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

Immigration Litigation Bulletin

Vol. 13, Nos. 5 *May 2009*

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Attorney General Vacates *Matter of Compean* — Directs EOIR to Address Ineffective Assistance of Counsel Claims Through Rulemaking

In *Matter of Compean, Bangaly & J-E-C-*, 25 I.&N. Dec. 1 (A.G. June 3, 2009), Attorney General Holder, upon reconsideration, vacated a decision of his predecessor as set forth in *Matter of Compean, Bangaly & J-E-C-*, 24 I.&N. Dec. 710 (A.G. Jan. 7, 2009). Attorney General Holder further directed the Executive Office for Immigration Review ("EOIR") to initiate rulemaking to evaluate whether the administrative framework for evaluating claims of ineffective assistance of counsel under *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA 1988), should be modified.

Background:

On January 7, 2009, former Attorney General Mukasey issued a decision affirming the BIA's denial of motions to reopen in three cases where the alien claimed deficient performance by counsel in removal proceedings. *Matter of Compean*, 24 I.&N. Dec. 710. *Compean* held that there is no constitutional right to effective assistance of counsel in removal proceedings. Additionally, the decision set forth an administrative framework for the BIA to adjudicate deficient performance claims, which superceded the prior framework set forth in *Matter of Lozada*,

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BIA CHAIRMAN JUAN OSUNA OIL'S NEW DAAG

Tony West, Assistant Attorney General for the Civil Division, has announced the appointment of BIA Chairman, Juan Osuna, to be the DAAG for the Office of Immigration Litigation.

DAAG Juan Osuna

Mr. Osuna was appointed as a Board Member in August 2000, and after serving as Vice-Chairman and Acting Chairman was appointed Board Chairman in September 2008.

Mr. Osuna is a graduate of George Washington University, and the Washington College of Law at American University. He has also a Master of Arts degree in law and international affairs in 1989 from American University's School of International Service.

BIA to Review Ineffective Assistance of Counsel Claims Under Matter of Lozada

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19 I.&N. Dec. 637 (BIA 1988). *Id.* at 732-39.

Vacatur of Compean:

On June 3, 2009, Attorney General Holder vacated *Compean*, reasoning that the process employed in *Compean* did not permit "thorough consideration of the issues involved." *Matter of Compean*, 25 I.&N. Dec. at 2. The Attorney General determined that rulemaking would be more appropriate for reforming the *Lozada* framework because it "affords all interested parties a full and fair opportunity to participate and ensures the relevant facts and analysis are collected and evaluated." *Id.* Accordingly, the Attorney General directed the Acting Director of EOIR "to initiate rulemaking procedures as soon as practicable to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration." *Id.*

The Attorney General also directed the Board and immigration judges to apply pre-*Compean* standards "to all pending and future motions based on ineffective assistance of counsel, regardless of when such motions were filed." *Id.* at 3. Thus, the pre-*Compean* standards (*i.e.*, *Matter of Lozada*) will be applied pending the rulemaking process.

As to that portion of *Compean* holding that there is no constitutional right to effective assistance of counsel, the Attorney General concluded that because it is not necessary to resolve that issue to decide these cases or to initiate the rulemaking process, that part of the decision should also be vacated. *Id.* at 3. The Attorney General made clear however that "[t]he litigating positions of the Department of Justice will remain unaffected by this order." *Id.*

Finally, the Attorney General noted that prior to *Compean*, the BIA had not resolved whether it could reopen proceedings based on a claim of ineffectiveness that occurred after the entry of a removal order. *Id.* The Attorney General "resolve[d] the question" by finding that the BIA has discretion to reopen such proceedings, but left it to the BIA to determine the scope of such discretion." *Id.*

Turning to the merits of the three cases, the Attorney General found that "for the reasons stated by the Board, its orders denying reopening of the three matters reviewed in *Compean* were appropriate under the *Lozada* framework and standards as established by the Board before *Compean*." *Id.*

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GUIDANCE FOR LITIGATING INEFFECTIVE ASSISTANCE CLAIMS IN LIGHT OF THE VACATUR OF *COMPEAN*

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

1. Review cases (pending cases or new cases) for claims of ineffective assistance of counsel.

2. In cases where briefing is already complete, and where *Compean* was cited in the brief or where a 28(j) letter was sent informing the court of the *Compean* decision, send a 28(j) letter to the court informing the court that *Compean* has been vacated, but that such vacatur has no impact on this case because the BIA did not apply the *Compean* standards in the case. *Note*: If the BIA *did* apply the *Compean* framework in your case, contact OIL attorney Papu Sandhu.

3. In *all new briefs* raising ineffective assistance claims, include a footnote informing the court that the Attorney General has vacated *Compean*. Furthermore, continue to argue/preserve the argument that there is no *constitutional* right to effective assistance of counsel in removal proceedings. *See Compean,* 25 I.&N. Dec. at 3 ("The litigating positions of the Department of Justice will remain unaffected by this order.").

4. The Attorney General's vacatur order finds that the BIA has jurisdiction to reopen proceedings based on claims of ineffective assistance that occurred *after* the entry of a removal order. *Id.* Accordingly, for those cases pending in the courts of appeals where the alien argued ineffective assistance based on his or her counsel's failure to file a timely petition for review, and the *sole* ground of the BIA's denial of that claim was that it lacked jurisdiction because the alleged ineffectiveness occurred after the issuance of a removal order, we should move to remand these cases to the BIA. If the alien raises another type of post-order ineffective assistance claim (*e.g.*, my attorney was ineffective because he filed a poor brief in the Ninth Circuit), contact Papu Sandhu.

5. If you have any questions about this guidance or would like to obtain a sample 28(j) letter or footnote mentioned above, please contact Papu Sandhu at (202-616-9357), or at papu.sandhu@usdoj.gov.

Contributions to the Immigration Litigation Bulletin Are Welcomed

Ninth Circuit's "Disfavored Group" Approach: Why The Approach Is Unsound

This is the second of two articles discussing the Ninth Circuit's "disfavored group" approach for proving a future-persecution claim. The first article, published in the March issue of the *Immigration Litigation Bulletin*, discussed the scope and effect of *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009), and its extension of the disfavored group approach to withholding of removal claims.

