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

# Immigration Litigation Bulletin

*Vol. 12, No. 11* *November 2008*

## LITIGATION HIGHLIGHTS

■ **Asylum**

►Lari ethnic group of Kongo tribe is a particular social group (8th Cir.) **13**

►Written warning on asylum application sufficient notice of consequence of filing frivolous asylum application (10th Cir.) **15**

►Falsification of asylum claim sufficient basis for frivolous finding (7th Cir.) **12**

■ **Crimes**

►Subsequent simple possession conviction not an aggravated felony (2d Cir.) **9**

►First degree larceny conviction not a CIMT (2d Cir.) **9**

■ **Jurisdiction**

►District court has jurisdiction over citizenship claim challenge to detention of alien in removal proceedings (9th Cir.) **15**

►Court finds jurisdiction to review case where BIA had reversed IJ's grant of asylum but remanded for VD (2d Cir) **10**

■ **Visas—Adjustment**

►Five year limitation on rescission of adjustment of status also applies to removal proceedings (3d Cir.) **11**

►In abandonment of permanent residence case, IJ improperly placed burden on a LPR (2d Cir.) **8**

## Inside



## Detention Rule Permits Continued Detention of Dangerous and Mentally Ill Aliens

***Brand X* and *Chevron* Trump *Zadvydas* and *Martinez***

In ***Hernandez-Carrera v. Carlson***, __F.3d__, 2008 WL 4868479 (10th Cir. Nov. 12, 2008) (Kelly, *McConnell*, Tymkovich), the Tenth Circuit held that under the principles outlined in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005), a subsequent, reasonable agency interpretation of an ambiguous statute, which avoids raising serious constitutional doubts, is due deference notwithstanding the Supreme Court's earlier contrary interpretation of the statute.

The issue involved the Attorney General's construction of INA § 241 (a)(6) as set forth in 8 C.F.R. § 241.14, which authorizes the detention beyond 90 days of aliens who are particularly dangerous and mentally ill. In *Zadvydas v. Davis*, 553 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court held that INA § 241(a)(6) permitted detention only for a period "reasonably necessary to remove an alien from the United States," namely presumptively six months.

The petitioners here are citizens of Cuba who sought to enter the United States illegally in 1980, during the Mariel boatlift. Both Cubans were classified as "inadmissible aliens," and were paroled into the United States. The government revoked their parole, however, in part because of their criminal convictions while on parole. Subsequently, petitioners were both

*(Continued on page 16)*

## Supreme Court Hears Persecutor Bar Case

On November 5, 2008, the Supreme Court heard argument in ***Negusie v. Mukasey***, No. 07-499. The question presented was whether an alien who was admittedly involved in persecutory conduct is exempt from the "persecutor bar" provisions of the INA if his conduct was the product of coercion.

### Statutory Framework And Background

The Immigration and Nationality Act (INA) prohibits the Attorney General from granting asylum to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42) and 1158(b)(2)(A)(i); *see also* 8 C.F.R. § 1208.13(c)(1). The INA similarly precludes any alien who "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion" from obtaining withholding of removal. 8 U.S.C. § 1231(b)(3)(B)(i); *see* 8 C.F.R. § 1208.16(d)(2). The INA's imple-

*(Continued on page 2)*

# Persecutor Bar Argued Before Supreme Court

(Continued from page 1)
menting regulations also direct that an applicant who engaged in persecutory conduct may not obtain withholding of removal under the Convention Against Torture (CAT), 8 C.F.R. § 1208.16(d)(2), although he is still eligible for deferral of removal under the CAT, 8 C.F.R. §§ 1208.16(c)(4) and 1208.17(a).

Negusie is a native and citizen of Eritrea who was forcibly conscripted into military service as a prison guard. At the prison where Negusie was a guard, prisoners were routinely tortured or killed on account of protected grounds such as religion and nationality. Negusie carried a gun and was responsible for keeping control over prisoners and preventing their escape. His duties included "punish[ing] the prisoners . . . by exposing them to the extreme sun heat" and by denying them water, forbidding them to take showers, and keeping them from ventilation and fresh air. Negusie was aware that prisoners died when exposed to the sun "for more than a couple of hours" and he knew that at least one person he guarded died as a result of sun exposure. Negusie also knew that prison officials used electricity to torture prisoners while he was standing guard. Negusie eventually abandoned his military post and fled Eritrea for the United States, where he applied for asylum, withholding of removal, and protection under the CAT.

An immigration judge (IJ) denied Negusie's applications for asylum and withholding of removal, concluding that he was barred from obtaining relief because he had "assisted or otherwise participated in the persecution of others" in his role as an armed prison guard. The Board of Immigration Appeals (Board) dismissed Negusie's appeal. Given Negusie's role as an armed prison guard and the evidence regarding the mistreatment endured by prisoners, the Board affirmed the IJ's determination that Negusie assisted or participated in the persecution of another on account of a protected ground. Relying on its own precedent, the Board held that whether Negusie "was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." The Board explained that Negusie's "motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution" because "it is the objective effect of [his] actions which is controlling."

**The Board explained that Negusie's "motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution."**

The Fifth Circuit denied Negusie's petition for review. Relying on the Supreme Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), the court of appeals held that "[t]he question whether [Negusie] was compelled to assist authorities is irrelevant, as is the question whether [he] shared the authorities' intentions." Instead, the court explained, "the inquiry should focus 'on whether [Negusie's] particular conduct can be considered assisting in the persecution'" of others. (quoting *Fedorenko*, 449 U.S. at 512). Applying that objective standard, the court of appeals held that the record evidence supported the Board's conclusion that Negusie assisted or participated in the persecution of prisoners. The Supreme Court granted Negusie's petition for a writ of certiorari over the government's opposition.

## Discussion

Before the Court, Negusie (joined by six *amici curiae*) argued that the court of appeals and the BIA erred in finding him ineligible for asylum and withholding of removal because being forced, upon threat of death or serious injury, to engage in acts of persecution does not trigger the persecutor bar. According to Negusie, an alien can only "assist" or "participate" in persecution if his "state of mind satisfies a standard of moral offensiveness" that is inherent in the term "persecution" — a standard that is not satisfied when the alien's conduct is coerced. Negusie further argued that the INA's persecutor bar must be read in the same manner as the United Nations Protocol Relating to the Status of Refugees, which excludes from the definition of "refugee" those aliens who have engaged in certain criminal conduct, and therefore incorporates criminal law concepts such as a duress defense. Moreover, Negusie claimed that the court's and Board's reliance on *Fedorenko* was misplaced because, in that case, the Court "construed the provision[s] of a different statute with different statutory language enacted in a very different statutory context." Finally, Negusie averred that, even assuming there is some ambiguity in the statutory text of the persecutor bar, the Board's interpretation — that voluntariness is not relevant — is not entitled to *Chevron* deference.

In response, the government argued that the plain text of the persecutor bar makes clear that it applies categorically. The statute, the Attorney General said, contains no *mens rea* requirement and no duress exception, and the words Congress chose — "assisted" and "participated" in "persecution" — evidence its intent that the persecutor bar be applied objectively based on an alien's conduct, not his state of mind. The government also claimed that if there is any ambiguity in the statute, the Board's determination that the persecutor bar applies without regard to motivation is controlling. According to the government, the Board's conclusion relies on the plain meaning of the statutory

(Continued on page 3)

## Supreme Court hears arguments on persecutor bar

(Continued from page 2)
terms; the Board's longstanding construction of key term "persecution"; the policies underlying the persecutor bar; and the Court's interpretation of a predecessor persecutor bar in *Fedorenko*. The government contended that there is no basis for concluding that the Board acted unreasonably in refusing to recognize an exception to a statute that, on its face, contains no exceptions.

At argument, the Justices approached the question presented from different perspectives, invoking morality, history, and plain English. Justice Breyer insisted that the Court was free to interpret the statute to require a level of intentional or voluntary conduct, which is inherent in the concepts of "praise and blame" — concepts that are deeply rooted in the law and in thousands of years of human history "which traces back at least to Aristotle." Justice Breyer was skeptical of the government's argument that Congress intended the persecutor bar to apply "where the person is in no sense blameworthy." Justice Scalia, however, agreed with the government's assertion that while it may be appropriate to read such requirements into criminal statutes, "[l]imiting the nation's generosity" in the immigration context "may or may not have anything to do with blame."

Justice Ginsburg wondered whether *Fedorenko* should be the starting point for the Court's analysis, noting that "the wording of [the INA's persecutor bar] provision[s] is very close to the wording of [the] statute [at issue in *Fedorenko*]," indeed, "much closer than the UN covenant" upon which Negusie relied. Justice Souter was quick to point out, however, that Negusie's case is distinguishable from *Fedorenko* because the statutory text at issue in *Fedorenko* revealed an express distinction between voluntary and involuntary conduct, whereas the INA persecutor bar provisions contain no such textual distinction.

