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LITIGATION HIGHLIGHTS

Inside

Supreme Court Finds That Kansas Conviction For Possessing Drug Paraphernalia Is Not a Controlled Substance Violation Under INA § 237 (a)(2)(b)(1)

On June 1, the Supreme Court held in ***Mellouli v. Lynch***, __ U.S. __, 2015 WL 2464047 (U.S. June 1, 2015), that an LPR's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under 8 U.S.C. § 1227(a)(2)(B)(i) for violating a law relating to a controlled substance. The Court determined that, "to trigger removal . . . , the Government must connect an element of the alien's conviction to a drug 'defined in [21 U.S.C. § 802(6)]."

The removal charge lodged against the LPR, Mellouli, was based on a Kansas drug paraphernalia possession conviction. The State defined drug paraphernalia in part by referring to Kansas's own schedules of controlled substances which, at the time of Mellouli's conviction, contained at least nine substances not included on the equivalent federal schedules referenced in the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* Thus, it was theoretically possible that Mellouli's paraphernalia conviction did not involve a federally controlled substance – indeed, the conviction records did not reflect a specific substance at all. Other evidence showed, however, that the drug paraphernalia in question was a sock used to contain four Adderall pills (which happen to be federally controlled), but this evidence was not relevant under the categorical (or modified categorical) approaches.

The removal provision at issue applies in relevant part to aliens "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country *relating to* a controlled substance (as defined in section 802 of title 21)" (emphasis added). The issue decided by the Su-

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Fifth Circuit Denies Government's Motion To Stay Preliminary Injunction Halting DAPA Program

In ***Texas v. U.S.***, __ F.3d __, 2015 WL 3386436 (5th Cir. May 26, 2015), the Fifth Circuit denied the government's request to stay the preliminary injunction which has halted the implementation by DHS of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, and the extension of the Deferred Action for Childhood Arrivals (DACA).

The government's motion for a stay pending appeal argued that the states do not have standing or a right to judicial review under the APA and, alternatively, that DAPA is exempt from the APA's notice-and-comment requirements. The government also argued that the injunction's nationwide scope was an abuse of discretion.

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Supreme Court Rules On Drug Paraphernalia Case

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preme Court was whether, to render an alien removable, it is necessary under this provision for a *conviction* to reflect a federally controlled substance, or whether it was sufficient if the *statute* under which the conviction was obtained relates to a federally controlled substance. The Court ruled in favor of the former, rejecting the latter.

The Eighth Circuit and the government's merits brief contended that the BIA had been in the process of developing a new interpretation of the removal provision that would apply to all controlled substance offenses, and would warrant application of the provision whenever the *statute* of conviction related to a federally controlled substance, regardless of whether a particular conviction did. The Court initially bypassed these contentions, however, and looked instead to the current state of actual BIA law, which distinguished drug paraphernalia cases from most other drug crimes. The BIA had ruled that, as to the former, it was unnecessary to connect a conviction to a federally controlled substance (because such crimes supposedly concerned "the drug trade in general"), while it remained necessary to show that a federally controlled substance was involved in possession and distribution offenses because they involved "a *particular* drug." *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 121 (BIA 2009). But the Court remarked that this distinction "finds no home in the text" of the removal provision, and noted the "incongruous upshot" that an alien would not be "removable for *possessing* a substance controlled only under Kansas law, but [would be] removable for using a sock to contain that substance."

The Court then invoked "[t]he historical background" it had previously laid out, showing that "Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug." That history included not only the BIA's requirement under existing law except in paraphernalia cases, but also prior deportation provisions that specified particular conduct and particular substances. The Court observed : "The Government offers no cogent reason why its position is limited to state drug schedules that have a 'substantial overlap' with the federal schedules[;] [a] statute with *any* overlap would seem to be *related to* federally controlled drugs."

The Court then silently pivoted to the separate question (not actually presented by the case) of what kind of conduct (rather than what kind of substances) might be covered by the controlled substance removal provision. Specifically, the majority stated that "[t]he Solicitor General . . . acknowledged that convictions under statutes 'that have some connection to drugs indirectly' might fall within § 1227(a)(2)(B)(i)." Taking this to be the interpretation espoused by the government, the Court declared: "This sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading." *Id.* The Court concluded with the holding "to trigger removal under §1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug 'defined in [§ 802]."

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Fifth Circuit Denies Stay Request Of PI Halting DAPA Program

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The Fifth Circuit found that the government had "not made a strong showing that it is likely to succeed on the merits of its notion that the states lack standing," because at least one state, Texas, is likely to satisfy all three standing requirements. In particular the court found that Texas was likely to meet its burden of showing a financial loss if it were required to issue driver's licenses, at a cost of $130.89 per license, to DAPA beneficiaries. The court also found that Texas is also likely to satisfy the requirement that its injury is "fairly traceable to the challenged action," rejecting the government's contention that the incidental consequences of DAPA are not cognizable injuries because the causal link is too attenuated. Finally, the court found that the injury would be redressable by a favorable ruling because "enjoying implementation of DAPA until it undergoes notice and comment could prompt DHS to reconsider its decision, which is all a litigant must show when asserting a procedural right."

The court also found that the government had "not rebutted the strong presumption of reviewability with clear and convincing evidence that the INA precludes review." The court disagreed with the government's contention that DAPA is a policy statement that is not subject to the notice and comment requirements under the APA. The court acknowledged that there was conflicting evidence on the degree to which the DACA program allowed for discretion, but that the government "had not made a strong showing that it was clearly erroneous to find that DAPA would not genuinely leave the agency and its employees free to exercise discretion."

Finally the court declined to narrow the scope of the injunction, finding, inter alia, that a partial injunction would be ineffective because DAPA beneficiaries would be fee to move between states."

FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction – Equitable Tolling

On April 29, 2015, the Supreme Court heard oral argument on the alien's petition in ***Mata v. Holder***, in which the Fifth Circuit held that it lacks jurisdiction to review the BIA's decision denying a request for equitable tolling of the 90-day filing deadline for motions to reopen. In its response to the petition for certiorari, the government argued that the Fifth Circuit holding is erroneous. The Supreme Court appointed amicus counsel to defend the judgment below.

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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. On March 17, 2014, an *en banc* panel heard oral argument.

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Conviction – Divisibility - Inconclusive Record

On May 8, 2015, the Ninth Circuit ordered *en banc* rehearing of ***Almanza-Arenas v. Lynch***. The panel opinion (originally published at 771 F.3d 1184, now withdrawn) ruled that California's unlawful-taking-of-a vehicle statute is not divisible, but even assuming divisibility, the record of conviction discharged the alien's burden of proving eligibility for relief from removal and held the Board's precedent decision (*Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009)) to be erroneous. In response to the court's *sua sponte* call for *en banc* views, the government recommended *en banc* rehearing, arguing that the panel erred because: it failed to address the Board of Immigration Appeals' precedent ruling that the alien did not carry his burden of proving eligibility when he refused the immigration judge's request to provide the plea colloquy that was relevant to assessing whether his conviction involved moral turpitude; it held (without needing to address the question) that the alien is eligible if it cannot be determined from the criminal record whether or not the conviction was for a crime of turpitude or not; it declined to follow its own *en banc* precedent (*Young v. Holder*, 697 F.3d 976 (9th Cir. 2012)) that the alien is ineligible if it cannot be determined conclusively from the criminal record that the conviction was not for a crime of turpitude, because, it believed, the reasoning in a Supreme Court decision (*Moncrieffe v. Holder*, 133 S. Ct. 1630 (2013)) overruled the reasoning of Young.

Simultaneous supplemental briefs are due from the parties by July 31, 2015.

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DHS Announces Intent to Expand Preclearance to 10 New Airports

On May 28, DHS announced that the United States intends to enter into negotiations to expand air preclearance operations to ten new foreign airports located in nine separate countries. The airports are: Brussels Airport, Belgium; Punta Cana Airport, Dominican Republic; Narita International Airport, Japan; Amsterdam Airport Schipol, Netherlands; Oslo Airport, Norway; Madrid-Barajas Airport, Spain; Stockholm Arlanda Airport, Sweden; Istanbul Ataturk Airport, Turkey; and London Heathrow Airport and Manchester Airport, United Kingdom.

These countries represent some of the busiest last points of departure to the United States – in 2014, nearly 20 million passengers traveled from these ten airports to the US. If negotiations are successful, preclearance could be completed before departure from these foreign airports rather than upon arrival in the U.S.

