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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Sixth Circuit Holds That INA Definition of "Crime of Violence" Incorporating 18 U.S.C. § 16(b) Is Unconstitutionally Vague

In ***Shuti v. Lynch***, __F.3d __, 2016 WL 3632539 (6th Cir. July 7, 2016) (*Cole*, Clay, Gibbons), the Sixth Circuit relying on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), held that the definition of "crime of violence" under 18 U.S.C. § 16(b) as incorporated in INA § 101(a)(43)(F), is unconstitutionally vague. The court said that the BIA was "misguided" in its conclusion that the void-for-vagueness doctrine does not apply in deportation proceedings because they are "civil in nature."

The petitioner, a citizen of Albania and an LPR, pled guilty in 2014 to a felony unarmed robbery under Michigan law and was sentenced to at least two and a half year in prison. DHS then instituted removal proceedings against the petitioner on the basis that his conviction amounted to an aggravated felony a crime of violence under INA § 101(a)(43)(F). The IJ denied all discretionary relief and ordered petitioner removed. The BIA affirmed, finding that unarmed robbery was "categorically a crime of violence" as defined in 18 U.S.C. § 16(b). "[A]n individual who engages in robbery," the BIA opined, "clearly involves a substantial risk that physical force will be used in the ordinary case." The BIA also rejected petitioner's contention that in light of the intervening Supreme Court decision in *Johnson*, the INA's definition of crime of violence was unconstitutionally vague.

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EOIR Proposes Rule Establishing Procedures for Reopening Cases Based on Ineffective Assistance of Counsel

EOIR has published a proposed rule which would establish procedures for the filing and adjudication of motions to reopen removal, deportation, and exclusion proceedings based upon a claim of ineffective assistance of counsel. 81 Fed Reg. 49556 (July 28, 2016).

The proposed rule is in response to *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009), in which the Attorney General directed EOIR to develop such regulations. The proposal would also amend the EOIR regulations that provide that ineffective assistance of counsel may constitute extraordinary circumstances that may excuse the failure to file an asylum application within 1 year after the date of arrival in the United States.

Under this proposed rule, an individual seeking to reopen his or her immigration proceedings would have to establish that the individual was subject to ineffective assistance of counsel and that, with limited excep-

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Definition of "Crime of Violence" Voided for Vagueness

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The court initially rejected the BIA's contention that the void-for-vagueness doctrine did not apply in removal proceedings. "If anything, it is 'well established' that the Fifth Amendment 'entitles' non-citizens to due process in removal proceedings [ ] This includes the constitutional requirements of 'fair notice' and 'even-handed administration of the law,'" said the court. The court explained that in *Jordan v. De George*, 341 U.S. 223 (1951), the Court applied the void-for-vagueness doctrine to a challenge to the definition of the INA term "crime involving moral turpitude." Thus, said the court, "the criminal versus civil distinction is thus 'ill suited' to evaluating a vagueness challenge regarding the 'specific risk of deportation'. . . Because deportation strips a non-citizen of his rights, statutes that impose this penalty are subject to vagueness challenges under the Fifth Amendment."

"The criminal versus civil distinction is thus 'ill suited' to evaluating a vagueness challenge regarding the 'specific risk of deportation.'"

On the merits, the court explained that in *Johnson* the Supreme Court voided for vagueness the Armed Career Criminal Act's residual clause of "violent felony." That clause defines a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another." The court found that this provision "while not a perfect match . . . undeniably bear[s] a textual resemblance" to the INA's definition of a crime of violence. "Both provisions combine indeterminacy about 'how to measure the risk posed by a crime' and 'how much risk it takes for the crime to qualify' as a crime of violence or violent felony," said the court citing *Johnson*. "We cannot avoid the conclusion that the INA's residual clause falls squarely within *Johnson*'s core holding," concluded the court.

The court also determined that its decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) – which held that 18 U.S.C. § 924(c)'s definition of crime of violence, which is identical to 8 U.S.C. § 16(b), was not unconstitutionally vague – was not inconsistent with *Johnson* because "18 U.S.C. § 924(c) is a criminal offense that requires an ultimate determination of guilt beyond a reasonable doubt – by a jury, in the same proceeding."

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Proposed Rule for Reopening Cases Based on Ineffective Assistance of Counsel

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tions, he or she suffered prejudice as a result.

The proposed rule would provide guidelines for determining when counsel's conduct was ineffective, and when an individual suffered prejudice.