Justices Alito and Scalia pressed Negusie's counsel to define what level of coercion might justify an alien's assistance or participation in persecution, and how the balance between those two concepts might be struck. Justice Ginsburg and Justice Souter were also curious about the lowest possible standard for such coercion, and questioned whether "serious bodily harm" would be sufficient. Justice Alito speculated that the practical consequence of Negusie's position was that the Attorney General would, in individual cases, "have to decide the degree of the threat that the asylum claimant underwent and the consequences of failing to comply with whatever he was directed to do." Justice Alito, Justice Scalia, and the Chief Justice all expressed concern that immigration judges would be making these difficult determinations "based solely on the credibility [of] an uncorroborated witness who's typically testifying through an interpreter and who has all the mannerisms and aspects of speech of someone who comes from an entirely different culture." Justice Kennedy further wondered whether the Attorney General even has the necessary "expertise [to determine] degrees of duress [or] degrees of culpability."

**Justice Breyer was skeptical of the government's argument that Congress intended the persecutor bar to apply "where the person is in no sense blameworthy."**

Of particular interest to several of the Justices was whether the government was advocating the position that, not only is involuntariness not relevant to the assistance in persecution calculus, but an alien can be subject to the persecutor bar even if he did not *know* that his actions would result in persecution. For example, although Justice Scalia seemed to think that the concepts of knowledge and voluntariness "are quite separable," he believed that the government was adopting an "extreme position" by saying, in some cases, that knowledge is not required. Justice Stevens also wondered what difference is there, if any, between "lack of intent" and "lack of knowledge." Justice Breyer further added that it was unclear why the government "read[s] some aspects of what it takes to hold a person responsible into the statute, but [does not] read other aspects of what it takes to hold a person [morally responsible] into the statute."

The Court also wrestled with how to conduct a *Chevron* analysis in this case. Justices Kennedy and Scalia, for instance, debated whether — assuming the statute is ambiguous — the Court can and should defer to the Board's conclusion that it was bound by *Fedorenko* to hold that voluntariness is not relevant. Justice Ginsburg also questioned whether the categorical exclusion of people who had involuntarily engaged in acts of persecution was unique to the Holocaust, and whether the Court should consider how other nations now treat such claims. Chief Justice Roberts, on the other hand, focused on step one of the *Chevron* analysis, looking to the plain language of the law itself. He read the statute to bar relief from aliens whose assistance or participation in persecution was "on account of" a protected characteristic of the victim(s).

### Briefing Note

The question whether to hold a petition for review in abeyance pending the Court's decision in *Negusie* must be considered on a case-by-case basis. Generally, it is only appropriate to hold a case in abeyance if the court is squarely presented

(Continued on page 16)

# Adverse Credibility Project

The Adverse Credibility Project was established over four years ago as a means to track decisions issued by the courts of appeals that specifically make a ruling on the agency's adverse credibility determinations. The decisions include opinions, memorandum dispositions, and orders – that is, decisions that are unpublished and published, non-precedent and precedent. The "database" or source for obtaining these decisions are the paper copies of decisions that the Clerks' offices send to OIL, and the electronic copies of adverse decisions that the Adverse Support Team (headed by Angela Green) obtains by searching the courts' electronic dockets.

**The Ninth Circuit upheld the agency's adverse credibility findings in 59.7% of the decisions issued between January 2005 and December 2007.**

The data compiled below reflects a tally of all decisions in which – regardless of the ultimate outcome of the petition for review – the appellate court has either approved of, or reversed, the adverse credibility holding reached by the immigration judge or Board of Immigration Appeals. Petitions for review decided wholly on non-credibility related issues are not counted, even though the immigration judge or Board of Immigration Appeals made an adverse credibility determination. So, for example, cases in which the court upheld the agency's adverse credibility determination, but nevertheless granted the petition for review on a different issue, would be included in this project. However, a petition denied because of a failure to demonstrate the requisite nexus, without involving any credibility issues, would not.

The following charts reflect relevant decisions issued by the courts of appeals in 2005, 2006, and 2007, the most recent years for which complete data is available. In that period, the Second and Ninth Circuits issued the highest numbers of cases addressing the agency's credibility finding (482 and 586, respectively). Further, these numbers indicate that the Ninth Circuit upheld the agency's adverse credibility findings in 59.7% of the decisions issued between January 2005 and December 2007. That figure differs significantly from a similar statistic noted by the Ninth Circuit in *Tekle v. Mukasey*, 533 F.3d 1044, 1047 (9th Cir. 2008), which found that "in asylum cases decided between January 2005 and March 2008 the Ninth Circuit affirmed approximately 80% of all adverse credibility findings." 533 F.3d at 1047. The charts below also indicate a higher than usual reversal rate in the majority of the courts during 2006. The Office is investigating reasons that may explain these disparities.

Previous uses for this project's results include support for the REAL ID Act's amendments regarding the agency's credibility determinations and the Department's ongoing efforts to challenge the Ninth Circuit's pre-REAL ID Act adverse credibility rules.

The "win" column refers to decisions in which the court has upheld or affirmed the agency's adverse credibility finding, regardless of whether the petition for review was granted or denied. The "loss" column refers to decisions in which the court has rejected or reversed the agency's adverse credibility finding, regardless of whether the petition for review was granted or denied.

