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# Immigration Litigation Bulletin

Vol. 13, No. 4 April 2009

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## Supreme Court Holds That Alien's Stay of Removal Request Pending Judicial Review Is Governed By Traditional Stay Standard

"It takes time to decide a case on appeal. Sometimes a little; sometimes a lot," wrote the Supreme Court in its opening line leading to its holding in *Nken v. Holder*, __U.S.__, 2009 WL 1065976 (2009), that the traditional four-part standard applies where an alien requests a stay of removal pending appeal. The Court disagreed with the government's contention that under the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), the more stringent statutory standard in INA § 242(f), 8 U.S.C. § 1252(f)(2) applied. However, the Court emphasized that while courts have discretion to enter a stay of removal, stays are not a "'matter of right.'"

Prior to the Court's decision, the circuits were split as to which stay standard applied. The Eleventh and Fourth Circuits applied the heightened statutory standard, specifically, "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." INA § 242(f)(2). The majority of the circuits held that the preliminary injunction standard

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## Tony West New Head Of Civil Division

On April 24, 2009, at a ceremony held in the Great Hall, Attorney General Eric Holder swore in Tony West as the Assistant Attorney General of the Civil Division.

In his remarks AAG West said that the Civil Division employees were "the backbone, heart, and soul of this Department."

Mr. West graduated with honors from Harvard College where he was the Harvard Political Review's publisher, and obtained his law degree at Stanford Law School where he was the Stanford Law review president. In 1993-94 he served as a Special Assistant in the Deputy Attorney General's Office where he worked on national crime policy is-

sues and the 1994 Omnibus Crime Bill. From 1994 to 1999 he was an AUSA in the N.D. California where he handled a wide-range of criminal cases. Before returning to the Department, Mr. West was a litigation partner at Morrison & Foerster in San Francisco. His trial practice included representing individuals and companies in civil and criminal matters.

## Traditional Standards Apply To Stay Requests

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applied. Under that standard, an alien must show a likelihood of success on the merits; irreparable injury; no substantial injury to the opposing party; and that a stay is in the public interest. Even among the majority, however, application of the traditional standard was not uniform, with some circuits using a more watered-down standard.

The petitioner, Jean Marc Nken's entered the United States in 2001 on a nine-day transit visa and claimed asylum from Cameroon based on his prior political activities. The agency found him not credible and denied his claim. The Fourth Circuit denied his petition for review. Nken then filed two motions to reopen, which the Board denied. He petitioned the Fourth Circuit for review of the second motion, which the court denied. Nken filed a third motion to reopen, claiming changed country conditions in Cameroon, and moved the Board for a stay of removal. The Board denied both the stay request and Nken's third motion to reopen. Undaunted, Nken filed a third petition with the Fourth Circuit, and subsequently moved for a stay of removal pending review over the government's opposition. The court denied Nken's stay request. While his petition for review was pending, Nken then sought and was granted a stay of removal by the Supreme Court and subsequently the Court granted certiorari.

Writing the majority, Chief Justice Roberts held that the traditional stay standard governs an alien's request for a stay of removal pending judicial review. Drawing on the courts' "inherent" power to hold an order in abeyance pending judicial review and distinguishing between a stay and an injunction, the Court ruled that section 1252(f)(2) did not govern the courts' authority to grant a stay of removal. It determined that the language employed by section 1252(f)(2), "enjoin," addressed injunctive relief and that Congress did not contemplate that the standard would also cover stays, which operate to "'suspend[] judicial alteration of the status quo.'" The Court concluded that if Congress intended for § 242(f)(2) to cover stays, it would have used the word "stay" and included the standard in section § 242(b)(3)(B), which explicitly directs that the filing of a petition for review no longer stays an alien's removal.

**The Court rejected the Ninth Circuit's presumption that "'the balance of hardships will weigh heavily in the applicant's favor.'"**

The Court acknowledged the government's argument that § 242(f) has no operational effect if not applied to stay requests, but determined it was "not enough to outweigh the strong indications that subsection (f)(2) is not reasonably understood to be directed at stays." The Court further expressed concern that a strict application of the standard in § 242(f) would preclude courts from considering any potential harm to the alien.

The Court clarified the nature of the traditional standard, and emphasized that the first two factors, likelihood of success on the merits and irreparable harm, "are the most critical," and rejected the more lenient approaches taken by the Seventh and Ninth Circuits. The Court observed that the mere fact that an alien will be removed while a court considers the appeal does not categorically establish irreparable harm in light of an alien's ability to pursue review from abroad and where a prevailing alien may return and have his prior immigration status restored. As to the third and fourth factors, harm to the opposing party and the public interest, the Court ruled that "[t]hese factors merge when the Government is the opposing party," and the government's interest is not "negligible" in immigration cases, rejecting the Second Circuit's determinations to the contrary. Moreover, the public's interest "may be heightened" where "the alien is particularly dangerous, or has substantially prolonged his stay by abusing the processes provided to him." The Court rejected the Ninth Circuit's presumption that "'the balance of hardships will weigh heavily in the applicant's favor.'" The Court vacated the Fourth Circuit's denial of Nken's stay motion and remanded for consideration under the traditional standards.

In a concurring opinion, Justice Kennedy joined by Justice Scalia, emphasized that "[a] stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." He suggested that certain statistics, including the number of stay grants and the correlation between the number of stays granted and the applicant's success on the merits, would assist both the Court and Congress in further evaluating the issue. Justice Kennedy acknowledged that even without precise numbers, the government's representations at oral argument indicated that "there are grounds for concern," citing specifically to Ninth Circuit practices. In his view, regardless of the standard employed, "courts should not grant stays of removal on a routine basis," and IIRIRA's amendments to the statute indicated that "obtaining a stay of removal is more difficult." Justice Kennedy wrote that a showing of harm, without more, is insufficient to warrant a stay of removal, and admonished that "courts cannot dispense with the required showing of one [factor] simply because there is a strong likelihood of the other."

In a dissenting opinion, Justice Alito, joined by Justice Thomas, would have held that § 242(f) ap-

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# "Arrested" Development: The Ninth Circuit Considers 8 C.F.R. § 287.3

Section 287(a)(2) of the INA authorizes immigration officials to arrest certain aliens without warrant. The regulations further provide in pertinent part, that "an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the [INA] will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government." 8 C.F.R. § 287.3(c). In two recent decisions, *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008), and *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009), the Ninth Circuit Court of Appeals addressed the issue of what rights, at what time, an alien must be advised of upon his or her apprehension by immigration officials.

