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Immigration Litigation Bulletin

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Ninth Circuit Holds That Criminal Alien Review Bar Does Not Apply to Procedural Motions

In *Garcia v. Lynch*, __ F.3d __, 2015 WL 4899018 (*Fletcher*, Owens, Wardlaw) (9th Cir. August 18, 2015), the Ninth Circuit held that the criminal alien review bar under "INA § 242 (a)(2)(C) does not bar review of the denial of a procedural motion that are independent of the merits of the removal order."

In this case, the court found that it had jurisdiction over the denial of a motion to continue even though the petitioner, Garcia, had been convicted for a drug offense and therefore was barred from pursuing judicial review in the absence of a constitutional claim or a question of law.

Garcia, a national of Mexico, was granted cancellation of removal in 2006 after a conviction for a drug offense. Following a second drug conviction in 2010, he was placed in immigration proceedings, where he received three continuances. He then requested a fourth, to pursue post-conviction relief. The IJ denied the request because he had been given "ample time" to pursue his collateral relief. The IJ also determined Garcia was ineligible for relief from removal and ordered him removed. Garcia appealed to the BIA arguing only that that the IJ had erred in denying a further continuance so that he could seek post conviction relief. The BIA dismissed the appeal on the ground that the IJ had "appropriately considered the relevant factors to determine whether good cause for a continuance was shown."

The Ninth Circuit preliminarily noted that it had jurisdiction to review the discretionary denial of a continuance because the denial of a continuance is not enumerated in INA § 242 (a)(2)(B) nor specified under the INA to

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Individual Born on a United States Military Base Abroad is Not a Birthright United States Citizen

In *Thomas v. Lynch*, 796 F.3d 535 (5th Cir. 2015) (*King*, Smith, Elrod), the Fifth Circuit held that an individual born in a military hospital located on a United States military base in Germany, to only one United States citizen parent, was not a birthright citizen of the United States under Citizenship Clause of the Fourteenth Amendment.

Petitioner was born on August 9, 1986, in a military hospital located on a U.S. military base in Frankfurt, Germany, and was admitted to the U.S. as an LPR in July 1989. His visa form listed his nationality as Jamaican. Petitioner's father, a United States citizen, was a member of the United States military serving on the base.

Petitioner's father had entered

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Military base not "in the United States" for purpose of Citizenship Clause

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the United States in September 1977, enlisted in the United States Army in 1979, and became a United States citizen in May 1984. His mother was a citizen of Kenya. In 2013, DHS instituted removal proceedings against petition on the basis that he had been convicted of an aggravated felony and two or more CIMTs. Petitioner conceded that if he was not a US citizen, he would be removable. Petitioner then sought to terminate proceedings claiming that he was a U.S. citizen.

The IJ determined that the military base on which petitioner was born was not part of the United States for purposes of the Fourteenth Amendment. Accordingly, the IJ concluded that petitioner had failed to rebut the presumption of alienage and ordered him removed to Jamaica. On appeal, the BIA agreed with the IJ that petitioner's birth at the military hospital in Germany, to only one US citizen parent, gave rise to a rebuttable presumption of alienage. The BIA also rejected petitioner's claim that his birth on a military base in Germany rendered him a birthright citizen by virtue of the Fourteenth Amendment.

The Fourteenth Amendment's grant of birthright citizenship contains an express geographical limitation, which does not encompass the military base where [petitioner] was born."

Preliminarily the Fifth Circuit noted that it would ordinarily lack jurisdiction to review a removal order of an alien convicted of certain criminal offenses, such as petitioner's convictions, but because petitioner was raising a nationality claim, the court would review that constitutional claim *de novo*.

The court first noted that it was undisputed that petitioner was not a statutory birthright citizen because his father did not meet the physical presence requirement of the statute in force at the time of petitioner's birth. That statute required his father to have had at least ten years of physical presence in the United States for petitioner to acquire citizenship.

The court then held that the military base on which petitioner was born was not part of the United States for purposes of the Citizenship Clause of the Fourteenth Amendment. The court explained that the "Fourteenth Amendment's grant of birthright citizenship contains an express geographical limitation, which does not encompass the military base where [petitioner] was born." Accordingly, because petitioner was not born "in the United States" for purposes of the Fourteenth Amendment, the court held that petitioner is not a birthright citizen.

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Judicial review bar for criminal aliens does not bar review of procedural motion

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be in the discretion of the Attorney General.

The court then disagreed with the government's argument that it lacked jurisdiction to review the denial of the motion to reopen because petitioner had been convicted of a qualifying crime under § 242(a)(2)(C). The court relied on *Unuakhaulu v. Gonzales*, 416 F.3d 931 (9th Cir. 2005), holding that § 242(a)(2)(C) "bars review only of those orders that are *actually* 'predicated on commission of a crime.'" (Emphasis in original). In *Unuakhaulu* the court held that it had jurisdiction to review the BIA's nondiscretionary denial of withholding, which was not predicated on Unuakhaulu's aggravated felony.

