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

Immigration Litigation Bulletin

Vol. 19, No. 7 JULY 2015

LITIGATION HIGHLIGHTS

■ **ASYLUM**

►Bosnian asylum applicant failed to establish persecution or an objectively reasonable fear of future persecution (8th Cir.) **8**

■ **CONSTITUTION**

►ICE needed probable cause to issue an immigration detainer in 2009 (1st Cir.) **1**

►Former INA citizenship statute violated Equal Protection Clause because it imposed different physical presence requirements on unwed parents (2d Cir.) **1**

►U.S. citizen lacks liberty interest in fiancée's visa petition (N.D.C.A) **10**

■ **JURISDICTION**

►INA's judicial-review venue provision is non-Jurisdictional (10th Cir.) **9**

►Court lacks jurisdiction to review challenges to denial of alien's eighth motion to reopen (7th Cir.) **7**

►District court lacks jurisdiction to consider alien's habeas challenge to commencement of his removal proceedings and bond determination.

■ **WAIVERS**

►Conditional LPR status qualifies as LPR status for purposes of the aggravated felony bar to §212(h) waiver for inadmissibility

Inside

Second Circuit Finds That Citizenship Statute Violated Equal Protection Clause Because It Imposed Different Eligibility Requirements On Unwed Mothers and Fathers

In *Morales-Santana v. Lynch*, __ F.3d __, 2015 WL 4097296 (2d Cir. July 8, 2015) (*Lohier*, Carney, Rakoff (by designation)), the Second Circuit held that a former version of INA § 309(a), (c), violated the Fifth Amendment's Equal Protection Clause because it imposed different eligibility requirements on unwed parents, for conferring derivative citizenship. While an unwed, citizen mother only had to satisfy one year continuous presence in the U.S. before her child's birth to be able to confer citizenship, the father had to establish continuous presence in the U.S. for ten years prior to the child's birth, five following his fourteenth birthday.

Morales-Santana's father was born in Puerto Rico in 1900 and acquired U.S. citizenship in 1917 pursuant to the Jones Act. In 1919, 20 days before his nineteenth birthday, he left Puerto Rico, to work in the Dominican Republic. In 1962 Morales-Santana was born in the Dominican Republic to his father and Dominican mother. He was "legitimat[ed]" by his father upon his parents' marriage in 1970 and admitted to the U.S. as an LPR in 1975.

In 1995 Morales-Santana was convicted of various crimes and sentenced to a total of 25 to 50 years incarceration. Morales-Santana was placed in removal proceedings in 2000, and after much litigation at the administrative and judicial level, his claims for relief and his claim for nationality were rejected. On March 3, 2011, the BIA denied his last motion to reopen where he again argued that he had derived U.S. citizenship from his father.

(Continued on page 2)

ICE Needed Probable Cause to Issue Immigration Detainers in 2009

In *Morales v. Chadbourne*, __ F.3d __ 2015 WL 4385945 (1st Cir. July 17, 2015) (Howard, Barron, *Lipez*), the First Circuit affirmed a district court decision denying qualified immunity to three ICE agents in a suit challenging the constitutionality of a detainer issued against a U.S. citizen who spent one day in jail beyond her release date. The court also ruled that the plaintiff's allegations against two supervisory ICE agents sufficiently plead a supervisory liability claim.

The plaintiff, Ada Morales, a naturalized U.S. citizen and a native of Guatemala, alleged that ICE agents, and others, unlawfully detained her in violation of her Fourth and Fifth Amendment rights when, after being released from criminal custody, she was re-booked based

(Continued on page 11)

Citizenship Statute Violated Equal Protection Clause

(Continued from page 1)

Before the Second Circuit Morales-Santana raised several statutory arguments. First, he argued that his father's physical absence from the U.S. was *de minimis* and therefore did not preclude him from satisfying the § 309's requirements. The court rejected Morales-Santana's claim finding that because his father left the United States and its outlying possessions 20 days prior to his nineteenth birthday and never returned, there was no gap to be considered, but rather a continuous absence from the United States. Therefore, even if there were a *de minimis* exception to gaps in continuous presence in the plain reading of the statute, which the court found there was not, Morales-Santana's father would not satisfy the continuous physical presence requirement.

Morales-Santana next claimed that under the 1966 Act the South Porto Rico Sugar Company, for which his father worked in the Dominican Republic, was multi-national and United States-owned and therefore effectively part of the U.S. government or an international organization as defined in 22 U.S.C. § 288, therefore allowing his father to satisfy the continuous physical presence requirement. The court rejected this claim, finding that the company constituted neither employment by the U.S. Government nor by an international organization under 22 U.S.C. § 288, since it was not "a public international organization in which the United States participate[d] pursuant to any treaty or under the authority of an Act of Congress authorizing such participation or making an appropriation for such participation" or "designated by the President" as such.

Morales-Santana then argued that when his father moved to the Dominican Republic it was an "outlying possession" of the U.S. The court determined that it was not congressional intention to include the Dominican Republic within the scope of "outlying possessions in §1407, because "there is no lease or treaty that conferred to the United States *de facto* or *de jure* sovereignty over the Dominican Republic." In addition the court noted that the Dominican Republic was occupied the U.S. from 1916 to 1924, but emphasized how "that control did not extinguish [its] sovereignty."

Lastly, Morales Santana argued that the different physical presence requirements for unwed fathers versus unwed mothers in the former § 309 violated the Fifth Amendment's guarantee of equal protection. The government responded that the different requirement was justified to ensure a sufficient connection between foreign born children and the U.S., and to avoid statelessness. The government also claimed that the court should apply a rational basis scrutiny relying on *Fiallo v. Bell*, 430 U.S. 787 (1977), where the Court applied rational basis scrutiny to review a section of the INA that gave "special preference for admission of non-citizens born out of wedlock seeking entry by virtue of a relationship with their citizen mothers, but not to similarly situated non-citizens seeking entry by virtue of their citizen fathers." The court rejected the government's argument, finding that unlike in *Fiallo,* Morales-Santana's claims of pre-existing citizenship at birth did not challenge Congress's "power to admit or exclude foreigners." The court instead applied intermediate, "heightened scrutiny," under which the "discriminatory means" must serve "actual and important governmental objective" and be "substantially related to the achievement of those objectives."

The court saw no reason that unmarried fathers need more time than unmarried mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad.

Regarding the asserted interest of ensuring a sufficient connection between citizen children and the United States, the court ruled that the government had failed to justify the different treatment of mothers and fathers by reference to the 1952 Act. The court was not persuaded by the government's comparison to the interests accepted by the Supreme Court in *Nguyen*. It saw no reason that unmarried fathers need more time than unmarried mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad. The court acknowledged that its ruling conflicts with *United States v. Flores-Villar*, 536 F.3d 990, 997 (9th Cir. 2008), *aff'd by an equally divided Court*, 131 S. Ct. 2312 (2011). The court agreed with the government that avoidance of statelessness is clearly an important governmental interest. However, it ruled that "avoidance of statelessness does not appear to have been Congress's actual purpose in establishing the physical presence requirements in the 1952 Act, *** and in any event the gender-based distinctions in the 1952 Act's physical presence requirements are not substantially related to that objective."