Expanding the preclearance program is both a security imperative – enabling CBP to stop potential threats before they arrive on US soil – as well as a strong economic opportunity. "Preclearance is a win-win for the traveling public. It provides aviation and homeland security, and it reduces wait times upon arrival at the busiest U.S. airports," said DHS Secretary Johnson.

Preclearance is the process by which CBP Officers stationed abroad screen and make admissibility decisions about passengers and their accompanying goods or baggage heading to the United States before they leave a foreign port. TSA requires that passenger and accessible property screening at a foreign preclearance airport conforms to U.S. aviation security screening standards so that the U.S.-bound aircraft can disembark passengers at a domestic U.S. air terminal without needing to be re-screened. CBP officers do, however, retain the authority to inspect passengers and their accompanying goods or baggage after arriving in the United States.

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FIRST CIRCUIT

First Circuit Holds Connecticut Plea Colloquy Not Enough to Treat Assault Conviction as Aggravated Felony

In *Villanueva v. Holder*, __ F.3d __, 2015 WL 1874108 (1st Cir. April 24, 2015) (*Lynch*, Kayatta, Barron), the First Circuit held that the BIA wrongly treated a conviction under Connecticut General Statutes § 53a-61(a) as a crime of violence and aggravated felony. The court agreed with the parties that the statute of conviction is divisible and that not all subsections constitute a crime of violence. However, the court determined that the conviction record, including the plea colloquy relied on by the agency, did not conclusively establish under which subsection of the statute the alien was convicted.

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SECOND CIRCUIT

Second Circuit Holds a Notice to Appear Without a Date and Time of Initial Hearing Triggers the Stop-Time Rule in 8 U.S.C. § 1229b(d)(1)

In *Guaman-Yuqui v. Lynch*, __ F.3d __, 2015 WL 2365838, (2d Cir. May 19, 2015) (Leval, Lynch, Lohier) (*per curiam*), the Second Circuit granted *Chevron* deference to the BIA's decision in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), and held that service of a NTA triggers the stop-time rule even if it does not contain the date and time of the alien's initial hearing.

The case concerned Guaman, an Ecuadorian national, who entered the United States without inspection in 2001. In March, 2010 the DHS personally served Guaman with a NTA, charging him with removability as an alien present in the U.S. without being admitted or paroled. The notice lacked a date and time, which were included in a notice of hearing mailed to him on April 30, 2010. Guaman did not appear at proceedings and was ordered removed *in absentia*. Several months later, Guaman filed a motion to reopen on the claim that he never received the notice of hearing. The motion was denied, but on appeal the BIA granted reopening based on evidence that the notice had been mailed to an incorrect address. In 2011, more than 10 years after Guaman's entry, the Immigration Court served Guaman with a new notice of hearing including a date and time. Guaman in turn applied for cancellation of removal, claiming undue hardship to his parents, both LPRs.

The court found that the BIA's interpretation of the stop-time rule was "a reasonable construction of statutory language, respecting both the broader structure of the INA and the extensive evidence of legislative intent."

The IJ denied Guaman's application, finding him ineligible for relief, because the April 30 notice triggered the stop-time rule, preventing him from satisfying the ten-year continuous residence requirement. Guaman appealed the IJ's decision to the BIA, which dismissed his appeal on the grounds that the stop-time rule comes into effect when DHS serves a NTA regardless of whether the notice contains the hearing's date and time.

The Second Circuit granted *Chevron* deference to the BIA's construction of the statute. The court determined the statutory language of the stop-time rule to be "ambiguous," in that, it could be read as, either enumerating requirements that the DHS is subject to in serving NTAs, or alternatively, as providing "a reference point for the charging document that triggers the stop time rule without demanding strict compliance with each of § 1229(a)'s requirements." The court found the BIA's interpretation, which adopts the latter of the two possible readings of the statute, to be "a reasonable construction of statutory language, respecting both the broader structure of the INA and the extensive evidence of legislative intent." The court determined that the legislative intent of the stop-time rule, "to discourage aliens from obstructing their immigration proceedings once notified that the government has initiated charges against them," does not depend on the alien's knowledge of his/her hearing's date and time.

Therefore the court concluded that the NTA, issued to Guaman on March 15, 2010, triggered the stop-time rule prior to his completion of ten years of continuous physical presence in the United States, rendering him ineligible for cancellation of removal.

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THIRD CIRCUIT

Third Circuit Holds That There Is No Duress Defense to Terrorist Activities Bar

In *Sesay v. Attorney General of the United States*, __ F.3d __, 2015 WL 3372539 (3d Cir. May 26, 2015) (Rendell, Smith, *Krause*) the Third Circuit held that petitioner, who alleged duress when he engaged in terrorist activity by providing material support to the Revolutionary United Front in Sierra Leone, was statutorily ineligible for asylum and restriction of removal (withholding). The court held that although the terrorism bar includes a discretionary exemption grantable by DHS for support provid-

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ed involuntarily, it does not include a duress defense.

The case concerned Sesay, a native of Sierra Leone. In 2001, he was kidnapped from his home by the Revolutionary United Front ("RUF"), after refusing to join its ranks. The petitioner was kept captive and repeatedly beaten, as he continued to rebuff the offer to take part in RUF. Eventually under the threat of death, on approximately five occasions, petitioner accompanied the rebels into the Sierra Leone jungle, during active fighting, and provided assistance by loading, unloading and carrying provisions for the rebels. After one month in the encampment, petitioner escaped, entering the U.S. in May 2001, and applying for asylum soon after. He was served an NTA in December 2009.

"Absent a waiver from the Executive Branch, the INA precludes asylum or withholding of removal for any alien who provided material support, voluntarily or involuntarily."

At his asylum hearing, the IJ found that petitioner had shown past persecution but also determined that the government had rebutted the presumption of future persecution. Alternatively, the IJ determined that petitioner was ineligible for asylum and withholding because he had provided material support to RUF, a tier III terrorist organization. The IJ also determined that there is no duress exception to the material support bar. On appeal the BIA did not address petitioner's claim of future persecution, instead it agreed with the IJ that petitioner's actions constituted material support and that there was no duress-exception.

The Third Circuit rejected petitioner's contention that his contributions were so small they should not be considered "material," finding instead that his "actions exceeded a *de minimis* threshold." However, it declined to "to define the outer boundaries of materiality." The court then, considering an issue of first impression, concluded that there is no exception to the material support bar. The court found that the statute does not contain an express duress exception, stating that this "silence… speaks volumes, given the exception to the material support bar for aliens who 'demonstrate by clear and convincing evidence that [they] did not know and should not reasonably have known that the organization was a terrorist organization." The court also noted that, since Congress subsequently" granted waiver authority to the Secretaries of State and Homeland Security, it clearly legislated on the premise that the material support bar otherwise applied to support given under duress." Therefore the court determined that, "absent a waiver from the Executive Branch, the INA precludes asylum or withholding of removal for any alien who provided material support, voluntarily or involuntarily." The court concluded that to allow a duress exception would be to "contravene unambiguous legislative intent."

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FOURTH CIRCUIT

■ Fourth Circuit Says Mother Merits Social Group Asylum Where Gang Threatened to Kill her to Recruit her Son

In ***Hernandez-Avalos v. Lynch***, 784 F.3d 944 (4th Cir. 2015) (*Shedd*, Wynn, Thacker), the Fourth Circuit determined that the death threats that petitioner, a Salvadoran mother, received from the Mara 18 gang when she refused to allow her son to join that gang, were on account of her membership in a particular social group, namely her family. Additionally, the court also held that, as matter of law, the government of El Salvador is unwilling and unable to protect petitioner from the gang members who threatened her.

The petitioner and her son entered the U.S. unlawfully in June 2008. A month later they were placed in removal proceedings, where petitioner conceded removability but sought asylum and withholding because if returned to El Salvador gang members would kill her. Petitioner claimed that in 2007 members of the Mara 18 killed one of her husband's cousins. She did not witness the murder, but she identified his body and prepared it for burial. After the burial, members of the Mara 18 came to her house and threatened to kill her if she identified gang members to the authorities as having been responsible for the killing. A few months later, five Mara 18 members came to her house and told her that her son, who was then 12, was getting ready to join the gang. When petitioner responded that her son was not going to join the gang, gang members put a gun to her head and told her that if she kept her son from joining she would die. In May 2008, gang members threatened petitioner for a third time and told her that her son was ready to join the gang. When she opposed them, she was told she had one day to turn her son over to the gang or she would be killed. Before dawn the next day, petitioner and her son left El Salvador and, with the help of a smuggler, traveled to the U.S. When asked why she did not report these incidents to the police, petitioner stated that although gang members are arrested they are released within days, find out who reports them to the police, and retaliate against that person.