Under the rules established by *Unuakhaulu* and its progeny, the court explained that it "retains jurisdiction over a petition for review challenging the denial of relief 'on the merits,' rather than on the basis of the qualifying conviction." "Despite criticism from within our court . . . *Unuakhaulu* and its progeny remain good law," said the court.

The court "retains jurisdiction over a petition for review challenging the denial of relief 'on the merits,' rather than on the basis of the qualifying conviction."

On the merits, the court held, however, that the IJ did not abuse his discretion in denying Garcia's request for a continuance. "Although it would have been reasonable for the IJ to grant Garcia an additional continuance, it was not unreasonable for him not to do so," explained the court.

Accordingly, the court denied the petition for review.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony

On November 3, 2015, the Supreme Court will hear argument on certiorari in ***Torres v. Lynch,*** 764 F.3d 152, where the Second Circuit held 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 was filed on September 22, 2015.

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Conviction – Divisibility Inconclusive Record

On September 10, 2015, the en banc Ninth Circuit heard argument on 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.

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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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Continuance– Waiver Standard

On July 14, 2015, over government opposition, the Seventh Circuit granted en banc rehearing in ***Bouras v. Lynch.*** 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.

Petitioner's supplemental brief to the *en banc* court relied on standard of proof for a good faith marriage waiver as described in the court's recent decision in *Hernandez-Lara v. Lynch*, 789 F.3d 800. The government supplemental brief, filed September 22, 2015, asks the en banc court to overrule *Hernandez-Lara*. *En banc* argument is calendared for December 1, 2015.

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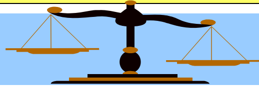
NOTED

DHS has designated Yemen for Temporary Protected Status (TPS) for 18 months due to the ongoing armed conflict within the country. Yemen is experiencing widespread conflict and a resulting severe humanitarian emergency, and requiring Yemeni nationals in the United States to return to Yemen would pose a serious threat to their personal safety. As a result of Yemen's designation for TPS, eligible nationals of Yemen residing in the United States may apply for TPS with U.S. Citizenship and Immigration Services (USCIS).



Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Petitioner Failed to Establish "Members That Oppose Gang Membership" Constitutes A Particular Social Group, Citing *W-G-R-* and *M-E-V-G-*

In *Paiz-Morales v. Lynch*, __ F.3d __, 2015 WL 4560270 (1st Cir. July 29, 2015), (*Thompson*, Howard, Barron), the First Circuit held that a Guatemalan citizen failed to establish that his proposed group consisting of "members that oppose gang membership" constituted a legally cognizable particular social group for purpose of asylum eligibility.

The petitioner affirmatively filed an asylum application in April 1998. In October of that year, he was placed in removal proceedings. When he failed to appear, a removal order was issued in absentia. Ten years later, in 2008, petitioner successfully moved to reopen the order of removal and requested asylum, withholding of removal, and protection under CAT. Petitioner's persecution claim stemmed from actions related to the Guatemalan Civil War. In particular, he testified that he left Guatemala before he turned eighteen because anti-government guerillas threatened and beat him when he refused to cooperate with them. Petitioner argued that he feared future persecution however, due to his membership in a particular social group consisting of "members that oppose gang membership." He claimed that "gang members know which persons in society are against their philosophies because gang members themselves wear certain clothing, have tattoos on their bodies and have easily identifiable signs of gang membership on their persons or bodies."

The BIA determined that petitioner failed to show that "members that oppose gang membership" is a legally cognizable social group.

The First Circuit rejected petitioner's contention that the BIA's decision in *Matter of M–E–V–G–*, 26 I&N Dec. 227 (BIA 2014), was "new case law" requiring a remand for reconsideration in light of the "clarification of the BIA's position on the social visibility requirement." The court concluded that the BIA's replacement of the term "social visibility" with "social distinction" did not depart from its prior interpretation, but "merely clarified that literal ocular visibility is not and has never been a prerequisite for a viable particular social group." The court then found that petitioner had failed to offer any evidence of the existence of a legally cognizable particular social group and denied the petition for review.

The court concluded that the BIA's replacement of the term "social visibility" with "social distinction" did not depart from its prior interpretation, but "merely clarified that literal ocular visibility is not and has never been a prerequisite for a viable particular social group."

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First Circuit Holds That it Lacks Jurisdiction to Review Discretionary Denial of Adjustment of Status

In *Mele v. Lynch*, __ F.3d __, 2015 WL 4932842 (1st Cir. August 19, 2015) (*Howard*, Thompson, Kayatta), the First Circuit held that it lacked jurisdiction to review purely discretionary decisions made under the other statutory sections identified in INA § 242(a)(2)(B)(i), including the discretionary decision to deny adjustment of status under INA § 245.