The court declined to infer that Congress was aware there existed a substantial risk that a child born to an unmarried U.S. citizen mother in certain countries would be stateless at birth unless the mother could pass her United States citizenship to her child, and that this risk was unique to the children of unmarried citizen mothers, because the explanatory comments to the 1940 INA (cited by

(Continued on page 12)

FURTHER REVIEW PENDING: Update on Cases & Issues

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.

Contact: Katherine Goettel, OIL-DCS
☎ 202-532-4115

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 were filed on July 31, 2015.

Contact: Patrick Glen, OIL
☎ 202-305-7232

Aggravated Felony

On June 29, 2015, over government opposition, the Supreme Court granted certiorari to review the Second Circuit's published opinion in ***Torres v. Lynch,*** 764 F.3d 152, holding that a state arson conviction need not include an interstate commerce element in order to qualify as an aggravated felony under 8 U.S.C. § 1101 (a)(43)(E). That provision defines aggravated felonies to include "an offense described in . . . 18 U.S.C. 844 (i)," which is the federal arson statute and which includes an element not found in state arson crimes – mainly, that the object of the arson be "used in interstate or foreign commerce."

The Second Circuit agreed with the Board of Immigration Appeals' decision in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), while the Third Circuit had previously rejected *Bautista* on direct review, 744 F.3d 54 (3d Cir. 2014). The government merits brief is due by September 22, 2015.

Contact: Patrick Glen
☎ 202-305-7232

Continuance

On July 14, 2015, over government opposition, the Seventh Circuit granted en banc rehearing in ***Bouras v. Holder.*** In the now-vacated panel opinion, 779 F.3d 665, the panel majority, over a dissent by Judge Posner, held that an immigration judge did not abuse his discretion in denying the alien's request for a continuance to obtain his former spouse's testimony in support of his request for a waiver under 8 U.S.C. § 1186a(c)(4) of the joint-petition requirement for removing the conditions on a grant of permanent resident status. The continuance was requested at the close of the hearing and the immigration judge determined that the alien had failed to show either that the testimony would significantly favor him or that he had made a good-faith effort to secure that testimony. The government supplemental brief is due by September 22, 2015.

Contact: Robert Markle
☎ 202-616-9328

Updated by Andy MacLachlan, OIL
☎ 202-514-9718

NOTED

Excerpts of Congressional testimony by Joseph Langlois, Associate Director, Asylum and International Operations Directorate, USCIS (July 7, 2015)

Since the *Trafficking Victims Protection Reauthorization Act* was implemented in FY 2009, 92% of unaccompanied children (UCs) who filed for asylum with USCIS were from Guatemala, Honduras, or El Salvador. During this time period, the USCIS asylum approval rate for all UCs was 42.6%, close to the overall approval rate of 41% for all new asylum applications received by USCIS during the same time period.

It can take a number of months for UCs to file asylum applications after their arrival in the United States. Asylum applications received by USCIS in one Fiscal Year may have been filed by UCs who arrived in a previous Fiscal Year. In FY 2014, 69% of UCs who filed asylum applications with USCIS did so more than 300 days after their arrival in the United States. In Fiscal Year 2015, 49% filed their asylum applications more than 300 days after their arrival in the United States.

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds That Agency Overlooked Evidence in Concluding That Alien Failed to Testify Credibly and Remands for Further Fact-Finding

In ***Mboowa v. Lynch***, __ F.3d __, 2015 WL 4442290 (1st Cir. July 21, 2015) (*Howard*, Lynch, Thompson), the First Circuit held that the IJ's and BIA's adverse credibility finding, which was based on a purported omission from petitioner's asylum application, was due to their overlooking a concurrently-filed supplement to petitioner's I-589 form.

Henry Mboowa, a native and citizen of Uganda, entered the United States on a J-1 visa to serve as a summer camp counselor. When his visa expired in September 2002 he failed to depart. On February 27, 2003, Mboowa applied *pro se* for asylum, but an asylum officer "denied" his application. No further action was taken until February 13, 2008, when DHS served Mboowa with an NTA. On July 3, 2008, Mboowa appeared for his hearing with legal counsel, conceded to the NTA's factual allegations, and indicated that he would seek asylum, withholding of removal, and protection under the CAT. In support of his applications Mboowa submitted his original 2003 asylum application, documents intended to corroborate his claims, an affidavit and, during his 2010 hearing before an IJ, his own testimony.

Mboowa's asylum claims rest on his participation in a "youth pressure group" called Youth Unity Peace Initiative (YUPI), which although focused on policy issues initially, became directly involved in the 2001 Ugandan presidential election by supporting the now-defeated opposition candidate, Colonel Besigye. Mboowa alleges that he and his family are now at risk of persecution from those loyal to the current incumbent, Yoweri Museveni, including the Ugandan military and intelligence service. To support his claim of persecution Mboowa cites several incidents. The first was in January 2001, when Mboowa claims he and his YUPI colleague were beaten by soldiers for hanging posters in support of Colonel Besigye and sustained injuries requiring hospital stay. The second incident, occurring in February 2001, was a home invasion, during which Mboowa was blindfolded and struck on the jaw while his house was ransacked. He claims he was warned that "this was the price to pay for not supporting the incumbent president." Following this incident and Museveni being elected President, Mboowa claims his father, also a politically active supporter of Colonel Besigye, was poisoned and died in 2002. Lastly Mboowa alleged that his cousin, also an active member of YUPI, disappeared and was later found beheaded.

To support the IJ's and BIA's adverse credibility determination the discrepancies and omissions had to be actually present in the record, be substantial enough to make petitioner's testimony incredible, and remain unjustified by petitioner.

The IJ did not find Mboowa's testimony credible based on "numerous internal inconsistencies and inconsistencies between his asylum application, affidavits and testimony and supporting documentation," and denied his applications. The BIA affirmed the IJ's decision, finding the discrepancies between his asylum application and testimony, as well as additional "material inconsistencies" identified by the IJ, as sufficient reasons for an adverse credibility finding.

The First Circuit reviewed the IJ's and the BIA's adverse credibility determination "under the deferential substantial evidence standard," *Dhima v. Gonzales*, 416 F.3d 92 (1st Cir. 2005), which "requires [the court] to uphold the ruling unless the record would compel a reasonable adjudicator to reach a contrary determination. Accordingly the court found that to support the IJ's and BIA's adverse credibility determination the discrepancies and omissions had to be actually present in the record, be substantial enough to make petitioner's testimony incredible, and remain unjustified by petitioner.