In *Rodriguez-Echeverria*, the petitioner applied for admission at a port-of-entry and was referred to secondary inspection when immigration officers suspected that one of the passengers in her vehicle was a Mexican citizen who presented a United States birth certificate not belonging to him. 534 F.3d at 1049. According to a Department of Homeland Security ("DHS") Report of Investigation (Form G-166), Rodriguez was arrested about ninety minutes after she was referred to secondary inspection. *Id.* Rodriguez was detained overnight, and the next day, during an interview with immigration officers, admitted responsibility for knowingly bringing the Mexican citizen into the United States with a false birth certificate. *Id.* The immigration officers then prepared a Notice to Appear, charging Rodriguez with removability. *Id.* at 1049-50. The Notice to Appear contained a statement informing Rodriguez that her statements may be used against her and that she has a right to counsel. *Id.* at 1050. At her subsequent merits hearing, Rodriguez moved to suppress the incriminating statements she made to immigration officers during her interview, arguing that they were obtained in violation of DHS regulations and were coerced in violation of the Fifth Amendment. *Id.* The Immigration Judge denied Rodriguez's motion to suppress, and the Board affirmed. *Id.*

The Ninth Circuit concluded that Rodriguez's overnight detention at the border qualified as a warrantless arrest under 8 C.F.R. § 287.8(b) (qualifying "interrogation and detention not amounting to an arrest" as being: "as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away"), and that "the arresting officers were accordingly obligated to comply with the requirements of § 287.3." *Id.* at 1051. The court remanded, with instructions to the Board to determine whether 8 C.F.R. § 287.3 required the officers to warn Rodriguez, prior to interrogation, of her right to counsel and that her statements could be used against her. *Id*. at 1052. Although the court noted that 8 C.F.R. § 287.3 states that "an alien arrested without warrant and placed in formal proceedings" shall be advised of this information, it then referred to the U.S. Customs and Border Protection Inspector's Field Manual, which suggests that arrested aliens should "be given two hours to contact counsel before questioning can proceed." *Id.* The court also raised the issue of whether DHS's failure to comply with the regulations "may bear on whether [Rodriguez's incriminating] statements were voluntary under the Fifth Amendment," and remanded on that question as well. *Id.* at 1051. The Board has not yet issued a decision on remand.

> **The Ninth Circuit concluded that Rodriguez's overnight detention at the border qualified as a warrantless arrest under 8 C.F.R. § 287.8(b).**

In *Samayoa-Martinez*, the petitioner was stopped and handcuffed by military police, who telephoned DHS officials, who questioned petitioner over the telephone without advising him of his right to counsel or that his statements might be used against him. 558 F.3d at 898. After his interview, Samayoa was transferred to DHS custody and served with a Notice to Appear. *Id.* Several days later, the Notice to Appear was filed with the immigration court. *Id.* At his removal hearing, Samayoa moved to suppress the telephonic statements he made to immigration officers on the ground that DHS had obtained the information in violation of several federal regulations, including 8 C.F.R. § 287.3. *Id.* The Immigration Judge denied the motion to suppress, and the Board affirmed. *Id.* The Ninth Circuit agreed with the agency's conclusion that the government did not violate 8 C.F.R. § 287.3 when it questioned Samayoa because, although Samayoa was essentially held under warrantless arrest, formal removal proceedings had not yet been initiated against him. *Id*. at 901-02. Because Samayoa was personally served with a Notice to Appear, which included a statement regarding his right to be represented at no cost to the government, before he was formally placed in removal proceedings by the filing of the Notice to Appear, the Court found that DHS did not violate 8 C.F.R. § 287.3 when it obtained information from Samayoa before notifying him of his procedural rights. *Id.* at 898, 902; *see* 8 C.F.R. § 1239.1 ("Every removal proceeding conducted under section 240 of the [INA] to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court."). In contrast to its decision in *Rodriguez-Echeverria*, at no time in *Samayoa-Martinez* did the Court dis-

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# Notice of Rights Under 8 C.F.R. § 287.3

*(Continued from page 3)*

cuss whether Samayoa was "arrested" or not, but instead focused on at what point Samayoa was "placed in formal proceedings" under the applicable federal regulations.

The Immigration Judges in both *Rodriguez-Echeverria* and *Samayoa-Martinez* reviewed petitioners' motions to suppress and denied them in light of findings that the statements Rodriguez and Samayoa made to immigration officers were voluntary, and that there was no evidence of coercion, duress, or improper action on the part of the immigration officers. 534 F.3d at 1050; 558 F.3d at 902. However, the Ninth Circuit did not, in either case, reach the issue of whether the petitioners' statements were voluntary.

**The court determined that an immigration officer is required to advise aliens of their right to representation and that their statements may be used against them, only after the alien is arrested *and placed in formal proceedings.***

In *Rodriguez-Echeverria*, the Court remanded to the Board the question of whether Rodriguez's statements were voluntary under the Fifth Amendment. 534 F.3d at 1051. In *Samayoa-Martinez*, the Court determined that it "need not reach Samayoa's argument that [the lack of notice of his procedural rights] made his statements to the border patrol involuntary." 558 F.3d at 902. Notably, although the primary issue in both cases was a motion to suppress incriminating statements made to immigration officials, the court did not, in either case, rely on the Supreme Court's oft-cited decision in *INS v. Lopez-Mendoza*, which holds that the exclusionary rule does not apply in immigration cases, except possibly for "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." 468 U.S. 1032, 1050-51 (1989); *see also Bustos-Torres v. INS*, 898 F.2d 1053, 1056-57 (5th Cir. 1990) (concluding that the plain language of 8 C.F.R. § 287.3(c) "does not require warnings similar to *Miranda* warnings to be issued before the examination that provides the information to be noted on the Form I-213," and that absent any showing of "coercion, duress, or improper action on the part of the immigration officer," an alien's statements are not considered involuntary). Although the Ninth Circuit focused its determination in *Rodriguez-Echeverria* and *Samayoa-Martinez* on the rights due to an alien under 8 C.F.R. § 287.3(c), nothing in either decision suggests that the agency's determination that the statements were voluntary and not obtained by coercion or duress, and therefore were admissible, was erroneous.

In conclusion, although the Ninth Circuit remanded *Rodriguez-Echeverria* to the Board to determine the scope and applicability of 8 C.F.R. § 287.3, in *Samayoa-Martinez* the court determined that only after the alien is arrested *and placed in formal proceedings is* an immigration officer required to advise aliens of their right to representation and that their statements may be used against them, in other words, after an NTA has been filed with the immigration court. 8 C.F.R. §§ 287.3(c), 1239.1. Nevertheless, the ultimate test of whether an alien's statements to an immigration officer should be suppressed is whether the alien's statements were voluntary, or were obtained due to coercion, duress, or improper action by the immigration officer. *Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975).

