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LITIGATION HIGHLIGHTS

Inside

Fourth Circuit Finds That Group Of "Individuals With Bipolar Disorder Who Exhibit Erratic Behavior" Qualifies As A Particular Social Group

In ***Temu v. Holder***, __F.3d__, 2014 WL 169932 (4th Cir. January 16, 2014)(King, *Gregory*; Agee (dissenting)), a divided panel of the Fourth Circuit held that a group of "individuals with bipolar disorder who exhibit erratic behavior" qualifies as a particular social group for purpose of asylum.

The case concerned Tumaini Temu, a Tanzanian national, who entered the United States on a visitor's visa but did not depart when that visa expired in 2006. In 2010, DHS instituted removal proceedings against Mr. Temu as an overstay. He in turn applied for asylum, withholding, and CAT protection, arguing that because he suffered from bipolar disorder and exhibited erratic behavior, he was persecuted because of his membership in a particular social group composed of similarly situated people in Tanzania.

According to Mr. Temu's testimony and that of two expert witnesses who discussed his diagnosis and the conditions that individuals with mental illness face in Tanzania, "severe mental illness with visibly erratic behavior is seen as a manifestation of demonic possession. Tanzanians even have a label for the group, referring to those with visibly severe mental illness as 'mwenda wazimu,' which means demon-possessed." The expert witness testified that even medical professionals in Tanzania believe that severe mental illness accompanied by erratic

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Part II
Gaining Citizenship Through Military Service

Our immigration laws have long recognized military service as a means to preserve or gain United States citizenship. Before the Supreme Court limited expatriation to cases of intended relinquishment, military service preserved citizenship against forfeiture by absence from the United States. *See, e.g.*, *Matter of Szajlai*, 10 I&N Dec. 103 (BIA 1962); *Matter of A–*, 2 I&N Dec. 799 (Atty. Gen. 1947). Throughout our history military service has been a principal avenue to gain citizenship. Since the Civil War, more than 750,000 alien veterans have naturalized including 143,000 World War II alien enlistees and draftees. *See* Goring, *In Service To America*, *supra*, 31 Seton Hall L. Rev. at 402; USCIS Fact Sheet, *Naturalization Through Military Service*, available at *www.uscis.go* (visited Sept. 16, 2013). The percentage of naturalizetions contributed by foreign nationals who serve in our armed forces has ranged from under 1 percent recently (1996-2005) to over 44 percent following World War I (1918-1920).

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"Individuals With Bipolar Disorder Who Exhibit Erratic Behavior"

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behavior is caused by demonic possession."

Mr. Temu's troubles began during his final year at the University of Dar es Salaam, when his mother died in a car accident. This spurred a mental breakdown that forced Mr. Temu to leave school, and he experienced a series of similar episodes that were later diagnosed as manifestations of bipolar disorder. During his manic episodes, Mr. Temu believes he has superhuman powers. He is visibly erratic and often walks into busy intersections to direct traffic because he thinks he has the ability to prevent car accidents. This behavior caught the attention of Tanzanian officials who took him to Muhimbili Hospital in Dar es Salaam, Tanzania, in 2003.

The nurses at Muhimbili Hospital treated Mr. Temu with violence and abuse. Nurses tied Mr. Temu's hands and feet for five to seven hours a day, four days per week. When Mr. Temu's condition worsened, his "treatment" became more inhumane, as he was bound and beaten with leather straps for eight hours per day, five or six days per week. Hospital stints turned into prison stints, and the abuse continued. Prison guards beat Mr. Temu with a club about his elbows and feet four days per week. The beatings were so severe that he could not walk. Throughout all his hospitalizations, the nurses referred to Mr. Temu as "mwenda wazimu." The record also shows that while binding Mr. Temu and beating him with leather straps, the nurses said on multiple occasions, "this is how we treat people who are mentally ill like you." In prison, the guards also referred to Mr. Temu as "mwenda wazimu." All prisoners were beaten, but Mr. Temu received worse beatings. However, other prisoners who also suffered from severe mental illness were beaten as much as Mr. Temu.

The IJ credited Mr. Temu's testimony and that of the two expert witnesses, and neither the BIA nor the government disputed any of the facts.

The IJ denied asylum and withholding but granted withholding under CAT. Both the IJ and the BIA determined that Mr. Temu was tortured by nurses and prison guards because he was mentally ill.

The IJ denied asylum finding that Mr. Temu's proposed group lacked the elements of immutability, particularity and social visibility necessary to qualify as a particular social group under the INA. In addition, both the IJ and BIA concluded that even accepting Mr. Temu's proposed group, he did not show that he was persecuted because of his membership in this group. The BIA also adopted the IJ's finding that there was no nexus between Mr. Temu's mistreatment and his defined particular social group.

The BIA committed "legal error by splitting the group into two and rejecting each part, rather than considering it as a whole."

The Fourth Circuit found it irrational that the BIA could conclude both that Mr. Temu was not persecuted because of his membership in the group of individuals with bipolar disorder who exhibit erratic behavior, and also that he was singled out for beatings because of his mental illness. "It might be possible to reconcile these conflicting findings, but it would demand logical acrobatics, and the BIA makes no attempt to explain how it can believe that Mr. Temu was not persecuted because of his bipolar disorder but was tortured because he was mentally ill," said the court. Accordingly, the court determined that the BIA's nexus finding "collapses under the weight of its logical legal defects," compelling the court to vacate the BIA's decision.

The court further determined that the BIA's legal analysis that Mr. Temu's group did not qualify as a particular social group was "manifestly contrary to law," and also rested on factual errors. The court determined that Mr. Temu' group satisfied the social visibility requirement because "Tanzanians view those with severe, chronic mental illness who exhibit erratic behavior as a group, since these individuals are singled out for abuse in hospitals and prisons and are specifically labeled "mwenda wazimu." Moreover, the court noted that Mr. Temu's group was singled out for worse treatment than other groups in light of the evidence showing that "even though all prisoners were abused, Mr. Temu was singled out for worse abuse, with the exception of other prisoners with mental illness, who received the same increased abuse as Mr. Temu."

The court also determined that the proposed group met the "particularity" requirement, rejecting the BIA's contrary finding that bipolar disorder is too broad and erratic behavior is too fuzzy. The BIA committed "legal error by splitting the group into two and rejecting each part, rather than considering it as a whole," said the court. The court explained that Mr. Temu's group was "limited to a specific mental illness that was so severe that individuals are visibly identifiably disturbed." Similarly, the "erratic behavior" is limited to individuals who suffer from bipolar disorder. Thus, said the court, the BIA committed legal error by failing to consider the proposed group as a whole and "missed the forest for the trees."

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Sohoni and Vafa, *The Fight To Be American*, *supra*, 17 Asian Am. L.J. at 130.

Our military naturalization statutes have varied widely in terms of the length of service and residence required of the alien applicants, and have included service branch-specific differentiation. *Id.*, at 127-28. *See Tak Shan Fong v. United States*, 359 U.S. 102, 104-06 (1959); Lee and Wasem, *Expedited Citizenship Through Military Service*, *supra*, pp. 4-6. *Cf.* 32 C.F.R. § 1602.17 (defining military service as service in the Army, Navy, Air Force, Marine Corps, and Coast Guard). However, the naturalization statutes have uniformly required the aliens to provide "honorable" service, as defined by the service branch in question.

> Honorable service and separation means . . . [that] which the executive department under which the applicant served determines to be honorable . . . .

8 C.F.R. § 329.1 (excluding applicants who were separated on account of alienage, were conscientious objectors, or who refused to wear a uniform). *See* 8 U.S.C. §§ 1439(b)(3), 1440(b)(3); DoD Instruction 1332.14, *Enlisted Administrative Separations*, Encl. 4, ¶ 3.b.2(a) (Aug. 28, 2008) ("honorable" is where "the quality of the . . . service generally has met the standards of acceptable conduct and performance of duty for military personnel").

Military naturalization is bottomed on the compelling notion that those willing to fight and die for the United States are worthy of its citizenship. *Cf. Hauge v. United States*, 276 F. 111, 113 (9th Cir. 1921) ("What finer test of . . . one who wishes to be naturalized . . . than to ascertain whether he is willing to support and defend the nation in time of war"). But for much of our history the opportunity for alien veterans to naturalize was never "equal". The race, nationality, and gender constraints that were included in both our immigration and our enlistment statutes greatly impacted the possibility of gaining citizenship through military service. *See* Sohoni and Vafa, *The Fight To Be American*, *supra*. *See also* Douglass, *The "Priceless Possession" of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930*, 43 Duq. L. Rev. 369 (Spring 2005). Such constraints at times conflicted, and some aliens who were eligible to enlist were ineligible to naturalize. *Compare* Act of March 3, 1865, *supra*, § 21, *as amended by* Act of Feb. 23, 1881, ch. 73, § 2, 21 Stat. 338 (excluding from Navy and Marine Corps enlistment only drunks, deserters, and minors under fourteen), *with* Act of July 14, 1870, ch. 254, 16 Stat. 254, 256 (authorizing naturalization of free whites and aliens of African nativity or descent). *See also* Act of July 26, 1894, *supra* (authorizing the naturalization of "any alien" who honorably served in Navy or Marine Corps).

Military naturalization is bottomed on the compelling notion that those willing to fight and die for the United States are worthy of its citizenship.