The court held that the BIA and the IJ found discrepancies that were unsupported by the record. The IJ and BIA were troubled by the omission of facts, including Mboowa's broken pelvis, three week hospital stay, and beheading of his cousin, from his initial asylum application that later appeared in his corroborative documents and testimony. However, the court found that although not contained in the physical I-589 form these facts were included in a typed statement that Mboowa submitted concurrently to the application. The court specifically noted that Mboowa mentioned both a broken hip and his cousin's detainment in sections of either the I-589 form or the concurrently submitted supplement. The court found additional inconsistencies in Mboowa's testimony of his 2001 beating to be "too immaterial to support a finding that no attack occurred at all," quoting *Wiratama v. Mukasey*, 538 F.3d 1 (1st Cir. 2008). In light of these findings, the court remanded to the BIA to revisit its credibility finding and render a decision consistent with its opinion.

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

(Continued on page 5)

Summaries Of Recent Federal Court Decisions

(Continued from page 4)

■ **First Circuit Holds That It May Consider Administrative Actions in Separate Proceedings for Purposes of Assessing Mootness and Remands for Further Fact-Finding**

In ***Manguriu v. Lynch***, __ F.3d __, 2015 WL4237699 (1st Cir. July 14, 2015) (Howard, *Selya*, Lopez), the First Circuit held that it could consider administrative actions in separate proceedings for purposes of determining whether an alien's petition for review was moot. The court ruled that it could consider the revocation of an immigrant visa by the USCIS during the pendency of a petition for review of a decision denying adjustment of status as a matter of discretion. The court remanded to the BIA for further fact-finding regarding whether notice of the visa revocation was properly served on the petitioner.

Joel Njoroge Manguriu, a Kenyan national, entered the U.S. in 1999 as a student and overstayed. He then married Manuelita Lopez, a U.S. citizen, who filed an I-130 visa petition seeking to classify Manguriu as an immediate relative. USCIS denied the I-130 on the ground of marriage fraud and on August 19, 2009,DHS initiated removal proceedings. Manguriu conceded removability, but sought relief under VAWA, claiming that he was abused by his U.S. citizen spouse. In 2010 USCIS approved his VAWA petition and Manguriu asked the IJ to adjust his immigration status to that of a lawful permanent resident. In 2012, the IJ denied Maguriu's petition for adjustment of status, acknowledging that he was statutorily eligible, but denying his request as a matter of discretion due to his marriage fraud, misrepresentation of material facts, false testimony and failure to pay income taxes owed. In 2014, the BIA affirmed the IJ's decision. While Manguriu's petition for review was pending, USCIS sent notice that it intended to revoke its approval of his VAWA petition. When Manguriu did not respond, USCIS revoked the petition.

The First Circuit concluded that it could consider the USCIS's revocation of the VAWA petition even though that action "took place outside the confines of the administrative record." The court emphasized the necessity to answer jurisdictional questions before addressing the merits of a case, citing *Steel Co. v. Citizens for a Better Env't*, 532 U.S. 83 (1998), and the importance of the principle that events occurring during an appeal can render a case moot. However, the court found that the petitioner's contention that USCIS did not properly notify him of the revocation proceedings, by allegedly notifying his former attorney rather than him, sufficient to raise a factual question requiring remand. The court remanded to the BIA to determine "whether the revocation of the VAWA petition was lawfully accomplished and, if so, whether the BIA decision that is the subject of [his] petition for judicial review is now moot." The court retained jurisdiction and mandated that the BIA furnish the court with status reports at 90 day intervals.

The court found that the petitioner's contention that USCIS did not properly notify him of the revocation proceedings, by allegedly notifying his former attorney rather than him, sufficient to raise a factual question requiring remand.

Contact: Tim Ramnitz
☎ 202-616-2686

THIRD CIRCUIT

■ **Third Circuit Rules that Conditional LPR Status Qualifies as LPR Status for Purposes of the Aggravated Felony Bar to §212(h) Waiver for Inadmissibility**

In ***Paek v. Lynch***, __ F.3d __, 2015 WL 4393910 (3rd Cir. July 20, 2015) (*Rendell*, Hardiman, and Vanaskie), the Third Circuit held that a conditional lawful permanent resident, who has committed an aggravated felony, is statutorily ineligible for a waiver of inadmissibility under INA § 212(h).

Paek, a native and citizen of South Korea, was admitted as a conditional LPR pursuant to § 216(a) on June 5, 1991, as an "alien son" due to his mother's marriage to a U.S. citizen and member of the U.S. military. On July 5, 2000, Paek's status was adjusted to that of a non-conditional LPR. In 2005 and 2006 Paek was convicted of receiving stolen property, theft, and first degree robbery. On the basis of these convictions DHS commenced removal proceedings against Paek. Paek then applied for adjustment of status on the basis of his marriage to a U.S. citizen and sought a § 212 (h) waiver of inadmissibility. The IJ ruled, *inter alia*, that Paek was statutorily ineligible for a §212 (h) waiver due to the aggravated felony bar. Paek attempted to avoid the aggravated felony bar by arguing that it did not apply to individuals who are conditional LPRs. The IJ rejected his argument. On appeal to the BIA, Paek only argued that the aggravated felony bar did not apply to conditional LPRs. In a published decision, the BIA held that the bar does apply to conditional LPRs based on its reading of the plain language of § 216.

The Third Circuit agreed with the BIA that the "the plain language of the INA indicates that an alien admitted as a Conditional LPR constitutes 'an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence,' INA § 212(h)." The court emphasized that it "must follow [the] definition [of conditional LPR provided in the statute], even if it varies

(Continued on page 6)

Summaries Of Recent Federal Court Decisions

(Continued from page 5)
from [the] term's ordinary meaning." Following the Supreme Court precedent in *United States v. Heirs of Boisdre*, 49 U.S. (1850), the court considered all parts of the statute including § 216A to determine that notwithstanding the conditional nature of their LPR status, conditional LPRs are "lawfully admitted for permanent residence."

To further support its claim the court referred to § 216 and § 216A that mention "'the second anniversary of the alien's obtaining the status of lawful admission for permanent residence' as being synonymous with the second anniversary of the alien's admission as a conditional LPR.'" In addition the court stressed how throughout the statutes it is "repeatedly discussed that Conditional LPRs [can have] their status of lawful admission for permanent residence 'terminated.'" Therefore the court explained, regardless of the addition of the word "conditional," Conditional LPRs are legally admitted for permanent residence in the United States for purposes of the § 212(h) waiver. Furthermore, the court saw "Congress' [mention] of the removal of [the] 'conditional basis of such status,'" as entailing "that a Conditional LPR [has] already obtained the status of 'lawful admission for permanent residence.'"

Regardless of the addition of the word "conditional," Conditional LPRs are legally admitted for permanent residence in the United States for purposes of the § 212(h) waiver.

Consequently the court upheld the BIA's determination that the aggravated felony bar rendered Paek statutorily ineligible for a § 122(h) waiver.