Under the proposed rule, a motion to reopen based on ineffective assistance of counsel would be required to include: (1) An affidavit, or a written statement executed under the penalty of perjury, providing certain information; (2) a copy of any applicable representation agreement; (3) evidence that prior counsel was notified of the allegations and of the filing of the motion; and (4) evidence that a complaint was filed with the appropriate disciplinary authorities.

EOIR proposes a prejudice standard modeled after *Strickland v. Washington*, 466 U.S. 668, 694 (1984), noting that it "would strike a proper balance between providing individuals with a reasonable opportunity to reopen proceedings based upon a meritorious ineffective assistance claim and safeguarding the finality of immigration proceedings." Accordingly, the proposed regulations would therefore provide that to succeed on an ineffective assistance of counsel claim, an individual needs to establish that ''there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different.''

The proposed rule notes that there is currently a split among the circuits regarding whether there is a constitutionally-based right to effective counsel in immigration proceedings.

More significantly, in a footnote, EOIR states that "[i]t is beyond the scope of this proposed rule to address whether there is a constitutionally-based right to effective assistance of counsel in immigration proceedings. Rather, this rule is limited to providing an administrative remedy under appropriate circumstances based on the Attorney General's statutory authority and discretion. . . .the Department has consistently argued before the Supreme Court that there is no constitutional right to effective assistance of counsel in immigration proceedings. . . Nothing in the proposed regulations affects this position."

FURTHER REVIEW PENDING: Update on Cases & Issues

Citizenship – Equal Protection

On June 28, 2016, the Supreme Court granted the government petition for a writ of certiorari in ***Lynch v. Morales-Santana***, No. 15-1191, challenging the Second Circuit's 2015 opinion, 804 F.3d 520, which severed, as a violation of equal protection, a distinction between unwed mothers and unwed fathers in the physical presence requirements of the 1952 statute providing for citizenship at birth of a child born abroad where only one of the parents is a U.S. citizen. The court extended the requirements for unwed mothers to unwed fathers. The same equal protection issue deadlocked the Supreme Court in *Flores-Villar v. United States*, 564 U.S. 210 (2011) (with Justice Kagan recused). The petition for certiorari argued that the Second Circuit erred in both the equal protection ruling and the remedy. The government's merits brief was filed on August 19, 2016.

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Mandatory Detention

On June 20, 2016, the Supreme Court granted the government petition for a writ of certiorari in ***Jennings v. Rodriguez***, No. 15-1204, challenging the Ninth Circuit's 2015 opinion, 804 F.3d 1060, which held that all aliens detained pending completion of their removal proceedings, including criminals and terrorists, must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. Under that ruling, such bond hearings must be afforded automatically every six months, the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, and the length of the alien's detention must be weighed in favor of release. The government's merits brief was filed on August 26, 2016. The Court took no action on the government's petition for a writ of certiorari in the related case, *Shanahan v. Lora,* No. 15-1205, challenging the Second Circuit's 2015 opinion, 804 F.3d 601, presumably holding that petition for *Rodriguez*, but denied the Lora's conditional cross-petition for a writ of certiorari. The *Lora* petition may reach whether the mandatory detention provision applies at all to aliens who were not taken into detention for removal at the time they were released from their criminal incarceration.

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Asylum —Unable or Unwilling to Control

On June 14, 2016, over government opposition, the Ninth Circuit granted rehearing *en banc* in ***Bringas-Rodriguez v. Lynch***. The panel decision, formerly published at 805 F.3d 1171, held that bare hearsay assertions were insufficient to contradict the substantial country-conditions evidence, and consequently, substantial evidence supported the Board of Immigration Appeals' determination that an alien who was sexually abused as a child failed to prove that his government would be unwilling or unable to control his abusers. The parties have filed supplemental briefs and *en banc* argument is calendared for September 7, 2016. The parties have filed supplemental briefs.

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Crime of Violence — Vagueness

On June 10, 2016, the government filed a petition for a writ of certiorari in ***Lynch v. Dimaya***, No. 15-1498, challenging the judgment of a divided Ninth Circuit panel (803 F.3d 1110) that the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the aggravated-felony provision of the immigration laws, is unconstitutional in view of *Johnson v. United States*, 135 S. Ct. 2521 (2015) (striking down the "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)). The government contends that review is warranted because that ruling is incorrect, strikes down a federal statute, conflicts with a decision of another court of appeals, and is already causing substantial disruption to the enforcement of the immigration laws and several criminal laws. Respondents filed their response on August 12, 2016.