By Anna Nelson, OIL
☎ 203-532-4402

# Law Extends Non-Minister Special Immigrant Religious Worker Program

On March 20, 2009, President Obama signed into law Public Law 111-9 extending the non-minister special immigrant religious worker program through Sept. 29, 2009. The program had expired on March 6, 2009.

The extended category covers special immigrant religious workers in professional or non-professional capacity within a religious vocation or occupation. The extended date also applies to accompanying spouses and children of these non-ministers. Workers entering the United States only to continue the vocation of a religious minister are not affected by the expiration date.

USCIS has announced that it will receive and process the *Petition for Amerasian, Widow(er), or Special Immigrant,* Form I-360, for those religious workers affected by the expiration of the program. USCIS will also process *Applications to Register Permanent Residence or Adjust Status,* Form I-485, based on approved Form I-360 petitions for non-minister special immigrant religious workers.

Unless Congress extends the expiration date of the program, beginning Sept. 30, 2009, USCIS will suspend processing of any pending Forms I-360, I-485 and I-824 affected by the expiration, and will reject all petitions and applications for this program received on or after that date.

# Summaries of Recent Board Decisions

After a quiet winter, the Board of Immigration Appeals continued its spring shower of precedent decisions in April with three new decisions addressing continuances to await visa approval, immigration judge jurisdiction to adjust the status of arriving aliens, and eligibility and the burden of proof for cancellation of removal.

### Motion to Continue Pending Family Adjustment

In *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the Board followed its precedent in *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), and held that an alien's unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition should generally be granted, upon a showing of good cause, if approval of the visa petition would render him prima facie eligible for adjustment of status. The Board listed a variety of factors to be considered to determine whether good cause exists to continue such proceedings, including, but not limited to: (1) the Department of Homeland Security's response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors.

### IJ's Jurisdiction Arriving Aliens

In a decision with relatively narrow applicability, ***Matter of Martinez-Montalvo***, 24 I&N Dec. 778 (BIA 2009), the Board declared its precedent decision in *Matter of Artigas*, 23 I&N Dec. 99 (BIA 2001), superseded in light of new regulations. Under *Matter of Artigas*, immigration judges in removal proceedings could adjudicate applications filed by arriving aliens for adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966. However, regulations at 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1)(ii), promulgated in 2006, vested authority to adjudicate adjustment of status applications of arriving aliens solely in USCIS. The Board noted that the regulations provided a limited exception for an arriving alien placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application. Subject only to that exception, the Board held that the new regulations deprived immigration judges of jurisdiction to adjudicate adjustment applications of arriving aliens, even under the Cuban Adjustment Act.

### Cancellation and REAL ID Act

In ***Matter of Almanza***, 24 I&N Dec. 771 (BIA 2009), the Board addressed the effect of various provisions of the REAL ID Act of 2005 on applications for cancellation of removal.

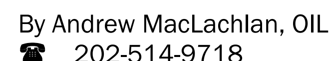
The Board held that where the application for cancellation of removal had been filed after the May 11, 2005, effective date of the REAL ID Act, the Act's new burden of proof provisions applied, regardless of when removal proceedings commenced. Therefore, an applicant for cancellation has the burden under INA § 240(c)(4)(A) to prove that he satisfies the applicable eligibility requirements and merits a favorable exercise of discretion, and must provide corroborating evidence requested by the immigration judge pursuant to INA § 240(c)(4)(B), unless it cannot be reasonably obtained.

Almanza had been convicted of an offense under a divisible criminal statute. The Board held that Almanza had the burden to establish that his conviction was not pursuant to any part of the statute that describes a crime involving moral turpitude. This includes the burden to produce corroborating conviction documents, such as a transcript of the criminal proceedings, when reasonably requested by the immigration judge, as it was in this case. Recognizing that Almanza's removal proceedings were completed within the geographic jurisdiction of the Ninth Circuit, the Board distinguished *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), because the burden provisions of the REAL ID Act were not applicable in those proceedings, and there was no indication that the immigration judge in that case had requested that the alien produce additional documents.

Finally, the Board affirmed the immigration judge's ruling that Almanza was not eligible for cancellation of removal under INA § 240A(b)(1)(C) because he had been convicted of an offense under INA § 237(a)(2), specifically a crime involving moral turpitude. The Board rejected Almanza's contention that he is an arriving alien, inadmissible under INA § 212(a)(2), not INA § 237(a)(2), and his conviction was covered by the exception for petty offenses at INA § 212(a)(2)(A)(ii)(II). The Board found controlling the Ninth Circuit's decision in *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004), which adopted the Board's reasoning in that case that the limitation on cancellation of removal in INA § 240A(b)(1)(C) applies to convictions for an offense *described* under any of the three sections listed therein. "The fact that he is an arriving alien and that his conviction might be considered to be for a petty offense for purposes of establishing his admissibility is therefore irrelevant for purposes of determining whether he is eligible for cancellation of removal" under INA § 240A(b)(1)(C).

**Editor's note**: *Petn for review filed sub nom. Almanza-Arenas v. Holder,* 9th Cir. Case No. 09-71415, May 12, 2009.

By Andrew MacLachlan, OIL


☎ 202-514-9718

# FURTHER REVIEW PENDING: Update on Cases & Issues

### Jurisdiction—Motion to Reopen

On April 27, 2009, the Supreme Court granted petitioner's request for certiorari in ***Kucana v. Holder***, 533 F.3d 534 (7th Cir. 2008), *cert. granted,* 2009 U.S. LEXIS 3158 (Apr. 27, 2009) (No. 08-911).

The question before the Court is whether INA § 242 (a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii) bars the review of a denial of a motion to reopen. The Seventh Circuit had held that the discretionary decision bar applies to motions to reopen.

In her response to the petition, the Solicitor General has stated "after reexamining its prior filings on this issue," that the government has concluded that the majority position—namely the majority of the courts holding that judicial review is available, "represents the better reading of the statute."

Contact: Melissa Neiman-Kelting, OIL
☎ 202-616-2967

### 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. The government is considering whether to seek further review.

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
☎ 202-514-4115

### 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? The case was argued on May 13.

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

### Aggravated Felony—$10,000

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." The case was agued on April 27.

Contact: Jennifer Keeney, OIL
☎ 202-514-4115

### Aggravated Felony--Crime of Violence

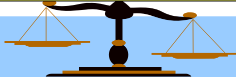
On May 6, 2009, the government filed its response to a petition for writ of certiorari in which it urged the Supreme Court to grant the alien's petition, vacate the court's judgment, and remand for further consideration in view of *Chambers v. United States*, 129 S. Ct. 687 (2009). The issue in ***Serna-Guerra v. Holder***, No. 08-983, is whether the crime of unauthorized use of a vehicle, in violation of Texas law, is a crime of violence.