This second article sets out arguments showing why the approach is unsound and other circuits should join the First, Third, and Seventh Circuits which have repudiated the current approach. *See Kho v Keisler*, 505 F.3d 50, 55 (1st Cir. 2007); *Lie v. Gonzales*, 396 F.3d 530, 538 (3d Cir. 2005); *Firmanshjah v. Gonzales*, 414 F.3d 598, 607 n.6 (7th Cir. 2005). As shown below no other circuit has adopted the Ninth Circuit's approach. The Board has authority by means of a published decision to reject the approach and restore uniformity to the law and consistency with the governing statutes. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation is binding on courts unless it is plainly erroneous or inconsistent with the regulation).

Recap Of Law

Statutes and regulations require an applicant to establish either a "well-founded fear" of future persecution for asylum, or that one's "life or freedom would be threatened" for withholding -- meaning persecution is "more likely than not." 8 U.S.C. §§ 1101(a)(42), 1231(b)(3); 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(2). If an applicant has not established past persecution, he must independently prove future persecution. 8 C.F.R. §§ 1208.13(b)(2), 1208.16(b)(2). Regulations require an applicant produce evidence showing that he faces being "singled out individually" for future persecution. 8 C.F.R. § 1208.13(b)(2)(iii); 8 C.F.R. § 1208.13(b)(2). However regulations relieve an applicant of the burden of making this showing, if he establishes a "pattern or practice" of group "persecution" -- that is, systematic, organized, pervasive group persecution. 8 C.F.R. §§ 1208.13(b)(2)(iii)(A), (B); 8 C.F.R. § 1208.16(b)(2)(i), (ii). *See Wakkary,* 558 F.3d at 1061 (describing pattern or practice of persecution as "systematic" and "organized" persecution); *Ahmed v. Gonzales,* 467 F.3d 669, 675 (7th Cir. 2006) (describing pattern or practice as "systematic, pervasive, or organized" persecution); *Lie,* 396 F.3d at 537 (same); *Makonnen v. INS,* 44 F.3d 1378, 1383 (8th Cir. 1995) (same). *See also Woldemeskel v. INS,* 257 F.3d 1185, 1191 (10th Cir. 2001) (describing pattern or practice as "something on the order of systematic or pervasive persecution").

The court took the position in Wakkary that a group is "disfavored" if it is subject to "widespread discrimination" with some unspecified "substantial" instances of persecution of some its members.

Wakkary's Revision Of The "Disfavored Group" Approach Treating Group "Discrimination" As Evidence Of Individual Risk Of "Persecution" To Lower The Burden To Prove That Requirement

The disfavored group approach applies to a future-persecution claim in which an applicant has not established past persecution, or a pattern or practice of persecution, and is trying to show he would be "singled out individually" for future persecution under the asylum or withholding regulations. *Wakkary*, 558 F.3d at 1052, 1062-65. *See Lolong v. Gonzales*, 484 F.3d 1173, 1179, 1181 n.6 (9th Cir. 20007) (en banc). As originally conceived in *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994), the approach was based on the Ninth Circuit's view that there is a "significant correlation between the . . . showing of group *persecution* and . . . a particularized threat of [individual] *persecution*." 31 F.3d at 853 (emphasis added). The court originally reasoned that "the more egregious the showing of group *persecution* -- the greater the risk [of persecution] to all members of the group -- the less evidence of individualized *persecution* must be adduced." *Id*. (emphasis added). Departing from the regulation's bright-line approach, the court invented a shifting, sliding-scale approach that comparatively lowered the burden of proving risk of persecution, depending how egregious or pervasive group persecution was. *Id*.

In *Sael* and *Wakkary* the Ninth Circuit materially changed the rationale and operation of the disfavored-group approach without being forthcoming that the court was doing so. *See Wakkary,* 488 F.3d at 1063-65; *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). The Ninth Circuit held that there is a correlation between group "discrimination" and risk of future individual "persecution." *See Wakkary,* 558 F.3d 1063-65. This is a fundamental departure from the original rationale that there is a correlation between group "persecution" and risk of future individual "persecution." *See Kotasz*, 31 F.3d at 853. The court took the position in *Wakkary* that a group is "disfavored" if it is subject to "widespread discrimination" with some unspecified "substantial" instances of persecution of some its members. *Id*. at 1052, 1064. Under the approach as clarified in *Wakkary*, evidence of widespread "group discrimination" is automatically credited as evidence of future individual risk of "persecution." *Id*. at 1065. This in turn lowers the amount of evidence of individualized risk of future perse-

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Wakkary Extends "Disfavorwed Group"

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cution an applicant must adduce. *Id.* at 1064, 1065. There is a sliding scale: the more pervasive or egregious the group "discrimination," the less evidence of individualized risk of future "persecution" an applicant must produce. *Id*. 1064, 1065. In the Ninth Circuit's words: "[e]vidence of group discrimination will go part of the way" or more toward proving individualized risk of future persecution; just "how far depend[s] on how 'egregious' and pervasive the showing of group discrimination is." *Id*. at 1065. This approach is unsound and should be repudiated by other circuits for the following reasons.

The disfavored group approach skews the risk assessment and results illegitimate asylum eligibility based on a less than a 10% risk of future persecution.

1. The Approach Reduces The Burden Of Proof By Lowering The Amount Of Evidence Of Individual Risk Of Future Persecution An Applicant Must Produce

The regulations establish a high bright-line threshold -- a pattern or practice of group persecution -- that relieves an applicant of his burden or proving an individualized risk (or likelihood) of future persecution. 8 C.F.R. §§ 1208.13(b)(2)(iii)(A), (B); 8 C.F.R. § 1208.16(b)(2)(i), (ii). As the First, Third, and Seventh Circuits have concluded, the disfavored group approach wrongly requires the agency to apply lower threshold -- group "discrimination" -- to relieve an applicant of having to produce evidence of an individualized risk of future persecution. *Kho*, 505 F.3d at 55; *Lie*, 396 F.3d at 538; *Firmanshjah*, 414 F.3d at 607 n.6. These courts hold that this is an unwarranted "judicially created alternative to the statutory and regulatory scheme, *Kho*, 505 F.3d at 55; and imposes a "lower threshold of proof," *Firmansjah*, 414 F.3d at 607 (7th Cir), or "lower level of individualized fear of future persecution" in disfavored group cases. *Lie*, 396 F.3dat at 538 n. 4.