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Good Moral Character

On June 6, 2016, the government filed a petition for *rehearing en banc* in ***Ledezma-Cosino v. Lynch***, challenging the Ninth Circuit panel's decision, 819 F.3d 1070, holding that the "habitual drunkard" bar to good moral character is unconstitutional under the Equal Protection Clause. The panel majority concluded that the provision targeted an underlying medical condition, alcoholism, and held "that, under the Equal Protection Clause, a person's medical disability lacks any rational relation to his classification as a person with bad moral character[.]" Dissenting, Judge Clifton would have held that the provision is rationally related to compelling government interests, including public health and safety, and thus constitutional. In its petition for rehearing, the government argues: 1) there are not two similarly situated classes of aliens, and 2) even assuming such classes, the statutory provision is rationally related to Congress's intent to limit eligibility for relief and benefits to those who do not present risks to public health and safety. Respondents filed a response on August 10, 2016.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds Naturalization Applicant Failed to Establish Derivative Citizenship Under Former INA § 321, 8 U.S.C. § 1432**

In ***Thomas v. Lynch***, __ F.3d ___, 2016 WL 3606943 (1st Cir. July 5, 2016) (Kayatta, *Barron*, Stahl), the First Circuit held that petitioner did not "begin to reside permanently" in the United States upon his lone surviving parent's naturalization, as required for him to obtain derivative citizenship under INA § 321, 8 U.S.C. § 1432, because he did not adjust to lawful permanent resident status by the age of eighteen.

The petitioner, a Haitian-born citizen, was removed following a state law conviction for armed robbery. Following his removal, he reentered the United States without inspection in April 2015, and was criminally charged for illegal reentry. He then filed an untimely motion to reopen to argue derivative citizenship in light of *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013).

The court explained that because petitioner took no official action with respect to his citizenship status in the three-day window between his mother's naturalization and his eighteenth birthday, petitioner never applied for lawful permanent resident status, and therefore did not "begin to reside permanently" in the United States as required by the former statute.

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■ **First Circuit Rejects "Individuals Returning to Guatemala while Leaving Behind Family Members in the United States" as a Particular Social Group**

In ***Alvizures-Gomes v. Lynch***, ___F.3d___, 2016 WL 3923837 (1st Cir. July 21, 2016) (Torruella, *Selya*, Lynch), the First Circuit rejected petitioner's claim that his membership in a discrete social group, namely, individuals returning to Guatemala from the United States while leaving behind family members in the United States, composed a particular social group. The court explained that "a cognizable social group does not exist merely because an alien can conjure up a description of it. Instead, finding a cognizable social group requires a showing that the group is 'a group of persons sharing a common, immutable characteristic that makes the group socially visible and sufficiently particular.'" The court also agreed with the BIA that the gangs' targeting of the petitioner was primarily motivated by a desire to swell their ranks and not by political motives.

Finding a cognizable social group requires a showing that the group is 'a group of persons sharing a common, immutable characteristic that makes the group socially visible and sufficiently particular.'"

The court also upheld the denial of petitioner's CAT claim that the Guatemalan government is unwilling to provide meaningful protection to him. The court joined other circuits in holding that merely because the local police could not determine who sent petitioner's threatening letters did not show that the police would acquiesce in torture.

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SECOND CIRCUIT

■ **Second Circuit Holds That New York Child Pornography Conviction Constitutes an Aggravated Felony Despite Lacking a Federal Jurisdictional Element**

In ***Weiland v. Lynch***, __ F.3d ___, 2016 WL 3548350 (2d Cir. June 29, 2016) (Parker, Lohier, Carney) (*per curiam*), the Second Circuit applied the Supreme Court's recent decision in *Torres v. Lynch*, 136 S. Ct. 1619 (2016), and held that petitioner' conviction for possession of child pornography under New York Penal Law § 263.11 constituted an aggravated felony, despite the state law's lack of a federal jurisdictional element.
The petitioner, a German citizen, argued that the interstate commerce component of the federal child pornography statute was a requirement of the underlying substantive offense. The court rejected that contention, explaining that in *Torres* the Supreme Court had "expressed concern that requiring a state law to include a federal jurisdictional element in order to be an offense 'described in' one of the federal laws identified in § 1101(a)(43) would exclude most state child pornography laws—an outcome that the Court characterized as 'perverse.'"

