



Immigration Litigation Bulletin

Vol. 21, No. 1

JANUARY 2017

LITIGATION HIGHLIGHTS

■ ASYLUM

► Asylum claim remanded to determine whether the applicant was subjected to at least one forced abortion (7th Cir.) **8**

■ BORDER SECURITY

► Implementation of E.O. suspending entry of nationals from certain countries enjoined (9th Cir.) **1**

■ CRIMES

► Involuntary manslaughter in Virginia is not categorically a CIMT (4th Cir.)

► Conviction for aggravated assault under Ohio Rev. Code § 2903.12 is categorically a CIMT (6th Cir.) **6**

► Conviction under Oregon drug statute does not constitute an aggravated felony drug trafficking offense (9th Cir.) **10**

■ DETENTION

► Court orders the government to provide bond hearings for unaccompanied minors (C.D. Cal.) **11**

■ JURISDICTION

► Denial of request for administrative closure is subject to judicial review (8th Cir.) **1**

■ TERRORISM

► Material support bar applies to an alien who provided translation services for the leader of a Tier III terrorist organization (7th Cir.) **7**

Inside

3. Further Review Pending

4. Summaries of Court Decisions

12. Inside OIL

PRESIDENTIAL ORDERS LAY OUT IMMIGRATION POLICIES Focus on border security, public safety, national security

On January 25-27, 2017, three Executive Orders were issued by the President setting out the immigration policies of the Executive Branch in three broad areas: border security, public safety, and national security.

Border Security

E.O. 13767, on *Border Security and Immigration Enforcement and Improvements*, 82 Fed. Reg. 8793 (Jan. 30, 2017), directs executive departments and agencies “to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.

In particular, the E.O. directs the Secretary of DHS to plan, design, and

construct a wall along the southern border, to construct detention facilities near the land border with Mexico and to locate asylum officers at those facilities to conduct credible fear determinations. The E.O. also directs the Attorney General to assign immigration judges at detention facilities to conduct hearings.

The E.O. also directs DHS to end the policy of “catch and release” and instead take measures to detain illegal entrants, and to expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States.

Public Safety in the Interior

E.O. 13768 on *Enhancing Public Safety in the Interior of the United States*
(Continued on page 2)

Ninth Circuit Upholds TRO of Executive Order Suspending Entry of Nationals of Countries of Particular Concern

On February 9, 2017, the Ninth Circuit Court of Appeals denied the government’s motion for an emergency stay of the TRO entered in *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). The district court enjoined the government’s implementation of E.O. 13769, which among other policies suspended the entry of nationals from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.

The complaint was brought by the states of Washington and Minnesota which claimed, among other

things, that they faced immediate and irreparable injury as a result of the signing and implementation of the Executive Order.

The Ninth Circuit held that the States had standing to sue because, generally state universities were injured when they “incurred the costs of visa applications” for students to enter the state universities, and the E.O. now prevented from attending those universities.

The Ninth Circuit then found that the Executive Order was subject to

(Continued on page 2)

Executive Orders Focus on Homeland Security

(Continued from page 1)

States, 82 Fed. Reg. 8799 (January 30, 2017), lays out the Executive Branch policies for enforcing the immigration laws in the interior of the United States.

In particular, the E.O. calls for “the faithful execution of the immigration laws of the United States . . . against all removable aliens,” and directs DHS to set forth enforcement priorities, including the removal of aliens who have been convicted of any criminal offense, or who have committed acts that constitute a chargeable criminal offense. Also on the list of enforcement priorities are aliens who have abused any program related to receipt of public benefits and those who are subject to final orders of removal but have not complied with their legal obligation to depart the United States.

The E.O. sets forth policies on expanding federal-state agreements under INA § 287(g), and to authorize state and local law enforcement officials “to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens” under the directions and supervision of DHS.