Wakkary took the position that its approach does not lower the burden of proof, because the court still requires at least a 10% risk of future persecution and is merely reducing the "amount" or proportion of evidence of individualized risk of future persecution an applicant must produce. *Wakkary*, 558 F.3d at 1064, 1065. This point is not well taken and should be rejected by other circuits. First, this is contrary to the plain language of the asylum regulation which expressly refers to the applicant's *"burden of proving*" a well-founded fear by providing evidence showing he would be "singled out individually" for future persecution. 8 C.F.R. § 1208.13(b((2)(C)(iii) (emphasis added). Second, the Ninth Circuit's explanation is a contrary to black-letter evidence and immigration law that "burden of proof" refers to, *inter alia*, a party's burden to produce evidence. *Matter of Y-B-*, 21 I. & N. Dec. 1136, 1156 (BIA 1998), *citing, e.g.*, McCormick, *McCormick on Evidence* § 341 (Edward M. Cleary ed., 3d ed. 1984). Thus, by lowering the amount of evidence of individual risk of future persecution an applicant must produce, the court is necessarily lowering the applicant's burden of proof. Third, as shown in point 4 below, the disfavored group approach skews the risk assessment and results illegitimate asylum eligibility based on a less than a 10% risk of future persecution.

Wakkary also attempted to justify the disfavored group approach by asserting that the Ninth Circuit is simply doing what other circuits do: considering "indisputably relevant . . . evidence [of] how others in a group are treated" to assess how likely it is that an individual will be singled out for future persecution. *Wakkary*, 558 F.3d at 1064. This is untrue and disguises what the Ninth Circuit is really doing. As revised in *Wakkary* and its predecessor *Sael,* the disfavored group approach uses a fundamentally different correlation than the regulation and other circuits by automatically treating group "discrimination" as evidence of individual risk of future "persecution." Contrary to the Ninth Circuit's suggestion, the Fourth and Eighth Circuits have not adopted this extraordinary approach, which violates not only the regulation but as shown below, the statutes. *Compare Wakkary*, 558 F.3d at 1065 (the more pervasive the group *discrimination*, the less evidence of individualized risk of *persecution* must be adduced) *with Chen v. INS*, 195 F3d 198, 203-04 (4th Cir. 1999) (suggesting that the more pervasive the group *persecution*, the less evidence of individualized risk of *persecution* must be adduced); *Makonnen* v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (same).

2. The Approach Is Contrary To The Statutes Because It Lowers The Level And Risk Of Future Conduct By Treating Discrimination As Persecution

Perhaps the most profound error in the revised *Wakkary/Sael* disfavored group approach is its requirement that widespread group "discrimination" automatically counts as evidence of individual risk of future "persecution." *See Kho*, 505 F.3d at 55. This is clear error. Either (1) the court is presuming that discrimination necessarily escalates to persecution -- which is error because it is not true, *see INS v. Elias-Zacarias,* 502 U.S. 478, 481 (1992) (reversing Ninth Circuit presumption of political motive for persecution because presumption was untrue), or (2) the court is treating discrimina-

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Wakkary expands asylum definition

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tion" as the equivalent of "persecution" -- which is error because "discrimination" and "persecution" are legally different levels of conduct, and the former does not establish the latter. As the Ninth Circuit, other circuits, and the Board all recognize, "'[p]ersecution is an extreme concept." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). "[Persecution] does not include mere discrimination, as offensive as it may be." *Fisher*, 79 F.3d at 962. "Persecution requires a showing of more than mere . . . discrimination." *Matter of T-Z-*, 24 I & N Dec. 163, 173 (BIA 2007). *See Matter of A-E-M,* 21 I & N Dec. 1157, 1159 (BIA 1998) (distinguishing between "mere harassment or discrimination and persecution").

Thus, evidence of group "discrimination" is probative of individual risk of future "discrimination" -- not of individual risk of future "persecution." *See Mansour v.Ashcroft*, 390 F.3d 667, 673 (9th Cir. 2004) (discrimination against Coptic Christians does not establish future individual risk of persecution); *Gormley v. Ashcroft,* 364 F.3d 1172, 1179 (9th Cir. 2004) (discrimination against whites in South Africa does not establish future individual risk of persecution); *Fisher,* 79 F.3d at 963 (discrimination against women in Iran does not establish future individual risk of persecution); *Prasad v. INS,* 47 F.3d 336, 340 (9th Cir. 1995) (poor conditions and ethnic discrimination against ethnic Indians in Fiji does not establish future individual risk of persecution). No how widespread group discrimination might be, therefore, it cannot automatically be credited as evidence of risk of the more severe, extreme level of conduct required for future "persecution," let alone lower the amount of evidence of individual risk of future persecution an applicant must submit. By automatically crediting group "discrimination" as evidence of risk of future individual "persecution," the Ninth Circuit has ratcheted-down the level of future harm required by statutes and regulations. And by requiring the agency to automatically treat discrimination which does not necessarily establish risk of future "persecution" as if it does, the Ninth Circuit has also in effect ratcheted-down the required risk of persecution.

3. The Approach Nullifies The Agency's Bright-Line Rule And Replaces It With A Nebulous Sliding-Scale Approach Susceptible To Misapplication

The regulations establish an objective bright-line standard of a "pattern or practice of persecution" for relieving an applicant of his burden of producing evidence showing he or she would be singled out individually for future persecution. 8 U.S.C. § 1208.13(b)(2)(C)(iii); 8 C.F.R. § 1208.16(b)(2)(i) and (ii). *See Kho*, 505 F.3d at 55. Contrary to this bright-line rule the Ninth Circuit has imposed a nebulous sliding-scale approach with a variable threshold to lower the applicant's burden of producing evidence to show he would be singled out individually for future persecution. *Wakkary*, 558 F.3d at 1065. It is axiomatic that a bright-line rule is more efficient to administer. It fosters greater consistency and is less susceptible to differences in application than a sliding-scale approach.

