not be reconciled with BIA precedents.

Judge Berzon, joined by Judges Pregerson, Fisher, and Paez, filed a dissenting opinion. They agreed with the majority that *Chevron* applied, both to a BIA precedential holding and to a precedential holding which directly controls the outcome in a subsequent non-precedential case. However, in their view, the BIA did not merit *Chevron* deference in this case because *Matter of Lopez-Meza* "is the epitome of an unreasonable agency interpretation, to which we need not defer under *Chevron*."

By Francesco Isgro, OIL

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

INSIDE DHS

President Obama has nominated **John Morton** to be the Assistant Secretary for Immigration and Customs Enforcement (ICE).

Mr. Morton is a career official at the U.S. Department of Justice (DOJ) with lengthy experience in immigration enforcement and criminal prosecution. He began his career in the former Immigration and Naturalization Service as a Trial Attorney in the Honors Program in 1994, and now serves as Acting Deputy Assistant Attorney General of the Criminal Division.

From September 2007 until January 2008, he was Acting Chief of the Domestic Security Section and Senior Counsel to the Assistant Attorney General for the Criminal Division, and prior to that, he was Deputy Chief of the Domestic Security Section. In these roles, he was responsible for the prosecution of criminal cases and the development of DOJ policy in the areas of immigration crime, particularly human smuggling and complex passport and visa frauds; human rights offenses, particularly torture, war crimes, genocide, and the use of child soldiers; and international violent crime, particularly violent crime under the Military Extraterritorial Jurisdiction Act.

From 1999 to 2006, Mr. Morton was as an Assistant United States Attorney in the Major Crimes and Terrorism Units of the United States Attorney's Office for the Eastern District of Virginia. Prior to that, he served for two and a half years as Counsel to the Deputy Attorney General, focusing primarily on immigration matters.

NOTED

The Texas International Law Journal has just published OIL Attorney **Scott Rempell's** article on credibility assessments under the REAL ID Act. Please note that Scott's views do not necessarily reflect the views of DOJ.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Equitable Tolling

(Continued from page 4)

discussion, the doctrine of equitable tolling is very limited. We have support in the case law to argue against attempts to base equitable tolling on garden-variety attorney negligence or on attorney conduct that had nothing to do with the running of the filing period. We also have good arguments against claims that due diligence was shown where the filing was years out of time. The large and seemingly ever-increasing volume of tolling claims underlines the importance of urging the courts to hew to a traditional interpretation of these equitable claims.

By Susan Houser, OIL
☎ 202-616-9320

INSIDE OIL

The Office of Immigration Litigation hosted its inaugural Distinguished Speakers Program on March 18, 2009. Ninth Circuit's **Chief Judge Alex Kozinski**, Judge **Stephen Reinhardt**, and Circuit Executive **Cathy Catterson** spoke to more than 150 OIL attorneys at the Liberty Square Training Center.

It was clear from the judges' remarks that the increased immigration caseload has led the Ninth Circuit to readjust its procedures and priorities for deciding cases. This "new reality" has caused a number of judges to look beyond the individual case and to question the removal priorities of the Department of Homeland Security.

Among the many suggestions offered by the judges to OIL attorneys were to know the record well, know the statute and the regulations really well, and to be familiar with matters that may be outside the record, *i.e.,* pending petitions.

SAVE THE DATE. The 13th Annual Immigration Litigation Conference will be held at the NAC in Columbia, South Carolina on July 20– 24. Contact Francesco Isgro for additional information.

Francesco Isgro, Thomas Hussey, Chief Judge Alex Kozinski, David McConnell, Cathy Catterson, Judge Stephen Reinhardt

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