When alien veterans challenged the disparities between our enlistment and naturalization statutes, the courts typically upheld the provisions limiting naturalization over those that rewarded honorable military service. *See*, *e.g.*, *Toyota v. United States*, 268 U.S. 402 (1925) (Japanese alien with ten years honorable wartime service in the United States Coast Guard held ineligible to naturalize); *Petition of Easurk Emsen Charr*, 273 Fed. 207 (W.D. Mo. 1921) (Korean alien with honorable wartime service in Army held not a "white person" and thus ineligible to naturalize). The Attorney General deferred to the courts. *See* 33 U.S. Op. Atty. Gen. 473, *Fleet Naval Reserve – Japanese and Chinese*, 1923 WL 1207 (May 1, 1923) (declining to opine whether Japanese and Chinese aliens with honorable military service were eligible for naturalization under the Act of May 9, 1918 (which applied to "any alien") notwithstanding their exclusion from citizenship by the Act of June 29, 1906, as amended (which confined naturalization to white persons and persons of African nativity or descent)). *See also Takao Ozawa v. United States*, 260 U.S. 178 (1922) (as "brown or yellow races are not 'white persons'" they are excluded from naturalization); *Matter of R–*, 4 I&N Dec. 275 (Atty. Gen. 1951) (in spite of their Asiatic origin, Russian Kalmuks held "white" and so eligible to naturalize). *See generally* Douglass, *The "Priceless Possession" of Citizenship: Race, Nation and Naturalization*, *supra*. In 1952, our naturalization laws finally caught up with the more enlightened enlistment provisions, when the INA opened to all aliens the possibility of citizenship by service. Act of June 27, 1952, Pub. L. 414, § 311, 66 Stat. 239:

> The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.

Current INA sections 328 and 329 offer two avenues for military naturalization, both of which exempt alien veterans from normal filing fees and forgive applicants of any deportability-based disqualification under 8 U.S.C. § 1429. 8 U.S.C. §§ 1439(b)(2) and (4), 1440(b)(1) and (4). For peacetime service, section 328 au-

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thorizes naturalization for persons with one year or more of honorable service in our armed forces, and waives the normally required five years residence in the United States (if the applicant seeks naturalization while still in the service or within six months after leaving the service). 8 U.S.C. § 1439(a). *See* Goring, *In Service To America: Naturalization Of Undocumented Alien Veterans*, *supra*, 31 Seton Hall L. Rev. at 428-30. *Cf.* 8 U.S.C. § 1101(a)(25) (defining non-combatant service).

Wartime service also offers citizenship to alien enemies, and restores citizenship to former citizens who expatriated themselves by foreign military service.

For service during time of war or national emergency, section 329 authorizes naturalization for persons with any period of honorable, active duty service (even one day), and similarly waives the normal residence requirement (without any application deadline). 8 U.S.C. § 1440(a). *See*, *e.g.*, INS Interp. Ltr. 329.1, *Naturalization Based Upon Honorable Service In The Armed Forces During Wartime*, 2001 WL 1333897 (Oct. 2001). Active duty service is defined as

> full-time duty in the active military service of the United States . . . includ[ing] full-time training duty, annual training duty, and attendance . . . at a school designated as a service school by law or by the Secretary of the military department concerned.

10 U.S.C. § 101(d)(1). *See Matter of Peralta*, 10 I&N Dec. 300 (BIA 1963); *Petition of Donn*, 512 F.2d 808 (3d Cir. 1975) (active service in Korea after cease-fire and inactive service during Vietnam war insufficient for INA section 329(a)). *See also* Goring, *In Service To America: Naturalization Of Undocumented Alien Veterans*, *supra*, 31 Seton Hall L. Rev. at 425-28.

Wartime service also offers citizenship to alien enemies, and restores citizenship to former citizens who expatriated themselves by foreign military service (excluding those who served with our Axis enemies). 8 U.S.C. §§ 1440(b)(1) and 1438. *See also* 8 U.S.C. § 1440-1 (posthumous citizenship for honorable wartime service that results in the death of the alien veteran). We have supplemented INA section 329 with special statutes addressing the wartime military service of certain alien groups. *See*, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 405, 104 Stat. 4978 (Filipinos veterans who served in World War II); Hmong Veterans' Naturalization Act, Pub. L. No. 106-207, 114 Stat. 316, *amended* Act of Nov. 1, 2000, Pub. L. 106-415 (Hmong veterans who served during Vietnam War). Indeed, honorable wartime service may even provide a basis for pardons of pre-service criminal convictions. *See*, *e.g.*, Proclamation 2676 (Truman, Dec. 24, 1945, World War II veterans), 3 C.F.R. Comp. 1943-1948, 72; Proclamation 3000 (Truman, Dec. 24, 1953, Korean War veterans). 3 C.F.R. Comp. 1949-1953, 175.

The immediate, "bootcamp" naturalization now available under 8 U.S.C. § 1440(a) is relatively new. Until 1968, naturalization provisions for wartime service were enacted for a particular war and covered only service during that war, not service during past or prospective conflicts. *See* Lee and Wasem, *Expedited Citizenship Through Military Service*, *supra*, pp. 4-6. *See also Lopez v. United States*, 243 F.2d 170 (9th Cir. 1957) (affirming naturalization denial to veteran who served less than then-required ninety days). INA section 329(a) originally authorized the naturalization of any person who "has served" honorably in our armed forces during World War I or World War II. Act of June 27, 1952, § 329, 66 Stat. 250; *see* Act of Sept. 26, 1961, Pub. L. 87-301, § 8 (adding the Korean War). In 1968, Congress added the Vietnam War and the current provisions that encompass additional, presidentially-designated periods in which our Armed Forces "are or were engaged" in conflict with a hostile foreign force. Act of October 24, 1968, Pub. L. 90-633, § 1, 82 Stat. 1343.

Several of our post-Vietnam conflicts have been presidentially designated, others have not. President Clinton designated the Persian Gulf Conflict as a qualifying period (August 1990 - April 1991), as did President Bush with the "war against terrorists of global reach" (September 2001 to present). *See* Executive Order 12939, 59 Fed. Reg. 61231 (Nov. 29, 1994); Executive Order 13269, *supra*. President Reagan ordered a geographically-limited designation for our operation in Grenada, but that was overturned by the Ninth Circuit and rescinded by President Carter. *See* Executive Order 12582, 52 Fed. Reg. 3395 (Feb. 2, 1987); *Matter of Reyes*, 910 F.2d 611 (9th Cir. 1990); Executive Order 12081, 43 Fed. Reg. 42237 (Sept. 18, 1978). Our military actions in Somalia, Bosnia, Kosovo, Haiti, and Panama were not designated. The designation differences have been challenged. *See*, *e.g.*, *Singh v. Gantner*, 503 F. Supp.2d 592 (E.D.N.Y. 2007) (presidential designation of Yugoslavia and Albania as a "combat zone" held insufficient to qualify under INA section as "military operations involving armed conflict with a hostile foreign force"). Today we remain under President Bush's 2002 war on terrorism designation.

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USCIS currently accepts naturalization applications from aliens who have completed "one day of honorable active-duty service" including basic training, and has established a Naturalization at Basic Training Initiative that gives non-citizen enlistees the opportunity to naturalize when they graduate from boot camp. *See* USCIS, *Naturalization Through Military Service: Fact Sheet*, and *Questions and Answers for Members of the Military*, available at *www.uscis.gov/ porta* (visited Sept. 16, 2013). *See also* DoD Instruction No. 5500.14, *Naturalization of Aliens Serving in the Armed Forces* (Jan. 4, 2006); 10 U.S.C. § 101(d)(1) (defining "active duty"). Expedited naturalization, however, does not contemplate prospective naturalization. *See, e.g.*, *Matter of Wong*, 13 I&N Dec. 701 (BIA 1971) (denying termination of proceedings so alien could seek naturalization based on prospective military service, where alien had been ordered to report for induction). Many alien enlistees have taken advantage of expedited naturalization. *See generally* McIntosh, Sayala, and Gregory, *Non-Citizens in the Enlisted U.S. Military*, *supra*.

While the INA authorizes aliens to naturalize after one year of honorable peacetime service or one day of honorable wartime service, both statutory provisions include the possibility of revoking such citizenship if the person separates from the military under "other than honorable conditions" before he or she has served honorably for five years. 8 U.S.C. §§ 1439(f), 1440(c). Such conditional or contingent naturalization has long been a feature of our military naturalization statutes. *See* Roche, *Statutory Denaturalization: 1906-1951*, 13 U. Pitt L. Rev. 276, 303 (1952). *See also Matter of R–*, 4 I&N Dec. 327 (BIA 1951) (citizenship gained by honorable service cancelled following dishonorable discharge). But placing persons so naturalized "on probation for the duration of [their] service" has been criticized as "second-class citizenship" resting on dubious constitutional footing. *See* Roche, *Statutory Denaturalization*, *supra* ("citizenship is put on the same level as sergeant's stripes – to be worn during good behavior"); *see* Lee and Wasem, *Expedited Citizenship Through Military Service*, *supra*, at pp. 23-25.

In addition to the variable of whether the service is in time of peace or war, the opportunity for military naturalization can be affected by the alien's immigration status and location at the time he or she enters the service. Neither INA section 328 nor section 329 requires that alien applicants be lawful permanent residents at the time of their military service. 8 U.S.C. §§ 1439(a), 1440 (indeed, as noted above, persons found deportable may nevertheless by honorable service gain naturalization). However, the wartime naturalization provisions do require that the alien veteran be physically present in the United States, several of its territories, or aboard a non-commercial United States vessel at the time of induction or enlistment (or extensions thereof), or that "at any time" thereafter the alien be lawfully admitted to the United States for permanent residence. 8 U.S.C. § 1440(a). The peacetime provisions are not so limited (but do have an application deadline). 8 U.S.C. § 1439(a).

The limitation of wartime service naturalization to alien veterans who either entered service in the United States or after entering service were admitted as lawful permanent residents has generated substantial litigation.

The limitation of wartime service naturalization to alien veterans who either entered service in the United States or after entering service were admitted as lawful permanent residents has generated substantial litigation. As for domestic induction or enlistment, the courts have held the statute satisfied by aliens who begin their service while paroled into the United States. *See, e.g.*, *Petition of Martinez*, 202 F. Supp. 153 (N.D. Ill. 1962) (alien who chose service over draft evasion prosecution held naturalization eligible); *Petition of Apollonio*, 128 F. Supp. 288 (S.D. N.Y. 1955) (drafted overstay seaman held naturalization eligible). Similarly, the courts have accepted aliens who enlist outside the United States and later re-enlist within a qualifying area. *See, e.g.*, *Petition of Zamora*, 232 F. Supp. 1017 (S.D. Cal. 1964) (enlisted in Philippines, re-enlisted in California); *In re Roque*, 339 F. Supp. 339 (S.D. Miss. 1971) (enlisted in Philippines, extended in Washington). Indeed, qualification by domestic induction or enlistment has been found if any of applicant's enlistments occurred within the statute's geographic limits. *See, e.g.*, *Villarin v. United States*, 307 F.2d 774 (9th Cir. 1962). However, enlistment in the Philippines (before its independence) does not qualify. *See, e.g.*, *Banaag v United States*, 695 F.2d 1133 (9th Cir. 1983); *Petition of Mata*, 196 F. Supp. 523 (N.D. Cal. 1961). Nor does enlistment on United States vessels on the high seas or in foreign waters. *See* 32 C.F.R. § 94.4(b)(1)(ii).