A bright-line rule also reasonably ensures the legitimacy of claims by requiring case-specific proof of individual risk future persecution except where group persecution is so systematic and pervasive that it is reasonable to assume all members have an individual risk of persecution. The Ninth Circuit's substitution of a nebulous sliding-scale approach for the regulations' bright-line rule is an impermissible judicial intrusion into the asylum scheme that should be repudiated. *See Kho*, 505 F.3d at 55.

4. The Approach Relies On Factors That Are Not Logically Probative, Skew Results, And Require Eligibility For Less Than A 10% Risk Of Future Persecution

The Ninth Circuit relies on evidence of chance, haphazard encounters during times of sporadic ethnic violence, that is, violence that is unpredictable due to its irregularity, as evidence of individualized risk of future persecution. *See Sael,* 386 F.3d at 928-29 (relying on two chance encounters taxi inadvertently drove applicant near riots in Jakarta as evidence of specific, individual risk of future persecution in the different city); *Wakkary,* 558 F.3d at 1054 (remanding for risk assessment, citing among other evidence similar haphazard encounters during rioting in Indonesia in 1998).

But haphazard personal experiences during irregular periods of ethnic strife do not logically predict that a particular applicant is at risk of being singled out individually for future persecution. Such experiences occur by chance and are unpredictable. And ordinarily there is no evidence that perpetrators knew the applicant's specific identity or have any inclination years later to seek out the applicant and persecute him or her. These experiences may also occur in parts of the country where the applicant no longer lives. "[A]n applicant must show more than the existence of generalized or random possibility of persecution in his native country." *Hakeem v. INS,* 273 F.3d 812 (9th Cir. 2001). *See also Chen*, 195 F.3d at 204 (4th Cir.) (observing that where group persecution is haphazard, a strong showing of future individual risk of persecution would be required). The Ninth Circuit also relies heavily on past instances of discrimination to skew results. *See e.g.*, *Sael* 396 F.3d at 928-29 (referring to past childhood discrimination in school); *Wakkary*, 558 F.3d at 1054 (referring to past run-ins with ruffians after school when applicant was 11 and 16 years old). As shown above in point 2, since discrimination and persecution are materially

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FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction—Motion to Reopen

On April 27, 2009, the Supreme Court granted the petitioner's request for certiorari in **Kucana v. Holder**, 533 F.3d 534 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2075 (2009). The question before the Court is whether INA §§ 242 (a)(2)(B)(ii) & (D), 8 U.S.C. §§ 1252(a)(2)(B)(ii) & (D) bar the review of a denial of a motion to reopen. The Seventh Circuit dismissed the case, holding that 8 U.S.C. § 1252(a)(2)(B)(ii), which bars courts' review of discretionary actions or decisions of the Attorney General "the authority for which is specified under" Subchapter II of the INA, precludes its review of motions to reopen.

In its response to the petition, the government stated "after reexamining its prior filings on this issue," that the majority position—namely the majority of the courts holding that judicial review is available, "represents the better reading of the statute." Because the parties agree that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar the courts' review of motions to reopen, the government will file its brief with the petitioner in July.

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Fourth Amendment Exclusionary Rule

On March 27, 2009, the Ninth Circuit denied the government's petition for rehearing en banc in **Lopez-Rodriguez v. Mukasey**, 536 F.3d 1012 (9th Cir. 2008), *rehg en banc denied sub nom.* **Lopez-Rodriguez v. Holder**, 560 F.3d 1098 (2009). The government is considering whether to seek certiorari challenging the Ninth Circuit's holding that the exclusionary rule applies in removal proceedings despite *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), where evidence is obtained as a result of "conduct a reasonable officer should know is in violation of the Fourth Amendment."

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Jurisdiction—REAL ID Act

On May 19, 2009, in ***Mercado v. Mukasey***, 566 F.3d 810 (9th Cir. 2009), the Ninth Circuit denied en banc rehearing and amended its panel decision. The questions raised for rehearing were 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, and 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?

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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)?

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Jurisdiction—REAL ID Act

On May 8, 2009, the Second Circuit remanded the petition for review in Mendez v. Holder, 566 F.3d 316 (2d Cir. 2009), because "where, as here, some facts important to the subtle determination of 'exceptional and extremely unusual hardship' have been totally overlooked and others have been seriously mischaracterized, we conclude that an error of law has occurred." The government is considering seeking en banc rehearing on the issue of whether the court erred in concluding that it has jurisdiction to review the agency's determination that an alien failed to prove that his removal from the United States to Mexico would work an "exceptional and extremely unusual hardship" upon his two United States citizen children.

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VWP — Waiver, Due Process

On January 30, 2009, the Seventh Circuit granted the government's petition for rehearing en banc in **Bayo v. Chertoff**, 535 F.3d 749 (7th Cir. 2008). The questions presented are 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, and the parties have filed supplemental briefs on four issues identified by the court at argument.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Determines a "Surviving Spouse" Is a "Spouse" for Purposes of Eligibility for an Immediate Relative Visa Petition

In *Taing v. Napolitano*, __ F.3d __, 2009 WL 1395836 (1st Cir. May 20, 2009) (*Torruella*, Lipez, Howard, JJ.), the First Circuit affirmed the judgment of the district court and, following the Sixth and Ninth Circuits, held that the word "spouse" includes surviving spouses for purposes of determining eligibility for immediate relative visas. USCIS had denied the visa petition filed on petitioner's behalf because the petitioning U.S. citizen spouse died after filing the visa petition, but before adjudication of the petition and before the marriage had lasted two years.

The court determined that, under *Chevron*, the plain language of the relevant provision of the INA did not differentiate between "spouses" and "surviving spouses."

The court determined that, for purposes of defining "immediate relatives," under *Chevron*, the plain language of the relevant provision of the INA did not differentiate between "spouses" and "surviving spouses." The word "spouse" explained the court, "includes surviving spouse under its common, ordinary meaning." Accordingly, the court held that deference to the government's opposite interpretation of the statute was not warranted. The court disagreed with the contrary interpretation in *Robinson v. Napolitano*, 554 F.3d 538 (3rd Cir. 2009)

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Editor's Note: On June 9, DHS Secretary Janet Napolitano granted deferred action for two years to widows and widowers of U.S. citizens—as well as their unmarried children under 21 years old—who reside in the United States and who were married for less than two years prior to their spouse's death. She also directed ICE to defer initiating or continuing removal proceedings, or executing final orders of removal against qualified widow(er)s and their eligible children.