Contact: Bernard Joseph, OIL
☎ 202-305-7043

SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Immigration Judge Did Not Abuse Discretion in Denying Petitioner's Request for a Continuance**

In ***Giri v. Lynch***, __ F.3d __, 2015 WL 4385695 (7th Cir. July 17, 2015) (Wood, *Williams*, Tinder), the Seventh Circuit held that the IJ did not abuse his discretion in denying petitioner's request for a continuance to submit fingerprints and submit his application for relief from removal, where petitioner had over a year and a half to prepare for his case, failed to show that he acted with diligence, failed to give a reason for his lack of compliance with the deadline, and did not request a continuance in advance of the hearing. The court also held that the IJ properly found petitioner to be removable where he conceded the factual basis for the charge of removability.

Parashu Giri, a native and citizen of Nepal, entered the United States lawfully as a non-immigrant visitor on April 29, 1998. In 2001 he married his second wife, Tammy Giri, and on the basis of this marriage gained conditional permanent residence. In May 2003, Parashu and Tammy filed a joint I-751 petition to remove the conditions of his permanent residence. The USCIS denied the petition due to their failure to appear at the interview and Tammy's submission of a letter withdrawing her support from the petition. In April 2007 Parashu and Tammy filed a second joint I-751. On January 29, 2010, USCIS denied the petition finding that Parashu had maintained a relationship with his first wife, living and having a child with her, during the period in which he was married to Tammy, suggesting that his marriage to Tammy was not bona fide.

In February 2010, DHS served Parashu with an NTA, commencing removal proceedings. A motion packet, filed by Parashu's counsel on October 21, 2010 informed the court that Parashu and Tammy wished to renew their I-751 petition. The motion packet also conceded to the NTA's allegations that Parashu is a citizen of Nepal, not the U.S., was admitted on April 29, 1998, became a conditional permanent resident on July 31, 2001, and that his conditional status was terminated. Parashu denied, however, that he was removable. On October 21, 2010, the immigration court granted the motion for a merits hearing, finding that Parashu had conceded removability, and ordered that applications for relief must be filed 45 days prior to the next hearing and that Parashu must be fingerprinted 60 days before his next hearing. The next day the court issued a notice of hearing informing Parashu that his hearing would take place on July 25, 2012. The hearing was then rescheduled for August 23, 2012. On the day of the hearing Parshu's counsel, who had not yet entered an official appearance, requested a continuance based on the fact that Parashu had not yet been fingerprinted and that she had been unable to timely submit documentary evidence supporting the bona fides of Parashu's marriage, which she claimed she had only received from Parashu the previous afternoon. Counsel also stated that she had difficulty getting an appointment with USCIS to get Parashu fingerprinted and that since Parashu had cancelled every other meeting she had organized, she only met with him two days before the hearing to prepare. The IJ determined a continuance was not warranted because Parashu had ample time to prepare, but failed to do so or to present a valid reason why

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

he was unable to. The court considered that Parashu had already conceded removability and ordered him removed to Nepal. On November 15, 2013, Parashu appealed to the BIA, which affirmed the IJ's ruling with its own analysis.

Before the Seventh Circuit Parashu argued that a continuance was warranted because his abusive, controlling wife was withholding documents and that he should receive a reprieve from the consequences of his actions because he was *pro se* until the hearing. The court determined that the IJ was within her discretion when she denied the continuance because Parashu had over a year and a half to prepare for the merits hearing, he had been warned of the deadlines for submitting applications and completing fingerprinting, he lacked a valid reason for his noncompliance, and he failed to request a continuance in advance of his merits hearing. Additionally the court acknowledged that there was "no evidence on the record of good cause supporting a continuance," finding no proof that Tammy had abused or controlled Parashu and that he even failed to bring this argument before the IJ. The court also found his argument regarding *pro se* representation disingenuous, since his counsel entered a notice of dated August 2010, which she testified she failed to file earlier since "it fell through the cracks." Parashu also claimed that his due process was violated, but the court found that he was given ample time to file applications and complete fingerprinting.

Even though petitioner denied that he was removable "he admitted the key facts in the [NTA] that provided the basis for removability."

Furthermore the court found that the IJ did not err by ordering Parashu removed. The court struck down Parashu's claim that because he had not conceded removability the government did not meet its burden to establish removability. The court held that "to establish that Parashu was removable, the government only needed to establish that: (1) Parashu was a conditional permanent resident; and (2) his status as a conditional permanent resident was terminated." Even though Parashu denied that he was removable "he admitted the key facts in the [NTA] that provided the basis for removability."

Contact: Joseph O'Connell, OIL
☎ 202-616-4893

■ **Seventh Circuit Holds That It Lacks Jurisdiction to Review Challenges to Denial of Alien's Eighth Motion to Reopen**

In ***Joseph v. Lynch***, __ F.3d __, 2015 WL 4232224 (7th Cir. July 14, 2015) (Bauer, Manion, *Hamilton*), the Seventh Circuit dismissed petitioner's appeal of the BIA's denial of his eighth motion to reopen his removal proceeding. The court ruled that it lacked jurisdiction to review the alien's challenge to the BIA's weighing of the evidence, and the BIA's determination that it would not grant the application for adjustment of status and a waiver for inadmissibility.

The case concerned Eugene Joseph, a Nigerian citizen, who entered the United States unlawfully in 1991 and was placed in removal proceedings for convictions of bank theft in Illinois and bank fraud in federal court. He conceded his unlawful status, but sought adjustment of status on the basis of his marriage to a U.S. citizen and a waiver of inadmissibility, claiming his removal would cause extreme and unusual hardship to his family. An IJ ordered him removed in 2008, deeming that any hardship to his family could not be characterized as extremely unusual. On appeal, the BIA upheld the IJ's decision. Subsequently, Joseph filed eight motions to reopen with the BIA, which were all denied and a petition for review for the seventh denial of his MTR, which was dismissed by the court. Joseph premised three of his MTRs on VAWA; in his first MTR filed on this ground, which missed the VAWA one-year deadline by nearly four years, Joseph claimed that his wife had been both physically and emotionally abusive. The BIA denied his MTR due to his failure to corroborate his claim of abuse and to submit evidence supporting hardship to his children should he be removed. The BIA also denied his later almost identical MTR based on VAWA.

Joseph's instant petition sought review of the BIA's eighth denial of his MTR, his third MTR based on VAWA. As supporting evidence for this MTR, he provided medical records for his two asthmatic sons and an affidavit from his brother attesting that the two boys had not received adequate medical care while under the sole supervision of their mother. The BIA denied this motion as both "time and number-barred" and added that Joseph did not provide sufficient evidence to overcome either of those statutory bars, as the only evidence provided was from "interested parties" and was contradictory to previous testimony. The BIA also noted that it would not reopen on the basis of its discretion "given the adverse factors of the record."