The alternative qualification for military naturalization by the alien veteran's entry as a lawful permanent resident has been similarly challenged. *See, e.g., Tak Shan Fong v. United States*, *supra* (entry on seaman's pass); *Petition of Hai Guan Han*, 178 F. Supp. 199 (S.D.N.Y. 1959) (entry on seaman's pass); *Matter of Villarba-Reyes*, 10 I&N Dec. 17 (BIA 1962) (entry on military orders).

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Admission as a non-immigrant does not satisfy section 1440's entry requirement. *See*, *e.g.*, *Petition of Garces*, 192 F. Supp. 439 (N.D. Cal. 1961). The courts are divided on whether admission to the United States on lawful military orders is sufficient. *See*, *e.g.*, *Petition of Chan Chick Shick*, 142 F. Supp. 410 (S.D.N.Y. 1956) (sufficient), *rev'd*, 254 F.2d 4 (2d Cir. 1958), *aff'd*, 359 U.S. 102 (1959). *Compare Petition of Tchakalian*, 146 F. Supp. 501 (N.D. Cal. 1956) (yes); *with Dela Cena v. United States*, 249 F.2d 341 (9th Cir. 1957) (no); *Petition of Chow*, 146 F. Supp. 487 (S.D.N.Y. 1956) (no). *See also Petition of Apollonio*, *supra* (lawful entry on seaman's pass sufficient). Most courts have concluded that an alien's honorable service and domestic enlistment or lawful entry need not occur at the same time. *See*, *e.g.*, *Petition of Convento*, 210 F. Supp. 265 (D.D.C. 1962), *aff'd*, 336 F.2d 954 (D.C. Cir. 1964); *Petition of Frank*, 143 F. Supp. 82 (S.D.N.Y. 1956) (alien admitted as LPR and expatriated for foreign vote, who was then drafted and served honorably held eligible to naturalize). *See also Yuen Jung v. Barber*, 184 F.2d 491, 497 (9th Cir. 1950) (honorable service after admission on false claim of citizenship; honorable discharge not dispositive of good moral character).

Unlike the naturalization provisions, the military enlistment statutes currently *do* require lawful admission. 10 U.S.C. § 504(b) (excepting only enlistment by persons from Micronesia, Marshall Islands, or Palau, and enlistment the Secretary deems "vital to the national interest"). *See* DoD Instruction No. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* (Sept. 20, 2005, *amended* Sept. 20, 2011). The military may separate (discharge) aliens who are found to have wrongfully enlisted, and may charge and punish under the Uniform Code of Military Justice (UCMJ) those found to have enlisted by misrepresenting their immigration status. Article 83 of the UCMJ provides that a person who enters military service by "knowingly misrepresenting or deliberately concealing" a material fact may be convicted of "fraudulent enlistment," and dishonorably discharged from service and confined to the brig (or stockade) for two years. 10 U.S.C. § 883. *See* Bettwy, *Assisting Soldiers in Immigration Matters*, *supra*, at 15. However, some enlistment-ineligible aliens do serve and serve honorably. *See* Lee & Was-em, *Expedited Citizenship Through Military Service*, *supra*, p. 15, *citing In re Watson*, 502 F. Supp. 145 (D.D.C. 1980) (service by non-immigrant).

The caselaw is divided on the naturalization eligibility of aliens who serve honorably in violation of the enlistment provisions, and suggests that citizenship may be granted where the wrongful enlistment was "innocent" as opposed to fraudulent.

The caselaw is divided on the naturalization eligibility of aliens who serve honorably in violation of the enlistment provisions, and suggests that citizenship may be granted where the wrongful enlistment was "innocent" as opposed to fraudulent. *See*, *e.g.*, *Petition of Watson*, *supra*, 502 F. Supp. at 149-50. *See also Maldonado v. Napolitano*, 2012 WL 4175772 (E.D. N.C. 2012) (unsuccessful prior habeas challenge was *res judicata* on naturalization denied for enlistment with false birth certificate, notwithstanding honorable service); *In re Fong Chew* Chung, 149 F.2d 904 (9th Cir. 1945) ("honorable service" is determined by the military, not the courts). As the Supreme Court has explained, wrongful enlistment is a voidable contract that is enforceable if the government so chooses. *United States v. Grimley*, 137 U.S. 147 (1890). Of course, fraudulent enlistment also may raise naturalization obstacles by precluding the necessary finding of good moral character. *See*, *e.g.*, *Kariuki v. Tarango*, 709 F.3d 495 (5th Cir. 2013) (non-immigrant discharged for fraudulent enlistment lacked good moral character). *See also* Herring, *A Soldier's Road to United States Citizenship*, 2004 JUN Army 20, 26 (June 2004). *But see* Goring, *In Service To America: Naturalization Of Undocumented Alien Veterans*, *supra* (proposing amnesty for alien veterans).

Aliens qualified to naturalize by their honorable military service must file a standard application (*i.e.*, Form N-400), be interviewed, and take the naturalization oath. *See*, *e.g.*, *Matter of Jose Mallary Lengson*, 2004 WL 848514 (BIA 2004). *See also* Form N-426, *Request for Certification of Military or Naval Service*, available at *www.uscis.gov* The separate oath of military service does not confer citizenship or nationality. *See*, *e.g.*, *In re Allan Guillermo Ramos-Garcia*, 2010 WL 1606999 (BIA 2010), *pet'n denied*, 483 Fed.Appx. 926 (5th Cir. 2012); *Matter of Colleen Anastasi Medford*, 2006 WL 1455273 (BIA 2006); *Matter of Navas-Acosta*, 23 I&N Dec. 586 (BIA 2003). The alien applicants need not be physically present in the United States when they naturalize, as our statutes have since World War I authorized proceedings abroad. *See* Act of May 9, 1918, 40 Stat. 542, and R.S. 1750; Act of June 30, 1953, Pub. L. No. 86, ch. 162, § 2, 67 Stat. 108, 109; INS Interp. Ltr. 329.1(e)(2), *Naturalization Based on Honorable Service in the Armed Forces During Wartime*, *supra*. The INA contemplates that veterans and their dependents may be naturalized at our embassies, consulates, and military installations overseas. Some have suggested that such naturalization provides "lesser" citizen-

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ship as the Fourteenth Amendment speaks of "persons born or naturalized in the United States," leaving other citizens vulnerable to possible legislative whim. *See, e.g.*, Lee and Wasem, *Expedited Citizenship Through Military Service*, *supra*, at p. 21 & n.49.

Losing Citizenship Through Military Service

Citizenship can be lost as well as gained through military service. Our laws have historically attached greater importance to one's obligation of military service to the United States than to the performance of such service for a foreign sovereign. That is, an alien may make himself ineligible to citizenship or a citizen may expatriate himself by desertion from our Armed Forces or by failure to register for the draft and to perform the required service to the United States. 8 U.S.C. §§ 1182(a)(8)(B), 1425. *But cf. Trop v. Dulles*, *supra* (desertion); *Kennedy v. Mendoza-Martinez*, *supra* (draft evasion). The cost of foreign military service by aliens and citizens is usually not so dear.

Only certain types of foreign military service have adverse immigration consequences, including service that involves Nazis, genocide, extrajudicial killing, terrorists, or child soldiers. *See* 8 U.S.C. § 1182(a)(3)(E)-(G). *See also* 8 U.S.C. §§ 1182(a)(3)(D), 1424 ("voluntary" Communists and totalitarians). Foreign military service by itself is neither a ground of inadmissibility (see 8 U.S.C. § 1182(a)), nor, except as discussed below, a basis for expatriation. *See* INS Interp Ltr. 349.4, *Expatriation By Foreign Military Service*, 2001 WL 1333931 (Oct. 2001). Indeed, foreign military service may actually excuse an alien from an obligation to serve in our military forces (see 8 U.S.C. 1426(c)), or, for World War II veterans who served in allied forces, restore lost citizenship. *See* 8 U.S.C. § 1438. *Cf.* 8 U.S.C. § 1442 (naturalization of alien enemies).

Citizens, by contrast, may suffer tougher consequences for their foreign military service. The INA provides that both native-born and naturalized citizens shall lose their nationality if they voluntarily

> enter[], or serv[e] in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or non-commissioned officer . . . .

8 U.S.C. § 1481(a)(3). *Cf.* 18 U.S.C. §§ 958-59 (criminal penalties for foreign military service that violate United States neutrality). Both native-born and naturalized citizens have forfeited their citizenship for voluntary foreign military service. *See, e.g., Matter of M–,* 9 I&N Dec. 452 (BIA 1961) (service in post-revolution Cuban forces), 203 F. Supp. 389 (S.D.N.Y.) (habeas granted), *rev'd sub nom. United States ex rel. Marks v. Esperdy*, 315 F.2d 673 (2d Cir. 1963), *aff'd by equally divided Court*, 377 U.S. 214 (1964); *Matter of Gonzalez-Hernandez*, 10 I&N Dec. 472 (BIA 1964) (same). *But see Nishikawa v. Dulles*, 356 U.S. 129 (1958) (dual national's wartime service in Japanese Army did not expatriate where government failed to prove voluntariness).

Because expatriation must be voluntary, citizenship is not forfeited where the foreign military service was compulsory.