By Donald E. Keener, OIL
Song Park, OIL
☎ 202-616-2189

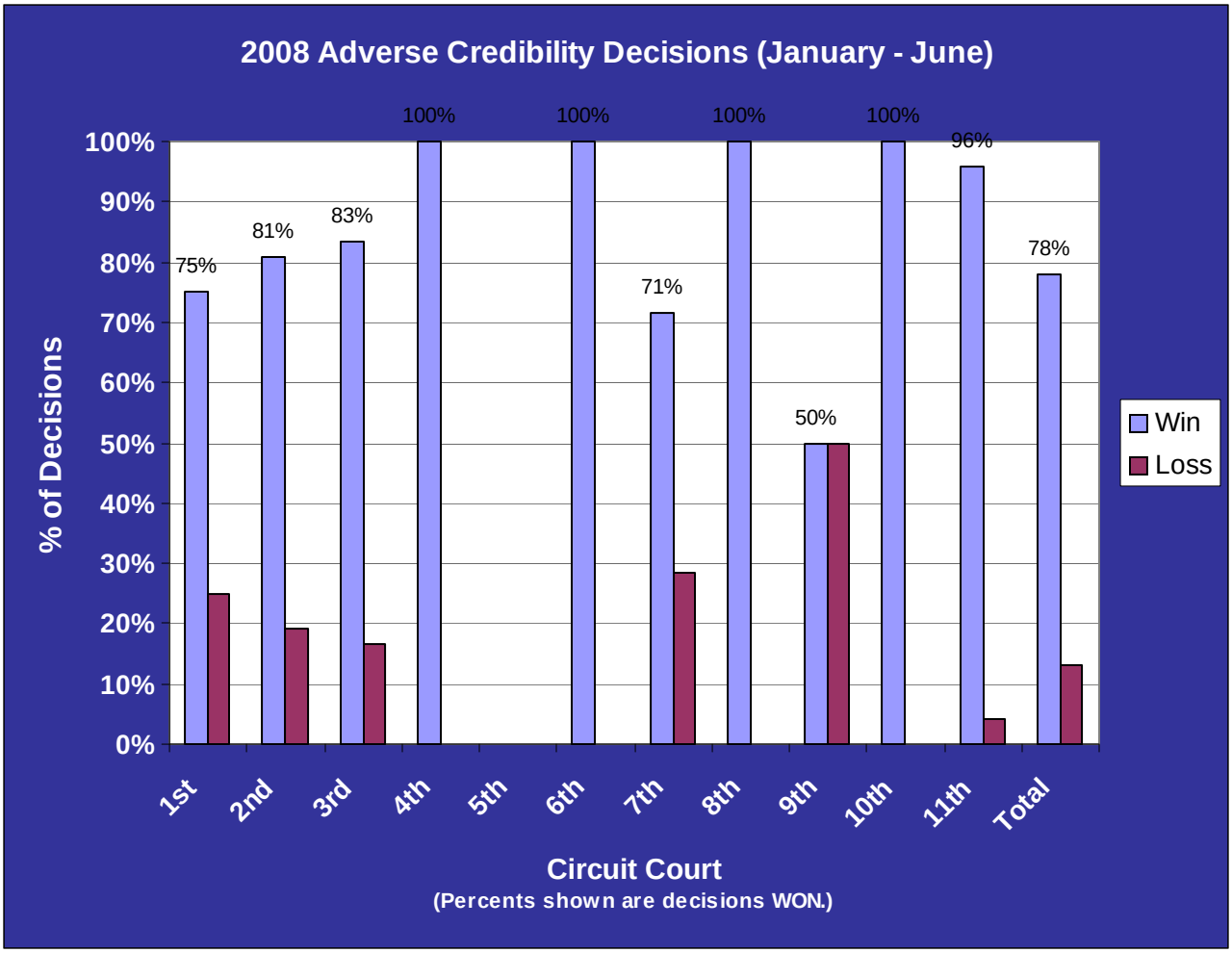
**2007 Adverse Credibility Decisions**

| Circuits | Win | (number) | Loss | (number) |
|---|---|---|---|---|
| 1st | 83% | 10 | 17% | 2 |
| 2nd | 54% | 93 | 46% | 78 |
| 3rd | 50% | 7 | 50% | 7 |
| 4th | 95% | 19 | 5% | 1 |
| 5th | 100% | 10 | 0% | 0 |
| 6th | 84% | 26 | 16% | 5 |
| 7th | 41% | 7 | 59% | 10 |
| 8th | 83% | 10 | 17% | 2 |
| 9th | 61% | 121 | 39% | 76 |
| 10th | 89% | 8 | 11% | 1 |
| 11th | 100% | 59 | 0% | 0 |
| *Total* | *76%* | *370* | *24%* | *182* |

# Asylum credibility decisions

| 2006 Adverse Credibility Decisions | | | | |
|---|---|---|---|---|
| Circuits | Win | (number) | Loss | (number) |
| 1st | 100% | 6 | 0% | 0 |
| 2nd | 14% | 30 | 86% | 183 |
| 3rd | 29% | 6 | 71% | 15 |
| 4th | 72% | 13 | 28% | 5 |
| 5th | 75% | 9 | 25% | 3 |
| 6th | 86% | 32 | 14% | 5 |
| 7th | 47% | 8 | 53% | 9 |
| 8th | 57% | 4 | 43% | 3 |
| 9th | 55% | 90 | 45% | 73 |
| 10th | 25% | 2 | 75% | 6 |
| 11th | 86% | 37 | 14% | 6 |
| *Total* | *59%* | *237* | *41%* | *308* |

| 2005 Adverse Credibility Decisions | | | | |
|---|---|---|---|---|
| Circuits | Win | (number) | Loss | (number) |
| 1st | 94% | 17 | 6% | 1 |
| 2nd | 63% | 62 | 37% | 36 |
| 3rd | 67% | 28 | 33% | 14 |
| 4th | 94% | 15 | 6% | 1 |
| 5th | 100% | 27 | 0% | 0 |
| 6th | 69% | 20 | 31% | 9 |
| 7th | 38% | 9 | 63% | 15 |
| 8th | 84% | 21 | 16% | 4 |
| 9th | 62% | 139 | 38% | 87 |
| 10th | 94% | 15 | 6% | 1 |
| 11th | 97% | 32 | 3% | 1 |
| *Total* | *78%* | *385* | *22%* | *169* |



# USCIS Publishes Final Rule for Religious Worker Visa Classifications

On November 26, 2008, USCIS published a final rule for Religious Worker Visa Classifications. 73 *Fed. Reg*. 72298 (Nov. 26, 2008)

The rule makes significant revisions to the special immigrant and nonimmigrant (R-1) religious worker visa classification regulations. Among the revisions are the following:

### Petitioning Requirements

The rule requires in every instance the filing of a petition by an employer on behalf of a nonimmigrant religious worker (the petition requirement already exists for special immigrants and for organizations seeking to extend the stay for or change status to nonimmigrant religious workers already in the U.S.). The employing U.S. organization must complete and submit the Petition for a Nonimmigrant Worker (Form I-129) or Petition for a Special Immigrant (Form I-360) (except in cases where the special immigrant is self-petitioning).

This requirement will allow USCIS to verify the eligibility of the petitioner, the alien beneficiary, and the job offer prior to the issuance of a visa or admission to the United States. Petitioning employers will be required to submit an Attestation (included in the Forms I-129 and I-360) verifying the worker's qualifications, the nature of the job offered, and the legitimacy of the organization.

### Onsite Inspections

The final rule provides additional notification to petitioners that USCIS may conduct onsite inspections of organizations seeking to employ religious workers. Inspections are intended to increase deterrence and detection of fraudulent petitions and to increase the ability of the agency to monitor religious workers and ensure their compliance with the terms of their religious worker classification.

If an onsite inspection yields derogatory information not known to the petitioner, USCIS will issue a Notice of Intent to Deny the petition. The petitioner may submit additional documentation to rebut the derogatory evidence. A denial of a petition may be appealed to the USCIS Administrative Appeals Office.

### Evidentiary Requirements for Petitioning Organizations

All petitioning organizations must submit a currently valid determination letter from the Internal Revenue Service establishing their tax-exempt status. (Note: A valid determination letter includes those issued before the effective date of the Internal Revenue Code (IRC) of 1986 and also those which may be issued under future IRC revisions).

Petitioning organizations that are not classified as "religious organizations" by the Internal Revenue Service must establish the religious nature and purpose of their organization. They must also certify that they are affiliated with a religious denomination that is tax exempt by completing the Religious Denomination Certification in the revised Forms I-129 and I-360.

### Nonimmigrant Religious Worker Classification

Every petition for a nonimmigrant religious worker (R-1) classification must be initiated by a prospective or existing employer through the filing of a Form I-129 with USCIS. The beneficiary (the religious worker) will no longer be able to obtain an R-1 visa at a U.S. Consulate abroad or at a port-of-entry without prior approval of the Form I-129 by USCIS.

The rule amends the standard initial period of stay for nonimmigrant religious workers from three years to up to 30 months. The period of stay granted is always based on the petitioner's need for the alien's services. The revision gives the agency the opportunity to review, at an earlier time, whether the terms of the R-1 visa have been met. (Requests for one potential extension of an additional 30 months will be considered.)

### Definitions

The final rule amends the definition of Religious Vocation to be a formal lifetime commitment to a religious way of life. The rule amends the definition of Religious Occupation by requiring that the occupation relate primarily to a traditional religious function that is recognized as a religious occupation within the denomination.

The rule defines the term Minister to be a person duly authorized by a religious denomination to conduct religious worship and other duties performed by clergy; but requires no uniform types of training for all denominations. Petitioning organizations may submit evidence of the individual denomination's requirements for ordination to minister, the duties allowed to be performed by virtue of ordination, and the denomination's levels of ordination, if any.

The rule defines Religious Denomination as a religious group or community of believers governed or administered under some form of "ecclesiastical government." USCIS acknowledges, however, that some denominations lack a central government. Accordingly, the religious entity may satisfy the 'ecclesiastical government' requirement by submitting a description of its own internal governing or organizational structure. Verifiable evidence must demonstrate how the alien will be supported.

# FURTHER REVIEW PENDING: Update on Cases & Issues

### Asylum — Persecutor Bar

On November 5 2008, the Supreme Court heard oral arguments in ***Negusie v. Gonzales***, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (per curiam), *cert. granted sub nom.* ***Negusie v. Mukasey***, No. 07-499, 2008 WL 695623 (U.S. Mar. 17, 2008). The question presented is: Does "persecutor exception" prohibit granting asylum to, and withholding of removal of a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

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

### GMC - Family Unity Waiver

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

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

### Coercive Family Planning Spouses — Lin/S-L-L- Issue

On May 28, 2008, the Third Circuit submitted ***Lin-Zheng v. Attorney General of the U.S.***, No. 07-2135, without oral argument to the en banc court. Prior to the Attorney General's decision in *Matter of J-S-*, 24 I&N Dec. 540 (A.G. 2008), the court had sua sponte ordered en banc hearing based on the issue of whether spouses of those subjected to forced sterilization or other family planning practices in China should be entitled to eligibility as refugees under 8 U.S.C. § 1101(a)(42)(B) for purposes of asylum, specifically including whether the court should adopt the reasoning of the Second Circuit in *Lin v. U.S. Dept. of Justice*, 494 F.3d 296 (2d Cir. 2007), which conflicts with *Chen v. Attorney General of the U.S.*, 491 F.3d 100 (3d Cir. 2007).

Song Park, OIL
☎ 202-616-2189

### Stay of Removal — Standard

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

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

### EAJA – Prevailing Party

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

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

### VWP — Waiver, Due Process

On October 15, 2008, the government filed a 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 is valid only if entered into knowingly and voluntarily, and is the alien entitled to a hearing on whether the waiver was knowing and voluntary?