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

### Jurisdiction—REAL ID Act

The government has filed an opposition to petitioner's petition for rehearing en banc in ***Mercado v. Mukasey,*** 539 F.3d 1102 (9th Cir. 2008). The question raised is whether the court has jurisdiction, under the REAL ID Act "question of law" exception to jurisdictional bars, to review the IJ's determination that the aliens' removal would not cause exceptional and extremely unusual hardship on their US born children and the husband's elderly parents? Did the IJ's legal error that the alien's brother had a legal obligation to support the parents require the court to take jurisdiction over that issue, and did the IJ's legal error affect the hardship finding?

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



# Summaries Of Recent Federal Court Decisions

## FIRST CIRCUIT

**■ En Banc First Circuit Reverses Award of EAJA Fees in § 1447(b) Action**

In *Aronov v. Napolitano*, 562 F.3d 84, 2009 WL 975836 (1st Cir. Apr. 13, 2009) (*Lynch*, Boudin, Howard; Lipez, Torruella, dissenting), the en banc First Circuit reversed the district court's award of EAJA fees to an alien who had filed suit under 8 U.S.C. § 1447(b) to compel U.S. Citizenship and Immigration Services to adjudicate his application for naturalization.

The court held, as a matter of law, that the alien was not a prevailing party because the district court's one-line electronic order granting the parties' joint motion to remand did not contain the required judicial imprimatur. The court reasoned that the order was plainly not a judgment on the merits and otherwise lacked all of the core indicia of a court-ordered consent decree. The court also held, as a matter of law, that the government's pre-litigation actions were substantially justified because its decision not to grant citizenship until it had received the results of a full FBI name check was reasonable.

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

**■ First Circuit Holds that the BIA May Not Have Applied Proper Standard to Evaluate Changed Country Circumstances to Reopen CAT Claim**

In *Larngar v. Holder*, 562 F.3d 71 (1st Cir. 2009) (Torruella, Stahl, *Howard*), the First Circuit held that it had jurisdiction to review the BIA's finding that the petitioner, an aggravated felon, failed to demonstrate changed country circumstances in Liberia to excuse his untimely motion to reopen. The court held that the BIA may not have applied the proper legal standard when it determined that the rise to power in Liberia of a person who had been assaulted by petitioner and wanted revenge is a change in personal circumstances rather than a change in country conditions, and remanded for further consideration.

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

## SECOND CIRCUIT

**■ Second Circuit Applies Law of the Case Doctrine to Determine that Alien Did Not Establish Eligibility for a Waiver Under INA § 212(c)**

In *Johnson v. Holder*, __ F.3d __, 2009 WL 997001 (2d Cir. Aril 15, 2009) (Feinberg, Pooler, Wesley), the Second Circuit held that the law of the case doctrine compelled the court to follow its prior decision in petitioner's case. In its prior decision, the court had required the alien to make a showing of individualized reliance on the continued availability of § 1182(c) relief when she decided to postpone making her application for such relief. Here, the court held that it would not address the merits of the alien's argument that the individualized reliance standard should not be applied to her case where the alien could have raised this argument at the time of her initial appeal but did not do so, and where there was no clear error in the court's prior decision.

Contact: Charles Canter, OIL
☎ 202-616-9132

**■ Second Circuit Holds that Nurse Who Provided Post-Abortion Care and Guarded Women Brought in for Forced Abortions Did Not Assist in Persecution of Others**

In *Yanqin Weng v. Holder,* __ F.3d __, 2009 WL 982452 (2d Cir. April 14, 2009) (Walker, B.D. *Parker*, Raggi) , the Second Circuit held that a nurse employed at a local hospital in China was not subject to the persecutor bar, rendering her ineligible for asylum, for providing post-surgical care to victims of forced abortions and by guarding such victims on one occasion. The court concluded that her conduct was not "active or had direct consequences for the victims," but instead was "tangential . . . and not integral to the administering of forced abortions . . . ." Accordingly, the court granted the alien's petition for review with respect to her claims for asylum and withholding of removal, but denied it with respect to her claim for CAT protection, and remanded the case to the BIA.

**The court held that a nurse employed at a local hospital in China was not subject to the persecutor bar, for providing post-surgical care to victims of forced abortions and by guarding such victims on one occasion.**

Contact: Janice K. Redfern, OIL
☎ 202-616-4475

## THIRD CIRCUIT

**■ Denial of Asylum Upheld Based on Petitioner's Failure to Corroborate His Weak Testimony; Petitioner's Motion for a Stay of Removal Does Not Implicitly Include a Request for a Stay of Voluntary Departure**

In *Sandie v. Attorney General*, 562 F.3d 246 (3d Cir. 2009) (*Smith*, Cowen, Thompson), the Third Circuit held that the BIA reasonably affirmed the IJ's conclusion that the alien failed to meet his burden of proof for asylum because of his failure to submit evidence corroborating his weak, but credible, testimony. In reaching this conclusion, the court rejected the petitioner's claim that his credible testimony was sufficient to meet his burden of proof for asylum. The court also denied the alien's motion to clar-

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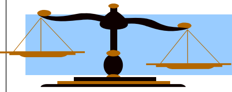

# Summaries Of Recent Federal Court Decisions

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ify, holding that it would not construe his motion for a stay of removal as implicitly including a request to stay his voluntary departure period, because: (1) an alien accorded the privilege of voluntary departure must expressly ask for a stay before its expiration or request the withdrawal of the order of voluntary departure; and (2) the court does not have the authority to reinstate or extend a period of voluntary departure.

Lindsay Glauner, OIL
☎ 202-305-4359

## FIFTH CIRCUIT

### ■ Fifth Circuit Holds that Applicant for Cancellation of Removal has Burden to Prove He is Not an Aggravated Felon

In *Vasquez-Martinez v. Holder*, __ F.3d __, 2009 WL 866195 (5th Cir. Apr. 2, 2009) (Smith, *Garza*, Clement), the Fifth Circuit ruled that an alien applying for cancellation of removal has the burden of proof to establish that he is not an aggravated felon. The court held that it has limited jurisdiction to consider whether the record is conclusive as to the offense of conviction because judicial review of a factual question is barred under 8 U.S.C. § 1252(a)(2)(C). The court held that it may still review the agency's legal conclusion that the crime for which the alien was convicted may have been an aggravated felony, and concluded that the alien's Texas conviction for possession with intent to deliver cocaine qualified as such.