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■ **Second Circuit Holds That Petitioner's Conviction Under the Possession With Intent to Manufacture or Deliver a Controlled Substance Statute is Categorically a Controlled Substance Offense**

In ***Collymore v. Lynch***, __ F.3d __, 2016 WL 3648337 (2d Cir. July 8, 2016) (*Wesley*, Straub, Livingston), the Second Circuit disagreed with the parties' interpretation, and held that the petitioner's conviction under 35 Pa. Stat. Ann. § 780-113(a)(30) was categorically a controlled substance offense for purposes of INA § 1227 (a)(2)(B)(i), thus rendering the alien removable.

The parties below, including the BIA, had determined that the Pennsylvania statute was not a categorical

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match because some of the substances covered by the Pennsylvania law do not necessarily appear in the federal schedules of controlled substances. The BIA, however, determined that the statute was divisible. Accordingly, it applied the modified categorical approach, and found that petitioner's conviction involved cocaine, a federal controlled substance, and that he was consequently removable.

The Second Circuit found that the BIA's interpretation of the statute was at odds with the court's "duty to consider the most natural reading of the text and the context of the statute." Here, the Pennsylvania statute also prohibited "counterfeit controlled substances" The court explained that "under the most natural reading of these terms taken together, however, in the context of § 780–113(a)(30), the term 'counterfeit' modifies the term 'controlled substance,' such that a 'counterfeit controlled substance' encompasses only a controlled substance that, consistent with the definition, is mislabeled, such that it falsely purports or represents to be the product of a manufacturer, distributer, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance." Therefore, concluded the court, "the Pennsylvania and federal controlled substance and counterfeit controlled substance definitions categorically proscribe the same controlled substances."

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■ **Second Circuit Determines That Detention Pending Withholding-Only Proceedings Is Controlled by the Pre-Order Detention Statute**

In ***Guerra v. Shanahan***, __ F.3d__ , 2016 WL 4056035 (2d Cir. July 29, 2016) (Winter, *Hall*, Droney), the Second Circuit in an issue of first impression, held that a reinstated removal order is not "administratively final" during the pendency of withholding-only proceedings. Consequently, petitioner was entitled to a bond hearing because his detention was authorized by INA § 236(a) and aliens detained pursuant to that section are entitled to a bond hearing before an IJ under 8 C.F.R. § 1236.1(d). The court explained that "an alien subject to a reinstated removal order is clearly removable, but the purpose of withholding-only proceedings is to determine precisely whether 'the alien is to be removed from the United States'" as provided under § 236(a).

"An alien subject to a reinstated removal order is clearly removable, but the purpose of withholding-only proceedings is to determine precisely whether 'the alien is to be removed from the United States.'"

The court also determined that no deference should be given to the agency's formal regulation indicating that such detention was controlled by the post-order detention statute.

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THIRD CIRCUIT

■ **Third Circuit Holds Alien Who Committed Fraud in Obtaining TPS Is Statutorily Ineligible for U.S. Citizenship**

In ***Saliba v. Att'y Gen. of U.S.***, __ F.3d __, 2016 WL 3648469 (3d Cir. July 8, 2016) (Ambro, Jordan, *Greenberg*), the Third Circuit held that petitioner who lied about his nationality to obtain Temporary Protected Status, but later adjusted to LPR status pursuant to an employment visa, was never "lawfully" admitted for permanent residence and thus ineligible for United States citizenship.

The petitioner obtained TPS in 1992 by providing falsified documents with his application indicating that he was a citizen of Lebanon. He was, in reality, a native and citizen of Syria, a country whose citizens at that time were not eligible for TPS. Nine years later, in 2001, petitioner was able to adjust his status even though his fraudulent procurement of TPS should have rendered him statutorily "inadmissible" under INA § 212(a)(6)(C)(I) and thus not eligible for LPR status. But when petitioner applied for naturalization in 2006, the USCIS discovered that he had obtained TPS by submitting a fraudulent application and denied his application for naturalization for that reason.

The court rejected petitioner's arguments that USCIS implicitly waived any bar to his admissibility attributable to his misrepresentations when it granted him LPR status. "In the absence of any evidence in the record showing that [petitioner] was eligible for, applied for, and obtained a waiver of inadmissibility under the procedures set forth in 8 U.S.C. § 1182(i)(1), and its implementing regulations, [petitioner's] inadmissibility was not waived at the time that he became a LPR," said the court.