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The IJ found petitioner's testimony credible but denied asylum and withholding because she had not demonstrated that she would suffer future persecution on account of a protected ground and that she had been threatened by persons that the Salvadoran government was unwilling or unable to control. On appeal the BIA affirmed the IJ's denial of asylum finding that the gang's threats against petitioner were not made on account of her membership in her nuclear family, but rather were merely incidental to the gang's recruitment aim.

The Fourth Circuit found "excessively narrow the [BIA's] reading of the requirement that persecution be undertaken 'on account of membership in a nuclear family.'" In particular the court criticized the BIA for drawing a "meaningless distinction when it concluded that the "threats were directed at [petitioner] not because she is his mother but because she exercises control over her son's activities." Under the facts of the case, said the court, the fact that petitioner is her son's mother is "at least one central reason for her persecution," and "any reasonable adjudicator would be compelled" to reach this conclusion.

The court also overturned the BIA's conclusion that petitioner had not shown that El Salvador was unwilling or unable to protect her. The court found that the BIA misstated the petitioner's testimony, and failed to consider relevant evidence about whether the government would protect her. The court explained that petitioner's "credible testimony, which is corroborated by the State Department Report, is legally sufficient under the circumstances to establish that the Salvadoran authorities are unable or unwilling to protect her from the gang members who threatened her."

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FIFTH CIRCUIT

Fifth Circuit Holds that Marijuana Conviction Rendered Lawful Permanent Resident Inadmissible for Purposes of Stop-Time Rule

In ***Calix v. Lynch***, __ F.3d __, 2015 WL 1918663 (5th Cir. April 28, 2015) (Reavley, Smith, *Southwick*), the Fifth Circuit concluded that the petitioner sufficiently exhausted his challenge to the agency's application of the stop-time rule in denying cancellation of removal. On the merits, the court upheld, albeit without giving *Chevron* deference, the BIA's conclusion that petitioner's 2001 drug conviction "rendered" him "inadmissible" for purposes of the stop-time rule.

"Any offense that triggers the stop-time rule will halt the period of continuous residence for those who are seeking admission and those who have already been admitted."

The case concerned Calix, a native and citizen of Honduras, who entered the United States in December 1997, as a lawful permanent-resident alien. He was convicted of possession of marijuana, in February 2001, and possession of cocaine, in July 2007. In October 2009, DHS charged Calix with deportability under INA, as an alien convicted of a controlled substance violation. Calix conceded removability and sought cancellation.

The IJ ruled that pursuant to the stop-time rule Calix's 2001 marijuana offense halted his accrual of continuous residence short of the seven year requirement rendering him ineligible for cancellation of removal. Calix appealed to the BIA claiming that, as he was not seeking admission to the United States in 1997, but was instead a lawful permanent resident, the stop-time rule had no effect on his eligibility. In September 2013 the BIA affirmed his removal.

The Fifth Circuit initially rejected the government contention that petitioner had failed to exhaust his administrative remedies because he had presented no legal support for his construction of the stop-time rule. The court said that petitioner had cited a case relevant to his claim. On the merits, the court did not grant *Chevron* deference to the BIA, as it determined that the BIA's interpretation in *Matter of Jurado-Delgado* 24 I&N Dec. 29, 30 (BIA 2006) "only partially resolve[d] the issues." Nonetheless, the court found that the stop-time rule applies when an alien commits an offense under INA § 212. The court opined that inadmissibility implies removability and that "removability seems a redundancy". The court determined that "the stop-time rule blends offenses that make aliens inadmissible with those making them deportable or removable. Any offense that triggers the stop-time rule will halt the period of continuous residence for those who are seeking admission and those who have already been admitted."

The court found that Paz Calix's continuous residence ended in 2001, due to his marijuana conviction that "rendered him inadmissible," and caused him to become "potentially removable if properly charged." The court concluded the Paz Calix's "accrual of continuous residence was halted as of the date he committed that offense. Because he has not resided in the United States continuously for seven years, he is ineligible for cancellation of removal."

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■ Fifth Circuit Holds that "Wave Through" at Border Counts as n "Admission in Any Status" for Cancellation of Removal Eligibility

In ***Tula-Rubio v. Lynch***, __ F.3d __, 2015 WL 2434832 (5th Cir. May 21, 2015) (*Haynes*, Stewart, Brown (sitting by designation)) the Fifth Circuit held that an alien who was "wave [d]-through" into the United States in 1992 was "admitted in any status" and therefore had accrued the continuous residence required for purposes of cancellation under INA § 240A(a)(2).

The case concerned Tula-Rubio, a Mexican national, who entered the United States in 1992, at the age of four, in a car driven by a U.S. citizen, who was waved through the port of entry by an immigration officer. Tula-Rubio became a lawful permanent resident in 2002. In May 2006 he committed two offenses: possession of marijuana and evading arrest or detention. In 2013, upon his return from a trip to Mexico, Tula-Rubio was served a NTA and charged with removability for criminal activity.

Tula-Rubio admitted the charges of removability, but filed an application for cancellation, claiming that he satisfied the seven year continuous residence requirement "after having been admitted in any status." The IJ pretermitted his application finding that "status" implied the necessity for the applicant to fall under a certain legal standing, which Tula-Rubio did not have when he entered the U.S. in 1992. On appeal the BIA also found that the 1992 entry did not constitute "admission in any status."

The court explained that "the phrase 'any status' naturally encompasses those aliens whose status allows them to lawfully remain in the United States after admission, as well as those aliens in an unlawful status."

The Fifth Circuit initially noted that there was no dispute as to whether Tula-Rubio had been lawfully admitted, as it agreed with the BIA's previous holding in *Matter of Areguillin*, 17 I&N Dec. 309 (BIA 1980) that "an alien with no immigration documents [is] 'inspected and admitted' when an immigration officer allow[s] the car she was passenger in to proceed into the United States." The court then considered whether Tula-Rubio's wave through at the border in 1992 constituted "admitt [ance] in any status." In particular, the court focused on "whether the phrase 'any status' imposes any addition to being admitted to the United States." The court held "that the plain meaning of the phrase 'any status' broadly encompasses all states or conditions, of whatever kind, that an alien may possess under the immigration laws." The court explained that "the phrase 'any status' naturally encompasses those aliens whose status allows them to lawfully remain in the United States after admission, as well as those aliens in an unlawful status." The court found that this broad interpretation of "any status" was consistent with Congress' intent, as no "specific status, lawful or otherwise is [mentioned as] necessary to satisfy this requirement."

The court concluded that "given [Tula-Rubio's] admission, it matters not whether his status under the immigration law at the time was lawful or unlawful or that of an immigrant or non-immigrant," because he was "admitted in any status." Therefore he fulfilled the seven year continuous residence requirement and is eligible for cancellation of removal.

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■ Fifth Circuit Holds Resident Child Receives Citizenship from Naturalizing Parent with Actual Custody

In ***Kamara v. Lynch***, __ F.3d __, 2015 WL 2384112 (5th Cir. May 18, 2012) (*Jones*, Barksdale, Prado), the Fifth Circuit held that, where no judicial custody decree exists, to decide whether a child of divorced parents derived citizenship under former 8 U.S.C. § 1432(a), the agency can look to whether the naturalizing parent had "actual uncontested custody" after a legal separation. The court also concluded that "actual uncontested custody" requires not only actual custody by the naturalizing parent, but also proof that the non-naturalizing parent is "removed from the picture."

The case concerned Kamara, a Sierra Leone native, whose parents were divorced in Texas. No child custody provisions were made because Kamara and his siblings lived with their father in Sierra Leone, at the time. In April 1991, Kamara came to the U.S. as a visitor and became an LPR on May 10, 1994. On February 20, 1998 Thersa Nuhad Kargbo, Kamara's mother, became a naturalized U.S. citizen. At that time Kamara was sixteen. He and his mother lived together in the U.S. from 1991 to 2000.