■ First Circuit Upholds Agency's Denial of Withholding of Removal Based on the Lack of Any Connection Between the Aliens' Alleged Persecution and the Brazilian Government

In *Gomes v. Holder*, 566 F.3d 232 (1st Cir. 2009) (*Howard*, Selya, Hansen), the First Circuit upheld the BIA's denial of petitioners' applications for withholding of removal. Petitioners' did not pursue their claim to asylum because it was time-barred. The two petitioners, who are brothers, alleged threats of violence from members of a Brazilian gang who suspected that one of the brothers identified the gang's leader to the police as the person who murdered the petitioners' nephew. Because the gang members did not know with certainty which of the brothers did it, they threatened harm to both.

The IJ and BIA both found that the record evidence failed to demonstrate the requisite connection of the purported persecution to the Brazilian government's action or inaction. The First Circuit held that the record evidence supported these findings. The court concluded that the fact that the Brazilian government incarcerated the gang's leader for the murder demonstrated the government's willingness and ability to combat the gang's violent tendencies. The court further noted that the fact that the aliens did not report the threats to the police also severed the threats from any action or inaction by the Brazilian government.

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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*, 564 F.3d 95 (2d Cir. 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. The petitioner, a citizen of Panama, entered the United States in 1975 as a lawful permanent resident following her marriage to a United States citizen. In 1995, following the death of her husband, she was convicted by a federal jury in the Middle District of Tennessee of possession and conspiracy to possess a controlled substance and sentenced to 188 months in prison. The former INS then sought to remove petitioner under INA §§ 241(a)(2)(B)(i) and 241(a)(2)(A)(iii). Eventually she was order deported by the BIA. In 2005, with the help of new counsel petitioner sought to reopen her case to apply for § 212(c) relief. The BIA denied the motion in July 2005, concluding that petitioner had not made out a valid claim under Second Circuit law, because she had failed to make an individualized showing of reliance. Following a remand from the court, the BIA again denied the motion to reopen.

In its first decision (*Johnson I*), the court had required petitioner to make a showing of individualized reliance on the continued availability of § 212(c) relief when she decided to postpone making her application for such relief. In this latest ruling, the court held that it would not address the merits of the petitioner's argu-

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ment that the individualized reliance standard should not be applied to her case where the petitioner 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. "The law of the case doctrine compels us to follow this Court's decision in *Johnson I* and to reject Johnson's argument that she need not make an individualized showing of reliance," said the court.

The court found that it had jurisdiction over a hardship-based denial of cancellation where the determination rested "on fact-finding which is flawed by an error of law."

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■ **Second Circuit Holds that it has Jurisdiction to Review an Agency's Hardship Determination When it is Based on an Error of Law**

In ***Mendez v. Holder***, 566 F.3d 316 (2d Cir. 2009) (McLaughlin, Calabresi, Sotomayor) (*per curiam*), the Second Circuit held that it had jurisdiction to review the agency's denial of the alien's application for cancellation of removal for failure to establish the requisite "exceptional and extremely unusual hardship," because the agency's decision rested on fact-finding that was "flawed by an error of law."

According to petitioner's testimony and other evidence, his U.S. citizen daughter suffers from severe asthma and has about twenty-five asthma attacks a year. His son Jesus, who was born in 1992 in the United States, was diagnosed with Grade II Vesicoureteral Reflux. This disease causes urine to reflux from the bladder back to the kidneys and liver, causing staph infections, scarring, and tissue damage. Jesus received treatment for this condition until age seven.

The IJ determined that while petitioner's children may "suffer a hardship, one which might even be characterized or classified as an extreme hardship, the court finds that there is insufficient evidence on which the court can conclude that this hardship to his children would be exceptional and extremely unusual." Accordingly, the IJ denied cancellation of removal. The BIA summarily affirmed.

The court panel, while acknowledging that under Second Circuit case law it lacks jurisdiction to review "exceptional and extremely unusual hardship" determinations, and noting at the same time that were it "operating under a clean slate" it would hold that it had jurisdiction to engage in such review, found that it had jurisdiction where the determination rested "on fact-finding which is flawed by an error of law." Here, the court found an error of law because the IJ did not discuss the fact that petitioner's daughter was not expected to outgrow her asthma and that she required several emergency visits to the hospital per year. The court also found that the IJ did not discuss the fact that the son has to undergo a yearly specialized medical examination which he may have difficulty obtaining in Mexico because petitioner "will not be able to travel to see specialized doctors or to pay for treatment." These, said the court, were errors of law because "significant evidence was overlooked and the record was mischaracterized."

Accordingly, the case was remanded to the BIA to reconsider the hardship determination in light of the court's ruling.

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FOURTH CIRCUIT

■ **Asylum Applicant Must File a Motion to Reopen Based on Changed Country Conditions in Order to File a Successive Asylum Application**

In ***Zheng v. Holder***, 562 F.3d 647 (4th Cir. 2009) (Motz, King, *Duncan*), the Fourth Circuit deferred to the BIA's decision in *Matter of C-W-L*, 24 I&N Dec. 346 (BIA 2007), which interpreted the asylum procedures in 8 U.S.C. § 1158(a)(2)(D) and the removal and motion to reopen procedures in 8 U.S.C. § 1129a(c)(7), and determined that an asylum applicant must comply with the timeliness and numerical requirements for motions to reopen when seeking adjudication of a successive asylum application after the agency issues a final order of removal. The court also held that petitioner was not entitled to a hearing on her claim of withholding of removal under the Convention Against Torture (CAT) and the U.N. Protocol, because neither the CAT nor the U.N. Protocol is self-executing.

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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. Apr. 8, 2009) (*Norris*, Cook, Griffin), the Sixth Circuit held that the asylum applicant 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 stating that she never received a notice of hearing and her demonstrated on-

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going interest in pursuing an asylum claim before the agency.

