

BRAUWERMAN LAW FIRM, P.A.

Immigration & Nationality Law

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The Immigration Connection

March 2011

Welcome to the **Brauerman Law Firm** newsletter. You are being sent this newsletter because of your interest in immigration and nationality matters. Should you wish to unsubscribe you may do so below.

Palestinian Terrorist and Former Nazi are Subjects of Two Courts of Appeal Decisions.

The 9th Circuit in *Abufayad v. Holder* decided February 16, 2011, held that the BIA's determination that a Palestinian citizen was inadmissible to the United States because he was likely to engage in terrorist activity or provide material support to a terrorist organization was supported by substantial evidence. The 7th Circuit Court of Appeals decided in *Firishchak v. Holder*, on February 14, 2011, that a former Nazi war criminal had been afforded a full and fair opportunity to litigate his claims in naturalization proceedings and upheld the application by an Immigration Judge of the collateral estoppel doctrine thereby preventing the alien from relitigating his claims.

One Day Apart, the Board of Immigration Appeals Decides That "Adjustment of Status" is an "Admission" and the U.S. Court of Appeals for the 11th Circuit Decides That it is Not.

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Featured Article

The Board of Immigration Appeals (BIA) reiterated that adjustment of status IS an "admission" (Feb. 3, 2011) but the U.S. Court of Appeals (11th Circuit, Feb. 4, 2011) decided that adjustment of status is NOT an "admission." In both cases the decision was favorable to the alien. In *Matter of Alyazji*, the BIA decided that the alien would not be deportable for a crime involving moral turpitude committed within five years of his adjustment of status to lawful permanent resident since he had been "admitted" to the U.S. as a visitor more than five years prior to the commission of the crime. The BIA decided that adjustment of status is an "admission" but it held it was not "the" admission that started the five year period. Contrariwise, the 11th Circuit decided in *Lanier v. U.S. Atty. Gen.* that when the alien adjusted his status to lawful permanent resident status while already living in the United States it did not qualify as "having previously been admitted to the United States as an alien lawfully admitted for permanent residence." Therefore, the bar to applying for a waiver under INA 212(h) for having been convicted of an aggravated felony if the alien had been previously admitted to the United States as an alien lawfully admitted for permanent residence did not apply.

Should *Padilla v. Kentucky* (130 S.Ct. 1473, 2010) be Applied Retroactively?

Recently, one federal court said yes while another said no. In *Doan v. U.S.* (E.D. Va. 2011) the Court found that *Padilla v. Kentucky*, should not be applied retroactively finding that *Padilla* creates new law and it does not meet the two exceptions for collateral attack. Meanwhile, the Court in *U.S. v. Zhong Lin* (W.D. Ky) found that *Padilla* should be given retroactive effect. *Padilla*, of course, held that criminal defense attorneys have certain obligations to their clients regarding advice regarding the possible immigration consequences of a potential plea in a criminal case. Convictions are being vacated based on *Padilla*.

H-1B Visas Reached the Cap for FY 2011. Filing for FY 2012 (Oct. 1, 2011) Starts April 1st.

The H-1B cap has been reached for the current fiscal year that ends September 30, 2011. The new filing period will begin April 1, 2011 for visas and visa classifications commencing October 1, 2011, the start of fiscal year 2012.

Selected Reserve of the Ready Reserve are Eligible for Expedited Naturalization Under INA 329(a), 8 U.S.C.1440.

The Selected Reserve consists of those units and individuals within the Ready Reserve designated by their respective services as so essential to the national military strategy that they have priority over all other Reserves. They also adhere to specific training requirements. They no longer are required to meet the definition of active-duty status contained in 8 CFR 329.1. Prior to this time the alien had to serve on active duty to qualify for expedited naturalization. This widens the pool of aliens eligible for expedited naturalization who would otherwise not be eligible for naturalization and could actually be subject to removal.



Jeffrey N. Brauwerman, formerly a United States Immigration Judge, has served as Regional Counsel for the Southern Region of the U.S. Immigration and Naturalization Service and Chief Legal Officer for its Miami District office.

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U.S. Court of Appeals for the 2nd Circuit Finds Use of a Child in a Sexual Performance is an Aggravated Felony and Authorizing a Performance is Sufficient for a Conviction.

In *Oouch v. Holder*, the Court found that NY Penal Law sec. 263.05 is not divisible, and any conviction under it is categorically an aggravated felony offense involving sexual abuse of a minor. Authorizing a performance is sufficient for a conviction and for it to be found to be an aggravated felony.

Is Any Intentional Sexual Conduct By an Adult With a Child Involve Moral Turpitude?

On February 23, 2011 the Board of Immigration Appeals utilizing all three steps of the *Silva-Trevino* analysis decided that it does involve moral turpitude so long as the perpetrator knew or should have known that the victim was under the age of 16. Interestingly, in this case the BIA stated that admissions made in *Immigration* Court can be used as evidence that the alien knew that the victim was under 16.

USCBP Has Authority to Waive ESTA Requirements and Emergency Travel.

Aliens seeking to be admitted to the United States without a visa under the visa waiver program (INA 217) can have their failure to register under ESTA (Electronic System for Travel Authorization) waived in the discretion, for emergent reasons, of the inspecting USCBP officer at the port of entry.

Jury Verdict Against Rancher Was Upheld in a Case Originally Heard by the Late U.S.D.J. John Roll in Arizona.

A decision of the U.S.D.J. who was killed during the shooting incident involving Arizona Congresswoman Gabrielle Giffords was upheld by the 9th Circuit in an unpublished decision. Judge John Roll presided over a case wherein the jury returned a verdict in favor of four aliens on claims of assault and intentional infliction of emotional distress against an Arizona rancher. (*Vicente v. Barnett*, Feb. 3, 2011).

Can a Refusal to Grant a Continuance Be an Abuse of Discretion?

The U.S. Court of Appeals for the 9th Circuit decided that it can be. In *Malilia v. Holder*, decided Feb. 3, 2011, the Court decided that a delay by USCIS in adjudicating a relative visa petition is no reason for an Immigration Judge to deny a continuance.

Call Us Today For A Professional Consultation

Jeffrey N. Brauwerman, of [Brauwerman Law Firm, P.A.](#), is available for consultations in either of our two offices and is also available for telephonic consultations.

We look forward to meeting with you and ultimately providing you with representation. Please note that a consultation does not constitute an attorney-client relationship although information disclosed during the consultation to any member of the firm will be strictly confidential.

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