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

### 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?

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

### CIMT—DUI

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

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

# Summaries Of Recent Federal Court Decisions

## SUPREME COURT

**■ Supreme Court Grants Stay Of Removal And Certiorari On Issue Of Appropriate Standard For Stay Of Removal Pending Judicial Review**

In ***Nken v. Mukasey***, __S. Ct.__, No. 08-681 (Nov. 25, 2008) the Supreme Court granted Nken's application for a stay of removal (No. 08A413) pending further order of the Court, treated his stay application as a petition for certiorari, and granted certiorari (No. 08-681) to resolve a circuit split on the appropriate standard for granting a stay of removal pending judicial review. Nken applied for a stay after the Fourth Circuit denied his motion for a stay of removal pending its decision on the petition for review. The Supreme Court directed the parties to file briefs addressing "[w]hether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in INA § 242(f)(2), 8 U.S.C. § 1252(f)(2), or instead by the traditional test for stays and preliminary injunctive relief." The Court has set oral argument for 1 p.m., Wednesday, January 21, 2009.

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

## FIRST CIRCUIT

**■ First Circuit Upholds Credibility Denial Of Pre-REAL ID Asylum Application Because Inconsistencies Went "To The Heart Of" The Alien's Claim**

In ***Bebri v. Mukasey***, 545 F.3d 47 (1st Cir. 2008) (Howard, Baldock, *Selya*), despite the IJ's reliance upon non-evidentiary "personal knowledge" in reaching an adverse credibility determination, the First Circuit upheld the IJ's denial of asylum.

Petitioner Bebri, an Albanian national who entered the U.S. illegally on February 4, 2001, sought asylum based upon alleged political persecution. The IJ denied asylum based upon "serious discrepancies" in the petitioner's testimony, as well as the striking similarity of petitioner's escape route to a well-known Albanian human-trafficking route. The BIA affirmed the IJ's adverse credibility decision on November 7, 2007.

**The court determined that fines and other economic penalties likely to be imposed upon petitioner's return to China would not amount to persecution.**

Petitioner appealed to the First Circuit, arguing that his testamentary discrepancies were not central to the merits of the asylum claim and thereby did not warrant adverse credibility. Moreover, he argued that the IJ had improperly relied upon assumptions and personal knowledge of human-trafficking routes rather than the evidence on the record. The court held that petitioner's inconsistent statements regarding the time, location, duration and intensity of the alleged persecution he received in Albania were indeed central to the merits of his asylum claim, in that "they go to the heart of the matter". The court also found that while the IJ's personal knowledge of Albanian human-trafficking routes affected petitioner's veracity, "that subject was peripheral to the merits of his asylum claim . . . [and] was only marginally relevant to his credibility".

Contact: Shahrzad Baghai, OIL
☎ 202-305-8273

**■ First Circuit Upholds The Denial Of A Motion To Reopen Based on The Births Of Two Children In The United States**

In ***Zheng v. Mukasey***, __F.3d__, 2008 WL 4725453 (1st Cir. Oct. 29, 2008) (Lynch, Torruella, Boudin) *per curiam,* the First Circuit affirmed the BIA's denial of a motion to reopen an asylum proceedings based on alleged new evidence. The petitioner is an asylum applicant from the Fujian Province in China, who has two children born in the United States. In support of her motion, she proffered affidavits from her family and from one John Aird. The court determined that fines and other economic penalties likely to be imposed upon petitioner's return to China would not amount to persecution.

In particular, the court noted that the Aird Affidavit has been consistently found to be less convincing than the State Department reports, and that the Fujian Family Planning Commission documents were insufficient to establish a well-founded fear of future persecution, citing the Second Circuit's recent decision in *Shao v. Mukasey*, __F.3d__, 2008 WL 4531571 (2d Cir. Oct. 10, 2008).

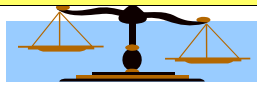
Contact: Christina B. Parascandola, OIL
☎ 202-514-3097

## SECOND CIRCUIT

**■ Second Circuit Holds That The Immigration Judge Improperly Allocated The Burden Of Proof Regarding Abandonment Of Lawful Permanent Residence**

In ***Matadin v. Mukasey***, __F.3d__, 2008 WL 4489760 (2nd Cir. Oct. 25, 2008) (Walker, Straub, *Pooler*), the Second Circuit vacated the decision of the BIA for misallocating the burden of proof when it decided that petitioner had abandoned her lawful permanent resi-

*(Continued on page 9)*



# Summaries Of Recent Federal Court Decisions

*(Continued from page 8)*
dent status.

The petitioner, a citizen of Guyana, was admitted to the U.S. as an LPR, in 1994. On September 2, 1999, she traveled to Guyana to care for her ailing father who had purportedly suffered a severe heart attack compounded by other debilitating illnesses. Petitioner allegedly remained in Guyana for the next thirty months nursing him back to health. While in Guyana, she worked as a sales clerk and also married a Guyanese citizen. Petitioner returned to the U.S. with her new husband in April 2002. Upon her return, DHS concluded that she had abandoned her LPR status and initiated removal proceedings.

**"DHS bore the burden of proving by clear, unequivocal and convincing evidence that [petitioner] had abandoned her LPR status."**

At a deportation hearing held on May 9, 2005, the IJ held that petitioner had abandoned her LPR status and found her removable as an immigrant not in possession of a valid entry document. The IJ informed petitioner at the outset that she bore the burden of proof, stating "when, as here, a permanent resident has been continuously absent for more than a year prior to seeking readmission, the resident has the burden to demonstrate that she did not abandon her lawful permanent residence during the course of her absence." The BIA affirmed the the IJ decision adding only that petitioner had presented no unforeseen circumstances that would explain the delay in her return to the United States.

The Second Circuit preliminarily noted that the question of the applicable burden of proof in abandonment cases was one of first impression for the court. The court found that the case and the rule cited by the IJ, namely *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988) and 8 C.F.R. 211.1(a)(2), did not support the contention that the burden of proof shifted to the alien after an absence of more than one year. "Indeed, we have no statute or regulations" that speaks to that issue said the court. The court then held, citing to cases discussing the burden of proof in removal proceedings, that the "DHS bore the burden of proving by clear, unequivocal and convincing evidence that [petitioner] had abandoned her LPR status." Moreover, said the court, the question of what degree of proof is required is a question left for the judiciary to resolve, citing *Woodby v. INS*, 385 U.S. 276 (1966). The court noted that two circuit courts had reached similar conclusions regardless of the aliens' prolonged absences outside the country. See *Hana v. Gonzales*, 400 F.3d 472 (6th Cir. 2005), and *Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003). Accordingly, the court held that it was legal error for the IJ not to have required DHS to prove abandonment by clear, unequivocal, and convincing evidence.

In a concurring opinion, Judge Walker agreed with the majority that the IJ improperly shifted the burden. However, he parted way with the majority's treatment of *Matter of Huang* and whether that decision was owed *Chevron* deference. In his view, *Woodby* offered no guidance as to the proper allocation of proof. Whether the *Huang* decision involves a statutory interpretation triggering *Chevron* analysis "presents more difficulty," said Judge Walker. In his view, one could view the *Huang* decision as interpreting the INA and therefore determine whether it commands deference under *Chevron*. In his view, even if the court assumed that it could review *Huang de novo*, he would have found that *Huang* "articulates the proper framework for allocating the burden of proof in this case."

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

■ **Second Circuit Holds That First Degree Larceny Conviction Is A Crime Involving Moral Turpitude**

In ***Mendez v. Mukasey***, __ F.3d __, 2008 WL 4810049 (2d Cir. Nov. 6, 2008) (Sack, *Katzmann*, & Rakoff), the Second Circuit held, that petitioner, a lawful permanent resident who had pled guilty to first degree larceny in the form of "defrauding a public community" in violation of Connecticut General Statutes §§ 53a-122 (a)(4) and 53a-119(6), had been convicted of a crime involving moral turpitude, and therefore was inadmissible under INA § 2122(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The court found "unpersuasive" petitioner's argument that defrauding a public community was not a crime involving moral turpitude because it did not require proof of intent to obtain government benefits to which she was not entitled. "While an offense under the Connecticut larceny statute does not necessarily constitute a crime involving moral turpitude, defrauding a public community does," because a conviction for defrauding a public community requires proof of an intent to wrongfully deprive another of property by making a knowingly false claim for benefits," said the court.

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

■ **Second Circuit Holds That A Subsequent Simple Possession Conviction Is Not An Aggravated Felony**

In ***Alsol v. Mukasey***, __F.3d__, 2008 WL 4890162 (2d Cir. Nov. 14, 2008) (Calabresi, *Straub*, Raggi), the Second Circuit held that a second conviction for simple controlled substance possession under state law is not a felony under the Controlled Substances Act because the offense of

*(Continued on page 10)*

# Summaries Of Recent Federal Court Decisions

(Continued from page 9)

conviction does not proscribe conduct punishable as a felony, as it does not correspond in any meaningful way with the federal crime of recidivist possession even if it could have been prosecuted in state court as a recidivist offense. The court joined the First, Third, and Sixth Circuits which have similarly held that a second simple drug possession conviction is not an "aggravated felony" as that term is defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)(B).