The petitioner, Mele, was admitted to the United States in May of 1992, on a non-immigrant visa, and never departed. When placed in removal proceedings in September 1993, he applied for asylum, claiming that his Kurdish ethnicity and support for the United States during the 1991 Gulf War would subject him to persecution in Jordan. However, he failed to appear at a hearing to consider the merits of his asylum claim and he was ordered deported in absentia.

In August 2002, Mele married a United States citizen who subsequently filed a Form I–130 petition on Mele's behalf for an immigrant visa. Mele then successfully moved to reopen his removal hearing and then was granted several continuances until the I–130 petition was granted. In November 2009, Mele was granted another continuance to prepare an application for adjustment of status.

On October 21, 2010, Mele was arrested in New Bedford, Massachusetts, on six counts related to the illegal sale of prescription drugs. The hearing was again continued in light of Mele's pending criminal case. A hearing finally took place on Mele's application for adjustment of status on September 2, 2011. Mele testified about his work history and his marriage, and his wife described their family life -- how Mele supported the family financially and how he helped her deal with certain medical issues. The police report detailing Mele's October 2010 arrest was also introduced into the record and the DHS trial attorney explored the details of Mele's arrest on cross-examination. Mele denied that he had committed a crime.

The IJ found Mele statutorily eligible for an adjustment of status, but noted that "the granting of an application for adjustment of status is discretionary." The judge listed various positive factors that weighed in Mele's favor, but found those considerations outweighed by the facts contained in the police report about

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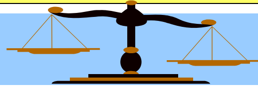

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his arrest, and denied adjustment. The BIA affirmed the IJ's decision.

The court rejected a challenge to the IJ's use of the police report noting that "an immigration court may generally consider a police report containing hearsay when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction, because the report casts probative light on an alien's character."

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■ First Circuit Holds that Honduran Applicant Failed to Establish Past Persecution or an Objectively Reasonable Fear of Future Persecution

In *Villafranca v. Lynch*, __ F.3d __, 2015 WL 4639244 (*Selya*, Lynch, Thompson) (1st Cir. August 5, 2015), the petitioner, a citizen of Honduras, claimed that he had been persecuted and feared persecution on the basis that he had escaped an attempted kidnapping or murder before entering the U.S. a year later. He said that, while driving his car along a Honduran road, a vehicle containing several armed men cut him off. The men were dressed in regalia of a sort that the petitioner thought "customary" for the special police. Three of them approached the petitioner's vehicle and, as he sped away, they opened fire. The petitioner was able to evade his assailants, but he nevertheless thought that he remained at risk because of his family's wealth and political ties.

The First Circuit held that a single, isolated criminal attack did not rise to the level of persecution. "We have regularly upheld determinations by the BIA that this sort of sporadic, isolated event does not – in the absence of evidence of systematic targeting or the like – constitute persecution," said the court.

The court further held that the record did not compel the conclusion that the petitioner's fear of future persecution was objectively reasonable as it was based upon the same past harm that did not rise to the level of persecution, and the alien was able to remain unharmed in Honduras for approximately six months after the attack. The court noted in particular that "despite the petitioner's assertion that the persecution he suffered was based on kinship, his family members have continued to dwell in Honduras unharmed."

"Despite the petitioner's assertion that the persecution he suffered was based on kinship, his family members have continued to dwell in Honduras unharmed."

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■ First Circuit Upholds Adverse Credibility Determination Based on Multiple Inconsistent Statements

In *Conde Cuatzo v. Lynch*, __ F.3d __, 2015 WL 4639241 (*Lynch*, Thompson, Barron) (1st Cir. August 5, 2015), the First Circuit upheld the BIA's adverse credibility determination where the alien's prior statements to a Border Patrol agent and an asylum officer were inconsistent with each other and with his testimony.

The court also held that the alien's due process rights were not violated when the IJ refused to admit a late-submitted declaration from an alleged expert, holding that the judge has broad discretion to admit or exclude evidence and that the alien was not prejudiced by the exclusion of the declaration because it had no bearing on the alien's credibility.

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■ First Circuit Holds Change in Personal Circumstances, with No Changed Country Conditions, Is Not a Basis for Untimely Motion to Reopen

In *Wang v. Lynch*, __ F.3d __, 2015 WL 4597553 (1st Cir. July 31, 2015) (Howard, *Lynch* Torruella), the First Circuit upheld the BIA's denial of an untimely motion to reopen based on claimed changed country circumstances, and changed personal circumstances.