Because expatriation must be voluntary, citizenship is not forfeited where the foreign military service was compulsory. Thus, there is no expatriation for citizens who are drafted abroad or who serve in accordance with a bilateral military service agreement. *See, e.g., Matter of K–G–*, 2 I&N Dec. 243 (Atty. Gen. 1945) (service in Mexico, one 19 countries with which we had such an agreement). Similarly, expatriation will not be found where the citizen's military service was the product of coercion or duress. *See, e.g., Stipa v. Dulles*, 233 F.2d 551 (3d Cir. 1956) (dual national not expatriated by service as Italian police auxiliary out of "economic necessity"). *Cf. Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949) (citizenship renunciations by interned Japanese-Americans were the product of fear, intimidation, and coercion and thus void); 8 C.F.R. § 349.1 (procedures by which Japanese renunciants can regain their United States citizenship, a legacy responsibility of the Office of Immigration Litigation).

The voluntariness of a citizen's foreign military service turns on whether the service could have been avoided and whether the service involved an oath of allegiance. *See, e.g., Matter of Duggan*, 13 I&N Dec. 490 (BIA 1970) (expatriation by voluntary oath and service in Canadian Navy, transferred allegiance); *Matter of W–,* 1 I&N Dec. 558 (BIA 1943) (dual national expatriated by Canadian military service, but not by his induction and oath to Crown while in Boston!). *Compare Matter of S–,* 1 I&N Dec. 476 (BIA 1943) (dual citizen expatriated for voluntary Canadian enlistment), *with Matter of T–,* 1 I&N Dec. 596 (BIA 1943) (citizen who did not acquire dual nationality was not expatriated by Canadian oath of fealty and military service). *See also* 41 U.S. Op. Atty. Gen. 85, *Loss of Citizenship Through Taking Oath of Allegiance to Foreign Sovereign*, 1951 WL 2339 (May 8, 1951); 40 U.S. Op. Atty. Gen. 553, *Loss of Citizenship Through Service in Armed Forces of Foreign States*, 1947 WL 1783 (Oct. 16, 1947); 39 U.S. Op. Atty. Gen. 337, *Citizenship – Enlistment in Service of Foreign State*, 1939 WL 1543 (Sept. 5, 1939) (a citizen who enlists in the armed forces of a belligerent country

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does not thereby lose his citizenship, but he is deemed to have expatriated himself if he takes an oath of allegiance to the foreign state).

The expatriating effect of an oath of foreign allegiance may depend upon the age of the citizen. *See*, *e.g.*, *Matter of R–*, 2 I&N Dec. 60 (BIA 1944) (no expatriation by minor who enlisted in Canadian Army without parents' permission); 39 U.S. Op. Atty. Gen. 474, *Loss of Citizenship Through Marriage to Alien, Foreign Naturalization, or Foreign Oath of Allegiance*, 1940 WL 1414 (Aug. 22, 1940). *Compare Ex parte Gilroy*, 257 Fed. 110, 121 (S.D.N.Y. 1919) (young citizen serving Germany as volunteer driver did not expatriate); *United States ex rel. Baglivo v. Day*, 28 Fed. (2d) 44 (S.D.N.Y. 1928) (20 year old citizen who joined Italian military did not expatriate), *with United States ex rel. Wrona v. Karnuth*, 14 F. Supp. 770, 771 (W.D.N.Y. 1936) (post-21 enlistment in Polish Army did expatriate). *See also McCampbell v. McCampbell*, 13 F. Supp. 847, 849 W.D. Ky. 1936) (insane persons cannot expatriate). Dual nationals may be put to the choice, at their majority, of which sovereign they wish to serve. *See*, *e.g.*, 40 U.S. Op. Atty. Gen. 553, *Loss of Citizenship Through Service in Armed Forces of Foreign States*, *supra* (under 1940 Nationality Act, dual nationals who enter foreign military service while a minor and continue to serve after reaching 18 do not lose their American citizenship, unless they reasonably could have obtained a discharge and failed to do so); 15 U.S. Op. Atty. Gen. 15, *Steinkauler's Case*, 1875 WL 4344 (June 26, 1875) (dual national residing in and called to duty by Germany, upon attaining his majority may elect to return and take the nationality of his birth or to retain the German nationality acquired through father, yet during minority is not exempt from German military duty). Expatriation also may depend upon the nature of the foreign military service. *See*, *e.g.*, *Matter of Quintanilla-Montes*, 13 I&N Dec. 508 (BIA 1970) (dual citizen did not expatriate himself by "Sunday marching" under Mexican Army supervision).

In 1967 the Supreme Court held that the Constitution forbids the expatriation of persons who are born or naturalized in the United States unless they intend to relinquish their citizenship.

In 1967 the Supreme Court held that the Constitution forbids the expatriation of persons who are born or naturalized in the United States unless they intend to relinquish their citizenship. *Afroyim v. Rusk*, *supra*, 387 U.S. at 268 (no expatriation for foreign voting). The Attorney General has opined that an intent to renounce citizenship can be inferred from service in the armed forces of a foreign state engaged in hostilities against the United States. U.S. Office of Legal Counsel, *Survey of the Law of Expatriation*, 2002 WL 32899774 (June 12, 2002); *accord* 42 U.S. Op. Atty Gen. 397, 401, *Expatriation – the Effect of Afroyim v. Rusk*, 1969 WL 5993 (Jan. 18, 1969).

The citizenship consequences of our Civil War were a bit more complicated. In the mid-Nineteenth Century the law of expatriation was largely undeveloped, but it was recognized that to deem those who served in the Confederate military forces as something other than United States citizens (*i.e.*, foreigners) would suggest some legitimacy to their succession, provide a defense to potential charges of treason, and confuse the status of loyalist residents of the Southern States. *See* Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 Harv. L. Rev. 901, 987-95 (Feb. 2012). *See also* Farber, *The Fourteenth Amendment and the Unconstitutionality of Secession*, 45 Akron L. Rev. 479, 499-501 & n.104 (2011-12). White, *Recovering the Legal History of the Confederacy*, *supra*. Accordingly, Confederates typically were simply labeled "rebels", who could "restore" their civil rights as United States citizens by the oaths prescribed in a series of presidential pardons and the Reconstruction Acts. *See*, *e.g.*, 12 U.S. Op. Atty. Gen. 182, *The Reconstruction Acts*, 1867 WL 2127 (June 12, 1867); 12 U.S. Op. Atty. Gen. 141, *The Reconstruction Acts*, 1867 WL 2123 (May 24, 1867). For Confederate veterans and supporters, President Johnson proclaimed

> to each and every person who, directly or indirectly, participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States or of adhering to their enemies during the late civil war, with the restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof . . . .

Proclamation 179, *Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War* (Dec. 25, 1868), available at *www.presidency.ucsb.ed.* *See also* Loane, *Treason and Aiding the Enemy*, 30 Mil. L. Rev. 43 (Oct. 1965).

Hostile military service by non-citizens appears to be less consequential. Save for terrorists and the several special categories noted above, alien veterans who fought *against* the United States are neither inadmissible nor ineligible to naturalization. *See* 8 U.S.C. §§ 1182(a), 1422-26. In contrast, citizens who expatriate themselves by hostile mili-

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The Immigration Consequences of Military Service

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tary service cannot use the INA's citizenship restoration provisions. 8 U.S.C. § 1438(e).

Military Service And Immigration Enforcement And Benefits

The immigration and citizenship consequences of a failure to fulfill one's service obligations under our laws were explored above, as were the naturalization opportunities for those who do provide honorable military service. Military service also has other effects on immigration enforcement and the benefits.

Military service may secure an alien's admission to the United States. For example, aliens serving in our Armed Forces may enter the United States on their military orders without need for passport or visas. 8 U.S.C. § 1354(a) (whether or not they are in uniform); 8 C.F.R. § 235.1. *See*, *e.g.*, *Matter of Pioquinto*, 15 I&N Dec. 508 (BIA 1975) (alien on Navy's Temporary Disability Retired List is, for immigration purposes, a member of the Armed Forces). *See also Matter of J– M– D–*, 7 I&N Dec. 105 (BIA 1956). Alien members of NATO Armed Forces entering the United States on NATO orders also are exempt from passport requirements (but NATO personnel without orders are not). *See* 8 C.F.R. § 235.1(c). The passport and visa exemptions for persons traveling on military orders do not extend to the service person's family members.

Military service is not a defense to removal. Alien veterans – including those who serve honorably – are subject to the full range of the INA removal provisions and are expelled from the United States. *See*, *e.g.*, *Lopez v. Henley*, 416 F.3d 455 (5th Cir. 2005); *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003). *See also In re Victor Acosta-Hidalgo*, 2004 WL 1739037 (BIA 2004), 24 I&N Dec. 103 (BIA 2007). Moreover, military court-martials are treated as "convictions" within the meaning of 8 U.S.C. § 1101 (a)(48). *See*, *e.g.*, *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008) (judgment of guilt entered by general court-martial is "conviction" within meaning of INA). *See also In re Aguilar-Turcios*, 2006 WL 2183442 (BIA June 12, 2006) (discredit upon armed forces); *In re B– M–*, *supra* (wartime court-martial for desertion sufficient to expatriate). But military service may be relevant to prosecutorial discretion in immigration cases, with such considerations belonging to DHS not EOIR. *See Matter of Rodney O'Mar Henry*, 2004 WL 1059588 (BIA 2004) (reversing termination based on violation of DHS SOP requiring regional director's approval of NTA's against current or former members of the Armed Forces). *See also* Lee & Wasem, *Expedited Citizenship Through Military Service*, *supra*, at p. 25. Military service also may be relevant to immigration enforcement involving a veteran's alien relatives. *See* USCIS, *Parole of Spouse, Children and Parents* (PM-602-0091 (Nov. 15, 2013), available at *www.uscis.go* (visited Nov. 21, 2013) ("parole in place" to be considered for immediate relatives of current and former members of our Armed Forces).

An alien's honorable military service will be considered in assessing his or her "good moral character" for immigration purposes.