In August 2000 Kamara was convicted of several crimes including unlawfully carrying a weapon. In 2009, Kamara was detained and placed in removal proceedings. However, the IJ terminated the proceedings due to the belief that Kamara may have been a derivative U.S. citizen and instructed him to file an N-600 (Application for Certificate of Citizenship) with USCIS. USCIS denied the N-600. In October 2011 ICE mailed Kamara a NTA, alleging that he was removable for the firearm offense. Kamara then sought

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to terminate the proceedings on the ground that he was a U.S. citizen. The IJ and subsequently the BIA determined that Kamara was ineligible for derivative citizenship because he failed to prove that his mother had "sole legal custody of him," as required by *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006). Kamara's parents' divorce degree did not include a custody award.

The Fifth Circuit disagreed with the BIA's application of *Bustamante-Barrera* "sole legal custody" standard in Kamara's case finding instead that he needed to prove only "actual uncontested custody." The court explained that *Bustamante-Barrera* applied only to cases in which joint custody was involved. However in cases where a custody agreement is lacking, such as that of Kamara, the *Matter of M's* 3 I&N Dec. 859 (CO 1950) two-step analysis should be applied. Under *Matter of M,* the first step is whether there is a "judicial determination of judicial or statutory grant of custody" and to determine if "the parent to whom custody has been granted has legal custody for INA purposes." Second, in the absence of a determination or where a custody agreement is lacking, the parent in "actual uncontested custody" is deemed to have legal custody.

Applying the *Matter of M* standard, the court found that Kamara's mother had actual custody from 1991 to 2000. But, the court determined that "[g]enuine issues of material fact remain, however, as whether the actual custody was *uncontested*." Finally, the court said that Kamara "bears the burden of proving by a preponderance of credible evidence that he qualifies for naturalization," and that all doubts should be resolved in favor of the United States. Accordingly, the case was remanded to the district court for a new hearing on Kamara's nationality claim.

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SIXTH CIRCUIT

■ Sixth Circuit Declines to Follow Ninth Circuit or Seventh Circuit View on Jurisdictional Bar for CAT Claims

In *Ventura-Reyes v. Lynch*, __ F.3d __, 2015 WL 3485909) (*Donald,* Merritt, Stranch) (6th Cir. May 26, 2015), the Sixth Circuit declined to follow the reasoning of either the Ninth Circuit in *Pechenkov v. Holder,* 705 F.3d 444 (9th Cir. 2012), or the Seventh Circuit in *Issaq v. Holder*, 617 F.3d 962 (7th Cir. 2010), and agreed with OIL's view that the jurisdictional bar in INA § 242(a)(2)(C) prevented the court from reviewing the merits of a criminal alien's claim for protection under the Convention Against Torture. Concluding that the alien, a citizen of the Dominican Republic, raised no meritorious constitutional claims or questions of law, the court denied the petition in part and dismissed the remainder for lack of jurisdiction.

The Sixth Circuit agreed with OIL's view that the jurisdictional bar in INA § 242(a)(2)(C) prevented the court from reviewing the merits of a criminal alien's claim for protection under the Convention Against Torture.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds the BIA Abused its Discretion in Determining Petitioner Was Not Prejudiced by His Attorney's Mistakes

In *Habib v. Lynch*, __ F.3d __, 2015 WL 3422868 (Flaum, Kanne, *Williams*) (7th Cir. May 29, 2015), the Seventh Circuit held that the BIA abused its discretion by denying petitioner's motion to reopen because he was prejudiced by his former attorney's actions. The court held the petitioner could have rebutted the presumption that he had gained residency because of a willful misrepresentation of fact by demonstrating that he was eligible for adjustment of status despite his misrepresentation.

The petitioner, a Pakistani national, was married in Pakistan in 1980 and had three children. He later came to the U.S., married Ruby Bualice a U.S. citizen in 1996, and then obtained LPR status. However, in his application for adjustment and his application for naturalization in 2004, petitioner neglected to mention his past marriage and his three children. When interviewed he also stated that Bualice was his first wife. Eventually, in 2010, the USCIS denied petitioner's application for naturalization on the ground that he had obtained LPR status by fraud. USCIS discovered that at the time petitioner obtained LPR status he was still married to his first wife in Pakistan. Bualice died in 2008.

Petitioner was then served an NTA, as an alien who was inadmissible at the time he adjusted his status, both on the grounds that he had committed fraud in obtaining LPR status and that he lacked a valid entry document.

During his removal hearing petitioner's lawyer allegedly made several errors including denying the allegation that petitioner's marriage to Bualice was not legally valid and later conceding to the materially identical allegation that Habib was "not validly married." petitioner's counsel also filed petitioner's divorce deed in an untimely manner

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and never amended or withdrew his plea admitting that petitioner's marriage was invalid, thus contradicting the decree and petitioner's later testimony. Petitioner testified that he had divorced and that the marriage to Bualice was valid. He admitted that he omitted the marriage information in fear he would upset Bualice with the truth. The IJ ordered petitioner removed as charged. Petitioner then obtained new counsel, appealed to the BIA and filed an MTR on the grounds of ineffective counsel. The BIA dismissed the appeal and denied the motion concluding that petitioner he had not been prejudiced by his prior counsel's actions.

The Seventh Circuit held that the BIA abused its discretion in denying the motion to reopen based on the ineffective assistance claim, finding that "the Board demonstrated a misunderstanding of the law when it stated that [petitioner] had not shown that 'he was prejudiced by counsel's admission . . . that he was not validly married to a United States citizen when he adjusted his status.'" The court determined that counsel's admission of the allegation, which petitioner later contradicted in his testimony, "effectively waived [petitioner's] defense to removal."

The court noted that the BIA only highlighted the fact that the divorce decree, used as evidence by petitioner, was not timely filed, but it did not consider counsel's inconsistencies in submitting the form, evidence that supported petitioner's claim that the untimely filing of the evidence was due to his counsel's inefficiencies. Therefore the court found that the BIA's "failure to discuss evidence tending" to support petitioner's claim "warrants remand because it calls into doubt whether the Board adequately considered this significant evidence."

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■ Seventh Circuit Holds Alien Is Not Eligible for "Stand-Alone" Waiver of Inadmissibility

In ***Palma-Martinez v. Lynch***, __ F.3d __, 2015 WL 2167719 (7th Cir. May 11, 2015) (Posner, *Manion*, Tinder), the Seventh Circuit held that the alien may only request a waiver of inadmissibility under section INA § 212(h), in conjunction with an adjustment of status application or by seeking admission from outside the United States. The court also held that the Immigration Judge did not abuse his discretion in denying the alien's continuance motion to pursue post-conviction relief because a pending collateral attack does not affect the conviction's finality for immigration purposes and relief was too speculative.

The court held that the IJ did not abuse his discretion in denying the alien's continuance motion to pursue post-conviction relief because a pending collateral attack does not affect the conviction's finality for immigration purposes.

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EIGHTH CIRCUIT

■ Eighth Circuit Upholds BIA's Denial of Motions to Reopen and Reconsider For Failure To Show Changed Country Conditions in Guatemala

In ***Martinez v. Lynch***, 785 F.3d 1262 (8th Cir. 2015) (*Kelly*, Colloton, Beam) the Eighth Circuit held that the BIA did not abuse its discretion in denying the petitioner's untimely motion to reopen because he did not demonstrate changed country conditions in Guatemala. The court concluded that conditions of gang violence in Guatemala were substantially similar to those that existed at the time of the petitioner's removal hearing. The court also held that the BIA did not abuse its discretion in denying the motion to reconsider because petitioner did not specify an error of fact or law in the BIA's earlier order denying reopening.

Petitioner, a Guatemalan national, entered the U.S. on June 16, 1999, at the age of 17, to join his mother, a Mexican native, who had moved to the U.S. earlier. In 1999, the U.S. Border Patrol issued petitioner a NTA. In 2000, petitioner missed his second hearing and was ordered removed *in absentia*. In 2010 he filed a MTR, which was denied. He appealed to the BIA, which granted his motion. In a hearing on October 22, 2012 the IJ granted petitioner voluntary departure. On February 20, 2013 petitioner filed an untimely MTR, which the IJ denied for failure to show changed country conditions. On appeal the BIA affirmed the IJ's decision and also denied a subsequent motion for reconsideration.

The Eight Circuit found that petitioner failed to show changed country conditions and that the type of violence suffered by petitioner "was occurring at the time of [his] 2012 hearing." Moreover, petitioner failed to show that the fact that his friend in Guatemala was killed, because he refused to sell drugs, was evidence of changed country conditions. Therefore the court determined that "it was not an abuse of discretion for the BIA to deny [his MTR]." The court also held that the BIA did not abuse its discretion in denying the motion for reconsideration," because petitioner failed to demonstrate "errors of law or fact in the previous order," as the evidence he presented to the court did not establish changed country condi-

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tions, but rather "conditions [that] have plagued Guatemala since [petitioner] left for the United States."