The E.O. calls on “sanctuary jurisdictions” to comply with 8 U.S.C § 1373 and if they willfully refuse, they could be ineligible to receive federal grants.

Section 11 of the E.O. calls on DHS and DOJ “to implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States.”

National Security

E.O. 13769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, signed on January 27, 82 Fed. Reg. 897 (February 1, 2017), seeks to “prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.”

The E.O. invokes in particular INA § 212(f) to suspend for 90 days the “entry into the United States, as immigrants and nonimmigrants” of persons from seven countries of particular concern, to ensure that mechanisms are in place to determine that “the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.”

Section 4 of the E.O. directs DHS, State, FBI, and DNI, to implement uniform screening standard of all immigration programs “to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm.”

The E.O. also suspends the FY 2017 refugee admission program for 120 days to allow the Secretary of State to review the adjudication process. Upon resumption of the program, DHS and State are directed “to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”

In Section 5(c) the E.O. finds that the entry of nationals of Syria as refugees “is detrimental to the interests of the United States” and suspends “any such entry” until changes are made to the “to ensure the admission of Syrians refugees is consistent with the national interest”

Ed. Note: In future issues, we will be discussing in more details these Executive Orders and their implementation by the executive agencies.

Ninth Circuit Keeps TRO in Place

(Continued from page 1)

review. “Although courts owe considerable deference to the President’s policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action,” said the court.

The court then determined that the government had not met its burden for a stay of the district court’s order. First, the court found that the government failed to show likelihood of success on the claim that the Executive Order did not violate the aliens’

due process rights. In particular, the court noted that the government had not “established that the Executive Order provides lawful permanent residents with constitutionally sufficient process to challenge their denial of re-entry.” The court declined the government’s assurance that the Executive Order no longer applied to lawful permanent residents.

Moreover, the court found that “even if the due process rights of lawful permanent residents were no longer part of this case, the States would continue to have potential claims regarding possible due pro-

cess rights of other persons who are in the United States, even if unlawfully.”

The court also rejected the government’s contention that the TRO was overbroad because it extends beyond lawful permanent residents, and covers aliens who cannot assert cognizable liberty interests.

The court reserved consideration of the claim that the E.O. violated the Establishment and Equal Protection Clauses because it was intended to disfavor Muslims.

Balancing the hardships and the public interest, the court then held that the government had not shown that a stay is necessary to avoid irreparable injury.

FURTHER REVIEW PENDING: Update on Cases & Issues

Citizenship – Equal Protection

On November 9, 2016, the Supreme Court heard argument 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 government argued that the Second Circuit erred in both the equal protection ruling and the remedy.

Contact: Andy MacLachlan, OIL

☎ (b) (6)

Mandatory Detention

Following argument in *Jennings v. Rodriguez*, No. 15-1204, the Supreme Court requested simultaneous supplemental briefing from the parties which were filed January 31, 2017, addressing whether the constitution requires particular limits on detention of aliens caught at the border entering illegally, or bond hearings after a particular period, or a particular standard and burden on a particular party to determine whether an alien must be release on bond.

In the underlying Ninth Circuit's 2015 opinion, 804 F.3d 1060, that court 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.

Contact: Sarah Wilson, OIL-DCS

☎ (b) (6)

Aggravated Felony - Sexual Abuse of a Minor

On February 27, 2017, the Supreme Court will hear argument on the alien's petition for a writ of certiorari in *Esquivel-Quintana v. Lynch*, No. 16-54, challenging the Sixth Circuit's opinion, 810 F.3d 1019, which denied the petition for review seeking direct review of the Board's precedent decision, *Matter of Esquivel-Quintana*, 16 I&N Dec. 469 (BIA 2015). The question presented is whether a conviction for consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen constitutes the aggravated felony of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). The case is fully briefed.

Contact: Patrick J. Glen, OIL

☎ (b) (6)

Crime of Violence – Vagueness

On January 17, 2017, the Supreme Court heard argument on the government's 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 rul-

ing 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. There are four related petitions for certiorari, and numerous other cases at various stays in the courts of appeals.