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

**Asylum applicant who claimed she never received notice of hearing was entitled, in light of her affidavit, to a hearing, to rebut presumption of delivery.**

## SIXTH CIRCUIT

### ■ Sixth Circuit Holds that Alien Should be Provided with an Opportunity to Rebut Presumption of Delivery by Regular Mail

In *Ba v. Holder*, 561 F.3d 604 (6th Cir. 2009) (*Norris*, Cook, Griffin), the Sixth Circuit held that the petitioner, an asylum applicant from Mauritania, was entitled to an opportunity to establish that she resided at the address where the notice of hearing was mailed and thereby rebut the presumption of delivery, in light of her affidavit. The affidavit stated that she did not receive notice of hearing and did not know of in absentia removal order until she went to immigration office to inquire about status of application to renew employment authorization card, and that she filed change of address form, after she failed to appear for asylum hearing, demonstrating interest in pressing forward with asylum claim.

Contact: Margaret O'Donnell, OIL
☎ 202-616-1092

### ■ Sixth Circuit Holds that Provision in REAL ID Act Foreclosing Habeas Relief does not Violate Suspension Clause

In *Muka v. Baker*, 559 F.3d 480 (6th Cir. Mar. 17, 2009) (*Moore*, White, Oliver), the Sixth Circuit after previously denying petitioner's first petition for review, affirmed on appeal a district court's dismissal of petitioner's subsequent habeas corpus petition. The court held that the REAL ID Act's elimination of habeas as a means for judicial review of an order of removal did not violate the Suspension Clause of the Constitution, because the Act provides aliens an adequate and effective mechanism to challenge a removal order by way of a petition for review filed in the court of appeals.

Contact: Robert W. Haviland, AUSA
☎ 810-766-5177

## SEVENTH CIRCUIT

### ■ Seventh Circuit Holds it Lacks Jurisdiction to Review Denial of Continuance Where There is no Evidence that Alien is Eligible for Relief

In *Afzal v. Holder*, 559 F.3d 677 (7th Cir. 2009) (Posner, Wood, *Tinder*), the Seventh Circuit distinguished *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), and held that it lacked jurisdiction to review an IJ's denial of a continuance because the petitioner had failed to demonstrate that he was eligible for adjustment of status. The petitioner's approved visa petition had been automatically revoked upon the death of his wife, but, at a hearing three years later, he requested a continuance to seek reinstatement of the petition. The court determined that reinstatement of a revoked visa petition is within the discretion of USCIS, and there was no evidence that the alien had taken any of the necessary steps toward reinstating his visa petition, nor that USCIS was likely to reinstate it if he had.

Contact: Corey Farrell, OIL
☎ 202-305-4923

### ■ Seventh Circuit Upholds Agency's Post-REAL ID Act Adverse Credibility Determination

In *Krishnapillai v. Holder*, __ F.3d __, 2009 WL 1078655 (7th Cir. April 23, 2009) (Easterbrook, *Rovner*, Wood), the Seventh Circuit affirmed an IJ's adverse credibility determination under the REAL ID Act. The petitioner, a Sri Lankan asylum applicant, claimed, based on his own experiences and on the adverse treatment of other ethnic Tamils like

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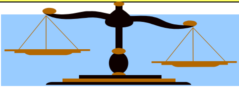

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himself, that he faced likely persecution at the hands of both the Sri Lankan authorities and terrorist insurgents if he is forcibly returned. The court ruled that petitioner's inconsistent testimony regarding the timing of events, his implausible statements, and his failure to provide apparently available corroborating evidence all supported the finding. The court explained that under the REAL ID Act, "as the terms of the statute make clear, the IJ is no longer required to link inconsistencies, inaccuracies, and falsehoods in a witness's testimony to the heart of the immigrant's claim before relying on those defects as a reason to discredit a witness's testimony." The court indicated that "only in extraordinary circumstances will we upset his credibility assessment."

The court also upheld the BIA's decision that petitioner failed to establish asylum eligibility premised on his claim that he may face persecution as a failed asylum seeker or on a "pattern or practice" theory based on his Tamil ethnicity.

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

■ **Seventh Circuit Rules that it Lacks Jurisdiction Over BIA's Denial of Motion to Reopen Because No Constitutional Claims or Questions of Law Were Raised**

In ***Patel v. Holder***, __ F.3d __, 2009 WL 1101574 (Bauer, Ripple, *Tinder)* (7th Cir. April 24, 2009), the Seventh Circuit held that it did not have jurisdiction to review the BIA's denial of the petitioner's motion to reopen proceedings and rescind the *in absentia* removal order against him. The court found that there was no constitutional claim because "due process does not require that the alien 'actually receive' notice of removal proceedings, but only that the government attempt to deliver notice to the last address provided by the alien," said the court. Further, there was no question of law because determining actual receipt was a question of fact that weighed into whether the BIA would exercise its discretion in reopening proceedings, which the court lacked jurisdiction to review. The court held that even if it had jurisdiction, petitioner's claim would fail because he had not submitted a change of address form and the government thus had no reason to believe that the alien had moved.

**The Seventh Circuit held that it did not have jurisdiction to review the BIA's denial of the petitioner's motion to reopen proceedings and rescind the *in absentia* removal order.**

Contact: W. Daniel Shieh, OIL
☎ 205-305-9802

■ **Seventh Circuit Denies EAJA Claim Following a Remand**

In ***Kholyavskiy v. Holder***, 561 F.3d 689 (7th Cir. 2009) (Flaum, *Ripple*, Manion), the Seventh Circuit denied a motion for EAJA fees after the court's remand for further consideration of petitioner's claim that he was persecuted as a child in Russia. *See Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008). The court noted that it had rejected most of petitioner's appellate arguments, and concluded that the government's litigation position regarding the two novel issues on which it remanded, though unsuccessful, was substantially justified.

Contact: Jeff Menkin, OIL
☎ 202-353-3920

## EIGHTH CIRCUIT

■ **Eighth Circuit Considers Whether it has Jurisdiction to Review the Denial of a Motion to Terminate and Holds that Agency's Denial of the Motion was Not an Abuse of Discretion**

In ***Hanggi v. Holder***, __ F.3d __, 2009 WL 1035139 (8th Cir. April 20, 2009) (*Colloton*, Bright, Shepherd), the Eighth Circuit noted that it may not have jurisdiction to review the denial of a motion to terminate proceedings under 8 U.S.C. § 1252(g). The court held that even if it had jurisdiction, the IJ did not abuse her discretion in denying the motion to terminate because the alien's case did not fall under 8 C.F.R. §§ 1238.1(e) or 1239.2 (f) (governing termination of proceedings), and the alien did not challenge the validity of the removal proceedings. The court also held that it lacked jurisdiction to review the denial of the alien's motion for a continuance because she did not raise that issue before the BIA.