**The Second Circuit held that a second simple drug possession conviction is not an "aggravated felony" as that term is defined in INA § 101(a)(43).**

The court further clarified that its observation on recidivism in *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002), a sentencing case, did not control the issue because the defendant in that case had pleaded guilty to illegal reentry as an aggravated felon, thus admitting his status as an aggravated felon.

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

■ **Second Circuit Affirms District Court's Dismissal Of The Alien's Naturalization Claim Where Removal Proceedings Were Pending Against Him**

In ***Ajlani v. Chertoff***, __F.3d__, 2008 WL 4472933 (2d Cir. Oct. 7, 2008) (*Raggi*, Wesley, Livingston), the Second Circuit affirmed the district court's dismissal of petitioner's challenge to removal proceedings that were not yet complete. The court held that pending removal proceedings precluded the district court from adjudicating petitioner's naturalization claim. The court ruled that petitioner did not "self-naturalize" by reciting the oath of allegiance to himself and signing a voter registration card where USCIS prohibited the alien from publicly taking the oath of allegiance because that agency was reconsidering its decision to grant his naturalization application.

Contact: Scott Dunn, AUSA
☎ 718-254-7000

■ **Second Circuit Holds That It Has Jurisdiction To Review A Decision Vacating An Immigration Judge's Grant Of Asylum**

In ***Alibasic v. Mukasey***, __F.3d__, 2008 WL 4601673 (2d Cir. Oct. 17, 2008) (*Pooler*, Hall, Gleeson), the Second Circuit held that an order issued by the BIA denying relief from removal and remanding for the sole purpose of considering voluntary departure was a final order of removal that the court had jurisdiction to review. The petitioner, an Albanian Muslim who was born in Montenegro, claimed persecution, *inter alia*, on account of his refusal to be conscripted into the Serbian army. The IJ granted asylum, withholding, and CAT protection. Following DHS' appeal, the BIA reversed that decision, finding that in light of the 2004 Country Report that conditions had changed for the better in Serbia and in Montenegro. The BIA remanded the case, however, to the IJ for consideration of voluntary departure.

Preliminarily, the court denied the government's motion to dismiss because of a lack of a final order, finding that under *Lazo v. Gonzales*, 462 F.3d 153 (2d Cir. 2007), it had jurisdiction because the statutory requirement of an order of removal was satisfied when the IJ made the initial finding of removability. The court then held that the BIA had failed to conduct an individualized analysis of changes in Montenegro when it reversed the IJ's grant of asylum based on the Country Report. The court relied on its prior holding in *Liang v. Mukasey*, 511 F.3d 138 (2d Cir. 2008), where it had held that the BIA's one-line statement about improved country conditions in Mauritania did not suffice as a holding that a fundamental change of circumstances occurred. Here, the court found that the BIA support for its assessment of country conditions was not much more than a one-line statement and it did not address the evidence of continued persecution of Serbian minorities identified by the IJ in supporting materials submitted by the petitioner.

Accordingly, the court vacated the denial of asylum, withholding and CAT and remanded the case for further consideration.

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

■ **Second Circuit Vacates Persecutor Bar Determination And Remands The Case For Articulation Of Adverse Credibility Finding**

In ***Balachova v. Mukasey***, __ F.3d __, 2008 WL 4865970 (2d Cir. Nov. 12, 2008) (*Pooler*, McLaughlin, Cote), the Second Circuit vacated an Immigration Judge's finding that petitioner was barred from asylum and restriction on removal (withholding) because he had furthered the persecution of others on account of a protected ground. Petitioner, who was a student at a Russian Military academy, claimed that when soldiers in his military unit which had been sent to reduce tensions between Armenians and Azerbaijanis, raped two adolescent girls he refused "to join in the orgy." As a result he was beaten by his colleagues, transferred to Leningrad, and eventually expelled from the military academy. The IJ did not find petitioner credible and further denied asylum and withholding based on the persecutor bar.

The court ruled that the IJ must specify the reasons discrediting petitioner's claims of persecution in Russia and his denial of participation in

(Continued on page 11)

# Summaries Of Recent Federal Court Decisions

*(Continued from page 10)*
the persecution of others. The court remanded for the IJ to articulate clearly the basis for the adverse credibility finding, pointing to flaws in the IJ's credibility finding, her failure to identify a nexus between the rape and a protected ground, and her error in requiring additional corroborating evidence.

Contact: Wendy Leon-Benner, OIL
☎ 202-305-7719

## THIRD CIRCUIT

### ■ Third Circuit Holds Five-Year Limitation On Government Action Applies To Both Rescission And Removal Proceedings

In ***Garcia v. Att'y Gen. of the United States***, __F.3d__, 2008 WL 4710783 (3d Cir. Oct. 28, 2008) (McKee, Fuentes, and *Weiss*), the Third Circuit held that the language of INA § 246(a) provides that the five-year limitation on government action applied to both rescission and removal proceedings. The petitioner had been granted adjustment of status in 1996 on the basis that she was the daughter of a United States citizen, even though several similar underlying visa petitions had been previously denied because of a lack of a family relationship. DHS did not realize the error until 2004 when petitioner applied for naturalization. DHS then commenced removal proceedings against petitioner because, inter alia, she was inadmissible at time of adjustment of status. The IJ found petitioner removed as charged and the BIA affirmed.

In her petition for review, petitioner contended that DHS was barred under INA § 246(a) from commencing removal proceedings against based on her fraudulent 1996 application and relied on the court's decision in *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996). In *Bamidele*, the Ninth Circuit held that the running of the limitation period under 246(a) barred the rescission of Bamidele's permanent resident status and, in the absence of the commission of any other offense, barred the initiation of deportation proceedings.

The government argued, as the BIA had found, that IIRIRA's amendments to § 246(a) separated rescission and removal proceedings so that the five-year limitation only applies to rescission and that the court should defer to that interpretation. The court held that the BIA's interpretation was not owed deference, because it had held in § *Bamidele* that since 246(a) is a statute of limitation, it is not a subject within the expertise of agency. The court then held that it was bound by its precedent decision in *Bamidele* and because the amendment to § 246(a) is part of the same statute discussed in *Bamidele*, "its holding applies and we will not defer to the agency's construction."

**The Sixth Circuit held that "persecution" requires "more than a few isolated incidents of verbal harassment and intimidation."**

The court acknowledged that its ruling conflicted with the Fourth Circuit's decision in *Asika v. Ashcroft*, a post-amendment case that disagreed with *Bamidele* and deferred to the DHS' interpretation of § 246(a).

Contact: Ari Nazarov, OIL
☎ 202-514-4120

## SIXTH CIRCUIT

### ■ Sixth Circuit Upholds Pre-REAL ID Act Adverse Credibility Finding Based On Contrast Between Detailed Testimony And Vague Asylum Application

In ***Kaba v. Mukasey***, __F.3d__, 2008 WL 4876838 (6th Cir. Nov. 13, 2008) (*Daughtrey*, McKeague, Van Tatenhove (sitting by designation), the Sixth Circuit upheld the adverse credibility finding and denial of asylum, restriction on removal (withholding), and CAT protection. The court held that the lack of specificity in petitioner's asylum application could serve as the basis for an adverse credibility determination where the written application failed to indicate the nature of the claim to be raised before the IJ.

The petitioner, a citizen of the Cote d'Ivoire (Ivory Coast) who had entered the U.S. as a student in 2000, claimed persecution on account that his family was Muslim and belonged to the Diula ethnic group. In that first asylum application, he did not list any instances of past persecution. In an amended application filed in 2004, petitioner also claimed without explanation that he would be tortured if returned to his home country. At the hearing petitioner testified with more specificity, but the veracity of his testimony when contrasted with the written applications was challenged by the DHS trial attorney. At the conclusion of the hearing, the IJ determined that petitioner was not credible and, alternatively, he did not qualify for asylum on the merits because he had not suffered past persecution. The BIA summarily affirmed.

The court agreed with the IJ's finding that petitioner had not suffered past persecution holding that "persecution" requires "more than a few isolated incidents of verbal harassment and intimidation." The court also affirmed the IJ's adverse credibility finding pointing to petitioner's complete lack of specificity in his two asylum applications which justified the IJ's "skepticism about the validity of those claims." However, the court suggested that "the mere failure of a petitioner to include every detail of an asylum claim in the application itself should not be considered fatal to a petitioner's request for relief." Alternatively, the court found that the evidence did not compel a conclusion that petitioner had a well-founded fear of future per-

*(Continued on page 12)*

# Summaries Of Recent Federal Court Decisions

(Continued from page 11)
secution and, consequently also affirmed the denial of withholding.