Military service is relevant to discretionary immigration benefits and relief. For example, alien service members are exempt from the INA's labor certification requirements. 8 C.F.R. § 1212.8(b). *But cf. Matter of Park*, *supra* (no labor certification exemption for alien who intends to serve but who is not presently a member of the military). An alien's honorable military service, wherever such service is provided, will satisfy the "residence" and "physical presence" required for immigration benefits. *See*, *e.g.*, 8 U.S.C. § 1439(b)(1) and (d); *Matter of Gee*, 11 I&N Dec. 639 (BIA 1966); *Matter of Woo*, 10 I&N Dec. 347 (BIA 1963). The Board has given a liberal construction to the notion of honorable military service. *See*, *e.g.*, *Matter of Flores-Gonzalez*, 11 I&N Dec. 485 (BIA 1966) ("honorable service" turns on the nature of alien's military discharge, not the manner of his separation); *Matter of Lum*, 11 I&N Dec. 295 (BIA 295) (military service includes Army National Guard training). Honorable service may also be relevant to the immigration benefits available to the service person's spouse and children. *See*, *e.g.*, 8 U.S.C. §§ 1186a(g) (conditional permanent residence); 1201(c) (visas); 1354 (b) (preservation of LPR status).

An alien's honorable military service will be considered in assessing his or her "good moral character" for immigration purposes. *See*, *e.g.*, *Matter of Woo*, *supra*. Honorable service may even be sufficient to expiate an alien veteran's false citizenship claim or visa fraud. *See*, *e.g.*, *Matter of Gee*, *supra*; *Matter of Lum*, *supra*. Honorable military service also is relevant to determining the potential hardship of an alien's removal. *See*, *e.g.*, *Matter of Leong*, 10 I&N Dec. 274 (BIA 1963); *Matter of Z–*, 7 I&N Dec. 253 (BIA 1956). *See also Matter of Vicedo*, 13 I&N Dec. 33 (District Director 1968) (enforcing foreign residency requirement against exchange alien who served in United States Navy would work exceptional hardship to his citizen children); *Matter of Gross*, 13 I&N Dec. 322 (Regional Commissioner 1969) (enforcing foreign residency requirement against alien spouse would work exceptional hardship to citizen husband seeking degree under GI Bill). Military service

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The Immigration Consequences of Military Service

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also may support the admission and naturalization of an alien's spouse and children. For example, the income requirements for immigration sponsors are relaxed for members of our Armed Forces. 8 U.S.C. § 1183a(f)(3).

Our concept of citizenship has evolved and no longer rests upon common law notions of perpetual allegiance controlled by the Sovereign.

Because, as discussed above, the courts generally enforced our naturalization restrictions over our enlistment entitlements, there were limited immigration opportunities for military dependents before 1952. *See generally* Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U.L. Rev. 1361 (Nov. 2011). For example, the World War II "War Brides Act" extended benefits to the alien spouses and children of our service members "if otherwise admissible." Act of December 28, 1945, ch. 591, 59 Stat. 659. *See* Act of June 29, 1946, ch. 520, 60 Stat. 339 (alien fiances, "if not subject to exclusion"). Indeed, our service members often were required to obtain permission to marry, and our military was generally inhospitable to marriages involving non-citizens.

> Except under very unusual circumstances, United States military personnel, and civilians employed by the War Department, will not be granted permission to marry nationals who are ineligible to citizenship in the United States.

U.S. Army, Circular No. 6, General Headquarters, Far East Command (Jan. 14, 1947). Conventional barracks wisdom held that, "if the Army/Navy/Marines wanted you to have a spouse, they'd issue you one." The constraints on naturalization may have become more relaxed, but the requirement that our men and women in uniform ask their commanding officer's permission to marry remains in force. *See, e.g.*, MILPERSMAN 5352-030 (Navy).

Finally, the alien spouse and children of a citizen who dies while honorably performing active duty in our Armed Forces may be naturalized without regard to normal residence and presence requirements. 8 U.S.C. § 1430(d). These provisions include the alien spouse and children of persons accorded posthumous United States citizenship for their honorable military service pursuant to 8 U.S.C. § 1440-1. *See* 8 C.F.R. § 392.1 (defining next of kin, representative for purposes of military naturalization).

Conclusion

The substantial relationship between immigration and military service has a long and rich history. Our concept of citizenship has evolved and no longer rests upon common law notions of perpetual allegiance controlled by the Sovereign. Our immigration now law recognizes the individual's right of expatriation, and constrains the State's power of denaturalization. But our political branches of government still retain their power to regulate which aliens will be admitted as new members of our community. And we continue to favor those aliens who serve in our military ranks.

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By Thomas Hussey, OIL

The views herein are purely personal, and the author does not speak for the Department of Justice or the Office of Immigration Litigation

PSG: "Individuals With Bipolar Disorder"

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Finally, the court concluded that the proposed group met the "immutability" requirement because "the underlying bipolar disorder will never be cured and will only worsen. He can only control his behavior with medication, but he will not have access to this medication in Tanzania. The inescapable conclusion from this finding is that if he is returned to Tanzania, Mr. Temu will not be able to control his behavior. In sum, Mr. Temu's membership in his proposed group is not something he has the power to change."

Accordingly, the court vacated the BIA decision and remanded the case to the BIA.

Judge Agee dissented from the majority's opinion. He would have found that the BIA "did not err as a matter of law in its determination that Temu's proposed social group lacked the necessary characteristic of particularity." He would not have found error in how the BIA analyzed the components parts of the proposed group and would have concluded that that "there is no discernible basis for readily identifying an individual as being part of the proposed group or not."

By Francesco Isgro

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FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

The Supreme Court heard argument On December 10, 2013, based on the government's petition for certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio v. Mayorka***s, 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argued that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the BIA reasonably interpreted INA § 203(h)(3).

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Moral Turpitude – Assault with a Deadly Weapon

On December 10, 2013, an *en banc* panel of the Ninth Circuit heard argument on rehearing of its published decision in ***Ceron v. Holder***, 712 F.3d 426, which held that a California conviction for assault with deadly weapon was crime involving moral turpitude, and the alien's conviction was a felony. *En banc* rehearing will address whether assault with a deadly weapon, in violation of California Penal Code Section 245(a)(1), is a categorical crime involving moral turpitude, and whether a sentence of imprisonment for a California misdemeanor conviction can exceed six months.

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BIA Standard of Review

Oral argument on rehearing was heard before a panel of the Ninth Circuit on September 9, 2013, in ***Izquierdo v. Holder,*** 06-74629, addressing the question of whether the Board the engaged in impermissible fact-finding when it ruled that the alien witnessed a human rights crime and made no effort to prevent it.

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Standard of Review Nationality Rulings

The Ninth Circuit granted en *banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder,*** 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same. The alien's supplemental *en banc* brief has been filed, the government response is due February 14, 2014. Argument before the *en banc* panel is set for March 17, 2014.

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Consular Nonreviewability

The government filed a petition for *en banc* rehearing challenging the 9th Circuit's decision in ***Din v. Kerry***, 718 F.3d 856, which reversed the district court's dismissal of the petition under the doctrine of consular reviewability, ruling that the government had not put forth a facially legitimate reason for the visa denial. The government rehearing petition argues that the panel majority's holdings constitute a significant violation of the separation of powers by encroaching on decisions entrusted solely to the political branches, and undermines the political branches' ability to protect sensitive national security information while excluding from admission aliens connected with terrorist activity.

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Retroactive Application of Board Decisions

On January 6, 2014, the Ninth Circuit ordered the government to respond to the rehearing petition challenging its September 19, 2013 unpublished decision in ***Diaz-Castaneda v. Holder***, 2013 WL 5274401. The petition contends that petitioners are eligible for adjustment of status because the balancing of the *Montgomery Ward* factors tilts against applying *Matter of Briones* retroactively to their case, and the case should be remanded to develop the record n their reliance and equitable interests relating to the *Montgomery Ward* balancing test. The government opposed rehearing on January 27, 2014, arguing that the panel appropriately determined the *Montgomery Ward* factors in the first instance and therefore the panel decision suffered no error of fact or law to support rehearing.

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Ordinary Remand Rule

On September 12, 2013, the Ninth Circuit withdrew its March 22, 2013 opinion in ***Amponsah v. Holder***, 709 F.3d 1318, requested reports on the status of the BIA's present case reconsidering of the rule asserted in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and stated that the government's rehearing petition is moot. The rehearing petition had argued that the panel violated the ordinary remand rule when it rejected as unreasonable under *Chevron* step-2 the BIA's blanket rule against recognizing state *nunc pro tunc* adoption decrees entered after the alien's 16th birthday.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds It Lacks Jurisdiction to Review Petitioner's Challenges to Discretionary Waiver Denials

In ***Lopez v. Holder***, __ F.3d __, 2014 WL 185541 (1st Cir. January 17, 2014) (*Lynch*, Stahl, Kayatta), the First Circuit held that it lacked jurisdiction to review the agency's denial of good faith and extreme hardship waivers for the joint-filing requirement for removal of conditions on permanent residency.

The petitioner, a citizen from the Dominican Republic, married a United States citizen in 1996. In January 1997, she adjusted her status to that of a permanent resident on a conditional basis, but that status was terminated two years later. On February 16, 1999, the petitioner and her spouse filed a joint Form I–751 Petition to Remove Conditions on Residence. The petition was denied on May 15, 2004, after petitioner's spouse failed to appear for the interview. DHS then instituted removal proceedings based on the termination of her conditional permanent resident status. The couple divorced shortly thereafter.

Petitioner then filed a second Form I–751 with USCIS requesting a discretionary waiver of the applicable joint-filing requirement on the ground that termination of her permanent resident status and removal would cause "extreme hardship. That request was denied. Undaunted, petitioner filed a third Form I–751 with USCIS on June 12, 2007, this time requesting a discretionary waiver on the ground that her marriage had been entered into "good faith" and was terminated through divorce. USCIS denied that request too, reasoning that she had provided contradictory or otherwise unreliable evidence of cohabitation and inadequate evidence of shared financial assets. Petitioner requested review by the IJ of both I-751 denials.

The IJ also denied the waivers requests because petitioner did not show that she and her U.S. citizen spouse had an "intent to establish a life together" at the time they were married, and that she had not shown that the hardship she and her son would suffer if she were removed qualified as "extreme." In particular, the IJ noted that petitioner had provided no evidence establishing the loss of value of her investments which the USCIS had calculated at $1,000,000 in assets. On appeal, the BIA affirmed the IJ's denial of the waivers.