Contact: Bryan Beier, OIL

☎ (b) (6)

Good Moral Character

On January 18, 2017, an en banc panel of the Ninth Circuit heard argument on the government petition for rehearing en banc in *Ledezma-Cosino v. Lynch*, challenging the 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[.]"

In its petition for rehearing, the government argued: 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.

Contact: Aimee Carmichael, OIL

☎ (b) (6)

Updated by Andy MacLachlan, OIL

☎ (b) (6)



Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds that Asylum Applicant Was Not Credible and Failed to Persuasively Explain Conflict between His Statements

In *Ye Xian Jing v. Lynch*, 845 F.3d 38 (1st Cir. 2017) (Lynch, Selya, *Burroughs* (D. Mass., by designation)), the First Circuit held that the BIA could deny the petitioner's asylum application on the basis that the he had disclaimed any past persecution when he was stopped at the border, but subsequently claimed that he had been persecuted in China on account of his religion.

When petitioner entered the United States unlawfully in Arizona on July 19, 2012, he was questioned by a Border Patrol agent, with the help of a Mandarin interpreter. That interview was reflected in the "Record of Sworn Statement in Proceedings Under Section 235(b)(1)" dated on the same day, and a one-page Jurat, signed on July 20. The Jurat contained petitioner's answers to a series of questions, including that he had left China "to live and work," that he had no fear or concern about returning, and that he would not be harmed if he returned.

Thereafter, petitioner expressed a fear of returning to China, and in November 2012 he was given a "credible fear interview," where he stated that when he was in China he had been arrested and beaten by Chinese authorities at an unauthorized house church and then detained for over a month. On November 14, 2012, an asylum officer determined that petitioner had expressed a credible fear of persecution. Consequently, he was placed in removal proceedings for an asylum hearing. Petitioner then testified that he feared religious persecution in China if he returned and that he had suffered a specific instance of

religious persecution by Chinese officials in the past. The IJ determined that petitioner was not credible because he had failed to provide a rational and reasonable explanation for his failure to state his claim to the Border Patrol agent. Therefore he denied his request for asylum, withholding and CAT protection. On appeal, the BIA upheld the IJ adverse credibility determination and also concluded that the facts did not demonstrate that petitioner would more likely than not be tortured in China.

The court held there was substantial evidence supporting the IJ's adverse credibility determination and the BIA's acceptance of it. The court explained that "determining credibility is a matter of sound judgment and common sense ..., when an alien's earlier statements omit any mention of a particularly significant event or datum, an IJ is justified—at least in the absence of a compelling explanation—in doubting the petitioner's veracity." It found no error in the IJ's and the BIA's finding that "the inconsistency between the DHS interview and later claims, which included nerves, lack of understanding, and the difficult journey, were insufficiently compelling." The court rejected petitioner's contention that because the border interviews are unreliable the IJ should have inquired into the reliability of his interview at the border. The court noted that Real ID Act § 101(a)(3) specifically allows IJs to consider "the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made).

Contact: Aric A. Anderson, OIL

☎ (b) (6)

■ First Circuit Holds Rhode Island Law Prohibiting the Manufacture, Delivery, or Possession with Intent to Distribute a Controlled Substance Is Divisible

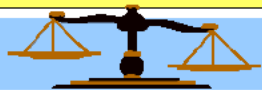
In *Swaby v. Yates*, ___ F.3d ___, 2017 WL 395097 (1st Cir. January 30, 2017) (*Barron*, Stahl, Lipez), the First Circuit held that Rhode Island General Laws § 21-28-4.01(a)(4)(i) is divisible and subject to the modified categorical approach because the nature of the controlled substance is an element of the offense.