Finally, the court also rejected petitioner's contention that by failing to rescind his LPR status within the five year limitations period in INA § 246(a), the government had waived the ground of disability for naturalization. The court explained that "the substantive compliance prerequisite to the grant of citizenship cannot be circumvented by reliance on a statute of limitations that by its terms applies only to rescission and removal, matters distinct from naturalization."

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FOURTH CIRCUIT

■ Fourth Circuit Holds Virginia Public Records Forgery Is a Categorical Match to Generic Forgery

In ***Alvarez v. Lynch***, __ F.3d __, 2016 WL 3632613 (4th Cir. July 7, 2016) (Diaz, Floyd, *Thacker*), the Fourth Circuit held that an alien's conviction for forging a public record under Virginia Code Ann. § 18.2-168 constituted an aggravated felony under INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R), as it forms a categorical match to the generic offense of forgery. The court denied as moot, the government's renewed request to remand in light of *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015).

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■ Fourth Circuit Affirms Removal of Rwandan Genocide Participant

In ***Munyakazi v. Lynch,*** __ F.3d __, 2016 WL 3670075 (4th Cir. July 11, 2016) (Traxler, *Shedd,* Floyd), the Fourth Circuit affirmed the BIA's determination that a citizen of Rwanda was ineligible for asylum and withholding of removal because he had participated in the 1994 Rwandan genocide.

The petitioner, an ethnic Hutu, came to the United States in 2004 on a business visa. Prior to his visa's expiration, he filed an application for asylum and withholding of removal. While in the United States, petitioner who worked as a college professor in Rwanda, began teaching at Montclair State University in New Jersey.

The court credited statements by witnesses interviewed by DHS agents in Rwanda, who reported that petitioner personally helped to instigate the massacre of ethnic Tutsis in his village. The court also upheld the BIA's denial of deferral of removal under the CAT, finding no evidence that the petitioner, who has been indicted in Rwanda on genocide charges, will likely be tortured upon his return.

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FIFTH CIRCUIT

■ Deadline for Filing a Motion to Reopen Under INA § 240(c)(7) is Subject to Equitable Tolling

In ***Lugo-Resendez v. Lynch***, __ F.3d __, 2016 WL 4056051 (*Higginbotham*, Dennis, Clement) (5th Cir. July 28, 2016), the Fifth Circuit joined nine sister circuits in holding that the deadline for filing a motion to reopen under INA § 240 (c)(7) is subject to equitable tolling, notwithstanding the departure bar regulations which strip the BIA and the Immigration Court of jurisdiction to consider motions to reopen filed by departed aliens. The court remanded for the agency to determine whether equitable tolling of the filing deadline is warranted in the Mexican citizen's case.

"The BIA should give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal System."

The court instructed the BIA to apply the same equitable tolling standard that it uses in other contexts, namely, that "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" In considering the facts in equitable tolling cases, the court noted "the BIA should give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions."

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■ Fifth Circuit Denies Citizenship Claim under the Child Citizenship Act, Holding LPR Status Is Conferred upon Formal Approval of the Application

In ***Gutierrez v. Lynch,*** __ F.3d __, 2016 WL 3900677 (5th Cir. July 18, 2016) (*Davis*, Jones, Graves), the Fifth Circuit concluded that petitioner became a lawful permanent resident after his eighteenth birthday, on the date his adjustment of status application was formally approved and his card issued, thereby precluding his citizenship claim under the Child Citizenship Act. The court rejected petitioner's argument that he had obtained LPR status four years earlier (before his eighteenth birthday), on the date the INS officer signed an I-89 Form which certified he was entitled to a permanent resident card. The court also concluded that the government was not equitably estopped from removing the petitioner due to the four-year delay in issuing the lawful permanent resident card, where there was no evidence of affirmative misconduct.

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■ Fifth Circuit Holds Immigration Judge Failed to Conduct Mixed-Motive Analysis and Consider Legitimacy of Investigation in Nexus Finding

In ***Sealed Petitioner v. Sealed Respondent***, __ F.3d __, 2016 WL

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3878166 (5th Cir. July 15, 2016) (Davis, Smith, *Higginson*), the Fifth Circuit held that the IJ and BIA failed to conduct a mixed-motive analysis pursuant to *Matter of S-P-*, 21 I&N Dec. 486, 492 (BIA 1996), and failed to consider the legitimacy of the investigation when they concluded that the petitioner, a native and citizen of Ethiopia, was harmed by the Ethiopian government only because he was suspected of financing terrorist activity and not on account of his ethnicity, family, or political opinion.