Contact: Patrick Glen, OIL
☎ 202-3057232

■ **Sixth Circuit Holds That An Alien's Robbery Conviction Is A Crime Of Violence That Precludes A 212(c) Waiver Of Removal**

In ***Thap v. Mukasey***, __F.3d__, 2008 WL 4568361 (6th Cir. 2008) (Daughtrey, Gibbons, *Zatkoff*), the Sixth Circuit ruled that the alien's robbery conviction under California Penal Code § 211 is a crime of violence, and that the alien is ineligible for § 212(c) relief because an aggravated felony crime of violence does not have a statutory counterpart under § 212(a).

Petitioner Thap, a citizen of Cambodia, was brought to the U.S. in 1983 as a young child when his family fled alleged persecution by the Khmer Rouge. Petitioner was admitted as a refugee, and received his LPR one year later. In 1996, Petitioner was convicted of robbery in the second degree under California statute, and the DHS commenced removal proceedings. In 2005, the IJ found him removable as an aggravated felon, despite petitioner's claims that his robbery conviction did not constitute an "aggravated felony" and that he was not removable since he still held refugee status. The BIA affirmed the IJ's finding, and petitioner appealed to the Sixth Circuit.

The Sixth Circuit, referencing *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2006), deemed meritless Petitioner's contention that he retains refugee status until he acquires the nationality of another country, and likewise rejected petitioner's argument that he, as a refugee, should be allowed to apply for readjustment under INA § 209(a) with a waiver of admissibility. The court reasoned that as an aggravated felon he is ineligible for waiver of admissibility. The court further rejected petitioner's claim that his conviction was not a "crime of violence", because "based on his robbery conviction (a crime of violence), which . . . does not have a statutory counterpart in §212 (a) . . . , under the majority approach, [petitioner] is not eligible for relief under § 212( c)."

Contact: Jesse Lloyd Busen, OIL
☎ 202-305-7205

## SEVENTH CIRCUIT

■ **Seventh Circuit Holds That An Alien's Falsification Of An Asylum Claim Was A Sufficient Basis For A Frivolous Finding**

In ***Siddique v. Mukasey***, __F.3d__, 2008 WL 4755770 (7th Cir. Oct. 31, 2008) (*Easterbrook*, Coffey, Wood), the Seventh Circuit ruled that an alien who had manufactured an asylum claim, providing both false testimony and fake documentary evidence, had been properly deemed by the IJ to have submitted a frivolous asylum application, and thus was permanently ineligible for any benefit under the INA. The petitioner, a citizen of Pakistan, submitted a number of documents in support of his asylum claim. Nonetheless, the IJ denied asylum, partly because petitioner had failed to seek asylum in Canada. While his appeal to the BIA was pending, petitioner married a U.S. citizen. The case was then remanded to the IJ at petitioner's request and also at the request of DHS which had concerns about the authenticity of certain documents provided by the petitioner. At the new hearing before the IJ, petitioner confessed that he had invented to some of his claims. The IJ then denied the asylum claim as frivolous and also found that the "frivolousness" finding disqualified petitioner from adjustment of status. The BIA affirmed. In the interim, while the case was on appeal to the BIA, USCIS approved the visa petition filed by petitioner's wife.

**"Aliens must tell the truth to officials in the United States," said the Seventh Circuit.**

Preliminarily, the court rejected petitioner's contention that his case should be remanded to the agency because by approving the visa petition, USCIS had waived his disqualification under INA § 208(d)(6). The court held that approval was of no import because the application of the INA's frivolous bar could not be waived by any agency. The court also rejected petitioner's argument that his fraud was not material. He claimed that since people regularly lie to the government in Pakistan to get benefits, he thought that he should proceed in the same fashion in the United Sates. "Aliens must tell the truth to officials in the United States," said the court . "The possibility of cultural difference is one reason why Congress directed immigration officials to notify aliens at the outset of the asylum process, that honesty is essential, and to foreclose remedies under the immigration laws only of an alien tells material lies after being informed about the consequences of frivolous applications." Here, concluded the court, petitioner "chose to disregard the warning and must pay the price of his decision. He should count himself lucky that he had not been prosecuted for perjury."

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

■ **Seventh Circuit Upholds Adverse Credibility Determination Where The Alien Failed To Mention Her Forced Abortion Claim In The Airport Interview**

In ***Xiao v. Mukasey***, __F.3d__, 2008 WL 4694922 (7th Cir. Oct. 27,

(Continued on page 13)

# Summaries Of Recent Federal Court Decisions

(Continued from page 12)

2008) (Posner, *Flaum*, Evans), the Seventh Circuit denied the petitioner's pre-REAL ID Act asylum claim. The court affirmed the agency's adverse credibility determination where petitioner contended that she failed to mention her forced abortion claim at an airport interview because she had been ashamed of having become pregnant before marriage. The court ruled that the explanation did not overcome the high level of deference given to the lower courts. The court determined the inconsistency to be a specific, cogent reason for the adverse credibility finding, going to the heart of the petitioner's claim, and sufficient to find her entire testimony not credible.

Contact: Jeffrey Meyer, OIL
☎ 202-514-6054

■ **Court Lacks Jurisdiction To Review Denial Of A Continuance For Adjustment Of Status Where That Relief Would Have Been Denied As A Matter Discretion**

In ***Malik v. Mukasey***, __F.3d__, 2008 WL 4659375 (7th Cir. Oct. 23, 2008) (*Posner*, Ripple, Evans) the Seventh Circuit held that the IJ's reason for denying the continuance, namely, that a continuance would be futile because petitioners did not merit a favorable exercise of discretion on any adjustment application, was consistent with the adjustment statute. The petitioners were three brothers who had lied about their names and nationalities in support of their father's fraudulent asylum application, and then in their own applications. They eventually withdrew the fraudulent asylum applications. When their cases resumed, they sought a continuance because each brother allegedly claimed to have been married to a U.S. citizen and their I-130s were pending before USCIS. The IJ denied motion after concluding that she would deny petitioners' adjustment applications as a matter of discretion because they lied to her and in addition had also lied to an asylum officer.

The court held that it lacked jurisdiction to review the denial because the denial of continuance "was an ancillary 'procedural step along the way to an unreviewable final decision' – the denial of their adjustment applications."

Contact: Karen Y. Stewart, OIL
☎ 202-616-4886

■ **Seventh Circuit Holds That It Lacks Jurisdiction To Review The Denial Of A Motion To Reopen After The Entry Of An *In Absentia* Removal Order**

In ***Adebowale v. Mukasey***, __F.3d__, 2008 WL 4682508 (7th Cir. Oct. 24, 2008) (Posner, Manion and *Coffey*), the Seventh Circuit held that it lacked jurisdiction under *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), to review the alien's motion to reopen after the entry of an *in absentia* removal order because he had failed to assert any constitutional or legal questions. The court ruled that the alien had presented no legal question by challenging the weight assigned to the evidence. The court also ruled that it lacked jurisdiction to review the alien's due process claims regarding the adequacy of the hearing notice and the notice of the *in absentia* removal order because these claims were merely an attempt to circumvent the jurisdictional bar but presented no real legal question.

Contact: Siu Wong, OIL
☎ 202-305-1955

**The court held that it lacked jurisdiction to review the denial because the denial of continuance "was an ancillary 'procedural step along the way to an unreviewable final decision.'"**

## EIGHTH CIRCUIT

■ **Eighth Circuit Holds That Lari Ethnic Group Of Kongo Tribe Is A Particular Social Group**

In ***Malonga v. Mukasey***, __F.3d__, 2008 WL 4763453 (8th Cir. Nov. 3, 2008) (Riley, *Bright*, Melloy), the Eighth Circuit affirmed that the court lacked jurisdiction to review an untimely asylum application and affirmed the agency's denial of protection under the Convention Against Torture. The court reversed with respect to withholding, ruling that the IJ applied an incorrect and heightened legal standard in evaluating petitioner's claim of persecution in the Republic of Congo. Additionally, the court held that the Lari ethnic group of the Kongo tribe constituted a particular social group because the members share a common dialect and accent and have distinguishable surnames, rejecting the argument that the group was too overbroad to constitute a particular social group.

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

## NINTH CIRCUIT

■ **Appellate Commissioner Awards Attorney's Fees At Enhanced Rate To ACLU Staff Attorneys**

In ***Nadarajah v. Mukasey***, No. 05-56759 (9th Cir. Sept. 29, 2008), the Ninth Circuit Appellate Commissioner reduced an alien's request for attorney's fees based on the government's opposition to excessive, duplicate, and inapplicable hours worked. The alien requested almost $200,000 in fees, and the Commissioner awarded more than $150,000 in fees under the Equal Access to Justice Act.