Petitioner, a native of Mauritania applied for asylum a few months after her arrival to the United States. Petitioner acknowledged that she received an NTA, which had been mailed to the address contained in her asylum application but she claimed that she never received a notice of hearing which was mailed two years later to the same address. Consequently she was ordered removed in absentia. Petitioner stated in a sworn affidavit, in support of her subsequent motion to reopen, that she was not aware of the in absentia removal order until she went to the local immigration office to inquire about the status of her application to renew her employment authorization card. The IJ denied the motion to reopen, and the BIA affirmed noting that petitioner had the burden to show non-receipt of the notice and that she had failed to state where she was residing at the time the notice was mailed.

The court preliminarily noted that "petitioner bears the burden, even when service is made by regular mail, to demonstrate that the address to which the notice was sent was current. A blanket statement, such as that made by petitioner that "I never received any notice of the hearing," is not enough." However, given the evidence that she wanted to pursue her asylum claim, and that she had every reason to appear at the hearing, the court remanded the case to give petitioner an opportunity to establish whether she was living at the address indicated in the asylum application at the time the notice was mailed.

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■ **Sixth Circuit Upholds Denial of Asylum Based on the Applicant's Failure to Provide Corroboration of His Past Practice of Falun Gong in China**

In ***Lin v. Holder***, 565 F.3d 971 (6th Cir. 2009) (Martin, Gilman, *Zachary*), the Sixth Circuit held that substantial evidence supported the BIA's determination that petitioner failed to present corroboration of his past practice of Falun Gong in China or his continuing practice in the United States. "Without showing that he continues to be a Falun Gong practitioner, [petitioner] cannot support his argument that 'race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason' for persecution on his return to China," said the court. The court also refused to take judicial notice of the 2008 State Department Country Report on China because it "cannot take judicial notice of facts, including country reports, outside the administrative record." Lastly, the court held that petitioner failed to exhaust his due process claim based on the immigration judge's failure to physically mark an exhibit at the hearing, and held that this claim nevertheless lacked merit because it was based on nothing more than a clerical error that had no affect on the outcome of the proceedings.

Without showing that he continues to be a Falun Gong practitioner, [petitioner] cannot support his argument that 'race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason' for persecution on his return to China."

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Immigration Judge Failed to Analyze Asylum Applicant's Social Group Claim Based on Her Familial Ties**

In ***Ayele v. Holder***, 564 F.3d 862 (7th Cir. 2009) (Kanne, *Williams*, Sykes), the Seventh Circuit held that the immigration judge reasonably determined that petitioner, an asylum applicant from Ethiopia, failed to establish a well-founded fear of persecution on account of her membership in the All Amhara People's Organization or on account of her Amhara ethnicity.

The court, however ruled, as the government had conceded, that the immigration judge "failed to fully analyze" petitioner's claim that she had a well-founded fear of persecution based on her familial ties. The court noted that under its case law it has recognized "a family as a cognizable social group under the INA," and that "without even mentioning this principle in the IJ's opinion" the court could not be certain that this ground of persecution had been assessed. The court further held that the immigration judge had also failed to consider whether there was a pattern or practice of persecution against members of petitioner's family.

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

In ***Krishnapillai v. Holder***, 563 F.3d 606 (7th Cir. 2009) (Easterbrook, *Rovner*, Wood), the Seventh Circuit upheld an adverse credibility determination under the REAL ID Act against an asylum applicant from Sri Lanka. Petitioner claimed that if returned to Sri Lanka, he faced likely persecution on account of his Tamil ethnicity, at the hands of both the Sri Lankan authorities and terrorist insurgents if he is forcibly returned. He also claimed that he had been persecuted by terrorist insurgents.

The court ruled that the petitioner's inconsistent testimony regarding the timing of events, his implausible statements, and his failure to provide apparently available corroborating evidence all supported the adverse credibility finding. In particular, the court noted that under the REAL ID Act, an "immigration judge now enjoys substantial leeway to demand corrobo-

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ration of an asylum applicant's allegations whether or not the judge finds the applicant credible." The court also upheld the BIA's decision that the 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.

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■ **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***, 563 F.3d 565 (7th Cir. 2009) (Bauer, Ripple, *Tinder*), 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 did not require that the alien receive actual notice of removal proceedings, only that the government attempted to delivery to the last address an alien provided. 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.

In a concurring opinion Judge Ripple suggested that the issue of the court's jurisdiction over denial of motions to reopen was ripe for review by the Supreme Court. "The time has come for higher appellate authority to determine whether the rest of the Nation now should follow our view or whether we should re-join the rest of the Nation," he wrote.

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"The time has come for higher appellate authority to determine whether the rest of the Nation now should follow our view or whether we should re-join the rest of the Nation."

■ **Seventh Circuit Rules that Alien was Denied a Meaningful Opportunity to be Heard Before an Impartial Immigration Judge**

In ***Castilho de Oliveira v. Holder***, __ F.3d __, 2009 WL 1258303 (7th Cir. May 8, 2009) (Posner, Kanne, *Sykes*), the Seventh Circuit concluded that the immigration judge ignored relevant evidence and engaged in unwarranted speculation in finding that the alien's asylum claim was not credible. As to the future persecution claim, the court determined that the IJ misconstrued the alien's argument and disregarded relevant evidence. Stating that the IJ repeatedly and inappropriately interrupted the examination of the alien and of his expert witness with irrelevant and confrontational questions, the court concluded that the record suggested apparent bias or prejudgment on the part of the IJ and remanded for a new hearing.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Denial of a Motion to Terminate Proceedings was Not an Abuse of Discretion**

In ***Hanggi v. Holder***, __ F.3d __, 2009 WL 1035139 (8th Cir. Apr. 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 Immigration Judge 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 Board.

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■ **Eighth Circuit Upholds Denial of Cancellation Applications Based Upon Failure to Adhere to Immigration Judge Filing Deadlines**

In ***Arellano-Hernandez v. Holder***, __ F.3d __, 2009 WL 1175471 (8th Cir. May 4, 2009) (*Bye*, Beam, Shepard), the Eighth Circuit denied the alien's petition for review from a decision of the Board denying her applications for cancellation of removal and cancellation of removal under the Violence Against Women Act (VAWA). The court determined that the alien's VAWA application was separate from her initial cancellation application and had to be timely filed. It further held that the immigration judge had the discretion to set filing deadlines, and a failure to timely file according to those deadlines is a valid basis for a denial.