The petitioner entered the United States on a tourist visa in May 1996, and in May 2010 he adjusted to LPR status. On September 4, 2013, petitioner pled nolo contendere in Rhode Island Superior Court to three counts of manufacturing, delivering, or possessing with intent

to distribute a controlled substance—to wit, marijuana—in violation of Rhode Island General Laws Section 21-28-4.01(a)(4)(i). An IJ determined that petitioner was removable as charged under INA § 237(a)(2)(B)(i), and denied his request for cancellation. Petitioner then filed a motion to reopen and to stay his removal. The IJ granted the reopening and the stay request but due to an oversight petitioner was removed to Jamaica. He was then brought back to the U.S. The IJ then denied the motion to reopen and the BIA affirmed the two IJ's rulings.

The court rejected the BIA's application of the categorical approach under *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), concluding that there is a realistic probability that the state would prosecute a controlled substance that is not on the federal schedule of controlled substances

(Continued on page 5)



Summaries Of Recent Federal Court Decisions

(Continued from page 4)

where that substance is listed on the state schedule. The court, however, concluded that the modified categorical approach applied because the Rhode Island statute is divisible by drug type. Applying the modified categorical approach, court the found that the relevant plea documents sufficed to make clear that petitioner's convictions were for the manufacturing, delivering, or possessing with intent to distribute marijuana. The court thus conclude that petitioner's convictions clearly do "relat[e] to a controlled substance as defined in [the federal drug schedules]."

The court also upheld the denial of the alien's application for cancellation of a removal as a matter of discretion.

Contact: Jessica Burns, OIL



(b) (6)

THIRD CIRCUIT

■ **Third Circuit Clarifies Its Limited Jurisdiction over Sua Sponte Reopening Denials and Declines Review under Its "Settled Course of Adjudication" Exception**

In *Park v. Att'y Gen. of the U.S.*, 846 F.3d 645 (3d Cir. 2017) (Ambro, Shwartz, Fuentes), the Third Circuit clarified that an exception to its rule against reviewing denials of *sua sponte* reopening may exist where the BIA has constrained its discretion (with a policy, rule, "settled course of adjudication," or other means) in a way that permits meaningful "abuse-of-discretion" review. Considering the unpublished BIA decisions cited by the alien, the court rejected his claim that the BIA had a "practice or pattern" of *sua sponte* reopening for an alien to apply for new relief.

Contact: Claire Workman, OIL



(b) (6)

FOURTH CIRCUIT

■ **Fourth Circuit Holds Involuntary Manslaughter in Virginia is Not Categorically a Crime Involving Moral Turpitude**

In *Sotnikau v. Lynch*, __ F.3d __, 2017 WL 344277 (4th Cir. January 24, 2017) (Niemeyer, King, Agee), the Fourth Circuit held that involuntary manslaughter under Virginia law is not categorically a crime involving moral turpitude because a conviction for that offense can be predicated on mere criminal negligence, which requires neither intent nor a conscious disregard of a known risk.

The petitioner, a native of Belarus, was admitted to the United States as an LPR in 2008. In the early hours of June 18, 2010, petitioner and his friend Randy Hines were drinking on a pier along the Elizabeth River in Portsmouth, Virginia. At some point, Hines fell down a series of concrete steps and into the river. After fruitless efforts to locate Hines in the river's dark waters, petitioner retreated to a local homeless shelter. He did not otherwise seek assistance or alert the authorities. Apparently, at the shelter someone overheard petitioner recount what had happened and reported to the police. Eventually, petitioner was charged with involuntary manslaughter by way of a one-count indictment in the Circuit Court of the City of Portsmouth. He pleaded guilty and was sentenced to five years in prison.

On October 21, 2011, the DHS instituted removal proceedings against the petitioner alleging removability under INA § 237(a)(2)(A)(i)(I), based on his having been convicted

in Virginia of a CIMT committed within five years of being admitted to the United States. The IJ found petitioner removable as charged, but subsequently the BIA removable the case because the IJ had not written a reasoned opinion.