Joseph claimed that the BIA ignored his sons' newly submitted medical records. The court found that because the Attorney General has discretion to waive the time limit on an MTR that invokes VAWA, it lacked subject-matter jurisdiction. It said however that it retained juris-

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
diction to review whether the BIA considered all relevant evidence in making its decision. The court found that "Joseph has framed his claim to try and take advantage of this jurisdictional path," and that his claim is based on his and his brother's testimony not on his children's asthma. Therefore the court affirmed that BIA considered all relevant evidence in making its decision.

Contact: Carmel Morgan, OIL
☎ 202-305-0016

EIGHTH CIRCUIT

■ Eighth Circuit Holds That Bosnian Asylum Applicant Failed to Establish Persecution or an Objectively Reasonable Fear of Future Persecution and Rejects Due Process Challenges

In ***Nanic v. Lynch***, __ F.3d __, 2015 WL 4393560 (8th Cir. July 20, 2015) (*Colloton*, Wollman, Benton), the Eighth Circuit held that the beatings and harassment of petitioner did not amount to persecution. The court also rejected the petitioner's claims that the admission of the asylum officer's "Assessment to Refer" and the admission of expert testimony deprived him of due process.

Hazret Nanic is a native and citizen of Bosnia-Herzegovina and a citizen of Croatia. He identifies himself as Bosnian, advocates for a unified Bosnia, and is Muslim, although he rejects the "Bosniak" label used by the governments of the region. Nanic and his wife, Jasminka Nanic, entered the United States in November 2007 as non-immigrant visitors from Bosnia -Herzegovina, authorized to stay until June 8, 2007. On June 13, 2007, Nanic applied for asylum and withholding of removal, naming his wife as a derivative beneficiary. DHS "denied" the application and issued NTAs, initiating removal proceedings.

In support of his claim of past persecution Nanic testified to being beaten at checkpoint in 1994 by Croatian police for stating that he was Bosnian not Croatian. On another occasion he was hit two or three times and held for questioning 24 hours by Croatian police. He also claimed that his daughters were harassed because they identified as Bosnian.

To bolster his claim of a well-founded fear of future persecution Nanic cited the deaths of his brother and Dr. Ljubijankic, who he alleged were killed because of their political views, as well as warnings from unidentified friends. The BIA upheld the IJ's conclusion that Nanic's brother and Dr. Ljubijanik were killed during military action in the 1992-1995 civil war. The BIA also relied on testimony from historian Michael MacQueen to determine that Nanic had no well-founded fear of future persecution, deeming that many people still living in Bosnia, identify as Bosnian, and come to no harm.

The court found petitioner's testimony about warnings from friends to be "too vague to compel a finding that he had a well-founded fear that is objective and reasonable."

The IJ and the BIA concluded that these incidents did not rise to the level of persecution and that Nanic failed to establish a well-founded fear of future persecution. The BIA also rejected Nanic's claim that his due process was violated.

The Eight Circuit agreed that Nanic had not established past persecution, stating that it had "upheld the denial of asylum claims involving more serious abuses than those claimed by Nanic." Nanic argued that the BIA failed to consider that he was followed by unknown persons and interrogated by secret police, but the court found that this alleged harassment also did not meet the level of persecution. In addition the fact that the governments of Bosnia-Herzegovina and Croatia refuse to allow him to identify as "Bosnian," although an alleged interference with Nanic's identity, does not amount to the extreme level of government action required to establish persecution, stated the court.

The court also upheld the BIA's determination that there was no well-founded fear of future persecution, finding that "[g]iven the testimony of... MacQueen about the brother's death and contemporaneous news accounts regarding the demise of Dr. Ljubijankic, a reasonable adjudicator was not compelled to reach a contrary conclusion on that point." The court also found Nanic's testimony about warnings from friends to be "too vague to compel a finding that he had a well-founded fear that is objective and reasonable," especially considering that members of his family continue to live in Bosnia-Herzegovina and that he returned there several times after 2000.

The court lastly rejected Nanic's due process claims. Nanic claimed that the BIA violated his due process rights by considering MacQueen's testimony because DHS failed to identify him as a witness at least fifteen days in advance of the hearing. Nanic also challenged the agency's consideration of an asylum officer's "Assessment to Refer," in which the officer found Nanic lacked credibility.

The court determined that "MacQueen's testimony was offered solely to rebut Nanic's testimony and affidavit" and that DHS moved to admit MacQueen's testimony in 2011, but that he did not testify un-

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

til 2012, giving Nanic more than six months' notice. Therefore the court concluded that the fifteen-day rule did not apply in this case and Nanic's due process was not violated. In regards to the assessment to refer, the court agreed with the BIA that the assessment did not prejudice Nanic because the IJ also "received evidence that undermined the asylum officer's conclusion on credibility" and because the IJ found Nanic to be a credible witness.

Contact: Thankful Vanderstar, OIL
☎ 202-616-4874

TENTH CIRCUIT

■ **Tenth Circuit Holds that INA's Judicial-Review Venue Provision is Non-Jurisdictional and Returns Petition for Review Back to the Fifth Circuit**

In ***Lee v. Lynch***, 791 F.3d 1261 (10th Cir. 2015) (Briscoe, *McKay*, Phillips), the Tenth Circuit held that the INA's judicial-review venue provision, 8 U.S.C. § 1252(b)(2), does not affect its subject matter jurisdiction, joining the consensus of judicial circuits that have addressed the issue. The court ruled that the venue of the alien's petition for review was properly laid in the Fifth Circuit, where the immigration judge, the alien, and the government's representative were physically present for the final hearing, rejecting the government's argument that venue was proper in the Tenth Circuit because the final hearing had been noticed for Oklahoma City, Oklahoma.

The case concerned Mr. Yang You Lee, a native and citizen of Thailand, who was admitted to the U.S. as a LPR in 1987 at the age of five, having derived refugee status through his Laotian parents. In 2014, an IJ found him removable for committing a crime of violence, a misdemeanor assault, and denied his application for cancellation of removal. The BIA agreed with the IJ and dismissed his appeal. During his removal proceedings Lee was detained in Oklahoma, which is within the Tenth Circuit. Several hearings were conducted via video conference with an IJ in Dallas, Texas, which is within the Fifth Circuit. Lee physically appeared before the IJ in Dallas with his representative at his final hearing. In its order dismissing Lee's appeal, the BIA noted Oklahoma City next to Lee's file number, apparently indicating that the final hearing was located there. Lee filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit, which summarily transferred the petition to the Tenth Circuit *sua sponte* and without explanation.

The court reaffirmed its power to make the transfer, as "[f]ederal circuit courts have inherent power to transfer a case over which they have jurisdiction but lack venue."

The Tenth Circuit preliminarily agreed with its sister circuits "that § 1252(b)(2) is a non-jurisdictional venue provision," and by the plain language of the statute, that "[t]he petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed proceedings." Because the IJ concluded proceedings in Dallas, Texas, the court held that the Fifth Circuit was the proper venue. The government argued that the Tenth Circuit was the proper venue, since the final hearing location was docketed in Oklahoma City, Oklahoma. The government claimed that hearing location, citing 8 C.F.R. § 1003.20(a)(4), a regulation that the EOIR proposed in 2007 but never promulgated, providing that "the final hearing location refers to the place of final hearing identified on the notice for the final hearing."