Contact: Aviva Poczter, OIL
☎ 202-305-9780

■ **Eighth Circuit Holds that 14-Year-Old State Child Protective Services' Finding of Sexual Abuse Does Not Preclude Finding of Good Moral Character for Naturalization**

In ***Nyari v. Napolitano***, 562 F.3d 916 (8th Cir. 2009) (Melloy, Bowman, *Smith*), the Eighth Circuit reversed and remanded a district court decision that granted summary judgment to the government in a naturalization action. The court determined that the alien's name on the Virginia Child Protective Services Abuse and Neglect Registry based on a 14-year-old finding of "founded sexual abuse," without significant information relating to the facts behind such a finding, was not dispositive, to establish that an alien lacked good moral character for naturalization. The court determined that the delayed recantations of the alien's allegedly sexually abused daughters created a genuine issue of material fact as to whether the alien abused them, and thus remanded the case for further proceedings.

Contact: Aram A. Gavoor, OIL-DCS
☎ 202-305-8014

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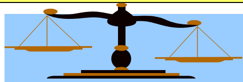

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## NINTH CIRCUIT

**Ninth Circuit Rejects in Absentia Removal Order for Lack of Evidence**

In *Al Mutarreb v. Holder*, 561 F.3d 1023 (9th Cir. 2009) (Tashima, *Berzon*, Smith), the Ninth Circuit put aside issues concerning whether the petitioner had adequate notice as to the date and location of the removal hearing, and determined that the record lacked sufficient evidence to support the entering of the *in absentia* removal order. Specifically, the court held that the record lacked any indication that the government submitted evidence to the Immigration Judge establishing the alien's removability for failing to comply with the terms and conditions of his student visa. The court rejected the government's argument that the existence of the Immigration Court's computer generated removal order warranted the drawing of an inference in favor of the necessary evidence having been presented to the Immigration Judge.

Contact: David McConnell, OIL
☎ 202-616-4881

**■ Ninth Circuit Grants Chevron Deference to the BIA's Interpretation of Particular Social Group**

In *Ramos-Lopez v. Holder*, __ F.3d __, 2009 WL 1012062 (Tashima, McKeown, Fletcher) (9th Cir. April 16, 2009), the Ninth Circuit held that *Chevron* deference was due to the BIA's interpretations of the ambiguous phrases "particular social group" and "political opinion." Applying the second step in *Chevron*, the court deferred to the BIA's interpretation in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), where, after analyzing the social group under the rubrics of particularity and social visibility, the BIA had determined that Salvadoran youth who resist recruitment by the MS-13 are not a particular social group. Here, the court concluded that "young Honduran men who have been recruited by the MS-13 [gang], but who refused to join" did not constitute a particular social group. The court also held that petitioner's resistance to gang recruitment did not constitute a political opinion.

**The Ninth Circuit held that Chevron deference was due to the BIA's interpretations of the ambiguous phrases "particular social group" and "political opinion."**

Contact: Susan Harrison, AUSA
☎ 206-553-7970

**■ Ninth Circuit En Banc Holds that the Alien Smuggling Bar to Good Moral Character May not be Waived, Overruling *Moran v. Ashcroft***

In *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (Kozinski, Pregerson, O'Scannlain, Rymer, Kleinfeld, *Silverman*, McKeown, Fisher, Paez, Callahan, N. Smith), the *en banc* Ninth Circuit held that the "family unity" alien-smuggling waiver of inadmissibility under 8 U.S.C. § 1182(d)(11) has no application to a determination of whether an alien can demonstrate good moral character for purposes of an application for cancellation of removal. The court determined that the relevant statutory language was clear under a *Chevron* step one analysis, and held that alien smugglers are one of the classes of persons that cannot be found to have good moral character for purposes of cancellation of removal, whether they are inadmissible on that basis or not. *Sanchez* expressly overrules *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005), which failed to adhere to the plain language of the statute.

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

**■ An Alien Born Out of Wedlock Cannot Acquire Citizenship from Birth Due to His Mother's Subsequent Marriage to a United States Citizen**

In *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (*Trott*, Thomas, Hogan), the Ninth Circuit held that an alien who is born out of wedlock in a foreign country to two foreign nationals cannot obtain citizenship from birth due to the alien's mother subsequent marriage to a United States citizen. The court rejected petitioner's argument that California law deemed him to be born in wedlock, holding that the state statute only applied to fathers legitimating their biological children. The court also held that there must be a blood relationship for a United States citizen to legitimate a child born out of wedlock.

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

**■ Ninth Circuit Denies Government's Panel Rehearing Petition but Amends Decision and Remands so BIA may Determine Whether Conviction can be Expunged Under Lujan-*Armendariz***

In *Ramirez-Altamirano v. Holder*, __ F.3d __, 2009 WL 982784 (9th Cir. April 14, 2009) (*Wardlaw*, Fogel, Ikuta), the Ninth Circuit amended its previous decision of February 4, 2009, ruling that the alien's conviction was expunged and remanding only on the issue of whether the alien was otherwise eligible for cancellation of removal. In response to the government's arguments for panel rehearing, the court decided to remand the alien's case to the BIA for consideration of: (1) whether the alien's conviction could be expunged under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), even though he received jail time, as opposed to only probation; (2) whether the alien is other-

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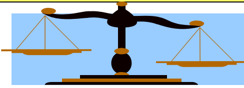

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wise eligible for relief; and (3) if so, whether it should be granted in the exercise of discretion.

Contact: Saul Greenstein, OIL
☎ 202-514-0575

■ **Ninth Circuit Affirms Denial of Motion to Suppress Evidence Gathered Following the Arrest of Petitioner by a Military Police Officer**

In *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009) (*Ikuta*, Callahan, Fernandez), the Ninth Circuit affirmed the IJ's admission into evidence of the Form I-213, titled "Record of Deportable Alien," which contained information gathered following the arrest of petitioner by a military police officer. The petitioner and his three passengers, could not produce valid identification documents during a routine traffic stop by a military officer at a Naval air station. The passengers, who were handcuffed, were then questioned over the telephone by a border patrol agent. After the interview, they were transported to the a nearby police station, fingerprinted and later transferred to the custody of the former INS. At the INS office, an immigration officer completed form I-213 and then served petitioner with an NTA.

Petitioner contended that the IJ should not have admitted the I-213 into evidence because the information was obtained in violation of several regulations, and relied upon *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979). The court held that the applicable regulations were not violated because the military officer was not an agent of the INS and he had independent authority to stop, arrest, and detain the petitioners. The court then held that the border patrol agent had not violated 8 C.F.R. 287.3 when he interviewed petitioner over the telephone without first notifying him of his rights. The court agreed with the IJ's reading of that regulation as only requiring than an immigration official inform aliens of their procedural rights after the commencement of the removal proceedings, namely after the NTA is filed with an immigration court.