On remand the IJ again determined that petitioner had been convicted of a CIMT based on the reasoning in *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), where the BIA had

An involuntary manslaughter conviction can be secured in Virginia without proving a conscious disregard of risks attendant to the offender's conduct.

concluded that an involuntary manslaughter offense in Missouri constituted a crime involving moral turpitude because "the Missouri statute defined involuntary manslaughter as 'recklessly causing the death of another person.'" The IJ also determined that petitioner was ineligible for withholding of removal because the crime for which he was convicted was "particularly serious" but granted deferral of removal under the CAT.

On appeal, the BIA agreed with the IJ that the *Franklin* decision controlled the outcome of petitioner's case: "[W]e conclude that the offense of involuntary manslaughter in Virginia contains all of the requisite elements outlined in *Franklin* to make the offense categorically qualify as a crime involving moral turpitude."

The Fourth Circuit disagreed with the BIA's conclusion. The court concluded that the elements of the petitioner's crime included "behavior that does not involve moral turpitude. The court explained that "an involuntary manslaughter conviction can be secured in Virginia without proving a conscious disregard of risks attendant to the offender's conduct; such a conviction can be predicated on proof that the offender failed to

(Continued on page 6)



Summaries Of Recent Federal Court Decisions

(Continued from page 5)

appreciate or be aware of the risks emanating from his conduct.” Therefore, the court concluded that crime was not categorically one involving moral turpitude. The court noted that the BIA’s *Franklin* decision did not compel a conclusion to the contrary because, unlike the Virginia status, the statute under which the alien had been convicted requires that she acted with a “conscious disregard of a substantial and unjustifiable risk.”

The court therefore concluded that petitioner was not subject to removal pursuant to INA § 237(a)(2)(A)(i)(I), and consequently it was not necessary to address the denial of asylum and withholding.

Contact: Keith McManus, OIL

☎ (b) (6)

The court found jurisdiction to consider petitioner’s contention that he is more likely than not to be persecuted on account of his membership in a particular social group because that claim raised a legal question.

before re-entering the country illegally. Ten years later, he was again removed after being convicted of aggravated assault with a deadly weapon and serving three years imprisonment. He again re-entered the United States illegally but was quickly apprehended by DHS. He was convicted of being unlawfully present in the United States and, after completing his sentence, was returned to DHS for removal procedures. He claimed withholding and requested a reasonable fear interview. The asylum officer conducting the interview found petitioner to be “credible” and to have a reasonable fear of persecution in his home country. The case was then referred to an IJ for determination.

Petitioner testified that he is afraid to return to Mexico because two of his cousins, Jose Luis

Garza and Hector Moreno, betrayed a drug cartel known as the Zetas. Both Garza and Moreno had been high-ranking members of the Zetas before they fled to the United States with five million dollars in cash and some of the Zetas’ ledger books and became informants for the Drug Enforcement Administration in 2011. Petitioner claimed that the cartel retaliated by massacring members of Garza and Moreno’s family, at least 200, and were still looking for individuals related to those families. Petitioners submitted newspaper articles and his mother’s testimony to support his claim.

The IJ determined that petitioner was statutorily ineligible for asylum because he had been convicted on an aggravated felony, but was eligible for withholding because he had not been convicted of a particularly serious crime. The IJ then denied withholding finding that petitioner had

“failed to testify credibly,” and also denied the CAT request. On appeal the BIA affirmed, noting that the IJ adverse credibility determination was not clearly erroneous.

Initially the court determined that it held that it lacked jurisdiction to consider petitioner’s argument that substantial evidence did not support the BIA’s conclusion that his testimony was not credible, because it was a factual question. However, the court found jurisdiction to consider petitioner’s contention that he is more likely than not to be persecuted on account of his membership in a particular social group because that claim raised a legal question, as well as his argument that he was eligible for protection under CAT. The court did not reach the merits of these claims because it found that the IJ and BIA, in finding that petitioner was not credible, had not considered the newspaper articles submitted by the petitioner nor his mother’s testimony.