The court found 8 C.F.R. § 1003.20(a)(4) to be inapplicable in this case, because it refers to venue in hearings held by telephone or video conference, while Lee, his representative and the IJ were all physically present in Dallas for the final hearing. Moreover, the court emphasized how under the proposed regulation "IJ venue initially 'lies at the designated place for the hearing as identified by the DHS on the charging document,'" which in this case alsowas Dallas. The court explained that giving the regulation deference, in this case, would create an anomaly, first, because the IJ venue originates in Dallas, second, because the final hearing was actually held in Dallas, third, because Lee and his representative were physically present at the hearing in Dallas, and fourth, because the IJ issued his final order in Dallas.

The court therefore held that venue was proper in the Fifth Circuit, finding that "the interests of justice will be best served if the Fifth Circuit adjudicates Mr. Lee's petition." Finally the court also reaffirmed its power to make the transfer, as "[f]ederal circuit courts have inherent power to transfer a case over which they have jurisdiction but lack venue," *citing Sorcia v. Holder*, 643 F.3d 117, 122 (4th Cir. 2011).

Contact: Sunah Lee, OIL
☎ 202-305-1950

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

■ **District of Colorado Holds That It Lacks Jurisdiction to Consider Alien's Habeas Challenge to Commencement of his Removal Proceedings and Bond Determination**

In ***Pelletier v. USA***, No. 11-cv-1377 (D. Colo. July 17, 2015) (Martinez, J.) the District of Colorado granted summary judgment in favor of the Government holding it lacks jurisdiction over an plaintiff's habeas challenge to DHS's commencement of his removal proceedings and bond determination. Specifically, the court held that section 1226(e) precluded review of the alien's bond determination, section 1252(g) stripped the court of jurisdiction to review of DHS's decision to issue a notice to appear, and section 1252(b)(9) precluded review of the alien's substantive claims challenging his removal proceedings.

Contact: Glenn Girdharry, OIL- DCS
☎ 202-532-4807

■ **Northern District of California Holds that U.S. Citizen Lacks Liberty Interest in Fiancée Visa Petition**

In ***Mayle v. Holder***, No. 14-cv-4072 (N.D.C.A. July 10, 2015)) (Corley, M. J., by consent) the Northern District of California granted the government's motion to dismiss plaintiff's challenge to the Department of State's denial of his fiancée's visa petition on the basis that their engagement was not bona fide. The court held that a U.S. citizen lacks a protectable liberty interest in the adjudication of his fiancée's visa petition. The court also held that, for purposes of consular nonreviewability, spousal visas and fiancée (or fiancé) visas are constitutionally distinct, and therefore, *Din v. Kerry*, 135 S. Ct. 2128 (2015), which addresses spousal visas, does not apply to K-1 visa petitions.

The plaintiff Alfred Mayle, a U.S. citizen, wished to marry a Nigerian citizen, Beatrice Nkwogu. Mayle met Nkwogu through her sister, who introduced them over the phone. Six months later Mayle visited Nkwogu in Lagos, Nigeria, and after four days together the couple decided to marry. Mayle applied for a K-1 visa in the U.S., which was approved in July 2011. However, Nkwogu's visa was denied by the consul in Lagos because Mayle did not travel to her village. Mayle reapplied for a visa petition in July 2011, which was again approved, but Nkwogu's visa was again denied because she "failed to convince the Consular Officer that [her] relationship with the petitioner is bona fide." Mayle then filed a complaint for a writ of mandamus under the APA. The government filed a motion to dismiss for lack of subject matter jurisdiction.

The court found that U.S. citizen had "not established that he has a protectable liberty interest in the adjudication of his fiancée's visa petition."

The United States District Court of the Northern District of California granted the government's motion to dismiss on June 24, 2015, finding that Mayle did not establish that "he has a liberty interest in the denial of his fiancée's visa sufficient to overcome the doctrine of consular nonreviewability." The court cited *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) in stating "a foreign national has 'no constitutional right of entry' to the United States."

The court acknowledged the limited exception that if a visa denial implicates a citizen's constitutional rights courts may review to determine whether the visa was denied based on a "facially legitimate and bona fide" reason. Nonetheless, the court found that Mayle had "not established that he has a protectable liberty interest in the adjudication of his fiancée's visa petition." The court explained that there is a meaningful distinction between spouse and fiancée and that Mayle's right to marry had not been infringed because Mayle and Nkwogu could marry anywhere else in the world or by proxy in the U.S. Accordingly, the court held that "there is no protectable liberty interest at stake and [that] Petitioner's action is barred by the doctrine of consular nonreviewability."

Contact: Erez Reuveni, OIL-DCS
☎ 202-307-4293

■ **Central District of California Holds That USCIS May Revoke Approval of Visa Petition When the Petitioner Died Before It Was Approved**

In ***Desai v. USCIS***, No. 14-cv-593 (Fischer, J.) (C.D. Cal. July 24, 2015), the Central District of California dismissed plaintiff's challenge to USCIS's decision revoking approval of a petition to classify him as the son of a United States citizen. The court noted that it was a longstanding practice of the government to deny petitions on behalf of relatives of United States citizens when the citizen petitioners die before the petition is granted.

The court concluded that the fact that Congress amended the INA in 2009 to add a limited exception to this practice through 8 U.S.C. § 1154(l) indicated Congress's intent to adopt the agency's longstanding practice. Accordingly, the court held, the government had "good and sufficient cause" to revoke the petition because it was granted after plaintiff's petitioning relative had died.

Contact: Erez Reuveni, OIL-DCS
☎ 202-307-4293

Court Denies Qualified Immunity Defense to ICE Agents

(Continued from page 1)

on an immigration detainer and held for an additional 24 hours. ICE agent Donaghy who issued the detainer, and his supervisors Chadbourne and Riccio, moved to dismiss the complaint based on qualified immunity. When the district court denied their motions they filed an interlocutory appeal with the First Circuit.

Morales claimed that ICE twice detained her under an immigration detainer to investigate her immigration status. The first detention occurred in 2004 when she was arrested on criminal charges which were eventually dismissed. ICE issued a detainer against her indicating that she was a non-citizen subject to removal, even though she was naturalized in 1995. The second occasion was in May 2009 when she was arrested on criminal charges for an alleged misrepresentation in a state benefits application. On this occasion she was questioned by a state police officer who asked her if she was "legal." Morales stated that she was born in Guatemala but was a U.S. citizen. She was transported to an Adult Correctional Institution (ACI) and taken into custody. Donaghy, who was under the supervision of Riccio and Chadbourne, faxed an immigration detainer to the ACI incorrectly identifying Morales as an alien. Before issuing the detainer, ICE did not interview Morales to determine her citizenship status and did not search federal immigration databases.