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

■ **China's Prosecution for Providing Aid to Unlawful Immigrants from North Korea in Defiance of China's Unofficial Policy Forbidding Such Aid Constitutes Persecution on Account of Political Opinion**

**China's prosecution of petitioner for providing aid to unlawful immigrants from North Korea in defiance of China's unofficial policy forbidding such aid constituted persecution on account of a political opinion.**

In *Xun Li v. Holder*, 559 F.3d 1096 (9th Cir. Mar. 23, 2009) (*Wardlaw*, Schroeder, Tallman), the Ninth Circuit held that substantial evidence did not support an IJ's denial of asylum to an applicant from China. The court rejected the IJ's adverse credibility finding because he "speculated" and "manufactured" inconsistencies. Accepting as credible the petitioner's testimony and the testimony of Chinese law experts, the court held that China's prosecution of petitioner for providing aid to unlawful immigrants from North Korea in defiance of China's unofficial policy forbidding such aid constituted persecution on account of a political opinion.

Contact: Timothy Stanton, OIL
☎ 202-305-7025

## ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds that District Court has Jurisdiction to Review Denial of TPS for Alien With Final Removal Order**

In *Mejia Rodriguez v. DHS*, 562 F.3d 1137 (11th Cir. 2009) (Barkett, Fay, Trager)(*per curiam*), the Eleventh Circuit held that, although Mejia Rodriguez was already subject to a final order of removal, the district court had jurisdiction to review the denial of his Temporary Protected Status (TPS) application by USCIS. The court, distinguishing a challenge to the denial of a TPS application from a challenge to a removal order, held that the INA did not deprive the district court of jurisdiction over USCIS's non-discretionary statutory eligibility decisions, such as this one. It further held that there was jurisdiction to review the final agency action under the APA.

Contact: Jeffrey S. Robins, OIL
☎ 202-616-1246

■ **Eleventh Circuit Holds that an Alien Ordered Removed Must Meet the Requirements for Reopening to File a Successive Asylum Application**

In *Yi-Qin Chen v. Attorney General*, __ F.3d __, 2009 WL 981212 (Black, Marcus, Bucklew) (*per curiam*) (11th Cir. April 13, 2009), the Eleventh Circuit ruled that an alien subject to a final order of removal must meet the requirements for reopening of removal proceedings in order to file a successive asylum application. The court joined seven other circuits in deferring to the BIA's holding in *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), as a reasonable interpretation of the statutory language and regulatory history.

The court rejected petitioner's argument that the BIA's reading of the statute rendered the provision allowing for the filing of a time or number-barred asylum application upon a showing of changed personal circumstances meaningless, and rejected the alien's argument that *C-W-L-* constituted a substantive change to the regulations that could have only been accomplished through notice and comment hearings.

Contact: Brianne Cohen, OIL
☎ 202-616-2052

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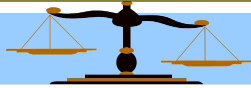

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## DISTRICT COURTS

**Western District of Washington Declares USCIS' Religious Worker Regulation Invalid in Class Action Lawsuit**

In *Ruiz-Diaz v. United States of America*, No. 08-1881, (W.D. Wash. Mar. 23, 2009) (*Lasnik*), the district court declared invalid 8 C.F.R. § 245.2 (a)(2)(i)(B), a USCIS regulation governing adjustment of status for religious workers. A class of religious workers seeking to adjust to permanent resident status filed suit to invalidate the regulation, alleging that it was inconsistent with the applicable statute, was unconstitutional, and it violated the Religious Freedom Restoration Act. The regulation prohibits alien religious workers from applying for permanent resident status prior to their obtaining an approved visa petition. Namely, it requires the concurrent filing of the petitions. The court found nothing in the statute to allow USCIS to treat religious workers different from other aliens seeking adjustment of status, and so it declared the regulation *ultra vires*.

Contact: Melissa Leibman, OIL
☎ 202-305-7016

**District of Columbia Court Concludes that Consular Decision Denying Visa Is Unreviewable**

In *Van Ravenswaay v. Napolitano*, __ F. Supp.2d __, 2009 WL 1175174 (D.D.C. May 4, 2009) (*Kollar-Kotelly*), the district court granted the government's motion to dismiss for lack of subject matter jurisdiction. The U.S. Consulate in Suriname had denied the alien's visa application due to the alien's suspected involvement in illicit trafficking and also had denied his application for a waiver of his inadmissibility. The district court concluded that, under D.C. Circuit precedent, the doctrine of consular non-reviewability applied to the alien's mandamus-styled claims, and further that the alien, as a non-resident, lacked standing to challenge the denial of his entry to the United States.

Contact: Kathryn Moore, OIL
☎ 202-305-7099

**Court Grants Government's Motion to Dismiss Based on Doctrine Consular Nonreviewability**

In *Cortes v. Secretary of DHS* (M.D. Fla. March 23, 2009)(*Sharp*) the court granted the government's motion to dismiss. The alien, who had been previously granted LPR status, challenged the U.S. Consulate's denial of his application for a visa after he remained outside of the United States for more than one year. He sought an order from the court compelling the Department of State or the Department of Homeland Security to issue him a travel document so that he could travel to United States and litigate whether or not he abandoned his LPR status. The court held that it did not have jurisdiction because of the doctrine of consular nonreviewability and also because plaintiff lacked standing as he is currently considered an unadmitted, non-resident alien.

Contact: Nicole Prairie, OIL
☎ 202-532-4074

**Adjustment of Status Application Delay Not Unreasonable Where Alien Allegedly Provided Material Support to Terrorist Organization**

In *Noorullah Khan v. Scharfen,* No. 08-cv-1679 (N.D. Cal. April 6, 2009) (*Chesney),* the court granted the government's motion for summary judgment where the alien allegedly provided material support to a terrorist organization. The alien applied for adjustment of status on December 14, 2001. USCIS denied his application on February 22, 2008, but reopened it on April 23, 2008. The court concluded that (1) the period for measuring the reasonableness of delay began, not on the application date, but when the application was reopened in order for the alien to be considered for an exemption from Tier III terrorist activity-based inadmissibility provisions; (2) the eleven month delay in re-adjudicating the alien's application was not unreasonable; (3) there was no adjustment of status interview requirement; and (4) there was no requirement that the "Exemption Worksheet" should have been completed at the time of the initial denial.