The court allowed market rates for certain attorneys and adjusted statutory maximum hourly rates on a number of grounds for legal services, with the exception of certain clerical work, provided in district and circuit

(Continued on page 14)

# Summaries Of Recent Federal Court Decisions

*(Continued from page 13)*
court proceedings, including the alien's mandamus and habeas petitions.

Contact: Edward Duffy, OIL
☎ 202-353-7728

■ **En Banc Ninth Circuit Reverses 60 Years Of Immigration Precedent On The Availability Of § 212(c) Waiver Of Inadmissibility Relief**

In ***Abebe v. Gonzales***, __F.3d__, 2008 WL 4937003, (9th Cir. Nov. 20, 2008) (Kozinski, Pregerson, Kleinfeld, Thomas, Silverman, Gould, Tallman, Clifton, Callahan, Bea, Smith), *per curiam*, the Ninth Circuit upheld the "comparable grounds" analysis to find the alien ineligible for a § 212(c) waiver of inadmissibility because there is no comparable ground of inadmissibility in 8 U.S.C. § 1182 (a) to the sexual abuse of a minor ground of removability in 8 U.S.C. § 1227(a)(2)(A)(iii).

**Ninth Circuit holds that restricting the § 212(c) waiver to inadmissible aliens does not violate equal protection.**

The court overturned *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), and held that it does not violate equal protection to restrict § 212(c) relief to aliens who departed the United States, returned, and were placed in removal proceedings as inadmissible aliens, while making the same relief unavailable to those aliens who remain in the United States and are placed in deportation proceedings because Congress could have had a rational reason for adopting such a scheme: to create an incentive for deportable aliens to leave the country. The court also held that an alien who raises an issue in the notice of appeal to the Board of Immigration Appeals but does not raise it in the brief filed with the Board has failed to exhaust the issue.

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

■ **Ninth Circuit Holds That The Government Cannot Be Estopped By Its Employee's Unauthorized Issuance Of Residency Documentation**

In ***Shin v. Mukasey***, __ F.3d __, 2008 WL 4661801 (9th Cir. Oct. 23, 2008) (*Bea*, Nelson, Oberdorfer), the Ninth Circuit granted in part petitioner's petition for panel rehearing and substituted this decision for its earlier opinion. The court considered whether petitioner who overstayed her tourist visa then purchased a fraudulent alien registration card manufactured by Leland Sustaire, a federal immigration employee, could bar the government from removing her on the grounds that the government is estopped from asserting that the green card is bogus.

The petitioner, who entered the U.S. in 1993, on a student visa, obtained in October 1994, a green card as the spouse of a skilled worker or professional holding a baccalaureate degree. At the time petitioner had no husband. She obtained the green card through an individual who was a runner for Leland Sustaire, a corrupted immigration official who was selling green cards. She paid $10,000 for the card. Petitioner, who had never been to an immigration office, claimed that she was unaware of the fraud until she read about it in the newspapers. Sustaire, who kept a list of A numbers used to generate the fraudulent cards, eventually turned the list over to the authorities. DHS then commenced removal proceedings against te aliens who illegally obtained the green cards, including petitioner.

Petitioner was order removed but she filed a motion to reopen with the BIA on the basis that she had an approved labor certification. The BIA denied reopening because petitioner did not attached the approved I-140 visa petition.

The court held that the government could not be equitably estopped because petitioner knowingly participated in the illegal conspiracy. Petitioner "was not an innocent dupe, but rather a party who sought to benefit from Sustaire's scheme," said the court. The court also affirmed the denial of the motion to reopen she had failed to meet the burden of proving that if proceedings were reopened, the new evidence would likely change the result in the case. Finally, the court declined to remand the case, noting that petitioner was now barred from filing a second motion because the 90-day filing period had expired.

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

■ **Ninth Circuit Holds That INA § 245(i) Is A Statute Of Repose, Which Is Not Subject To Equitable Tolling**

In ***Balam-Chuc v. Mukasey***, __F.3d __, 2008 WL 4683220 (9th Cir. Oct. 24, 2008) (Nelson, Hawkins, *Bybee*), the Ninth Circuit upheld the agency's ruling that the deadline imposed by Congress under INA § 245(i) constitutes a statute of repose, which, unlike a statute of limitations, is not subject to equitable tolling. The court compared § 245(i) to NACARA § 203(a) and concluded that both statutes were created by Congress with fixed statutory cutoff dates, independent of any variable, and were deadlines that effectively closed the class of individuals entitled to special treatment under a statutory initiative. The court also held that assistance of counsel in preparing and filing an application prior to the commencement of removal proceedings does not implicate the Fifth Amendment.

Contact: Dalin Holyoak, OIL
☎ 202-514-9289

*(Continued on page 15)*

# Summaries Of Recent Federal Court Decisions

(Continued from page 14)

■ **Conviction For Fleeing The Scene Of An Accident Is Not Categorically A Crime Involving Moral Turpitude**

In ***Latu v. Mukasey***, __ F.3d __, 2008 WL 4764442 (9th Cir. Nov. 3, 2008) (O'Scannlain, *Tashima*, Smith), the Ninth Circuit held that the full range of conduct encompassed by the Hawaii hit-and-run statute did not categorically constitute a CIMT. The court also concluded that a driver's failure to provide identifying information, as required by the statute, did not constitute inherently fraudulent conduct. The court further held that *INS v. Ventura,* 537 U.S. 12 (2007), did not require the court to remand the matter to the Board of Immigration Appeals to apply the modified categorical approach.

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

■ **Ninth Circuit Holds That District Court Has Jurisdiction Over Citizenship Claim Challenge To Detention**

In ***Flores-Torres v. Mukasey***, __ F.3d __, 2008 WL 4911408 (9th Cir. Nov. 10, 2008) (Schroeder, D.W. Nelson, *Reinhardt*), the Ninth Circuit concluded that an alien claiming derivative citizenship was not barred by The REAL ID Act from raising a habeas corpus citizenship claim as a defense to his detention. The petitioner was born out of wedlock in El Salvador in 1978. In 1986, he came to the United States to join his mother, who had already moved here. He obtained lawful permanent resident status in 1993, and his mother became a naturalized United States citizen in 1995 when he was seventeen years old. Petitioner contended that he is not an "alien," that he became a United States citizen at the age of seventeen when his mother was naturalized, and that ICE was therefore without authority to detain him. In holding that the district court had habeas jurisdiction over petitioner's claim, the court emphasized that, unlike its decision in *Iasu v. Smith*, 511 F.3d 881, 891 (9th Cir. 2007), the citizenship claim was not a challenge to a final order of removal. Here petitioner "challenges his detention prior to the issuance of such order," reasoned the court. Moreover, said the court, "even post-REAL ID Act, aliens may continue to bring collateral legal challenges to the Attorney General's detention authority" through a petition for habeas corpus. Accordingly, the court reversed the district court's dismissal for lack of jurisdiction and remanded the case for a determination of whether the alien is a citizen and thus immune from detention under the INA.

**"Even post-REAL ID Act, aliens may continue to bring collateral legal challenges to the Attorney General's detention authority."**

Contact: Melanie Proctor, AUSA
☎ 415-436-6730

## TENTH CIRCUIT

■ **Denial Of Second Motion To Reopen Upheld For Failure To Show Changed Circumstances Regarding China's One-Child Policy**

In ***Wei v. Mukasey***, __F.3d__, 2008 WL 4822879 (10th Cir. Nov. 7, 2008) (Murphy, Brorby, *Hartz*), the Tenth Circuit upheld the BIA's denial of petitioner's second motion to reopen, which was based on China's one-child policy and petitioner's pregnancy with her fourth child. The court found that the BIA did not abuse its discretion because changed personal circumstances were insufficient to permit reopening, and petitioner had failed to show that the one-child policy had changed in any significant respect since the her original proceedings or first motion to reopen. The court also affirmed the BIA's decision that the alien had no independent right to file a successive asylum application based solely on changed personal circumstances. Finally, the court rejected petitioner's contention that that the BIA violated her a due process rights by failing to give her a full and fair hearing, noting that "due process does not guarantee a party the right to make the same claim before a tribunal repeatedly."