The court also declined to consider whether the alien was eligible for CAT protection because the BIA failed to bifurcate the CAT analysis by focusing primarily on the second prong, which considers whether there is sufficient state action involved in that torture.

Contact: Lisa Damiano, OIL

☎ (b) (6)

FIFTH CIRCUIT

■ Fifth Circuit Holds That BIA Failed to Properly Consider Evidence or Apply the Correct Legal Standard

In *Iruegas-Valdez v. Yates*, __ F.3d __, 2017 WL 354315 (5th Cir. January 23, 2017) (Wiener, Clement, Higginson), the Fifth Circuit held that the BIA erred by basing the alien’s denial of restriction on removal (withholding) solely on the IJ’s credibility determination, and failing to consider witness testimony or submitted documents.

In 1975, one-year-old Iruegas-Valdez, a Mexican national, entered the United States with his parents as an LPR in 1975. In 1997, he was convicted of possession of a controlled substance and removed from the United States. He remained in Mexico for only two days

SIXTH CIRCUIT

■ Sixth Circuit Holds a Conviction for Aggravated Assault under Ohio Rev. Code § 2903.12 is Categorically a Crime Involving Moral Turpitude

In *Lovano v. Lynch*, 846 F.3d 815 (6th Cir. 2017) (Gilman, Griffin, Stranch), the Sixth Circuit held that the petitioner, a citizen of Canada, who was convicted of aggravated assault under Ohio Rev. Code § 2903.12 was categorically convicted

(Continued on page 7)



Summaries Of Recent Federal Court Decisions

(Continued from page 6)

of a CIMT. The court rejected the petitioner's arguments that Ohio law treated "physical harm" as less severe than "physical injury," and that the *mens rea* requirement of "knowingly" was an insufficiently culpable mental state to trigger a finding of moral turpitude.

The court also rejected the argument that the "provocation" language in the aggravated assault statute negated either the *mens rea* or the serious-injury elements of the offense of aggravated assault, where the provocation portion of the statute was not an element of the crime. Because petitioner had also been convicted of attempting to pass a bad check – a CIMT that he did not dispute – the court ordered him deported under INA § 237(a)(2)(A)(ii) as an alien "convicted of two ... crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct"

Contact: Liza S. Murcia, OIL

☎ (b) (6)

SEVENTH CIRCUIT

■ Seventh Circuit Remands for "Fuller Evaluation of the Record" and Discusses a "Substantial Risk" Test for Withholding of Removal

In *Velazquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017) (Posner, Rover, Ripple (dissenting)), the Seventh Circuit rejected the well-established application of the "more likely than not" test, instead concluding that an alien is entitled to restriction on removal (withholding) if there is a "substantial, albeit unquantifiable, probability that if deported he will be persecuted."

The dissent noted that the majority ignored "well-established principles of law" by diverging from the deferential substantial evidence standard. The majority vacated the deci-

sions of the BIA and Immigration Judge, and remanded for reconsideration.

Contact: Linda Y. Cheng, OIL

☎ (b) (6)

■ Seventh Circuit Holds Asylum Applicant Failed to Establish Likelihood of Persecution Based Upon Perception of Wealth by Salvadoran Gangs

In *Rivera v. Lynch*, 845 F.3d 864 (7th Cir. 2017) (Posner, Wood, Flaum), the Seventh Circuit held that an asylum applicant failed to establish that he faced a likelihood of future persecution from gangs in El Salvador based upon their alleged perception that he was wealthy. The court held the record did not contain evidence Salvadoran gangs would either perceive the applicant as wealthy or individually target him for persecution. "The point . . . is that members of well-to-do coteries or established expatriate families are not, so far as the record of this case reveals, frequent targets of violence in El Salvador," explained the court.