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NINTH CIRCUIT

■ **Ninth Circuit Applies U.S. Immigration Laws Retroactively in the CNMI**

In *Mtoched v. Lynch*, __ F.3d __, 2015 WL 2445063 (9th Cir. May 22, 2015) (Tashima, Rawlinson, *Clifton*) the Ninth Circuit held that U.S. immigration laws could be applied retroactively and enforced against an alien who entered the territory, committed a crime, and was convicted before the U.S. extended its immigration laws to the Commonwealth of the Northern Mariana Islands in November 2009. The court also held that the alien's conviction for assault with a dangerous weapon under CNMI law was a crime involving moral turpitude, under the modified categorical approach, making him removable.

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■ **Ninth Circuit Favorably Amends Panel Decision Upholding Application of Heightened Discretionary Standard Articulated in *Matter of Jean* to Adjustment of Status Applicants Who Are Convicted of "Violent or Dangerous" Crimes**

In *Torres-Valdivias v. Lynch*, __ F.3d __, 2015 WL 2146726 (9th Cir. May 8, 2015) (*Clifton*, Silverman, Watson (by designation)), the Ninth Circuit amended its prior published decision and denied the alien's petition for panel and *en banc* rehearing. In the underlying decision, the panel upheld the BIA's application of the heightened standard for granting discretionary relief to aliens convicted of a "violent or dangerous" crime established in *Matter of Jean*, 23 I&N Dec. 373 (AG 2002), to adjustment of status applications under 8 U.S.C. § 1255. The court deleted language from the original decision which stated that the BIA created a new rule, and amended its decision to reflect that the BIA merely applied its already -existing controlling precedent in *Matter of Jean*.

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■ **Ninth Circuit Holds Waiver of Appeal Not Valid Where Immigration Judge Made Mistake about Conviction that Impacted Eligibility for Relief**

In *Garcia v. Lynch*, __ F.3d __, 2015 WL 2385402 (9th Cir. May 20, 2015) (Hawkins, Paez, Berzon) (*per curiam*), the Ninth Circuit held a waiver of appeal was not considered knowing and intelligent where the IJ erroneously found that petitioner's statute of conviction was an aggravated felony and advised him that he did not qualify for any relief from removal.

The court explained that when the record contains an inference that an alien is eligible for relief but the IJ fails to advise him or her and give an opportunity to develop the issue, his waiver of appeal is not "considered and intelligent."

The petitioner, a citizen of the Philippines, has been an LPR since 2004. In 2009 he pleaded guilty to four charges in California, including a violation under California Penal Code § 487(a). He was sentenced to one year and four months in prison for that conviction. In 2011, DHS instituted removal proceedings against petitioner alleging that § 487(a) conviction constituted an aggravated felony because it was a theft offense under INA § 101(a)(43(G). Petitioner initially sought to obtain counsel but then proceeded pro se. However, he did receive assistance of counsel in preparing his pleadings where he argued that his § 487(a) conviction was not an aggravated felony because that section was overbroad. The IJ found that the conviction was an aggravated felony and ordered petitioner removed. The IJ then explained to petitioner that he had the right to appeal but could waive that right, and also explained that despite his marriage to a U.S. citizen he would not be eligible for any waiver due to his conviction. Petitioner agreed to waive the appeal, but nonetheless filed a pro se notice of appeal to the BIA, attaching the pleadings he had filed with the IJ.

The BIA dismissed the appeal noting that petitioner had waived his right to appeal. Petitioner, who was now represented by counsel, filed a motion to reconsider arguing that at the time he had waived his appeal he was confused and had not made a knowing and intelligent and voluntary waiver. He also attached declaration stating that at time of hearing he was scared, confused, English was not his first language, and had difficulty hearing the IJ. The BIA denied the motion finding that petition had made a knowing an voluntary waiver of his appeal.

The Ninth Circuit found that the BIA's denial of the motion was contrary to law and an abuse of discretion. The court explained that when the record contains an inference that an alien is eligible for relief but the IJ fails to advise him or her and give an opportunity to develop the issue, his waiver of appeal is not "considered and intelligent." Initially the court determined that petitioner had exhausted the argument because he had articulated his contentions. On the merits, the court found that under the categorical approach, § 487(a) is doubly overbroad because it permits a conviction for

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theft of labor, while the generic definition does not, and an individual may be convicted even if the victim consented to transfer his property. The court then applied the modified categorical approach and held that nothing in the convictions documents established that petitioner's conviction was for non-consensual grand theft. Accordingly, the court held that in light of the IJ's error, petitioner's waiver was not "considered and intelligent," and therefore the denial of the motion was contrary to law and an abuse of discretion.

In a concurring opinion Judge Berzon agreed with the majority's conclusion that the appeal waiver was invalid, but would have also found that the regulation governing the finality of IJ decisions, 8 C.F.R. § 1003.39 "is flatly inconsistent with the INA" and, that the "appeal waiver system in immigration courts raises some troubling due process concerns."

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DISTRICT COURTS

■ **Central District of California Grants Government's Motion to Dismiss Constitutional and APA Challenges to Adam Walsh Act**

In *Gebhardt v. Johnson*, No. 14-cv-02277 (C.D. Cal. May 13, 2015) (Phillips, J.), the District Court for the Central District of California dismissed a complaint challenging a provision of the Adam Walsh Act ("AWA") that bars the approval of beneficiary petitions filed by individuals convicted of certain sex offenses unless the Secretary of Homeland Security finds in his "sole and unreviewable discretion" that the petitioner poses no risk to the beneficiary. The complaint challenged the AWA as violating the petitioner's substantive due process right to marriage. The complaint also challenged the agency's implementation of the AWA as improperly retroactive, excessively punitive, procedurally deficient, and as applying a higher evidentiary standard on the petitioner than the one imposed by the statute. The court found that the AWA, when read in conjunction with 8 U.S.C. § 1252(a)(2)(B)(ii), bars all challenges to the Secretary's exercise of discretion, including claims that the agency acted unconstitutionally in implementing the statute.

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■ **District of Columbia District Court Denies Tech Workers' Preliminary Injunction Motion Seeking to Block Final Rule Permitting Certain Spouses of H-1B Workers to Apply for Employment Authorization Documents**

In *Save Jobs USA v. Dep't of Homeland Security*, No. 15-cv-615 (D.D.C. May 25, 2015) (Chutkan, J.), after oral argument, the District Court for the District of Columbia denied a preliminary injunction motion to Save Jobs USA, composed by a group of former Southern California Edison tech workers who lost their jobs and were allegedly replaced by H-1B workers.

Plaintiff had sought to block the DHS's implementation of a final rule published at 80 *Fed. Reg.* 10284 (Feb 25, 2015), permitting certain H-4 spouses of H-1B workers to apply for employment authorization documents ("EADs").

The court held that plaintiffs failed to demonstrate irreparable harm because their claim of increased competition for tech jobs from H-4 nonimmigrants with EADs was entirely speculative. "Save Jobs does not explain how many IT jobs may be taken by H-4 visa holders, how many of those jobs its members may have sought themselves, what pay or benefits its members risk losing while the case is pending, or what other harm its members may face," said the court. "The court is left to speculate as to the magnitude of the injury, and speculation is not enough to turn economic loss into irreparable harm."

"The court is left to speculate as to the magnitude of the injury, and speculation is not enough to turn economic loss into irreparable harm."

The court also held that plaintiff had not shown that the harm was imminent. "When the Rule takes effect on May 26, 2015, H-4 visa holders will begin applying for employment authorization. These applications may take months to process, and may be followed by months of job hunting until an H-4 visa holder actually finds employment. There is no clear indication when additional competition may occur. Save Jobs has also not shown that the Rule will have any imminent impact on H-1B visa holders."

The court declined to address the other preliminary injunction factors in light of the plaintiff's failure to show irreparable harm, but noted that "whether American workers and the U.S. economy are better served with more or fewer foreign workers is a policy question the court need not answer.

The court did not address the merits of the parties' arguments or jurisdictional issues.

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Court of Appeals Adverse Credibility Project – Report for 2014

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

The data compiled in the tables below reflect relevant decisions issued by the courts of appeals in 2014, the most recent year for which complete data are available. The tables tally all decisions in which – regardless of the ultimate outcome of the petition for review – the appellate court has either approved of, or reversed, the adverse credibility holding reached by the immigration judge or Board of Immigration Appeals.