Wang, a Chinese citizen, was interdicted in international waters near Bermuda in 1996 and was later placed in removal proceedings. He conceded removability but sought asylum on the basis that his life was in danger because, he claimed, he had testified against the organized crime group that tried to smuggle him into the United States. He also claimed he faced persecution based on China's birth control policy because he and his wife had refused to undergo forced sterilization.

On February 2, 1998, an IJ denied, in part based on adverse credibility findings, Wang's applications for asylum and withholding of removal and the BIA dismissed his appeal on February 5, 1999. Petitioner, however, was not removed and remained in the United States. In 2014 Wang filed an untimely motion to reopen his asylum and withholding of removal proceedings claiming changed country conditions in China. He claimed that he has been a practicing Christian since being baptized in 2012 and that he would face persecution if he returned to China because the Chinese government's suppression of underground churches had intensified since 1998.

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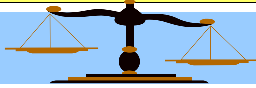

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The First Circuit held that petitioner's conversion to Christianity constituted a change in personal circumstance and that "a change in personal circumstances alone does not meet the standard for the exception to the time bar for changed country conditions." However, the court noted that Wang presented a "mixed petition," that is both that his personal circumstances have changed and that country conditions have done so. Under those circumstances, said the court, certain courts of appeal have considered changes in personal circumstances when combined with changes in country conditions. The court, though, declined to take a position on this issue, because in Wang's case the BIA had considered the claimed changed conditions in connection with his changed personal circumstances. Consequently, the court found that the BIA did not abuse its discretion in in its denial of the motion to reopen

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■ First Circuit Upholds "Inference" of Marriage Fraud

In *Atieh v. Riordan,* 727 F.3d 73 (1st Cir. 2015) (Howard, *Selya*, Thompson), the First Circuit affirmed a district court decision that substantial evidence supported a BIA's denial of an I-130 because of the husband's prior marriage fraud. The appellate court noted that the case involved "dueling inferences," holding, "It is perfectly appropriate for an agency to rely on reasonable inferences in determining the existence *vel non* of marriage fraud."

In rejecting the argument that the agency should have given greater weight to certain evidence, and lesser weight to other evidence it considered, the court held, first, that "weighing the evidence is, within wide limits, the exclusive province of the agency," and, second, that "the agency fully discharged its duty by fairly considering the [parties'] submissions and articulat[ing] its decision in terms adequate to allow a reviewing court to conclude that the agency has thought about the evidence and the issues and reached a reasoned conclusion."

"The agency fully discharged its duty by fairly considering the [parties'] submissions and articulat[ing] its decision in terms adequate to allow a reviewing court to conclude that the agency has thought about the evidence and the issues and reached a reasoned conclusion."

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■ First Circuit Holds Alien Failed to Exhaust Equitable Estoppel Claim for Government Misconduct

In *Batres v. Lynch*, 796 F.3d 157 (1st Cir. 2015) (Torruella, *Lynch*, Kayatta), the First Circuit held that petitioner failed to exhaust his equitable estoppel claim based on government misconduct because he raised it for the first time on his petition to the court.

The petitioner, a Guatemalan citizen, who traveled in and out of the United States, claimed that the government was estopped from removing him because it failed to take from him an invalid LPR card he had once been issued and to update its databases to reflect that he was not an LPR.

The court ruled that, before the BIA, petitioner claimed only that the government had failed to confiscate his LPR card and admitted him to the United States, but never described the government's actions as affirmative misconduct. Therefore, the court found that it lacked jurisdiction to review that claim. Additionally, the court concluded that petitioner addressed his mistaken belief in the validity of his LPR status before the BIA and the court, but that he did so for entirely different purposes, to wit, to argue he had no intent to deceive.

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■ First Circuit Holds that Alien Who Failed to Update Mailing Address Was Not Entitled to Rescission of In Absentia Removal Order Based on Alleged Lack of Notice

In *Ledesma-Sanchez v. Lynch*, __ F.3d __, 2015 WL 4855771 (1st Cir. August 14, 2015) (Torruella, Thompson, *Barron*), the First Circuit held that an alien who failed to update his mailing address, despite proper advisement under INA § 239(a), was not entitled to rescission of an *in absentia* removal order due to alleged lack of notice.

The petitioner, a citizen of the Dominican Republic, was personally served with a Notice to Appear charging him as an overstay. The NTA ordered petitioner to appear before an immigration judge in Boston to adjudicate his removability, at a date and time to be set. The NTA informed petitioner that he was obliged to provide immigration authorities with his mailing address and telephone number among other requirements and that if he did not comply he might then be ordered removable in absentia. Petitioner moved twice but did not update his last address. As a result, he did not receive the hearing notice and when he did not appear at the scheduled hearing, the IJ ordered him removable in absentia. Over a year later, in August of 2012 petitioner moved to reopen his removal proceedings arguing that he had not received notice of the hearing. The IJ denied the motion because petitioner

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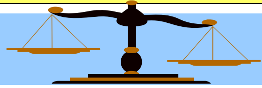

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had failed to inform the immigration authorities of his change of address when he last moved. The BIA affirmed the IJ's denial.