Contact: Daniel Shieh, OIL

☎ (b) (6)

■ Seventh Circuit Holds Continuance Request Mooted By DAPA Injunction

In *Robledo-Soto v. Lynch*, 845 F.3d 834 (7th Cir. January 10, 2017) (Posner, Kanne, Sykes), the Seventh Circuit held that an alien's request for a continuance to seek prosecutorial discretion was moot. The court pointed out that, because of the injunction affirmed in *United States v. Texas*, 136 S. Ct. 2271 (2016), the Depart-

ment of Homeland Security has declined to grant deferred action to alien parents of United States citizen children. "As a result there is no 'deferred action' process for Robledo-Soto to invoke," said the court.

Contact: Surell Brady, OIL

☎ (b) (6)

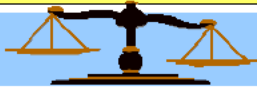
■ Seventh Circuit Holds the Material Support Bar Applies to an Alien Who Provided Translation Services for the Leader of a Tier III Terrorist Organization

"The point . . . is that members of well-to-do coteries or established expatriate families are not, so far as the record of this case reveals, frequent targets of violence in El Salvador."

In *Jabateh v. Lynch*, 845 F.3d 332 (Bauer, Kanne, Hamilton) (7th Cir. 2017), the Seventh Circuit held that USCIS has exclusive authority to adjudicate applications to adjust status under 8 U.S.C. § 1255b. Adjustment under this provision is available to an alien who, having been admitted under §§ 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the INA, has performed diplomatic or semi-diplomatic duties, can establish compelling reasons why he or she is unable to return to the country that accredited them as a diplomat, and whose adjustment of status is in the national interest.

Petitioner had entered the United States on a A-2 visa, a nonimmigrant visa that allows foreign officials to enter the country to engage in official duties or activities on behalf of their national government. A month after his arrival, petitioner filed an affirmative application for asylum claiming he had suffered past persecution and fears future persecution on account of his status as a Mandingo Muslim, as well as his political opinion and membership in a particular social group—

(Continued on page 8)



Summaries Of Recent Federal Court Decisions

(Continued from page 7)

"Mandingo Muslims who are governmental officials." He also contended that he was eligible for CAT protection because it was more likely than not that he would be subjected to torture with the consent or acquiescence of the Liberian government.

During the hearing, it was revealed that petitioner had become close to the head of the Liberians United for Reconciliation and Democracy (LURD) and had interpreted for him at doctors' appointments and social errands. The IJ and BIA determined that the LURD was a Tier III terrorist organization. But the IJ concluded that petitioner's services to the head of LURD did not constitute "material assistance" under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). On appeal, the BIA reversed that finding and held that petitioner had provided "material support" and therefore was ineligible for asylum, withholding, and CAT.

The court upheld the BIA's finding that petitioner had provided "material support," noting that the Supreme Court in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) has taken an "expansive view" of what constitute material support and that even "seemingly benign support" can constitute unlawful material support. The court also upheld the denial of deferral of removal under CAT agreeing with the BIA that petitioner had not met his burden.

Contact: Daniel Smulow, OIL

☎ (b) (6)

■ **Seventh Circuit Remands for the Agency to Determine Whether the Alien Was Subjected to at Least One Forced Abortion**

In *Xiang v. Lynch*, 845 F.3d 306

(7th Cir. 2017) (Bauer, Flaum, Shadid (C.D. Ill., by designation)), the Seventh Circuit remanded to the BIA for further proceedings to determine whether a Chinese national had been subjected to at least one forced abortion.

The law is clear that if petitioner had suffered a forced abortion, she "shall be deemed to have been persecuted on account of political opinion," and also entitled to a presumption of a well-founded fear of future persecution.

The court explained that the law is clear that if petitioner had suffered a forced abortion, she "shall be deemed to have been persecuted on account of political opinion," and also entitled to a presumption of a well-founded fear of future persecution.