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■ **Fifth Circuit Holds That Assault Under Texas Penal Code § 22.01(a)(1) Is Not Categorically a Crime Involving Moral Turpitude**

In *Gomez-Perez v. Lynch*, __ F.3d __, 2016 WL 3709757) (5th Cir. July 11, 2016) (Jolly, Haynes, *Costa*), the Fifth Circuit held that the three mental states under Texas Penal Code § 22.01(a)(1) – (1) knowing; (2) intentional; and (3) reckless – constituted alternative means of committing the offense, rather than separate "elements" that must be proven to a jury pursuant to the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). Thus, the statute was "indivisible."

Because the BIA had ruled that reckless assault under the Texas statute did not constitute a crime involving moral turpitude, the court concluded that the Texas statute, after *Mathis*, categorically did not constitute a crime involving moral turpitude.

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The petitioner was harmed by the Ethiopian government only because he was suspected of financing terrorist activity and not on account of his ethnicity, family, or political opinion.

SIXTH CIRCUIT

■ **Alien's Concession That He Was Removable Because He Entered the United States without Inspection Is Insufficient to Satisfy His Affirmative Burden to Prove Eligibility for Relief on the Same Basis**

In *Govindbhai Patel. v. Lynch*, __ F.3d __, 2016 WL 3619833 (6th Cir. June 30, 2016) (Clay, Rogers, McKeague) (*per curiam*), the Sixth Circuit denied the alien's appeal finding that his concession he was removable because he entered the United States without inspection was not sufficient to meet his burden to affirmatively prove that he satisfied 8 U.S.C. § 1255 (i)'s requirement of having entered the United States without inspection. The court agreed with the agency that, while it might appear "somewhat incongruous" for the agency to hold that the alien was removable because he entered without inspection and ineligible to adjust status because he did not enter without inspection, this result was dictated by the applicable burdens of proof and the fact that his testimony lacked credibility.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Adverse Credibility Ruling Was Erroneous Based on Trivial or Immaterial Inconsistencies that Were Easily Explained**

In *Yuan v. Lynch*, __ F.3d __, 2016 WL 3536667 (7th Cir. June 28, 2016) (*Kanne*, Sykes, Hamilton), the Seventh Circuit granted the Chinese alien's petition for review and remanded this asylum case. The court ruled that the adverse credibility determination upheld by the BIA was flawed because the purported inconsistencies cited by the Board were easily explained, trivial, or immaterial. The court also ruled that the Board and the Immigration Judge failed to grapple with potential explanations offered by the alien.

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■ **Seventh Circuit Holds That No Waiver of the Joint-Filing Requirement Is Required for I-751 Petition Where Petitioning Spouse Died During the Two-Year Conditional Period**

In *Putro v. Lynch*, __ F.3d __, 2016 WL 3632602 (7th Cir. July 7, 2016) (Flaum, Manion, *Williams),* the Seventh Circuit denied the government's motion to remand to the BIA, but remanded to the BIA to reconsider the petitioner's I-751 Petition to Remove Conditions on Residence. Citing *Matter of Rose*, 25 I&N Dec. 181 (BIA 2010), the court concluded that the agency erred by requiring a waiver of the joint-filing requirement where the alien's spouse died during the two-year conditional period. The court also explained that this error improperly shifted the burden of proof to the alien to prove that her marriage was bona fide.

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EIGHTH CIRCUIT

Nigerian Asylum Applicant Failed to Demonstrate Changed Country Conditions to Qualify for Exception to Filing Deadline for Reopening

In *Zeah v. Lynch*, __F.3d __, 2016 WL 3648325 (8th Cir. July 8, 2016) (Murphy, *Beam*, Gruender), the Eighth Circuit held that an alien,

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who alleged past persecution and asserted that conditions in her country remained unacceptable, failed to demonstrate a material change in country conditions to qualify for an exception to the filing deadline for reopening. The court also rejected the alien's due process claim, stating that the BIA's taking administrative notice of facts in a country report was expected and fair under the circumstances.