The First Circuit ruled that the petitioner only sought reweighing of factors, not raising any reviewable legal or constitutional claims, and dismissed the petition for lack of jurisdiction under 242 §(a)(2)B)(ii) as a challenge to the agency's discretion.

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First Circuit Holds Evidence of Changed Country Conditions in Albania Rebutted Presumption of Future Persecution

In ***Ruci v. Holder***, __ F.3d __, 2013 WL 6759397 (1st Cir. December 23, 2013) (*Torruella*, Lynch, Lipez), the First Circuit held that substantial evidence supported the BIA's finding that the presumption of future persecution based on the petitioner's political opinion and Greek (minority) origins was rebutted by the government's evidence.

The petitioner, an Albanian citizen, entered the United States illegally on May 4, 2002, using a fraudulent passport, while his wife and children, who joined him later, obtained visas in Greece. When placed in removal proceedings on September 19, 2002, petitioner sought asylum, withholding, and CAT protection. The petitioner claimed that as a member of the Democratic Party, he was threatened with death by members of the Socialist Party. On one occasion, petitioner had to be hospitalized overnight after he was attacked by two masked men, who beat him and ordered him to leave the Democratic Party.

The First Circuit upheld the BIA's conclusion finding that materially changed circumstances rebutted the petitioner's presumption of future persecution.

That evidence showed that since the Democratic Party took power in Albania in 2007, political detentions have ceased, the government created procedures to compensate past victims of the socialist regime and to repatriate political refugees, and political parties operate without restriction. It also showed that Greeks serve as high-ranking government positions, represent the largest minority group, routinely turn to the government for protection of their rights, and that the government neither participates in, nor sanctions violence against Greeks.

The IJ determined that the Department of State's country reports therefore, rebutted the presumption of a well-founded fear of persecution for the purposes of petitioner's asylum claim, and that petitioner had failed to demonstrate a likelihood of persecution for the purposes of withholding of removal or a likelihood of torture for his CAT claim. The BIA agreed with the IJ that both the 2009 report and an earlier 2006 country report indicated that country conditions in Albania, both for supporters of the Democratic Party and for ethnic Greeks, had stabilized since petitioner's departure.

The First Circuit upheld the BIA's conclusion finding that materially changed circumstances rebutted the petitioner's presumption of future persecution as to his claims for asylum and withholding. The court also found

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no evidence to suggest that petitioner may face torture by or with the consent of a public official upon his return to Albania.

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■ **First Circuit Holds that BIA Did Not Abuse Its Discretion in Denying Motion to Reopen**

In ***Rosales-Perez v. Holder***, 740 F.3d 57 (1st Cir. 2014) (Lynch, Souter (by designation), *Selya*), the First Circuit held that an asylum applicant must show that evidence in support of a motion to reopen was "new" and "material" before reaching the issue of whether a case demonstrates *prima facie* eligibility.

The petitioner, a Guatemalan teacher, sought reopening, on the basis of new evidence he claimed showed the "persecution of teachers and school administrators who publicly oppose gang practices and values by expressly dissuading their students from participating in gangs." The BIA denied the motion finding that the gang's criminal extortion of money from schools and teachers did "not amount [to] a showing that a central reason [for that extortion] was their purported membership in a particular social group."

The First Circuit concluded that "the new evidence was not material to the question of the nexus between his treatment and one of five protected grounds. The new evidence said nothing on this issue at all. This was a key gap in his original application, and the new evidence did not even purport to fill that gap." The court also determined that "the new evidence was not material where it did nothing to fill a gap that existed in the original record evidence: proof that persecution was *on account* of teachers' public teaching and opposition to gangs." Accordingly the court found that the BIA did not misapply the materiality standard where it evaluated whether the new evidence showed that a "different outcome is warranted."

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■ **First Circuit Holds It Lacks Jurisdiction over Motion to Reopen When Petition Was Timely Only for Motion to Reconsider**

In ***Saka v. Holder***, __ F.3d __, 2013 WL 6760827 (1st Cir. December 23, 2013) (*Torruella*, Lipez, Thompson), the First Circuit held that when a petition for review is timely only as to the BIA's denial of a motion to reconsider, the court lacked jurisdiction to address the prior decision of the BIA denying reopening.

The court rejected the petitioner's attempt to circumvent the jurisdictional bar by arguing that the BIA failed to explicitly address his asylum claim that was raised for the first time in his motion to reopen. The court held that the BIA acted within its discretion in denying the petitioner's motion to reconsider, and had not abused its discretion in failing to explicitly discuss the petitioner's asylum claim when that claim was based on the same set of facts as his withholding of removal claim.

The court also held that the BIA had not abused its discretion in referencing the Immigration Judge's adverse credibility determination in determining whether the evidence submitted with the motion to reopen was material to his claim.

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■ **First Circuit Holds Substantial Evidence Supports BIA's Denial of Asylum Claim Based on "Other Resistance" and Illegal Departure from China**

In ***Guo Shou Wu v. Holder***, __ F.3d __, 2013 WL 6697823 (1st Cir. December 20, 2013) (Lynch, *Torruella*, Thompson), the First Circuit held that the asylum applicant did not establish a well-founded fear of persecution in China based on "other resistance" to the one-child policy when the record reflected that he lived in China for nearly a decade afterwards without incident.

The asylum applicant did not establish a well-founded fear of persecution in China based on "other resistance" to the one-child policy when the record reflected that he lived in China for nearly a decade afterwards without incident.

The court also concluded that the record neither reflected that the BIA ignored the applicant's testimony that he would be arrested and financially harmed based on his illegal departure from China, nor compelled the conclusion that his fears of future harm were well-founded or would amount to persecution.

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■ **First Circuit Holds BIA Is Not Required to Dissect in Minute Detail Every Contention Complaining Party Advances**

In ***Wu, Li Sheng v. Holder***, 737 F.3d 829 (1st Cir. 2013) (*Lynch*, Torruella, Kayatta), the First Circuit held that the BIA, in denying a motion to reopen based on failure to establish a *prima facie* case, need only "fairly consider the petitioner's claims and state its decision "in terms adequate to allow a reviewing court to conclude that the agency has thought about the evidence and the issues and reached a reasoned conclusion." The BIA is not required

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"to dissect in minute detail every contention that a complaining party advances," said the court. Here the court found that the BIA did not fail to consider material, individualized evidence of the likelihood of persecution on account of religion upon petitioner's return to China; rather, petitioner failed to present any such evidence.

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THIRD CIRCUIT

■ **Third Circuit Affirms Summary Judgment and 12(b)(6) Dismissal for USCIS Regarding Spousal Visa Petition Denial**

In ***EID v. Thompson***, No. 12-4271 (3rd Cir. January 10, 2014) (*Ambro*, Fisher, Hardiman), the Third Circuit held that an alien who has married a United States citizen solely to gain immigration benefits has entered into that marriage with the intent to evade immigration laws within the meaning of INA § 204 (c). Thus, although the petitioner may not have intended to break the law *per se*, § 204(c) prohibits USCIS from granting any future spousal petition for that alien if the alien sought or received immigration benefits through such marriage.

The court also rejected the petitioner's assertions that: (1) his sham marriage was merely a *de minimis* violation of law; (2) USCIS could not hold his sham marriage against him because he and his spouse timely withdrew the petition and adjustment application; (3) his hypothetical removal from the United States would violate the Eighth Amendment; (4) section 204(c) violates equal protection by drawing an unconstitutional distinction between aliens who have obtained benefits through fraud and aliens who have unsuccessfully attempted to do so.

" 'A conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.'"

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■ **IIRIRA Did Not Disturb *Matter of Ozkok* Finality Rule**

In ***Orabi v. Att'y Gen. of the U.S.***, 738 F.3d 535 (3rd Cir. 2014) (Smith, *Garth*, Sloviter), the Third Circuit held that IIRIRA's elimination of the finality requirement for deferred adjudications did not disturb the longstanding finality rule for direct appeals of criminal convictions recognized in *Matter of Ozkok*, 29 I&N Dec. 546 (BIA 1988). "We are convinced that the principle announced and held in *Ozkok* — that 'a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived' — 'is alive and well' in this Circuit and is correctly applied to [petitioner] as this Circuit's precedent," said the court. Because the petitioner here, had a direct appeal pending from his criminal conviction that served as the basis for removal, the court reversed the BIA decision and instructed the government to return petitioner to the United States in accordance with the ICE policy.

Judge Smith in his dissent would have found that "the plain text of the statutory provision defining 'conviction' does not require the exhaustion or waiver of an alien's right to a direct appeal from a formal judgment of guilt before that conviction may serve as the predicate for an alien's removal."

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FOURTH CIRCUIT

■ **Fourth Circuit Holds that Former Gang Membership Is Immutable Characteristic of Particular Social Group**

In ***Martinez v. Holder***, __ F.3d __, 2014 WL 243293 (4th Cir. January 24, 2014) (*Niemeyer*, Wynn, Flanagan), the Fourth Circuit held that the BIA erred by holding that former gang membership is not an immutable characteristic of a particular social group for purposes of withholding of removal.

The petitioner claimed that as a former member of the violent Mara Salvatrucha gang ("MS–13"), he is a member of a "particular social group" qualifying him for withholding of removal, and that he would be killed if sent back to El Salvador because he renounced his membership in MS–13. Based on these circumstances, he also requested CAT protection contending that the government of El Salvador would acquiesce in his torture at the hands of MS–13.

The IJ and the BIA rejected petitioner's arguments, concluding that being a "former member[ ] of a gang in El Salvador" is not an "immutable characteristic" of a particular social group that could qualify for withholding of removal, since the characteristic "result[ed] from the voluntary association with a criminal gang." The IJ and the BIA also found that petitioner's claim for relief under the CAT was not supported by sufficient evidence.