The day ICE issued its detainer the state court ordered Morales released from criminal custody on personal recognizance. However, based on the ICE detainer she was rebooked in ACI custody, strip-searched, and kept in jail for an additional 24 hours. When she was informed of the reason for here detention she made several attempts to notify the ACI of her citizenship status, but was ignored multiple times. The next day Morales was driven to an ICE office, interviewed, and released. She claimed that she was told that detention "could happen [to her] again in the future."

On April 24, 2012, Morales filed a civil damages action against Donaghy, Riccio and Chadbourne. She alleged, *inter alia*, that Donaghy violated her Fourth Amendment right to be free from unreasonable seizure and her Fifth Amendment equal protection right to be free from discrimination on the basis of race, ethnicity, and national origin. She also alleged that Riccio and Chadbourne "knew or were deliberately indifferent to the fact that their subordinates routinely issued ICE detainer without probable cause, and formulated or condoned policies permitting the issuance of detainer without probable cause in violation of the Fourth Amendment." The three ICE agents moved for summary judgement based on qualified immunity but the district court denied their motion.

"It is beyond debate that an immigration officer in 2009 would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status."

The First Circuit reviewed the denial of qualified immunity *de novo* and applied a two part analysis, first considering whether the alleged facts showed that the defendant's conduct violated a constitutional right, and second, whether the contours of that right was clearly established, so that a reasonable officer would have known that his conduct was unlawful.

Donaghy first claimed that it was not clearly established in 2009 that an ICE agent needed probable cause to issue a detainer. The court determined, however, that the law was well established before Morales was detained in 2009 "that immigration stops and arrests were subject to the same Fourth Amendment requirements as other stops and arrests." The court cited to *United States v. Brignoni-Ponce*, 95 S.Ct. 2574 (1975), where the Supreme Court held that an immigration officer "must have reasonable suspicion" to briefly stop individuals in vehicles to question them regarding their citizenship status, but that any further detention must be based on "probable cause." "It is beyond debate that an immigration officer in 2009 would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status," said the court. Due to the fact that Morales was held an additional 24 hours solely on the basis of Donaghy's detainer and because "a law enforcement officer is 'responsible for the natural consequences of his actions,'" Donaghy was responsible for proving probable cause before issuing a detainer for Morales, explained the court.

While Donaghy also argued that if probable cause was required the facts in this case showed that he had probable cause, the court dismissed this factual challenge for want of jurisdiction because it did not present a pure issue of law. Similarly, the court said that it lacked appellate jurisdiction to consider Donaghy's argument that he was entitled to qualified immunity on Morales's Fifth Amendment equal protection claim, because had not detained her on the basis of her race, ethnicity or national origin.

The court also affirmed the denial of qualified immunity to Donaghy's supervisors, Chadbourne and Riccio. Citing *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir.2009), the court explained that "a supervisor may be held liable for the consti-

(Continued on page 12)

Former Version of Citizenship Statute Found Unconstitutional

(Continued from page 2)

the government) did not mention statelessness, and the article cited itself did not support that the children of unmarried citizen mothers faced a greater risk of statelessness than the children of unmarried citizen fathers. And although the explanatory comments and other contemporary administrative memoranda did not mention statelessness, "they arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock," therefore the court "conclude[d] that neither reason nor history supports the Government's contention that the 1952 Act's gender-based physical presence requirements were motivated by a concern for statelessness, as opposed to impermissible stereotyping." Alternatively assuming that preventing statelessness was Congress's actual motivating concern in enacting the physical presence requirements, the court ruled that the availability of effective gender-neutral alternatives precluded the gender-based distinction from surviving intermediate scrutiny. Gender-neutral alternatives had been proposed, and "the gender-based distinction at the heart of the 1952 Act's physical presence requirements is not substantially related to the achievement of a permissible, non-stereotype-based objective."

The gender-based distinction at the heart of the 1952 Act's physical presence requirements is not substantially related to the achievement of a permissible, non-stereotype-based objective."

To provide equal treatment under the law the court saw three solutions: striking both § 309 (c) and (a) entirely, requiring that citizenship could be conferred only with ten years continuous presence for both unwed citizen fathers and mothers, or requiring that citizenship could be conferred with one year continuous presence in the U.S. for both unwed citizen fathers and mothers. To select among these options the court looked to the intent of Congress and determined the third option of a one year continuous presence requirement to be the most probable congressional intention, driven by the binding precedent in cases such as *Califano v. Westcott,* 443 U.S. 76 (1979), which express the necessity to "extend rather than contract benefits in the face of ambiguous congressional intent." Consequently, the court found that Morales-Santana had pre-existing citizenship conferred to him at birth by his father, reversed the BIA, and remanded for further proceedings.

By: Gaia Mattiace, Summer Intern

Contact: Imran Zaidi, OIL
☎ 202-305-4241

ICE Agents Denied Qualified Immunity Defense

(Continued from page 11)

tutional violations committed by his subordinates where 'an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor's conduct led inexorably to the constitutional violation." Morales alleged that the two ICE supervisors "knew or were deliberately indifferent to the fact that their subordinates routinely issued immigration detainers against naturalized U.S. citizens without probable cause."

The court found that the allegations in Morales's complaint "are based on factual assertions that establish the affirmative link necessary to sufficiently plead a supervisory liability claim," and held that Morales sufficiently alleged that "Chadbourne and Riccio, through their action or inaction, permitted subordinates" to issue detainers to U.S. citizens "without probable cause in violation of the Fourth Amendment."

The court remanded the case for further proceedings.

By: Gaia Mattiace, Summer Intern

Contact: J. Max Weintraub, OIL-DCS
☎ 202-305-7551

NOTED: ICE arrest 82 Criminal Aliens in the Houston Area

Eighty-two convicted criminal aliens were arrested during a five-day enforcement action which conducted by officers with ICE Enforcement and Removal Operations (ERO) in the Houston area.

The enforcement operation took place July 13-17 and was part of an ongoing effort by ICE to prioritize the arrest and removal of convicted criminal aliens and egregious immigration law violators.

All 82 individuals arrested have been convicted of crimes in the U.S. and fall within ICE's enforcement priorities. Of those, 21 have felony convictions and seven have aggravated felony convictions. These convictions include robbery, aggravated assault and drug possession.

DACA: Congressional Testimony

Excerpts of testimony before the Senate Committee on Judiciary on July 21, 2015, by USCIS Director Leon Rodriguez

This Administration has worked diligently to focus our limited immigration enforcement resources on national security, public safety, and border security. As a part of that commitment, on June 15, 2012, then-Secretary of Homeland Security Janet Napolitano announced that certain individuals who came to the United States as children and meet several key guidelines can request deferred action and permission to work for a period of two years. As explained by Secretary Napolitano, the DACA process supports DHS-wide efforts to prioritize overall enforcement resources more efficiently to focus on the removal of criminals, recent illegal border crossers, and those non-citizens who pose a threat to national security or public safety, while recognizing the humanitarian principles that also underlie our immigration laws. As Secretary Napolitano stated in her 2012 memorandum, the individuals favorably considered for DACA are "young people brought to this country as children."