The court found without merit petitioner's claim that his duty to update his address "had not yet attached" because the NTA had not been filed with the immigration court in Boston. The court further explained that the notice to appear specifically advised him of this duty and the immigration courts docketing rules mandated that the clerks retain change-of-address forms even when the notice to appear has not been filed.

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SIXTH CIRCUIT

■ Sixth Circuit Holds that Congress Intended AEDPA § 435 to Apply to Pre-AEDPA Conduct During Post-AEPDA Immigration Proceedings

In ***Velasco-Tijero v. Lynch***, 796 F.3d 617 (6th Cir. 2015) (Guy, Gibbons, *Rogers*), the Sixth Circuit rejected the alien's argument that application of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) § 435's amendments to his pre-AEDPA conviction during his post-AEDPA immigration proceedings was impermissibly retroactive. The court held that § 435(b) clearly indicates Congress's intent that § 435 applies in proceedings initiated on or after the date of AEDPA's enactment, even where the proceedings are based on conduct occurring before AEDPA took effect.

The court also found that the BIA did not abuse its discretion in denying petitioner's motion to remand so that he could request termination of removal proceedings and apply for adjustment of status. The court found that the BIA adequately explained its decision when it stated that petitioner's extensive criminal record, including a shoplifting offense in 1995 and four DUIs, and the lack of any evidence of rehabilitation precluded him from meeting his heavy burden to justify remand

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■ Sixth Circuit Remands for Agency to Reevaluate Materiality of Alien's False Statements

In ***Yousif v. Lynch***, 796 F.3d 622 (6th Cir. 2015) (Daughtrey, Gibbons, *Griffin*), the Sixth Circuit reversed the agency's finding that the alien had filed a frivolous asylum application. The court determined that substantial evidence supported the agency's finding that the alien made false representations in support of his asylum claim, and rejected the alien's claim that a withholding grant and a frivolous asylum denial are never compatible. Nevertheless, the court concluded that the agency failed to properly evaluate whether the alien's false statements were material – in that they had the potential to make a difference in the outcome of his asylum application – at the time his asylum application was filed.

> **The court concluded that the agency failed to properly evaluate whether the alien's false statements were material – in that they had the potential to make a difference in the outcome of his asylum application – at the time his asylum application was filed.**

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EIGHTH CIRCUIT

■ Eighth Circuit Finds it Lacks Jurisdiction Over Motion to Reopen Sua Sponte

In ***Shoyombo v. Lynch***, __ F.3d __, 2015 WL 5084623 (8th Cir. August 28, 2015) (*Loken*, Bye, Kelly), the Eighth Circuit held that it lacked jurisdiction to review the denial of the petitioner's motion to reopen *sua sponte*. Although petitioner alleged that his prior attorney abandoned his case, the motion was not based on *Matter of Lozada*.

Shoymbo, a native of Nigeria, entered the United States illegally in July 1993 and fraudulently filed two asylum applications in different names in 1993 and 1995. The second application, in his own name, was denied and he was ordered deported in absentia in November 1995. Shoyombo remained in the United States and married a United States citizen. His second motion to reopen, filed while he applied for adjustment of status, was granted in February 2002. However, after DHS discovered Shoyombo had previously filed a second asylum application, the proceedings were reopened on the Immigration Court's own motion.

After a hearing, the IJ denied adjustment of status but granted Shoyombo's request for voluntary departure. DHS appealed the latter ruling. The BIA affirmed in a January 19, 2010, order that gave Shoyombo sixty days to leave the United States. He did not depart, instead marrying a second United States citizen on February 1, 2010. His attorney filed a new I–130 visa petition on March 12, 2010, but failed to file a third motion to reopen the removal proceedings and apply for adjustment of status.

ICE arrested Shoyombo in March 2012. He hired a new attorney and filed a grievance against his former attorney. In December 2013, a new I–130 application was ap-

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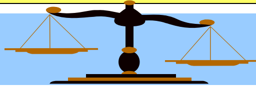

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proved. In March 2014, Shoyombo filed a third motion to reopen his removal proceedings to request adjustment of status based on the approved I-130 visa petition, admitted that the motion was untimely but asserted the delay was due to the previous attorney abandoning his case. The BIA denied the motion because "[t]he record as a whole, which includes evidence of extensive fraud on the part of the respondent, does not demonstrate an exceptional situation that warrants reopening sua sponte."

The Eighth Circuit determined that because there is "no meaningful standard" to measure the IJ's exercise of discretion, it would join "ten of our sister circuits" in concluding that it lacked jurisdiction to review the denial of a motion in such circumstances.