Petitions for review in which the decision does not decide an adverse credibility issue are not counted, even though the immigration judge or Board made an adverse credibility determination. Cases in which the court upheld the agency's adverse credibility determination, although granting the petition for review on a different issue, would be included in the data. However, a petition denied because of, for example, a failure to demonstrate the requisite nexus, without addressing any credibility issues, would not.

This project's results were used to support the adoption of the REAL ID Act amendments. The project now monitors results in both pre- and post-REAL ID Act cases. The current purpose of the project is to determine the extent to which the courts of appeals are applying those amendments. The underlying assumption is that the courts' conscientious application of the amendments should be reflected in higher

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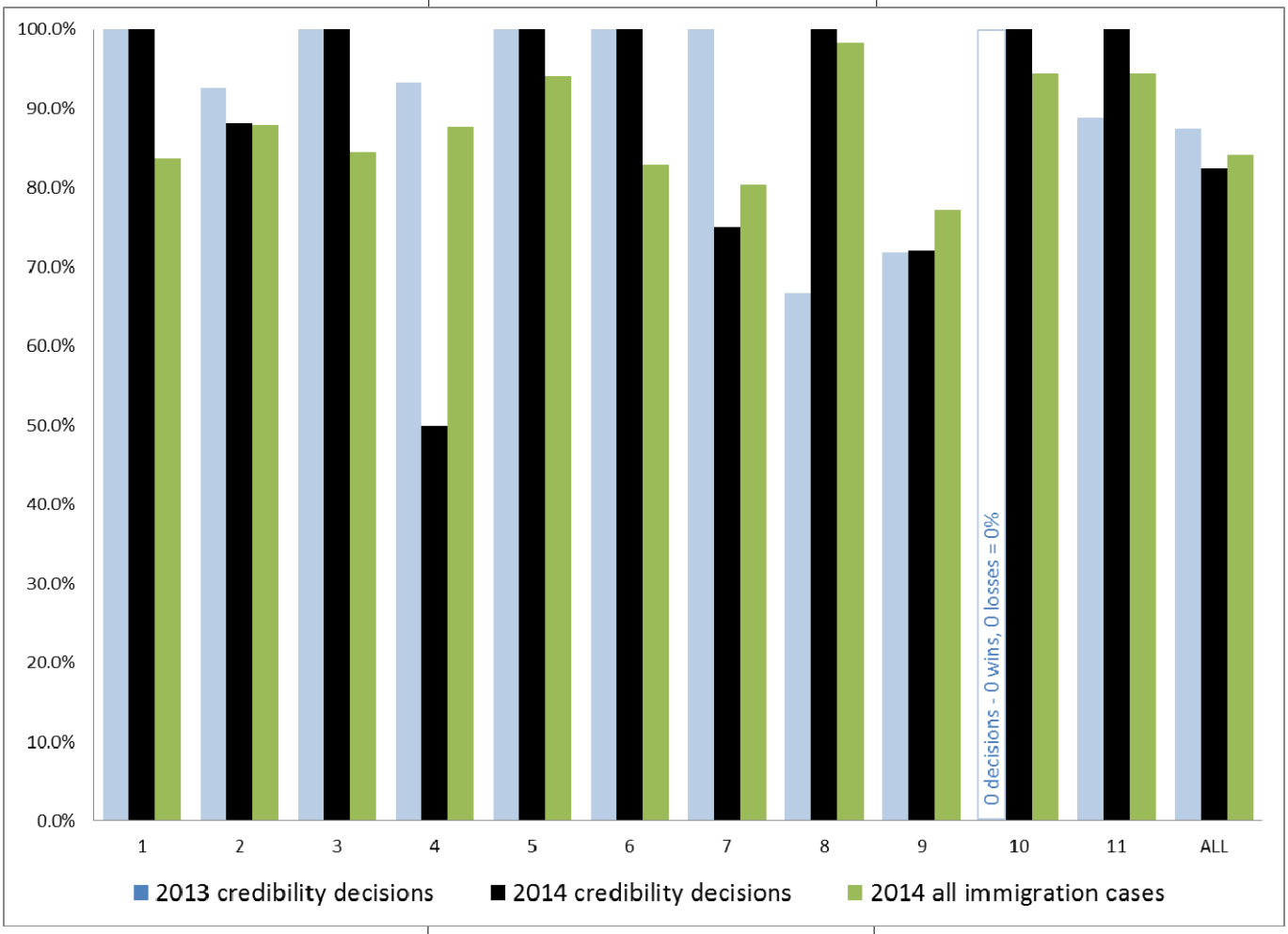

CREDIBILITY PROJECT

government win rates in post-REAL ID Act cases.

RESULTS

Total number of adverse credibility decisions rose by about 15%

The chart shows that the number of relevant decisions rose in 2014, with the total number of adverse-credibility-related decisions at 302. By contrast, in 2013 the number was 264, and in 2012, 293. As usual, the Ninth Circuit issued the highest number of decisions addressing the EOIR's credibility findings (136 in 2014, up from 85 in 2013). The second-place circuit in 2014 was the Second Circuit and the third-place circuit was the Sixth Circuit, exchanging the ranks they held in 2013, and resuming the relative ranks they held in 2012. The Second Circuit numbers rose to 93 from 54 in 2013; the Sixth Circuit dropped to 40 from 62 in 2013 (all wins in both years). No other circuit had a number in double digits in 2014, although such numbers were reached by the Eleventh, Third, and Fourth Circuits in 2013.

Overall win percentage decreased from 2013 to 2014

The overall win percentage in adverse credibility cases in 2014 was 82.5%, down from 87.5% in 2013. This win percentage was higher than the 2014 win percentage in all asylum cases (81.3%), but lower than the win percentage in all immigration cases (84.1%).

Adverse-credibility-related losses occurred only in the Second, Fourth, Seventh, and Ninth Circuits, but the win percentage declined in all of these except the Ninth

All of the adverse credibility decisions in the following seven circuits were wins in 2014 – the First (3), Third (5), Fifth (4), Sixth (40), Eighth (2), Tenth (1), and Eleventh (8) Cir-

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2012 Credibility Decisions

Circuits	win (%)	win (#)	loss (%)	loss (#)	overall win % (all immigr. cases)
1st/pre REAL ID	100.0%	2	0.0%	0	
1st/post REAL ID	100.0%	1	0.0%	0	
1st/total	100.0%	3	0.0%	0	89.5%
2d/pre REAL ID	100.0%	6	0.0%	1	
2d/post REAL ID	88.4%	76	11.6%	10	
2d/total	88.2%	82	11.8%	11	92.2%
3d/pre REAL ID	0.0%	0	0.0%	0	
3d/post REAL ID	100.0%	5	0.0%	0	
3d/total	100.0%	5	0.0%	0	91.5%
4th/pre REAL ID	0.0%	0	0.0%	0	
4th/post REAL ID	50.0%	3	50.0%	3	
4th/total	50.0%	3	50.0%	3	95.4%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	4	0.0%	0	
5th/total	100.0%	4	0.0%	0	98.1%
6th/pre REAL ID	100.0%	5	0.0%	0	
6th/post REAL ID	100.0%	35	0.0%	0	
6th/total	100.0%	40	0.0%	0	96.9%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	66.7%	2	33.3%	1	
7th/total	75.0%	3	25.0%	1	74.3%
8th/pre REAL ID	100.0%	1	0.0%	0	
8th/post REAL ID	100.0%	1	0.0%	0	
8th/total	100.0%	2	0.0%	0	93.8%
9th/pre REAL ID	69.8%	30	30.2%	13	
9th/post REAL ID	86.1%	68	13.9%	11	
9th/total	80.3%	98	19.7%	24	86.1%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	50.0%	1	100.0%	1	
10th/total	50.0%	1	50.0%	1	88.6%
11th/pre REAL ID	100.0%	2	0.0%	0	
11th/post REAL ID	75.0%	6	25.0%	2	
11th/total	80.0%	8	20.0%	2	83.7%
TOTAL	85.6%	249	14.4%	42	
Total/pre REAL ID	77.0%	47	23.0%	14	
Total/post REAL	87.8%	202	12.2%	28	

Win percentage in all asylum cases circuitwide -- 81.3%

Win percentage in all immigration cases circuitwide -- 89.1%

CREDIBILITY PROJECT

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cuits. In other words, we lost adverse credibility decisions in only four circuits (the Second, Fourth, Seventh and Ninth Circuits), compared to six circuits (the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits) in 2013. Among these four, the lowest win percentages were in the Fourth Circuit, at 50% (based on six cases), the Ninth Circuit, at 72.1% (based on 136 cases), and the Seventh Circuit, at 75% (based on four cases).