DACA does not confer legal status on the recipient; it is an exercise of prosecutorial discretion to defer the removal of an individual for a specific period of time and may be reconsidered or terminated at any time.

USCIS first implemented DACA in August 2012. Under DACA, children and young adults may be considered on a case-by-case basis for deferred action if they meet certain threshold guidelines, including that they were under the age of 31 as of June 2012, pass criminal and national security background checks, were present in the United States in June 2012 and have lived here continuously for at least five years as of that date. All individuals requesting DACA are subjected to biographic and biometric background checks against various national law enforcement databases before USCIS will consider their DACA request. These systems include data on immigration history, public safety, national security and criminal watchlists, and other law enforcement concerns such as gang membership.

Each DACA request is considered on a case-by-case basis by an adjudicator who must make a determination about whether a specific requestor meets the applicable guidelines, whether they pose a threat to public safety or national security, and whether other factors are present that might adversely impact the exercise of discretion. DACA does not confer legal status on the recipient; it is an exercise of prosecutorial discretion to defer the removal of an individual for a specific period of time and may be reconsidered or terminated at any time.

USCIS adjudicators evaluate the evidence each DACA requestor submits in conjunction with the relevant DACA guidelines. Adjudicators assess the appropriate weight to accord such evidence, and ultimately determine whether the evidence is sufficient to satisfy the guidelines and whether there are any other factors that, in the exercise of discretion, would make the grant of deferred action inappropriate. An adjudicator may issue a Request for Evidence (RFE), which requires the requestor to submit additional evidence in support of the DACA request before the request will be decided. Since the inception of DACA through March 31, 2015, USCIS issued more than 200,000 RFEs in the process of reviewing DACA requests. Failure to respond to an RFE may result in denial of the request.

Individuals accorded deferred action pursuant to DACA are considered for employment authorization under longstanding USCIS regulations, which stipulate that persons with deferred action who demonstrate economic necessity may be authorized to work in the United States for the duration of their deferred action. In addition, DACA recipients are permitted to request a renewal of their deferred action and work authorization when their initial two-year period nears expiration. The DACA renewal period began in August 2014, two years after the first requests were accepted. DACA is funded exclusively through the fees requestors submit with the applications for employment authorization accompanying the initial DACA request and request for DACA renewal.

USCIS publishes quarterly data on the number of DACA requests received, accepted, granted and denied. Since the inception of DACA through the end of March 2015:

USCIS has received 1,175,689 DACA requests. More than 71,000 of these requests were rejected and returned at the outset before being considered. Rejections may occur for a variety of reasons, such as the DACA request submitted is incomplete or without fee, or the requestor fails to meet the age guideline.

Of the 1,104,594 DACA requests accepted by USCIS, 748,789 were initial requests and 355,805 were renewal requests.

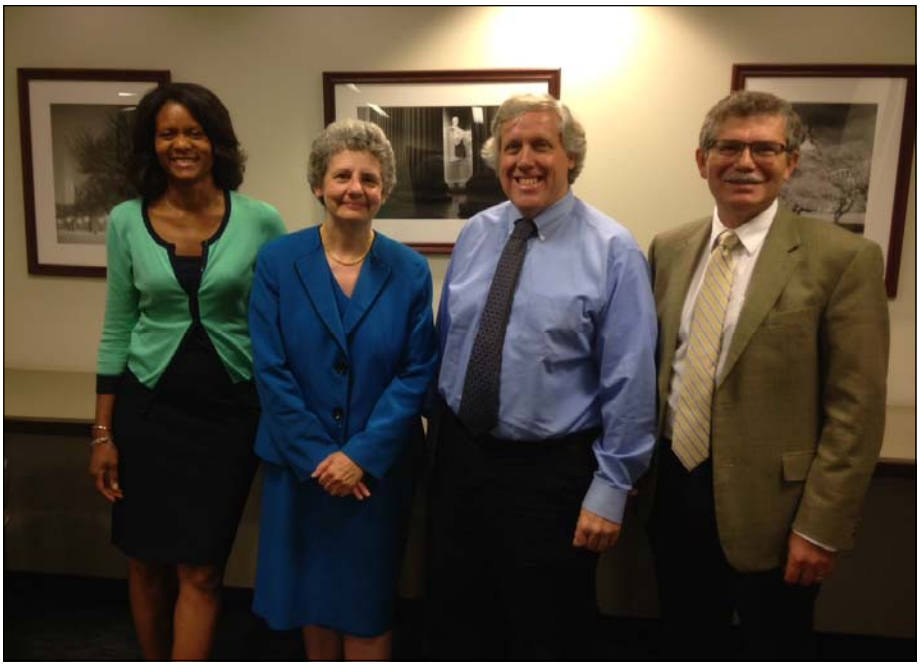
.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

INSIDE OIL

BIA Board Member and former OIL Assistant Director ***Linda Wendland***, was the guest speaker at OIL's monthly Brown Bag Lunch & Learn Program.

OIL mourns the loss of ***Brad Glassman*** who had a long and distinguished career at the U.S. Department of Justice, including several years as an OIL Trial Attorney before he moved on to be Counsel to the Deputy Attorney General. During that time, we came to know him as brilliant, yet humbly so, with a quick wit and kind, encouraging words for all. Indeed, Brad was a wonderful colleague – one of OIL's finest.



OIL Deputy Director Michelle Latour, Board Member Linda Wendtland, OIL Director David M. McConnell, Francesco Isgrò.

OIL TRAINING CALENDAR

September 28, 2015. Brown Bag Lunch & Learn with ***Prof. Shoba Wadhia***, Director of the Center for Immigrants' Right Clinic at Penn State Law, who will discuss her recently published book: *"Beyond Deportation, The Role of Prosecutorial Discretion in Immigration Cases."*

September 28, 2015. Webinar presented by USCIS Office of the Chief Counsel on Violence Against Women Act (VAWA). OCC attorneys will give an overview of the VAWA process and discuss current issues in litigation. Contact francesco.isgro@usdoj.gov.

October 6-9, 2015. OIL new attorney training. Contact Jennifer Lightbody at Jennifer.Lightbody@usdoj.gov

November 2-6, 2015. 21st Annual Immigration Law Seminar. This is an intermediate immigration law training. Attorneys from OIL's client agencies and AUSAs are invited to attend. Contact Jennifer Lightbody at Jennifer.Lightbody@usdoj.gov.

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

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

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

Office of Immigration Litigation

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

If you would like to receive the *Immigration Litigation Bulletin* electronically send your government email address to:

linda.purvin@usdoj.gov