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SEVENTH CIRCUIT

■ Seventh Circuit Upholds Adverse Credibility Finding Where Alien Failed to Authenticate Documents

In *Arnaud Tawuo v. Lynch*, __ F.3d __, 2015 WL 4940824 (*Wood*, Hamilton, Darrah) (7th Cir. August 20, 2015), the Seventh Circuit upheld the BIA's adverse credibility finding, noting the review standard to be critical. The court stated it would not overturn a credibility determination "simply because the evidence might support an alternate finding." The court held that the government had no duty to send its evidence "to a forensics laboratory" for authentication and that 8 U.S.C. § 1158(b)(1)(B)(iii) does not require the court to consider demeanor and candor in making a credibility determination.

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EIGHTH CIRCUIT

Eighth Circuit Holds that a Forgery Conviction Under California Law is Categorically a Crime Involving Moral Turpitude

In *Miranda-Romero v. Lynch*, __ F.3d __, 2015 WL 4746166 (8th Cir. August 12, 2015) (*Gruender*, Melloy, Benton), the Eighth Circuit held that a specific intent to defraud is a required element for a conviction of possessing a forged or counterfeit document under California Penal Code § 472. The court relied on the California courts' longstanding interpretation of CPC § 472 as including the element of a specific intent to defraud. Because a conviction under CPC § 472 necessarily involves a specific intent to defraud, and carries a potential sentence of one year or more in prison, it is categorically a CIMT, held the court..

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■ Eighth Circuit Holds That Foreign Conviction Can Be Proven Through a Combination of Documents

In *Fraser v. Lynch*, 795 F.3d 859 (8th Cir. 2015) (Loken, Bye, *Kelly*), the Eighth Circuit held that the Immigration Judge properly found the alien removable under 8 U.S.C. § 1227(a)(1)(A), as an alien who was inadmissible at the time of adjustment, based on a 1991 Canadian conviction for cocaine possession for the purpose of trafficking. The court concluded that, while no single document in the record was sufficient to establish the alien's conviction, the IJ properly relied on a combination of certified and uncertified documents to support her finding.

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■ Eighth Circuit Holds Minnesota Obstruction with Force or Violence Not Categorically a Crime of Violence

> **Minnesota crime of obstruction with force or violence was not categorically a "crime of violence" under 8 U.S.C. § 16, because the minimum necessary force was less than the requisite "force capable of causing physical pain or injury."**

In *Ortiz v. Lynch*, __ F.3d __, 2015 WL 4645869 (8th Cir. August 6, 2015) (Riley, *Bright*, Murphy), the Eighth Circuit held that the Minnesota crime of obstruction with force or violence was not categorically a "crime of violence" under 8 U.S.C. § 16, because the minimum necessary force was less than the requisite "force capable of causing physical pain or injury." The court did not remand for the modified categorical approach because, assuming divisibility, the court concluded that the conviction documents did not establish the portion of the statute under which the alien was convicted. The court remanded to the BIA to address whether the alien's conviction rendered him removable for having been convicted of a crime involving moral turpitude.

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■ Eighth Circuit Affirms Adverse Credibility Finding Based on Implausible Testimony, but Remands for Voluntary Departure Determination

In *Mohammed Emu Ademo v. Lynch*, __ F.3d __, 2015 WL 4568941 (8th Cir July 30, 2015) (Loken, *Colloton*, Shepherd), the Eighth Circuit held that an IJ may

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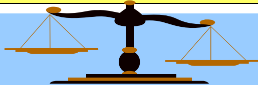

Summaries Of Recent Federal Court Decisions

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base a credibility finding on an asylum applicant's implausible testimony, and a reasonable adjudicator could have done so in this case.

The adverse credibility decision was supported by substantial evidence and was a sufficient basis on which to deny relief. The court remanded solely for the BIA to correct its failure to address the IJ's denial of voluntary departure. The court also held that there was no abuse of discretion in the BIA's denial of the motion to reopen.

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The alien's signature alone on the admissible Form I-9 constituted adequate evidence to establish his removability for making a false citizenship claim.

■ **Eighth Circuit Holds that Alien's Signature on a Form I-9 Established a False Claim to United States Citizenship**

In *Etenyi v. Lynch*, __ F.3d __, 2015 WL 4979579 (8th Cir. August 21, 2015) (*Gruender*, Melloy, Benton), the Eighth Circuit held that petitioner's signature on a Form I-9, which he claimed his employer completed for him, constituted a false claim to citizenship because it was signed under the penalty of perjury.

The court sustained the agency's adverse credibility finding regarding the form completion based on the alien's admission that he reviewed other parts of the I-9, and the alien's English speaking skills and high education level. The court added that the alien's signature alone on the admissible Form I-9 constituted adequate evidence to establish his removability for making a false citizenship claim.