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■ **Substantial Evidence Supported the Immigration Judge's Adverse Credibility Finding**

In *Arevalo-Cortez v. Lynch*, __ F.3d __, 2016 WL 3947816 (8th Cir. July 22, 2016) (Riley, Murphy, *Shepherd*), the Eighth Circuit held that the agency properly concluded that the alien was not credible based on the contradictions between her testimony and record evidence regarding: her passport's expiration date and her previous attempts to travel to the United States; the lack of evidence that her abuser was a police officer; and the inconsistent letters written by witnesses of the alleged abuse. The court concluded that despite the alien's plausible explanations about the inconsistencies, the Immigration Judge did not "commit[] error in rejecting [those explanations]," and "a reasonable adjudicator would reach the same credibility determination as the Judge and the Board of Immigration Appeals."

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■ **Eighth Circuit Upholds DHS's Reinstatement of Prior Removal Order and Its Subsequent Denial of Reopening of the Reinstated Order**

In *Perez-Garcia v. Lynch*, __ F.3d __, 2016 WL 3902651 (8th Cir. July 19, 2016) (Wollman, Benton, *Shepherd*), the Eighth Circuit held that substantial evidence supported the DHS's reinstatement of a prior removal order because the petitioner, a Mexican citizen, never claimed compliance with a 1998 grant of voluntary departure. The court also held that DHS acted within its discretion in denying reopening of the reinstated order based solely on a personal affidavit and unauthenticated photocopy of a document purporting to show compliance with voluntary departure.

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The court held that it had jurisdiction to review legal and constitutional issues in the BIA's decision denying a request for *sua sponte* reopening.

NINTH CIRCUIT

■ **Ninth Circuit Upholds Agency Finding That a Former Salvadoran Deputy Congressman May Have Committed a Serious Nonpolitical Crime Outside The United States**

In *Silva-Pereira v. Lynch*, __ F.3d __, 2016 WL 3632373 (9th Cir. July 7, 2016) (Wallace, *O'Scannlain*, Huff (by designation)), the Ninth Circuit agreed with the BIA that there were serious reasons to believe the petitioner had committed a serious nonpolitical crime, thereby disqualifying him from asylum and withholding of removal.

The petitioner, a former professional soccer player and deputy congressman from El Salvador, was charged with conspiring to murder three representatives to the Central American Parliament in Guatemala. The court determined that the Guatemalan indictment and the processes attached to its issuance amply supported the agency's conclusion. The court declined to review the petitioner's request for deferral of removal to El Salvador however, unless and until El Salvador becomes the primary country of removal.

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■ **Ninth Circuit Asserts Jurisdiction over Legal Issues in Sua Sponte Reopening and Decides Effect of Reopening on INA § 212(c) Waiver Eligibility**

In *Bonilla v. Lynch*, __ F.3d __, 2016 WL 3741866 (9th Cir. July 12, 2016) (*Berzon*, Owens, Marbley (by designation)), the Ninth Circuit upheld the decision of the BIA that a six-year gap in seeking legal representation demonstrated that the petitioner did not exercise sufficient diligence to justify equitable tolling of the motion to reopen to apply for adjustment of status. However, in an issue of first impression, the court joined three other circuits and held that it had jurisdiction to review legal and constitutional issues in the BIA's decision denying a request for *sua sponte* reopening to pursue a waiver of inadmissibility under INA § 212(c).

The court then held that remand to the BIA was warranted for determination of whether petitioner had sufficient lawful presence to become eligible for waiver of inadmissibility, as would permit BIA's exercise of *sua sponte* authority to reopen deportation proceedings.

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Summaries Of Recent Federal Court Decisions

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■ **Ninth Circuit Holds Asylum Applicant from Mongolia Failed to Establish Retaliation for Whistleblowing Claim Amounting to Persecution on Account of a Political Opinion**

In ***Lkhagvasuren v. Lynch***, __F.3d __, 2016 WL 3745524 (9th Cir. July 13, 2016) (Wallace, Schroeder, Kozinski) (*per curiam*), the Ninth Circuit adopted and applied the BIA's three-factor framework in *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011), for determining whether retaliation for whistleblowing amounts to persecution on account of a political opinion.

The petitioner, who was employed in Mongolia by an alcoholic-beverage company that he believed was engaged in corrupt activities, claimed that he was subsequently fired from his job, joined a non-governmental consumer activist group, and later publicly voiced objections to the company's business practices. Petitioner asserted that his whistleblowing activities constituted a political opinion for which he was persecuted with either the consent or acquiescence of government actors.