Compared with the 2013 statistics, there were decreases in win percentages in the Second (from 92.6% to 88.2% of 93 cases), Fourth (from 93.3% to 50% of six cases), and Seventh (from 100% to 75% of four cases) Circuits. In contrast, the win rates increased in the Eighth Circuit (66.7% to 100% of two cases), Ninth (71.8% to 72.1% of 136 cases), Tenth (0% to 100% of 1 case), and Eleventh (88.9% to 100% of eight cases) Circuits.

Percentage of credibility-related cases decided under the REAL ID Act increased, with win rates continuing to be higher in post-REAL ID Act than in pre-, but win rates declined in both post- and pre-REAL ID Act cases.

Decisions are categorized by whether they did or did not involve application of the changes introduced by the REAL ID Act. In 2014, 79.1% of the credibility-related decisions were decided under the REAL ID Act; in 2013, that percentage was 71.2%. The win percentage circuitwide in 2014 was considerably higher for post-REAL ID Act determinations (84.5%) than for pre-REAL ID Act decisions (74.6%). The corresponding numbers in 2013 were 89.9% and 81.6%.

In 2014, the Ninth, Second, and Sixth Circuits – the same circuits with the biggest numbers of all credibility decisions – had the largest numbers of post-REAL ID Act decisions. The

2013 Credibility Cases

Circuits	win (%)	win (#)	loss (%)	loss (#)	overall win % (all immigr. cases)
1st/pre REAL ID	100.0%	1	0.0%	0	
1st/post REAL ID	100.0%	2	0.0%	0	
1st/total	100.0%	3	0.0%	0	89.5%
2d/pre REAL ID	100.0%	7	0.0%	0	
2d/post REAL ID	91.5%	43	8.5%	4	
2d/total	92.6%	50	7.4%	4	92.2%
3d/pre REAL ID	100.0%	3	0.0%	0	
3d/post REAL ID	100.0%	13	0.0%	0	
3d/total	100.0%	16	0.0%	0	91.5%
4th/pre REAL ID	100.0%	5	0.0%	0	
4th/post REAL ID	90.0%	9	10.0%	1	
4th/total	93.3%	14	6.7%	1	95.4%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	5	0.0%	0	
5th/total	100.0%	5	0.0%	0	98.1%
6th/pre REAL ID	100.0%	14	0.0%	0	
6th/post REAL ID	100.0%	48	0.0%	0	
6th/total	100.0%	62	0.0%	0	96.9%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	100.0%	1	0.0%	0	
7th/total	100.0%	2	0.0%	0	74.3%
8th/pre REAL ID	50.0%	1	0.0%	1	
8th/post REAL ID	100.0%	1	0.0%	0	
8th/total	66.7%	2	33.3%	1	93.8%
9th/pre REAL ID	66.7%	26	33.3%	13	
9th/post REAL ID	76.1%	35	23.9%	11	
9th/total	71.8%	61	28.2%	24	86.1%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	0.0%	0	100.0%	1	
10th/total	0.0%	0	100.0%	1	88.6%
11th/pre REAL ID	100.0%	4	0.0%	0	
11th/post REAL ID	85.7%	12	14.3%	2	
11th/total	88.9%	16	11.1%	2	83.7%
TOTAL	87.5%	231	12.5%	33	
Total/pre REAL ID	81.6%	62	18.4%	14	
Total/post REAL ID	89.9%	169	10.1%	19	

Win percentage in all asylum cases circuitwide: 87.5%

CREDIBILITY PROJECT

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Ninth had 91 (66.9% of all its credibility decisions), the Second had 86 (92.5%), and the Sixth had 35 (87.5%). The Second, Ninth, and Tenth Circuits had higher win rates in post-REAL ID Act cases than in pre-REAL ID Act cases: the Second's win percentages were 88.4% (of 86 cases) and 85.7%, respectively; the Ninth's were 74.7% (of 91 cases) and 66.7%; and the Tenth's were 100% (of one case) and 0%.

Zeroing in on the Ninth Circuit

The number of credibility decisions was 302, up from 264 in 2013. The win percentage was 82.5%, down from 87.5% in 2013. We may see a continuation of these trends, as lower government win rates may spur an increase in the number of credibility challenges filed in the Ninth Circuit.

Focusing on the impact of the REAL ID Act, the number of post-REAL ID Act cases was 91, representing 66.9% of all credibility decisions in the Ninth Circuit. In 2013, there were 46 post-REAL ID Act decisions, representing 54.1% of all the credibility decisions in the Ninth Circuit. As time goes by, we expect to see a rise in the percentage of credibility cases decided under the REAL ID Act.

The win rate for post-REAL ID Act cases was 74.7%, compared to a win rate of 66.7% for pre-REAL ID Act cases. In 2013, these rates were 76.1% and 66.7%, respectively. Thus the win rates in post-REAL ID Act cases continue to surpass those in pre-REAL ID Act cases within the Ninth Circuit, mirroring the circuit-wide pattern. Yet the win rates for both post- and pre-REAL ID Act cases fell in the Ninth Circuit between 2012 and 2014.

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2014 Credibility Cases

Circuits	win (%)	win (#)	loss (%)	loss (#)	overall win % (all immigr. cases)
1st/pre REAL ID	100.0%	2	0.0%	0	
1st/post REAL ID	100.0%	1	0.0%	0	
1st/total	100.0%	3	0.0%	0	89.5%
2d/pre REAL ID	100.0%	6	0.0%	1	
2d/post REAL ID	88.4%	76	11.6%	10	
2d/total	88.2%	82	11.8%	11	92.2%
3d/pre REAL ID	0.0%	0	0.0%	0	
3d/post REAL ID	100.0%	5	0.0%	0	
3d/total	100.0%	5	0.0%	0	91.5%
4th/pre REAL ID	0.0%	0	0.0%	0	
4th/post REAL ID	50.0%	3	50.0%	3	
4th/total	50.0%	3	50.0%	3	95.4%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	4	0.0%	0	
5th/total	100.0%	4	0.0%	0	98.1%
6th/pre REAL ID	100.0%	5	0.0%	0	
6th/post REAL ID	100.0%	35	0.0%	0	
6th/total	100.0%	40	0.0%	0	96.9%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	66.7%	2	33.3%	1	
7th/total	75.0%	3	25.0%	1	74.3%
8th/pre REAL ID	100.0%	1	0.0%	0	
8th/post REAL ID	100.0%	1	0.0%	0	
8th/total	100.0%	2	0.0%	0	93.8%
9th/pre REAL ID	69.8%	30	30.2%	13	
9th/post REAL ID	86.1%	68	13.9%	11	
9th/total	80.3%	98	19.7%	24	86.1%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	50.0%	1	100.0%	1	
10th/total	50.0%	1	50.0%	1	88.6%
11th/pre REAL ID	100.0%	2	0.0%	0	
11th/post REAL ID	75.0%	6	25.0%	2	
11th/total	80.0%	8	20.0%	2	83.7%
TOTAL	85.6%	249	14.4%	42	
Total/pre REAL ID	77.0%	47	23.0%	14	
Total/post REAL	87.8%	202	12.2%	28	

Win percentage in all asylum cases circuitwide -- 81.3%

Win percentage in all immigration cases circuitwide -- 89.1%

OIL Summer Interns

(Continued from page 17)

Kirsten Battaglia

Ms. Kirsten Battaglia graduated with a BA in international relations and Spanish with a minor in vocal performance from Muskingum University, and is a rising 3L at American University Washington College of Law. Her primary legal interests include national security law, international trade and business law, tax law, and immigration law. She has interned at EOIR with the BIA and is interning at OIL on John Blakeley's team. After graduation, she intends to begin a career with the federal government, with an emphasis in national security matters.

Lilah Thompson

Ms. Lilah Thompson is a rising 2L at Temple University James E. Beasley School of Law in Philadelphia. Lilah is the President of the Student Public Interest Network, the Co-President of the National Lawyer's Guild, and a Law and Public Policy Scholar. This summer, Lilah is serving as an OIL intern for the McIntyre Team.