The court held that membership in a group that constitutes former MS–13 members is immutable, and that it would be "perverse" to interpret the INA to force individuals to rejoin such gangs to avoid persecution. The court rejected the government's contention that the INA disqualifies groups whose members had formerly participated in antisocial or

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criminal conduct. "Attaching this condition to qualification as a 'particular social group,' however, is untenable as a matter of statutory interpretation and logic," said the court.

The court accordingly reversed the ruling on immutability and remanded the petitioner's application to permit the BIA to consider whether the petitioner's proposed social group satisfies the other requirements for withholding of removal. The court, however, affirmed the denial of CAT protection

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FIFTH CIRCUIT

■ **Fifth Circuit Affirms Dismissal of *Bivens* Claims Against CBP Officer**

In *Castro v. Cabrera*, __ F.3d __, 2014 WL 341280 (5th Cir. January 30, 2014) (Stewart, Jolly, *Smith*), the Fifth Circuit affirmed the dismissal of *Bivens* claims against a United States Customs and Border Protection officer challenging his detention and interrogation of various individuals seeking admission into the United States at a border station. The court found that the "entry fiction" doctrine applied, so that those plaintiffs who were seeking admission as aliens did not have Fourth Amendment rights with regard to their admission. Moreover, to the extent any of the plaintiffs were seeking admission as U.S. citizens, the court found that the officer was entitled to qualified immunity.

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■ **Fifth Circuit Holds Alien Failed to Demonstrate Legal Reentry**

In *Martinez v. Johnson*, __ F.3d __, 2014 WL 274463 (5th Cir. January 24, 2014) (Jolly, *Smith*, Clement), the Fifth Circuit held that it lacked jurisdiction over the petitioner's claim that a prior deportation order must be rescinded as unconstitutional.

The court rejected petitioner's claim that the prior order could not be reinstated because he had legally reentered after his deportation, as witnessed by his receiving a new immigration card. The court noted that petitioner had not received permission from the Attorney General to reapply for readmission. Instead, he illegally crossed the border and then applied at the INS for a new immigration card, under a different identity and number, and without divulging that he previously had been deported. "Successfully deceiving immigration officials into providing one with a new immigration card does not constitute either permission to reenter from the Attorney General or legal reentry," said the court.

"Successfully deceiving immigration officials into providing one with a new immigration card does not constitute either permission to reenter from the Attorney General or legal reentry."

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that Intervening Unpublished Circuit Precedent Is Sufficient to Relieve a Concession of Removability**

In *Hana v. Holder*, __ F.3d __, 2014 WL 184500 (6th Cir. January 17, 2014) (Merritt, *Gibbons*, Mckeague), the Sixth Circuit held that because an intervening unpublished circuit court decision held that the petitioner's statute of conviction was divisible, holding the petitioner to his counsel's concession of removability would "produce an unjust result."

The petitioner, a citizen of Iraq, applied for asylum, withholding of removal, and CAT protection. Through his first counsel, he conceded removability based on a conviction of felonious assault under Mich. Comp. Laws § 750.82. The IJ ordered his removal and denied his applications relief and protection, and the BIA adopted and affirmed IJ's decision on appeal. The BIA then reopened petitioner's asylum application based on changed conditions for Chaldean Christians in Iraq.

On remand, petitioner, represented by new counsel, contested his removability and pursued claims for asylum and withholding of removal. The IJ granted petitioner's application for withholding of removal but held that he was ineligible for asylum because he firmly resettled in Canada before entering the United States. The IJ also held that petitioner was bound to his first attorney's concession of removability.

The court preliminarily determined that petitioner should be relieved of an admission of counsel because binding petitioner to that admission would "produce[ ] an unjust result." The court explained that an intervening decision now recognizes Mich. Comp. Laws § 750.82 as divisible, and, as such, the statute encompasses non-CIMT offenses. "Binding Hanna to his 2003 admission — where there has been an intervening change in the law as to the divisibility of his statute of conviction, where Hanna argues that is offense is not a CIMT, and where his argument is supported by record evidence that an immigration court may consider — would 'produce[ ] an unjust result,'" said the court. Accordingly, the court remanded the

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case to thethe BIA to determine whether petitioner's specific offense under Mich. Comp. Laws § 750.82 is a CIMT and whether he is removable.

However, the court upheld the BIA's denial of asylum, finding that petitioner, who had received landed immigrant status in Canada prior to coming to the United States, had firmly resettled in Canada and therefore was subject to the firm resettlement bar under INA § 208(b)(2)(A)(vi).

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds It Lacks Jurisdiction to Review Discretionary Denial of Hardship Waiver**

In ***Darif v. Holder***, 739 F.3d 329 (7th Cir. 2014) (Posner, Rovner, *Sykes*), the Seventh Circuit held that it lacked jurisdiction to review the petitioner's claim that the IJ's bias violated his right to due process. The court held that the petitioner had no protected liberty interest in obtaining a discretionary extreme-hardship waiver under § 216(c)(4)(A). "We have repeatedly held that the opportunity for discretionary relief from removal is not a protected liberty interest because aliens do not have a legitimate claim of entitlement to it," explained the court.

The court further held that even viewing the claim as a challenge to the legal sufficiency of his immigration hearing, the petitioner was not prejudiced because the BIA independently denied the waiver as a matter of discretion.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Immigration Judge's Introduction of Evidence in Removal Proceedings Did Not Violate Due Process**

In ***Constanza-Martinez v. Holder***, 739 F.3d 1100 (8th Cir. 2014) (Bye, Smith, *Benton*), the Eighth Circuit held that the IJ's introduction of evidence in removal proceedings did not violate due process. The court stated that the IJ has a duty to develop the record, and concluded that the admission of the contested evidence did not render the proceedings fundamentally unfair. The court also held that petitioner failed to establish that the record compelled the conclusion he would more likely than not be persecuted in El Salvador.

The court stated that the IJ has a duty to develop the record, and concluded that the admission of the contested evidence did not render the proceedings fundamentally unfair.

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■ **Eighth Circuit Holds that Applicant for Adjustment is Not Eligible for Grandfathered Status Based on Previously-Used Petition**

In ***Mansour v. Holder***, 739 F.3d 412 (9th Cir. 2014) (Bye, Smith, *Benton*), the Eighth Circuit held that the petitioner was not eligible for grandfathered status under INA § 245(i) based on a previously-used petition.

The petitioner, a Jordanian citizen, entered the United States on a student visa. He subsequently married a legal permanent resident who, in 1986, filed a visa petition on his behalf. Petitioner then adjusted his status to conditional permanent resident. The former INS terminated the conditional LPR status in 1989, when petitioner and his wife failed to petition for removal of the residency conditions (he was living out of the country). In 1992, petitioner's mother, by then a legal permanent resident, filed an I–130 petition on his behalf. The INS denied the petition because petitioner was married. Petitioner and his wife divorced later that year. In 1999, petitioner's mother filed another I–130 petition on his behalf. The INS approved the petition in 2000, authorizing him to return to the United States and remain until 2005. petitioner returned on a non-immigrant visa, but remained past the 2005 deadline without renewing it or adjusting his status.

In 2007, petitioner filed an I–485 application, again seeking to adjust his status to legal permanent resident under § 245(i), which permits adjustment of status for aliens ineligible under § 245(a) or disqualified under § 245(c). Although § 245 (i) expired in 2001, a grandfather provision preserved the right to adjust status under § 245(i) for certain aliens: the alien must have been the beneficiary of a qualifying immigrant visa petition (*e.g.*, I–130 petition) filed on or before April 30, 2001; and, the petition must have been "approvable when filed" (*i.e.*, "properly filed, meritorious in fact, and non-frivolous"). The USCIS found petitioner ineligible for grandfathering based on any of his three I–130 petitions, and in particular it determined that petitioner could not rely on his 1986 petition because "an application for adjustment of status cannot be based on an approved visa petition that has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant." Subsequently the IJ and the BIA agreed with the USCIS interpretation, denied adjust-

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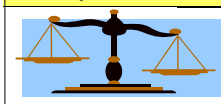

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ment, and ordered petitioner removed.

The Ninth Circuit preliminarily noted that the adjustment statute does not address whether a petition already used to adjust status is available for grandfathering under § 245 (i). Similarly the regulation at 8 C.F.R. § 245.10(a)(3) does not address cases where a petition was previously approved.

The court then found the BIA's interpretation of § 245(i) to be persuasive and not plainly erroneous or inconsistent with 8 C.F.R. § 245.10. In particular, the BIA relied on an INS memorandum stating that, "USCIS no longer considers an alien 'grandfathered' once the alien is granted adjustment of status under section 245(i) because the alien has acquired the only intended benefit of grandfathering: LPR status."

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■ **Ninth Circuit Holds that Viewing Pornography is Not an "Aggravated Felony" under the UCMJ**

In ***Aguilar-Turcios v. Holder***, __ F.3d __, 2014 WL 241868 (9th Cir. January 23, 2014) (Fletcher, *Paez*, Bybee), the Ninth Circuit decided that petitioner's conviction for viewing pornography under Article 92 of the Uniform Code of Military Justice did not qualify categorically as an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(I).

The panel held that the modified categorical approach had no role to play in this case, because neither Article 92 nor section 2–301(a), "requires that the 'pornography' involve a visual depiction of a minor engaging in sexually explicit conduct. Moreover, neither Article 92 nor section 2–301(a) include anywhere the element of a visual depiction of a minor engaging in sexually explicit conduct, even as an alternative element. Instead, they are missing this element altogether."

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■ **Ninth Circuit Holds BIA Properly Considered Alien's Guilty Plea in Overturned Conviction by Affirming A Consular Officer Reason to Believe Alien Engaged in Illicit Trafficking**

In ***Chavez-Reyes v. Holder***, __ F.3d __, 2014 WL 274486 (9th Cir. January 27, 2014) (*Graber*, O'Scannlain, Nguyen), the Ninth Circuit held that under INA § 212 (a)(2)(C)(i) there was reason to believe an alien had engaged in illicit trafficking in a controlled substance when the alien was the sole occupant of a vehicle containing 900 pounds of cocaine and had pleaded guilty to possession of cocaine with intent to distribute, even though his conviction had been overturned on a reason unrelated to the voluntariness of the guilty plea.