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NINTH CIRCUIT

■ **California's Overbroad Theft Statute is Not Divisible, Meaning Convictions Under the Statute Are Not Aggravated Felony Theft Offenses**

In *Lopez-Valencia v. Lynch*, __ F.3d __, 2015 WL 4879874 (9th Cir. August 17, 2015) (Kleinfeld, *McKeown*, Smith), the Ninth Circuit followed circuit precedent holding that California's main theft statute, Penal Code § 484, was overbroad. Then, interpreting *Descamps v. United States*, 133 S. Ct. 2276 (2013), and following *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), the court held that because a California jury need not determine unanimously under which theory of theft a defendant is guilty before convicting him, the different theories are not elements of different offenses, such that the theft statute is indivisible and not subject to a "modified categorical" approach.

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■ **Ninth Circuit Recognizes Precedents' Abrogation and Remands for Consideration of Alien's Eligibility for Relief Notwithstanding His Drug Paraphernalia Conviction**

In *Madrigal-Barcenas v. Lynch*, __ F.3d __, 2015 WL 4716767 (9th Cir. August 10, 2015) (Noonan, Tashima, *Graber*), the Ninth Circuit held that *Mellouli v. Lynch*, 135 S. Ct. 2828 (2015), abrogated precedents of the court of appeals and of the BIA holding that it was unnecessary to prove that a federally controlled substance was involved in a state drug paraphernalia conviction in order for the offense to have immigration consequences under 8 U.S.C. §§ 1182 (a)(2)(A)(i)(II) and 1227(a)(2)(B)(i). The Ninth Circuit further held that Nevada's drug paraphernalia possession statute was overbroad, and agreed with the Government that a remand was necessary to apply the modified categorical approach.

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■ **Ninth Circuit Holds Ineffective Assistance of Counsel Advising Alien of Relief for Which He Was Not Statutorily Eligible Warrants Equitable Tolling**

In *Salazar-Gonzalez v. Lynch*, __ F.3d __, 2015 WL 4939615 (Thomas, *McKeown*, Fletcher) (9th Cir. August 20, 2015), the Ninth Circuit held that the petitioner was entitled to equitable tolling of the motion to reopen filing deadline. The court concluded that the advice by the petitioner's prior counsel to waive appeal of the IJ's denial of his cancellation of removal application and to instead pursue consular processing in Mexico for a visa for which he was statutorily ineligible, constituted deficient performance.

The court disagreed with the BIA's conclusion that petitioner was not entitled to tolling because prior counsel's recommendation that petitioner return to Mexico was a tactical decision that did not rise to the level of ineffective assistance of counsel. The court further concluded that the government had not rebutted the presumption of prejudice that had arisen from the petitioner's denial of his right to appeal. Consequently, petitioner "demonstrated that the outcome of the proceedings may have been different had he not been the victim of ineffective counsel."

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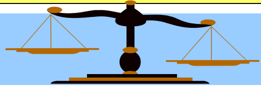

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■ Ninth Circuit Holds Applicant Ineligible for Deferral of Removal Under CAT Based on Decorative Non-Gang-Related Tattoos

In *Andrade v. Lynch*, __ F.3d __, 2015 WL 5040202 (9th Cir. August 27, 2015) (Wallace, Kleinfeld, Christen) (*per curiam*), the Ninth Circuit held that petitioner failed to establish eligibility for Deferral of Removal under the CAT based on his two decorative, non-gang-related tattoos.

The petitioner, who had been convicted of child molestation in Washington State, claimed that he would likely be tortured if returned to El Salvador because his tattoos would cause him to be perceived as a gang member. The IJ and the BIA agreed that the tattoos were decorative, not gang-related, showing his initials and the initials of his girlfriend. The BIA also determined that being deported from a richer country and bearing non-gang tattoos failed to establish a probability of torture upon his return to El Salvador.

The court held that the agency "gave careful and extensive consideration" to the Country Report and other evidence and that not just "any tattoos are enough to justify Convention Against Torture relief."

Distinguishing *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011), the court held that the agency "gave careful and extensive consideration" to the Country Report and other evidence and that not just "any tattoos are enough to justify Convention Against Torture relief." Namely, the court found that substantial evidence supported the BIA's conclusion that petitioner "had not proved that 'deportees (with or without tattoos) are likely to experience mistreatment rising to the level of torture.'"

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■ BIA's Decision in *Matter of Briones* Should Not Apply Retroactively to Bar Petitioner's Application for Adjustment of Status

In *Acosta-Olivarria v. Lynch*, __ F.3d __, 2015 WL 5023955 (9th Cir. August 26, 2015) (Bea, *Friedland*, Rice (by designation)), the Ninth Circuit held that *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), should not apply retroactively to bar the petitioner's application for adjustment of status under INA § 245(i).