Lindsay Donahue

Ms. Lindsay Donahue graduated from Scripps College with a major in East Asian Studies and a minor in Japanese. She is a rising 3L at the University of Washington School of Law in Seattle, where she serves as a Senior Articles Editor for the Washington International Law Journal. Lindsay is a returning OIL intern on the Flynn Team, and will be interning at the Seattle Immigration Court this fall.

Lisa Southerland

Ms. Lisa Southerland is a rising 2L at American University Washington College of Law and an OIL Law Clerk for the John Hogan team. She is a Junior Staff member of the American University International Law Review, a Research Associate for the Public International Law and Policy Group, and will be a Research Assistant for Professor Ira Robbins at WCL in the fall. She is also a Returned Peace Corps Volunteer and served in Armenia from 2011-2013.

Meaghan McGinnis

Ms. Meaghan McGinnis is a rising 2L at The Pennsylvania State Dickinson School of Law. She is a new OIL intern with Team Candaux and was previously an intern for a District Attorney's Office in Upstate New York where she is from. She is excited to gain experience with immigration law and is grateful for the opportunity to learn as much as she can from the OIL attorneys this summer.

Melissa Castillo

Ms. Melissa Castillo is a rising 2L at Temple University Beasley School of Law. She is the Vice President for the International Law Society and a member of the Immigration and Human Rights Committee of the National Lawyers Guild. She is a new OIL intern with Team McKay this summer.

Miriam Abaya

Ms. Miriam Abaya is a rising 2L at Temple University Beasley School of Law. She is a 2015 Law and Public Policy Scholar. She is a new OIL Intern with Team Wernery.

Monica Twombly

Ms. Monica Twombly is a rising third-year law student at St. Thomas University in Miami, FL. She is a member of the *St. Thomas University Law Review* editorial board, where she serves as Executive Notes and Comments Editor. She wrote her comment for full membership on the law review on the effect of counsel in special immigrant juvenile status proceedings. Monica is a law clerk on team 7, working under the supervision of Lisa Damiano.

Olga Fleysh

Ms. Olga Fleysh is a rising 2L at Washington College of Law at American University. She is President of the JD/MBA Club, Junior Staff on the International Law Review, and on the board of the Jewish Law Student Association. She is a new OIL intern with Team Molina and this spring will be interning in the pro bono department of a D.C law firm.

Rogendy Toussaint

Mr. Rogendy Toussaint is a rising 4LE at St. John's University School of Law. He is the Executive Director of the Moot Court Honor Society and a Senior Staff Writer for the Journal of Civil Rights and Economic Development. He is a new OIL intern with Team Blakeley, and this fall, will be interning within the Civil Division of the US Attorney's Office for the Eastern District of New York.

Samy Dorgham

Mr. Samy Dorgham is a rising 2L at American University Washington College of Law. He is a Marshall Brennan Fellow and the Vice President of ADVANCE Mentoring at American. He is part of Team Hogan, as a new OIL Law Clerk.

Sandra Huerta

Ms. Sandra Huerta is a rising 2L at Columbia Law School. She is a Production Editor for the Columbia Journal of Gender and Law and is on the board of the Columbia Law School Latino/a Law Students Association. She is a new OIL intern with the Appellate Team.

Scott Dion

Mr. Scott Dion is a rising 2L at Temple University's Beasley School of Law and a Temple Law & Public Policy Scholar. As a Law & Public Policy Scholar, in addition to spending the summer working in a public interest job, he will be researching a selected area of public policy. He is a graduate of the University of Michigan with a B.S. in Economics and has previously worked in Washington, D.C. on Capitol Hill as an intern for Congressman Mike Fitzpatrick.

Thelma Lizama

Ms. Thelma Lizama is a rising 2L at American University Washington College of Law. She is a volume 24 Junior Staff member for the *Journal of Gender, Social Policy & the Law*. She is a new OIL intern with Team Molina, and will be interning with the U.S. Department of State's Bureau of Democracy, Human Rights and Labor this fall.

OIL's Summer Interns

Alejandro Gonzalez
Mr. Alejandro González is a rising 2L at American University Washington College of Law. He is a competition team member on the Alternate Dispute Resolution Honor Society and a translator for the various in house law clinics.

Amy Sellers
Ms. Amy Sellers is a rising 3L at the Charleston School of Law in Charleston, SC. She has interned with the U.S. District Court and the U.S. Attorney's Office for the District of South Carolina. Ms. Sellers serves as an Articles Editor for the Federal Courts Law Review and is a new OIL intern with Team Goad.

Angela Chen
Ms. Angela Chen is a rising 3L at American University Washington College of Law. She is a Senior Research Associate at Public International Law and Policy Group and the Year-In-Review Editor for the *Human Rights Brief*. She previously interned at the DOL - Office of Child Labor, Forced Labor, and Trafficking, and at International Rights Advocates, working on Alien Tort Statute litigation. She also volunteered with the Iraqi Refugee Assistance Project at the Washington College of Law. She is a new OIL intern with the Front Office.

Anna Miller
Ms. Anna Miller graduated from Patrick Henry College with a degree in Classical Liberal Arts. Prior to attending law school, she worked for three years as a tax-exempt organizations paralegal. She is now a rising 2L at George Mason University School of Law and is interning this summer with OIL on Team Ferrier.

Christine Kim
Ms. Christine Kim is a 3L at the University of Maryland Francis King Carey School Of Law. She is a new OIL intern on Team Ginsburg after a semester as a judicial intern at Baltimore Immigration Court.

Gaia Mattiace
Ms. Gaia Mattiace is a rising sophomore at Georgetown University. She is Assistant Editor for The Hoya, Georgetown University's newspaper, and president of EcoAction, an on-campus environmental organization. She is also a member of the International Relations Club and Georgetown Energy's Marketing, Partnerships and Events Team. She plans on pursuing a career in law and is excited to be working as a new OIL intern for the Front Office.

George Johnson
Mr. George Johnson is a rising 3L at George Mason University School of Law. He is an Executive Board Member of the Trial Advocacy Association and a member of the George Mason Law Review. During his 2L year, George served as a member of the Student Bar Association's Executive Board and interned within the Civil Rights Division of DOJ. He is a new OIL intern with Team Keener.

Grace Brier
Ms. Grace Brier is a rising 2L at the George Washington University Law School, where she is a member of the Mock Trial board. She graduated from the University of Notre Dame with majors in Finance and English. She is a new intern on the Candaux Team

Irina Majumdar
Ms. Irina Majumdar is a rising 2L at the George Washington University Law School. She hopes to pursue a career in litigation after graduation and is very active on both mock trial and moot court teams at her school. She is a new intern on Team McKay and looking forward to learn all that OIL has to offer.

Jessica Strokus
Ms. Jessica Strokus is a rising 3L at Wake Forest University School of Law. She is returning to OIL this summer and is on Team Payne. She is the *Sua Sponte* Editor for the Wake Forest Journal of Law and Policy, a Solicitor for the Honor Council, and a member of the Pro Bono Honor Society.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

July 6, 2015. Brown Bag Lunch & Learn with ***Prof. Christopher Walker***, Michael E. Moritz College of Law, who will discuss his research on the evolution of administrative law's ordinary remand rule in the immigration context. Noon-1:00 pm LSB LL-100.

July 14, 2015. Brown Bag Lunch & Learn with BIA Board Member and former OIL Assistant Director, Linda Wendtland. Noon-1:00 pm, LSB 5421

October 6-9, 2015. OIL new attorney training. Contact Jennifer Lightbody at 202-616-9352.

November 2-6, 2015. 21st Annual Immigration Law Seminar. Attorneys from OIL's client agencies and AUSAs are invited to attend. Contact Jennifer Lightbody at 202-616-9352 or at Jennifer.Lightbody@usdoj.gov for additional information.

OIL WELCOMES SUMMER INTERNS

First Row: Miriam Abaya, Melissa Castillo, Meaghan McGinnis, Angela Chen , Kirsten Battaglia, (Eva– Kirsten's dog), Irina Majumdar, Thelma Lizama, Grace Brier, Anna Miller

Second Row: Sandra Huerta, Lisa Southerland, Jessica Strokus Christine Kim
Not Pictured: Lindsay Donahue, Gaia Mattiace

Third Row: Rogendy Toussaint, George Johnson, Monica Twombly, Lilah Thompson. Alejandro Gonzalez Amy Sellers, Olga Fleysh, Scott Dion Samy Dorgham

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

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

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

Office of Immigration Litigation

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

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linda.purvin@usdoj.gov