The Ninth Circuit held that under INA § 212(a)(2)(C)(i) there was reason to believe an alien had engaged in illicit trafficking in a controlled substance when the alien was the sole occupant of a vehicle containing 900 pounds of cocaine.

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■ **Ninth Circuit Holds that Material Inconsistencies in Testimony Regarding One Claim Supports Adverse Credibility Determination on Unrelated Claim in Pre-REAL ID Act Case**

In ***Li v. Holder***, 738 F.3d 1160 (9th Cir. 2013) (O'Scannlain, *Bea*, Christen), the Ninth Circuit held that the BIA properly applied the maxim *falsus in uno falsus in omnibus*, in a pre-REAL ID Act case, to support an adverse credibility finding on a claim unrelated to the inconsistencies. Because substantial evidence supported the determination that the asylum applicant's testimony included material inconsistencies concerning her religious persecution claim, the BIA properly discredited all of her testimony, even testimony concerning her unrelated family planning claim.

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■ **Ninth Circuit Holds that BIA Place-of-Filing Rule Is a Procedural Claims-Processing Rule**

In *Euceda-Hernandez v. Holder*, 738 F.3d 1099 (9th Cir. 2013) (*Christen*, O'Scannlain, Bea), the Ninth Circuit held that the BIA's place-of-filing rule, which provides that a motion to reopen must be filed with the IJ when the BIA dismisses an appeal as untimely, is only a procedural claims-processing rule and not a jurisdictional bar to the BIA's authority to consider a motion to reopen.

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■ **Ninth Circuit Holds that BIA Erred by Determining that Alien's Post-Entry Adjustment of Status Constituted an Admission**

In ***Negrete-Ramirez v. Holder***, __F.3d __, 2014 WL 211768 (9th Cir. January 21, 2014) (O'Sannlain, *Cowen*, Berzon), the Ninth Circuit considered whether a noncitizen, who is admitted to the United States on a visitor visa and later adjusts her status to a lawfully admitted permanent resident without leaving the United States, qualifies under INA § 212(h) as "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence," and, therefore, is ineligible to apply for a § 212(h) waiver.

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The petitioner was admitted into the United States in April 1996 on a B-2 visitor visa. In 2002 she adjusted her status to LPR. Four years later, she pleaded *nolo contendere* to two counts of committing a lewd act upon a child. In January 2009, after her return from abroad she was paroled into the United States and subsequently served with a Notice to Appear charging her with being inadmissible under INA § 212(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude. Eventually, the BIA found her ineligible to apply for the § 212(h) waiver due to her aggravated felony because she was "admitted" to the United States when she adjusted her status in 2002.

The court determined that § 212(h) of the INA expressly incorporates the terms of art "admitted" and "lawfully admitted for permanent residence" as defined by § 101(a)(13) and (20). "Accordingly, the plain language of § 212(h) unambiguously demonstrates that [petitioner's] post-entry adjustment of status to an LPR after her admission to the United States as a visitor does not constitute an admission in the context of § 212(h). Only noncitizens who entered into the United States as LPRs are barred from eligibility to apply for the § 212(h) waiver," said the court. Accordingly, the court remanded the case to permit petitioner to apply for a § 212(h) waiver.

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■ **Ninth Circuit Holds Canadian Removed Pursuant to Expedited Removal Statute May Not Challenge His Removal in Habeas Proceedings or Collaterally Attack His Removal Order**

In ***Smith v. United States CBP***, __ F.3d__, 2014 US App Lexis 438 (9th Cir. January 9, 2014) (Hawkins, *McKeown*, Clifton), the Ninth Circuit rejected a challenge to the expedited removal statute and corresponding implementing regulations. Specifically, the court held that an alien removed pursuant to an expedited removal order, although subject to the collateral consequence of a five-year bar to reentry to the United States, is not "in custody" for habeas purposes under 8 U.S.C. § 2241, and therefore may not challenge his removal in habeas proceedings. Second, the court held that although the petitioner could avail himself of the limited review permitted under 8 U.S.C. § 1252(e)(2), he failed to show that he was entitled to any of the three permissible bases for review.

An alien removed pursuant to an expedited removal order, although subject to the collateral consequence of a five-year bar to reentry to the United States, is not "in custody" for habeas purposes.

Accordingly, the court lacked jurisdiction to reach the petitioner's collateral attack on his removal. Finally, the court concluded that any due process challenge to the expedited removal regime was foreclosed by *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

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TENTH CIRCUIT

■ **Tenth Circuit Holds It Lacks Jurisdiction over BIA's Credibility and Evidentiary Determinations, and BIA Did Not Abuse Discretion by Denying Motion to Reopen**

In ***Maatougui v. Holder***, 738 F.3d 1230 (10th Cir. 2013) (*Tymkovich*, Holloway, Gorsuch), the Tenth Circuit held that it lacked jurisdiction to address whether the BIA incorrectly weighed the evidence and made an adverse credibility determination in denying the petitioner a hardship waiver and cancellation of removal. "[W]hich evidence is credible and how much weight should be given to the evidence are not decisions we can review for a cancellation of removal claim like this one. Thus, even if Maatougui is correct that the IJ and BIA 'gave no weight' to testimony suggesting [her former husband] abused her, we do not have jurisdiction to reevaluate that determination," said the court.

The court also upheld the denial of a motion to reopen filed by petitioner who claimed changed conditions in Morocco and alleged ineffective assistance of her prior attorney. The court found that petitioner had failed to present new, material, previously unavailable evidence; and that she waited over six years to raise her ineffective assistance claim and failed to demonstrate due diligence for her delay.

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ELEVENTH CIRCUIT

Eleventh Circuit Holds that Remarriage Bar Does Not Apply to Adjustment Applicants Whose Deceased Spouses Filed Visa Petitions on Their Behalf

In ***Williams v. Secretary, USDHS***, __ F.3d __, 2014 WL 185367 (11th Cir. January 17, 2014) (*Martin*, Anderson, Huck), the Eleventh Circuit, in an issue of first impression, held that an applicant for adjustment who remarries is not barred from adjusting status based on a prior marriage to a deceased US citizen.

On January 11, 2002, Ms. Raquel Pascoal Williams, a Brazilian citizen, married Derek Williams, a

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U.S. citizen. On December 19, 2002, Mr. Williams filed an I–130 beneficiary-petition on Ms. Pascoal's behalf. Ms. Pascoal also filed her own I–485 application to adjust her status to lawful permanent resident and Mr. Williams filed his affidavit in support. Mr. Williams unexpectedly died on September 17, 2003, before DHS made a final decision on the I–130 beneficiary-petition and I–485 application. Soon after Mr. Williams died, DHS denied Ms. Pascoal's application to adjust her status. The denial stated that because of Mr. Williams's death, Ms. Pascoal was no longer classified as an "immediate relative" of a U.S. citizen and therefore she could not adjust her status on that basis. Subsequently, DHS denied Ms. Pascoal I–360 self-petition because she had not been married to Mr. Williams for at least two years before he died as required by the INA.

On August 8, 2009, Ms. Pascoal remarried to Noel Wells. Ms. Pascoal and Mr. Wells were only married for a short time and were formally divorced on April 8, 2010. After her divorce, Ms. Pascoal sought to reopen her original I–130 beneficiary-petition that Mr. Williams had filed on her behalf before he died. Her motion was based on a newly enacted provision at INA § 204(l), which allowed people like Ms. Pascoal to reopen an earlier filed I–130 beneficiary-petition that had been denied because of the death of the qualifying U.S. citizen relative. However, DHS denied Ms. Pascoal's motion to reopen based on her marriage to Mr. Wells, relying on the remarriage bar in the second sentence of the "immediate relatives" definition. INA § 201(b)(2)(A)(i). Ms. Pascoal challenged the denial of the motion to reopen in district court. That court granted judgment to the government interpreting the statute as limiting an alien widow's right to acquire immigration benefits based on a first marriage after the widow has remarried.

The Eleventh Circuit preliminarily determined that it had jurisdiction under the APA because DHS's denial of Ms. Pascoal's application for status as a permanent resident was a final decision, and the decision determined Ms. Pascoal's statutory eligibility to adjust her status, having the legal consequences of revoking her employment authorization and ending her permission to be present in the United States. The court also determined that it had jurisdiction under the INA because Ms. Pascoal's appeal involved a purely legal question of statutory eligibility, not a discretionary agency action.

The court then disagreed with DHS' interpretation that a widow or widower will cease being an "immediate relative" when he or she remarries. Instead, the court concluded that the plain meaning of the statute supported its conclusion that the remarriage bar in the second sentence of the "immediate relatives" definition, which defines whether an alien spouse is an "immediate relative" after the citizen spouse has died, does not apply to individuals in Ms. Pascoal's circumstances. "That a spouse eventually remarries does nothing to impugn the validity of the original I–130 beneficiary-petition or the first marriage, and leaves the surviving spouse in the same position she would have been but for the untimely passing of her husband, an event that is beyond her control," explained the court. "[O]ur interpretation today is true to the intent of Congress that I–130 beneficiary-petitions be "adjudicated notwithstanding the death of the qualifying relative." 8 U.S.C. § 1154(l). Accordingly, the Eleventh Circuit reversed the district court's grant of summary judgment and remanded for entry of judgment in favor of Ms. Pascoal.

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DISTRICT COURTS

■ District Court Upholds CBP's Determination that "Cruises To Nowhere" Must Be Staffed By U.S. Citizens or Lawful Permanent Residents

In *Bimini Superfast Operations, LLC v. Winkowski*, No. 13-cv-1885 (D.D.C., January 10, 2014) (Kollar-Kotelly, J.), the District Court for the District of Columbia denied plaintiffs' motion for a preliminary injunction and granted, in part, the government's motion to dismiss or, in the alternative, motion for summary judgment. Plaintiffs' lawsuit challenged warning letters in which CBP warned plaintiffs that their nightly "cruises to nowhere" must cease until they were staged by U.S. citizens or lawful permanent residents, rather than D-1 nonimmigrant crewmen.

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INSIDE OIL - SPRING INTERNS

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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.

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