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■ **Eighth Circuit Holds that BIA Did not Exceed Scope of Review When it Reversed the Immigration Judge's Grant of Asylum**

In ***Cubillos v. Holder***, __ F.3d __, 2009 WL 1288671 (8th Cir. May 12, 2009) (Murphy, *Smith*, Limbaugh), the Eighth Circuit held that two anony-

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mous letters, without more, over a four-year period, were insufficiently severe to constitute past persecution or to establish a well-founded fear of future persecution if the alien returned to Colombia.

The court also held that the BIA did not exceed its scope of review under 8 C.F.R. § 1003.1(d)(3) when it reversed the immigration judge's asylum grant because, rather than conducting any fact-finding on its own, the Board simply accepted the immigration judge's factual findings and concluded that the harm did not rise to the level of persecution.

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NINTH CIRCUIT

■ **Ninth Circuit Grants Alien's Panel Rehearing Petition, Holds it has Jurisdiction to Review a Particularly Serious Crime Determination (PSC) in the Asylum Context.**

In ***Delgado v. Holder,*** 563 F.3d 863 (9th Cir. 2009) (*Canby*, Siler, Berzon), the Ninth Circuit withdrew its decision at 546 F.3d 1017 (9th Cir. 2008), and granted the alien's petition for panel rehearing. The court deferred to the agency's determination that a crime may be classified as "particularly serious" even if it is not an aggravated felony, and that for purposes of asylum, the Attorney General may determine by adjudication that a crime is "particularly serious" without first so classifying it by regulation.

The court held that it lacked jurisdiction to review the BIA's discretionary determination that a crime is "particularly serious" for purposes of withholding of removal, but held it had jurisdiction over such discretionary determination in the asylum context. The court further held that the BIA erred in determining the alien's DUI convictions were "particularly serious" rendering him ineligible for asylum.

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

In *Ramos-Lopez v. Holder*, __ F.3d __, 2009 WL 1012062 (9th Cir. Apr. 16, 2009) (*Tashima*, McKeown, Fletcher), the Ninth Circuit held that *Chevron* deference was due to the BIA's interpretations of the ambiguous phrases "particular social group" and "political opinion." Accordingly, the court deferred to the BIA's decision in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), and 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 the alien's resistance to gang recruitment did not constitute a political opinion.

"To condone this style of judging, unhinged from the prerequisite of substantial evidence, would inevitably lead to unpredictable, inconsistent, and unreviewable results."

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■ **Ninth Circuit Holds that Possession of Child Pornography Is a Crime Involving Moral Turpitude**

In *United States v. Santacruz*, __ F.3d __, 2009 WL 1036081 (9th Cir. Apr. 20, 2009) (Kleinfeld, Bea, Ikuta) (per curiam), the Ninth Circuit held that possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a crime involving moral turpitude. The court concluded that, even though the federal statute lacked an element of specific intent, the act of knowing possession of child pornography is so inherently vile, base, and depraved that it involves moral turpitude. The court affirmed the district court's order revoking defendant's naturalization because his commission of the crime of possession of child pornography precluded him from meeting the good moral character requirement for naturalization and rendered him ineligible for naturalization, as a matter of law.

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■ **Tenth Circuit Remands Withholding of Removal Claim Based on Homosexual Social Group for New Hearing Before Different Immigration Judge**

In *Razkane v. Holder,* 562 F.3d 1283 (10th Cir. 2009) (Briscoe, Holloway, *Murphy*), the Tenth Circuit reversed the denial of withholding of removal against an applicant from Morocco and remanded for a new hearing and a different immigration judge if the BIA deemed further consideration before an IJ were necessary. The court determined that homosexual stereotyping infected the immigration judge's analysis. In particular, the court found that the "IJ's reliance on his own views of the appearance, dress, and affect of a homosexual led to his conclusion that [petitioner] would not be identified as a homosexual."

The court held that a remand was appropriate so that all findings are based on evidence and not stereotypical assumptions. "To condone this style of judging, unhinged from the prerequisite of substantial evidence, would inevitably lead to unpredictable, inconsistent, and unreviewable results," it said.

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ELEVENTH CIRCUIT

■ **Adverse Credibility Finding was Erroneous Where Inconsistencies Were not Truly Inconsistent**

In *Kueviakoe v. United States Att'y Gen.*, __ F.3d __, 2009 WL 1298537 (11th Cir. May 12, 2009) (Marcus, Kravitch, Anderson) (per curiam), the Eleventh Circuit held that the agency wrongly decided that the alien was not credible because the cited inconsistencies were in fact not inconsistencies at all. In this post-REAL ID case, the court ruled that there was no plausible or material inconsistency between "car," as used in his testimony, and "truck," as used in his asylum application. The court also ruled that the alien's written statement indicating that he was tortured for two days was consistent with his testimony indicating that he was only beaten on one day. Lastly, the court disagreed that the alien's statement that he was "hospitalized two days after his release" and his testimony that he stayed three weeks, were inconsistent because the agency improperly added the word "for" to his statement.

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■ **Eleventh Circuit Affirms BIA Finding of No Nexus for Withholding of Removal Claim**

In *Peraza Recinos v. Holder* __ F.3d __, 2009 WL 1107806 (11th Cir. April 27, 2009) (Dubina, Wilson, *Pryor*), the Eleventh Circuit held that substantial evidence supported the BIA's denial of a Guatemalan alien's application for withholding of removal because the alien failed to establish a nexus between the harm he feared and his political activities. The court also held that it lacked jurisdiction to review the denial of the alien's untimely application for asylum.