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

■ **Written Warning In The Asylum Application Provides Sufficient Notice Of The Consequences Of Filing A Frivolous Application**

In ***Ribas v. Mukasey***, __F.3d__, 2008 WL 4781711 (10th Cir. Nov. 4, 2008) (Tacha, Ebel, *Murphy*), the Tenth Circuit held that, as a matter of law, the written warning in the asylum application form (Form I-589) provides sufficient notice under INA § 208(d)(4)(A) of the consequences imposed by INA § 208(d)(6) for filing a frivolous application. Petitioner, who claimed persecution if returned to Angola, argued that he had received inadequate notice under INA § 208(d)(6), in connection with his first asylum application that he could be penalized for filing a frivolous application with a lifetime bar from relief. The court found that there was nothing in the statute requiring the notice to be provided in verbal form or that the consequences of filing a frivolous application be explained in detail to the applicant." The written notice in the asylum form, said the court, "supplies all of the information concerning he consequences of filing a frivolous application to which the alien is entitled" under the statute. The court specifically disagreed with the Ninth Circuit's "unexplained remark" in *Chen v. Mukasey*, 527 F.3d 935, 940 (9th Cir. 2008), that notice must be issued by an IJ. Accordingly, the court concluded that "as a matter of law, the written notice provided on the asylum form is sufficient."

Contact: John Cunningham, OIL
☎ 202-307-0601

# Detention Rule Upheld

(Continued from page 1)
issued exclusion and deportation orders, based on their lack of entry documents and their convictions for crimes of moral turpitude.

In February 2006, Immigration Judges separately ordered the continued detention of petitioners under 8 C.F.R. § 241.14, a rule published by the Attorney General following the *Zadvydas* decisions, which authorizes, *inter alia*, continued detention under certain special circumstances. Here, the IJs found that the two petitioners where aliens who "posed a special danger to the public," and therefore were subject to continued detention.

Following the IJs' ruling, petitioners sought writs of habeas corpus, challenging the constitutionality of their continued detention. The district court held that the regulations authorizing petitioners' detention was not authorized by the INA § 241(a)(6), as that statute had been interpreted by the Supreme Court to preclude continue detention past the six-month presumptively reasonable period.

In vacating the district court's order, the Tenth Circuit explained that under *Brand X* a "prior judicial construction of a statute trumps [a subsequent] agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Here, the court first found that "the statute is silent or ambiguous" as to the Attorney General's authority to detain certain categories of aliens beyond the ninety day removal period, noting that the Supreme Court twice explicitly found the statute to be ambiguous in *Zadvydas* and *Martinez*.

Second, the court held that the Attorney General's construction of the detention statute as implemented in the detention regulation, was a "permissible" one under *Chevron*.

The court rejected petitioners' contention that principles of *Brand X* could not apply when the prior judicial interpretation was by the Supreme Court. The court reasoned that under *Chevron* agencies are delegated the authority to fill statutory gaps where there are ambiguities. "Judicial deference to administrative interpretations in these cases is not a policy choice, but rather a means of giving effect to congressional intent. When Congress leaves a gap within a statute administered by an agency, Congress impliedly entrusts the agency with authority to explain and fill in the interstices," said the court. In *Brand X* reasoned the court, "whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur." Thus, when a court resolves an ambiguity in a statute that an agency is empowered to administer, "such a resolution carries the force of law until an agency issues a definitive interpretation of the kind that would ordinarily warrant *Chevron* deference." The court found no reason why *Brand X* would not be equally applicable to agency constructions that displace tentative Supreme Court interpretations.

The court noted that its holding was in conflict with the results reached by two other circuits, but observed that in those cases *Brand X* was not considered. *See Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

Finally, the court concluded that the constitutional avoidance doctrine did not preclude the Attorney General's construction of INA § 241(a)(6) because 8 C.F.R. § 241.14 satisfies due process and does not raise serious constitutional doubts. Specifically, the court found that the "substantive limitations built into the Attorney General's power to detain aliens beyond the removal period, as well as the procedural protections provided in such cases, are sufficient to satisfy due process."

Consequently, the court found that the Attorney General's interpretation of INA § 241(a)(6) was reasonable and entitled to *Chevron* deference. "Whether or not we think the Attorney General's interpretation is the 'best' one is immaterial . . . . Separation of powers principles dictate that we defer to the Attorney General's construction of the statute so long as it is reasonable." The court concluded that the Attorney General's construction of the statute authorizing the detention of certain dangerous, mentally ill aliens, such as the two petitioners was "eminently reasonable."

By Francesco Isgro, OIL

Contact: Samuel Go, OIL-DCS
☎ 202-353-9923

# Persecutor Bar Argued Before Supreme Court

(Continued from page 3)
with the question whether an alien may be subject to the persecutor bar when his offending conduct was compelled under threat of death or torture or otherwise "involuntary." In some cases, it may also be appropriate to hold in abeyance petitions that raise the question whether an alien may be subject to the persecutor bar when there is evidence demonstrating that he did not know, or did not have reason to know, that the consequences of his actions would assist in acts of persecution.

Briefing attorneys should discuss these issues with their Team Leaders and Reviewers and should, in appropriate cases, consider advising the court(s) of appeals of the Court's pending consideration of *Negusie*.

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

# INSIDE OIL

(Continued from page 18)
three years. She began her career with the Criminal Division's Office of International Affairs, where she handled extradition and evidence sharing requests with Middle Eastern countries. She also served as a Special Assistant U.S. Attorney in the District of Columbia.

***Jerry Alexander*** is a graduate of Vanderbilt Law School and Columbia University. He comes to OIL from the Department of Housing and Urban Development, where he served as Assistant General Counsel in the Office of Litigation. Prior to joining HUD, he spent 15 years as a Trial Attorney in the Commercial Litigation Branch of the Civil Division. For the academic year 2008-2009, he is serving as a Wasserstein Public Interest Law Fellow at Harvard Law School.

***Julie Saltman*** is a graduate of the University of Michigan Law School in 2006. She earned a B.A. in history from Yale University in 2002. Prior to joining OIL, she worked as a trial attorney for the Department of Justice, Tax Division, in the Civil Trial Section, Central Region. She joins OIL's District Court Section.

## 14th Annual Immigration Conference Attracts Large Number of Students

More than 140 attorneys attended the 14th Annual Immigration Law Seminar held on September 17-21, 2008, and October 20-24, 2008, in Washington, D.C. This is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law. In addition to new OIL attorneys, attorneys from ICE, USCIS, DHS, EOIR, Department of State, and USAOs also attended the seminar.

***Acting Chief Immigration Judge, Thomas G. Snow***

***Michael Neifach, Principal Legal Advisor, ICE***

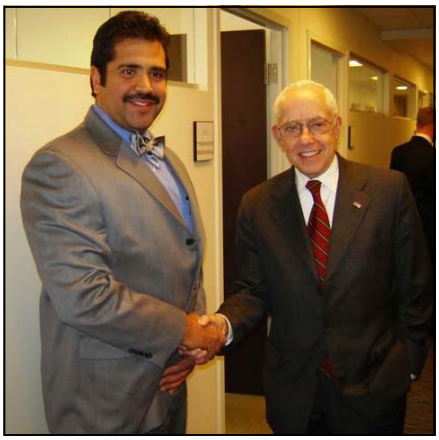
***Juan Osuna, Chairman Board of Immigration Appeals***

## INDEX TO CASES SUMMARIZED IN THIS ISSUE



## Attorney General Visits OIL

Attorney General Mukasey visited OIL on October 30, 2008, and met with a number of OIL attorneys located on the 5th Floor LSB.



***Assistant Director Ernesto Molina with Attorney General Michael Mukasey***

# INSIDE OIL

OIL welcomes onboard the following new attorneys:

***Dan Smulow*** joins OIL from U.S. Immigration and Customs Enforcement's National Security Law Division. Prior to ICE, Dan served as a state and local prosecutor in Massachusetts where he focused on appellate matters. He also taught research and writing at Boston University School of Law. Dan is a graduate of Case Western Reserve University School of Law.

***Trish Maskew*** is a 2008 graduate of American University's Washington College of Law. Prior to joining OIL, she developed an interest in immigration law through her many years of working on international adoption policy--as the founder of a non-profit dedicated to the regulation and reform of adoption practices, and as a consultant for the Hague Conference on Private International Law. She recently returned from Cambodia where she assisted in the development of new child protection and adoption procedures.

***Lynda Do*** joined OIL in 2006, as a contract attorney. She received her bachelor's degree in Finance from Virginia Tech and her J.D. from Cleveland-Marshall College of Law. She officially joined OIL in November 2008.

***Patricia Bruckner*** is a graduate of Georgetown University and of the Georgetown University Law Center. Prior to joining OIL, she worked on national security cases at USCIS Headquarters as Policy Chief in the National Security Branch of the Office of Fraud Detection and National Security, and Associate Counsel in the Office of Chief Counsel. Trish previously worked at ICE Headquarters' Office of the Principal Legal Advisor on national security and enforcement issues for

*(Continued on page 17)*

Photo by Erika Madrigal

***From Left: Julie Saltman, Dan Smulow, Lynda Do, Trish Maskew, Patricia Bruckner, and Gerald Alexander.***

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

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

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

Office of Immigration Litigation

*"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"*

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