The court held that substantial evidence supported the BIA's conclusion that petitioner failed to present evidence that his purported persecutors were motivated by his anticorruption beliefs, or that the corruption was connected to government actors. Petitioner's "theory that a cabal of private and government officials conspired to silence him is unsupported in the record," said the court.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds That It Lacks Jurisdiction Over Sua Sponte Reopening**

In ***Butka v. U.S. Att'y Gen.***, ___ F.3d ___, 2016 WL 3608672 (11th Cir. July 5, 2016) (*Hull*, Black, Moreno), the Eleventh Circuit adhered to *Lenis v. U.S. Att'y Gen.,* 525 F.3d 1291 (11th Cir. 2008), holding that it lacks jurisdiction to consider the denial of requests for reopening under the BIA's *sua sponte* authority.

The court rejected petitioner's suggestion that the Supreme Court had instructed federal circuit courts to assert jurisdiction over legal claims related to or underlying requests for sua sponte reopening.

The petitioner, a citizen of South Korea, overstayed a six-month nonimmigrant visitor's visa, which was issued in 1981. Prior to her admission to the United States, petitioner had been convicted in 1977 in South Korea for possession of 105 grams of marijuana. DHS initially placed her in proceeding for a controlled substance violation, but later filed the additional charge of visa overstay. When petitioner failed to pursue her request for relief, the IJ entered an order of removal and found that she was ineligible for adjustment and voluntary departure due to the drug conviction. The IJ also determined that petitioner's conviction could not be waived under INA § 212(h) because it involved more than simple possession of 30 grams of marijuana.

On appeal the BIA affirmed the removal order and rejected petitioner's claim of a due process violation because she was ordered removed without a hearing. In May 2011, the Eleventh Circuit concluded that it had jurisdiction to review petitioner's constitutional claim but found no violations.

On March 2, 2015, petitioner sought reopening pursuant to the BIA's *sua sponte* authority under 8 C.F.R. § 1003.2(a). The BIA determined that petitioner did not present an "exceptional situation to justify reopening *sua sponte*," and it denied the motion as time-barred.

In declining to exercise jurisdiction the Eleventh Circuit ruled that the Supreme Court's decision in *Mata v. Lynch,* 135 S. Ct. 2150 (2015), did not undermine its holding in *Lenis*, which foreclosed any claim that the court could rule on the legal challenges presented. The court rejected petitioner's suggestion that the Supreme Court had instructed federal circuit courts to assert jurisdiction over legal claims related to or underlying requests for *sua sponte* reopening.

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DISTRICT COURTS

■ **District of Kansas Affirms USCIS's Finding That the "Ability to Pay" Requirement for Religious Workers Does Not Violate the Religious Freedom and Restoration Act**

In ***Iglesia Pentecostal Casa de Dios Para Las Naciones* v. *Johnson***, 2016 WL 3936435 (D. Kan. July 21, 2016) (Crabtree, J.), the District of Kansas rejected a claim that USCIS's "ability to pay" requirement, 8 C.F.R. § 214.2(r)(11), violates the Religious Freedom and Restoration Act because it substantially burdens the plaintiffs' ability to live by their genuinely held religious beliefs. The court held that the regulation did not prohibit the church from compensating its employee through "love offerings," and thus did not substantially burden their faith. The regulation requires only that the church demonstrate its ability to pay through "verifiable evidence," which it had failed to do.

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INSIDE OIL

USCIS attorneys from the Refugee and Asylum Law Division, spoke recently to OIL attorneys and provided their perspective of the reasonable fear screening process. The also discussed current challenges that the asylum and refugee programs are facing. In addition, ***Elizabeth Mura***, the head of the Operations Branch at Asylum HQ presented some statics and answered questions about operational issues.

Friends and former co-workers recently mourned the passing of ***Mary Koehmstedt Doyle***, the first Director of Training for the Civil Division.

Maura Ooi, Elizabeth Mura, Dorothea Lay

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OIL TRAINING CALENDAR

October 3 -7, 2016
New OIL Attorneys Training
October 31-November 4, 2016
Immigration Litigation Seminar
NAC, Columbia, SC
December 5-December 9, 2016
22nd Annual Immigration Law Seminar, Washington, DC

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

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

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

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