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DISTRICT COURTS

■ **Los Angeles District Court in Class Action Case Applies Law of Aliens' Residence in Determining Whether Alien Widows and Widowers May Adjust Status to Lawful Permanent Residents**

In *Hootkins v. Napolitano*, 2:07-cv-05696 (C.D. Cal. Apr. 28, 2009) (Snyder, J.), Los Angeles District Court Judge Snyder granted summary judgment to plaintiffs in part and to defendants in part. Plaintiffs are surviving alien spouses of U.S. citizens, whose citizen spouses died before their second marriage anniversaries and before U.S. Citizenship and Immigration Services (USCIS) adjudicated their adjustment-of-status applications. The court earlier had refused to certify a nationwide class, instead certifying one limited to alien surviving spouses within the Ninth Circuit, but it allowed individual plaintiff aliens from outside the Ninth Circuit to continue in the lawsuit. In its April 28th decision, the court followed a prior Ninth Circuit surviving-spouse case and held that USCIS abused its discretion by imposing certain limitations on Ninth Circuit class aliens who applied for adjustment of status under the rationale of that case. Then the court refrained from applying Ninth Circuit law to non-Ninth Circuit individual plaintiffs, and specifically applied Third Circuit law (which conflicts with Ninth Circuit law) to the individual plaintiff residing within the Third Circuit.

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■ **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, J.), 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 his 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.

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■ **District Court Denies Plaintiffs' Preliminary Injunction Motion Seeking to Enjoin Policy for Adjudicating Alien Therapist Worker Petitions**

In *RCM Technologies v. DHS*, 09-cv-650 (D.D.C. May 11, 2009) (Bates, J.), the District Court denied plaintiffs' motion for a preliminary injunction. Plaintiffs sought to enjoin USCIS from implementing purported policy-setting standards for the adjudication of temporary worker petitions for physical and occupational therapists. Plaintiffs alleged that the purported policy, albeit unwritten, was approved by USCIS headquarters and provided that temporary worker petitions for physical and occupational therapist positions must require at least a master's degree for the position to qualify as a specialty occupation under the statute. Plaintiffs alleged that the purported policy is contrary to the organic statute and was promulgated in violation of the APA's notice and comment rulemaking requirements. The district court denied preliminary injunctive relief because plaintiffs' attack on the agency's policy was not a challenge to a "final" agency action, as required under the APA. Plaintiffs also failed to show that their alleged economic harm stemming from the denied petitions constituted irreparable injury.

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Ninth Circuit's Disfavored Group Approach

different levels of conduct, past inidividual discrimination in itself is not probative of future individual persecution. Rather, an applicant would have to also produce evidence showing how and why past discrimination would escalate to future persecution in his or her particular case.

These errors skew the risk assessment under the disfavored group approach, resulting in illegitimate asylum eligibility where there is a less than 10% risk of future persecution. Take for example the *Sael* case, where a female ethnic Chinese Indonesian claimed to fear future persecution based on two chance encounters during the 1998 riots, a verbal threat, two instances of vandalism, and childhood discrimination at school. *See* 386 F.3d 925-29. The Ninth Circuit's decision recited that more than 1,000 people were killed and "dozens" of women were raped in the 1998 rioting, and an unspecified number of businesses, homes, or churches were vandalized. *Id.* While these kinds of statistics are deplorable, a portion of the country report the Ninth Circuit did not mention put this in context. At that time the population of Indonesia was 211 million persons, of which 3% -- or approximately 6.33 million persons -- were ethnic Chinese. To meet the Ninth Circuit's 10% risk of future persecution standard based on being ethnic Chinese, Sael would have to have shown that 10% of the ethnic Chinese Indonesians (633,000 ethnic Chinese) were currently being persecuted in Indonesia. In at least one other case the court has recognized that this kind of statistical evidence and analysis is appropriate. *See Hakeem,* 273 F.3d at 816-17. But the evidence upon which the court relied in *Sael* showed nothing near this level of mistreatment. Even assuming several thousand businesses or homes were destroyed, the risk of future persecution appears to have been less than 1%. The Ninth Circuit held that Sael qualified for asylum, because in the "context of the country-conditions evidence of widespread discrimination," her past experiences made an individualized risk showing of a "well-founded fear" of future persecution (that is a 10% risk). *Wakkary*, 558 F.3d at 1063, 1064. If anything, Sael's past experiences of discrimination and harassment are evidence that she is part of the relevant disfavored group, *i.e.,* the ethnic Chinese, the group which was determined to be disfavored because of general discrimination and harassment. Without an analysis of whether an applicant's experiences were appreciably harsher than others in her group, any analysis of the context of an alien's claim would be incomplete and would not justify a departure from a necessary showing of the Ninth Circuit's 10% risk of persecution for the relevant group. In failing to complete such an analysis, *Sael* demonstrates how asylum may be granted in cases where the risk of future persecution is less than the stated 10% standard.

5. The approach leads to confusion and disarray in the law

Contrary to the Ninth Circuit's *en banc Lolong* decision, *supra* -- which holds that the approach applies only to proof of being "singled out individually" for future persecution -- the court recently mistreated the disfavored approach as a standard for determining if past conduct rose to the level of "persecution." *Sinha v. Holder*, 556 F.3d 774, 784-85 (9th Cir. 2009). This conflates the elements of past persecution and future persecution, which require independent analyses with different legal standards. This appears to have been dicta since the court was addressing an issue which it conceded was not before the court. But this shows how the approach leads to confusion and conflation of legal standards.

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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." Giving welcoming remarks will be Tony West, the Assistant Attorney General for the Civil Division.

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

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INSIDE OIL

OIL welcomes new Trial Attorney ***David H. Wetmore.*** He received his B.A. from Miami University, majoring in Political Science and Philosophy, and his J.D. from The George Washington University Law School, where he currently teaches Legal Research and Writing. Following law school, David clerked for the Honorable Gordon J. Quest, U.S. District Court for the Western District of Michigan, and later for the Honorable Daniel A. Manion, U.S. Court of Appeals for the Seventh Circuit. Prior to joining OIL, David practiced in Sidley Austin LLP's D.C. office, where he was active in the firm's white collar and appellate litigation practices.

David H. Wetmore

Senior Litigation Counsel ***Francesco Isgro*** has been the Acting Director of Training for the Civil Division pending the recruitment of a permanent Director.

Assistant Attorney General Tony West visited the Office of Immigration Litigation shortly after his appointment. Pictured at left is Tony West with Nannette Anderson and with other OILers in the corridors of LSB.

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

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