Contact: Chris Hollis, OIL
☎ 202-305-0899

**Adjustment of Status Application Delay Not Unreasonable Where Alien Allegedly Provided Material Support to Terrorist Organization**

In *Shahid Khan v. Scharfen,* No. 08-cv-1398 (N.D. Cal. April 6, 2009) (*Conti*), the court granted the government's motion for summary judgment where the alien allegedly provided material support to a terrorist organization. The alien applied for adjustment of status on January 10, 2003. USCIS denied his application on March 3, 2008 and reopened it on April 23, 2008. The court concluded that the INA did not bar judicial review and that neither the lack of specified time frame for adjudication in the statute nor the discretionary nature of the inadmissibility exemption process precluded judicial review The court explained that (1) the alien's case was distinguishable from the standard FBI name-check delay cases because it involved national security concerns ; (2) the period for measuring the reasonableness of delay began, not on the application date, but when the application was reopened for alien to be considered for an exemption from Tier III terrorist activity-based inadmissibility provisions; (3) the one-year delay in re-adjudicating the application was not unreasonable; and (4) USCIS's adjudicatory hold favored the alien because it could result in his exemption from inadmissibility grounds.

Contact: Chris Hollis, OIL
☎ 202-305-0899

# "PRIORITIES ENFORCING IMMIGRATION LAW"

**The following are excerpts from identified DHS officials who recently testified on "Priorities Enforcing Immigration Laws," before the House Appropriation Committee, Subcommittee on Homeland Security.**

■ *David Venturella, Executive Director of Secure Communities, ICE*

Secretary Napolitano has made the identification and removal of criminal aliens a top priority for ICE. As part of her overall review of immigration and border security efforts, on January 30, she issued an action directive to examine the broad range of the Department's authorities and efforts on immigration and border security, including how the Department works with state and local partners and how the Department pursues criminal and fugitive aliens.

She specifically asked ICE to examine how it might accelerate "Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens," program's deployment. We are reviewing how we can do just that, including studying how current ICE staffing can be dedicated to support deployment, the possible acceleration of key acquisitions to ensure adequate infrastructure to support the increased number of identified criminal aliens, and the acceleration of the technology rollout.

■ *Marcy M. Forman, Director Office of Investigation*

Opportunities for employment remain a primary motivation for aliens seeking illegal entry into the United States. As noted recently by Secretary Napolitano, ICE's worksite enforcement program targets unscrupulous employers who prey upon these aliens by subjecting them to poor or unsafe working conditions or paying them sub-standard wages. ICE's multi-faceted worksite enforcement strategy targets employers, whose business model is based upon exploiting an unauthorized workforce, and employers who place our national security at risk by employing unauthorized workers in the sensitive industries in our Nation's critical infrastructure.

Employers hire undocumented workers for reasons such as: obtaining a financial advantage over their competitors by paying lower wages, offering few if any benefits, failing to comply with tax laws, and avoiding health and safety related complaints. ICE focuses on the most egregious violators, namely employers who engage in human smuggling, identity theft, and social security fraud. ICE also focuses on employers who use undocumented workers at our Nation's critical infrastructure sites, including airports.

■ *Michael Aytes, Acting Deputy Director, USCIS*

The Department of Homeland Security believes E-Verify is an essential tool for employers committed to maintaining a legal workforce. E-verify works by addressing illegal immigration from the demand side. Any participating company in the United States can access E-Verify through a user-friendly government website that compares employee information taken from the Employment Eligibility Verification (Form I-9) with more than 449 million records in the Social Security Administration's database, our partner in the program, and more than 80 million records in DHS immigration databases.

E-Verify has grown exponentially in the past several years. Much of this increase is due to a growing number of States that have passed laws requiring all or some of the employers in their State to use E-Verify. Currently over 117,000 employers are enrolled, representing over 456,000 locations. An average of 1,000 employers enroll each week and participation has more than doubled each fiscal year since 2007.

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## Supreme Court Rules on Stays

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plies to stays of removal. In his view, a stay of removal is indistinguishable from an injunction, and the context of IIRIRA dictated that the statutory standard should apply.

By: Melissa Neiman-Kelting, OIL
☎ 202-616-2967

**Contributions to the Immigration Litigation Bulletin Are Welcomed**

# INSIDE OIL

## OIL's 13th Annual Immigration Litigation Conference Scheduled for July 20-24 at NAC, in Columbia, SC

OIL's 13th Annual Immigration Litigation Conference is scheduled to be held at the National Advocacy Center, in Columbia, SC, the week of July 20-24, 2009. This annual conference is designed for Assistant United States Attorneys and DOJ division attorneys who have some experience in immigration law, either as district court litigators or as immigration brief writers, and for agency counsel who advise AUSA's and Office of Immigration and Litigation attorneys on immigration matters. The theme for this year's conference is "Immigration: New Directions."

The conference will present various panels and individual speakers to address topics of current interest to practitioners in the nation's district and appellate courts, including litigation under the REAL ID Act, naturalization litigation, credibility determinations in asylum cases, issues involving consular actions, agency decision-making, right to counsel issues, detention and removal of criminal aliens, litigation of national security cases, and protection under the Convention Against Torture. Speakers will include judges from the appellate and district courts, senior level officials from the Department of Justice, the Executive Office for Immigration Review, the Board of Immigration Appeals, and officials from the various components of the Department of Homeland Security and from the Department of State.

For additional information contact Francesco Isgro at Francesco.isgro@usdoj.gov.

## OIL Attorneys Participate at APLD Conference

Deputy Director **Donald Keener**, Senior Litigation Counsel **Bryan Beier** and **Jennifer Keeney**, participated at the 2009 Appellate and Protection Law Division, Office of the Principal Legal Adviser, ICE, held in Chicago on May 5-7, 2009. The theme of the conference was "Appellate issues, Litigation and Advocacy (AILA) conference," and was chaired by David Landau, Chief, APLD.

## Oilers Return to National Mall, Hope for a Winning Season

OIL Softball is back this year. Games will be held Wednesdays on the National Mall at 6:00 pm sharp. Last year OIL had a winning season and hope to continue the trend over the next few months. If anyone has any questions about the games, the schedule can be seen on Sharepoint under Softball, or you can contact James Lindahl at 202-305-2040. We hope that everyone can make it out to the games to root for the Civil Division's finest!

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.

*"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

**Tony West**
Assistant Attorney General

**Vacant**
Deputy Assistant Attorney General
Civil Division

**Thomas W. Hussey,** Director
**David J. Kline**, Director
**David M. McConnell,** Deputy Director
**Donald E. Keener,** Deputy Director
Office of Immigration Litigation

**Francesco Isgrò,** Senior Litigation Counsel
Editor

**Tim Ramnitz**, Attorney
Assistant Editor

**Karen Y. Drummond**, Paralegal
Circulation Manager