The court reached its conclusion by applying the five-factor balancing test set forth in *Montgomery Ward & Co., Inc. v. Federal Trade Commission*, 691 F.2d 1322 (9th Cir. 1982). The court determined that petitioner had reasonably relied upon an earlier Ninth Circuit decision, *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), which permitted such applications, and the petitioner's reliance interest outweighed the interest in uniform application of the immigration laws.

Dissenting, Judge Rice would have held that the BIA properly denied the petitioner's application for adjustment of status based upon *Matter of Briones*. "[T]the majority's balancing of the *Montgomery Ward* factors here is no longer tethered to the general rule [that a court should apply the law in effect at the time of its decision] applied for over 200 years. Rather, the majority's analysis—in which the factors are divorced from the general rule and allowed to become a framework in and of itself—loses sight of the guidance centuries of jurisprudence have offered," wrote Judge Rice.

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TENTH CIRCUIT

■ Tenth Circuit Holds Criminal Impersonation in Colorado Is Categorically a Crime Involving Moral Turpitude

In *Veloz-Luvevano v. Lynch*, __ F.3d __, 2015 WL 5097611 (Gorsuch, *O'Brien*, Bacharach) (10th Cir. August 31, 2015), the Tenth Circuit granted the government's motion to publish its decision which held that the Colorado crime of criminal impersonation under Col.Rev.Stat. § 18–5–113(1)(d) is categorically a crime involving moral turpitude because "fraud is inherent in the statute."

The petitioner, a Mexican citizen who had entered the U.S. as a visitor on February 14, 1998, and never left, had been convicted for possessing a forged social security card. He was eventually ordered removed and his application for cancellation was pretermitted. The court rejected petitioner's argument that the conduct underlying his conviction did not involve any fraudulent intent and thus did not satisfy elements of Colorado criminal statute.

The court also held that IJs, the BIA, and the Federal Courts of Appeal do not have jurisdiction to review the DHS's prosecutorial discretion decisions.

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OIL's Interns

Mr. Bradley Dumbacher graduated from Marquette University with a degree in political science concentrated in Political Economy, and is a rising 2L at the University of Georgia School of Law. Bradley is a new OIL intern in the appellate section and spent the summer as a legal intern at a non-profit organization, "The Mediation Center" in Savannah Georgia."

Madeline Dang is a 3L at American University Washington College of Law. She attended UC Santa Barbara, where she earned her B.A.s in Business-Economics and French. Madeline is a new OIL intern on Team Blakeley. Her previous internships include the U.S. Attorney's Office for the District of Columbia (Summer 2015), the Office of Police Complaints (Fall 2014), and the Asian Pacific American Legal Resource Center (Summer 2014). In her free time, Madeline enjoys road cycling, running, and exploring around Washington, DC.

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

Stephanie Groff is a 3L at George Mason University School of Law. She is a new OIL intern on Team O'Connor after a summer interning with DHS Office of the General Counsel, a semester interning at the BIA, and a semester interning with ICE Immigration Law and Practice Division.

Abigail Leach is a 2L at the Catholic University of America Columbus School of Law. She is a new OIL intern on Team Payne after a summer as a law clerk at a transportation firm in downtown Washington, D.C.

Maricela Lechuga is a 3L at American University Washington College of Law. She will join OIL as a new intern in January 2016.

Christin Mitchell is a 4L at American University Washington College of Law. She will join OIL as a new intern in January 2016 after working this fall for the Commonwealth's Attorney's Office in Alexandria, VA.

Ms. Sandy Pineda, Esq., is a Law and Government LL.M. Candidate at the American University Washington College of Law. She is an OIL law clerk for the Ernesto H. Molina Jr. team.

Nelle Seymour is a JD/MPH student at Northeastern University School of Law and Tufts University School of Medicine. She is a new OIL intern on Team Ginsburg, after having interned with the Suffolk County District Attorney's Office and the National Women's Law Center.

Zade Shamsi-Bashi is a 3L at University of Alabama. He will join OIL as a new intern in January 2016.

Ms. Emily Wyche graduated from College of Charleston with a major in History and a double minor in Philosophy and Religious Studies. She is now a 2L at University of Georgia School of Law. Emily is a new OIL intern on the Ferrier Team after spending the summer at the Georgia Sea Grant in Athens, Georgia.

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.

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Welcome to our 2015 Fall Interns and 2016 Spring Interns

First Row: ***Christin Mitchell, Emily Wyche, Abigail Leach, Lindsay Donohue, Sandy Pineda.*** Second Row: ***David McConnell (Director) , Madeline Dang, Maricela Lechuga, Stefanie Groff, Bradley Dumbacher, Zade Shamsi-Basha, Michelle Latour (Deputy Director), Donald Keener (Deputy Director).***

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.

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

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