The court acknowledged that the immigration judge found the petitioner's overall testimony incredible based on inconsistencies with two of the three purported abortions, but the IJ was silent on whether the first abortion had actually occurred. The court explained that given the statutory presumption, the agency must explicitly determine whether the initial abortion in fact occurred. "If the IJ had credited [petitioner's] claim that she had at least one forced abortion, she would automatically be entitled to a rebuttable presumption of a well-founded fear of future persecution," said the court.

Contact: Kimberly Burdge, OIL

☎ (b) (6)

■ **Seventh Circuit Upholds Adverse Credibility Finding Supporting Denial of Asylum Application, but Rejects Finding That Alien Submitted a Frivolous Application**

In *Wang v. Lynch*, 845 F.3d 299 (7th Cir. 2017) (Wood, Bauer, Sykes) (*per curiam*), the Seventh Circuit held that substantial evidence supported the immigration judge's denial of petitioner's asylum application based on adverse credibility and a failure to

corroborate his claim that he was subject to mistreatment for attendance at Christian gatherings in China. However, the court also held that substantial evidence did not support the agency's finding that the petitioner had submitted a frivolous application, for which the court required more indisputable evidence of deliberate fabrication.

Contact: Aaron Nelson, OIL

☎ (b) (6)

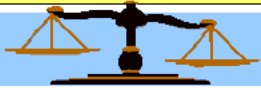
EIGHTH CIRCUIT

■ **Eighth Circuit Holds Deaths of Alien's Relatives Reflected a Continuation of, Rather than a Change in, Country Conditions in Guatemala**

In *Villatoro-Ochoa v. Lynch*, 844 F.3d 993 (8th Cir. 2017) (Colloton, Melloy, Shepherd), the Eighth Circuit held that the BIA did not abuse its discretion by concluding that an asylum applicant failed to establish a material change in country conditions to excuse the untimely filing of his motion to reopen.

The petitioner, who had illegally entered the U.S. in 1998, and placed in removal proceedings in 2003, filed an application for withholding in 2007. The IJ found him not credible and denied the claim. The BIA affirmed on February 14, 2012. On October 19, 2012, petitioner filed a motion to reopen his removal proceedings, well past the 90-day filing deadline in 8 U.S.C. § 1229a(c)(7)(C)(i). The IJ dismissed the motion for lack of jurisdiction. He then appealed to the BIA and filed a second, separate motion to reopen with the BIA on January 18, 2013. He claimed that there was increased violence in Guatemala and that gangs killed several members of his family due to their refusal to sell drugs. On August 21, 2015, the BIA dismissed the appeal and denied petitioner's second motion to reopen as being untimely.

(Continued on page 9)



Summaries Of Recent Federal Court Decisions

(Continued from page 8)

and because he had failed to establish changed country conditions.

The court agreed with the BIA's assessment regarding country conditions. The court also found that evidence of two of the deaths was available at the time of that hearing. Although two of petitioner's relatives were killed by Guatemalan gangs after the applicant's removal hearing, he failed to show that those deaths were the result of changed country conditions.

Contact: Ashley Martin, OIL

☎ (b) (6)

NINTH CIRCUIT

■ **Ninth Circuit Holds the “One Central Reason” Nexus Standard Does Not Apply to Withholding of Removal, and Instead a Lower “A Reason” Nexus Standard Applies, and That There is No “Rogue Police” Exception to CAT Acquiescence**

In *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) (Kleinfeld, Watford, Nguyen), the Ninth Circuit held that the withholding of removal statute unambiguously states that a protected ground need only be “a reason” for persecution, as opposed to the asylum statute which requires the protected ground to be “one central reason.”

The petitioner, a Mexican citizen, who grew up in California, was initially deported in 1998. In Mexico, he eventually bought a house and was in the process of improving it when he ran into problems with some off duty policemen. Apparently, four of them came to his house demanding money, and when he refused he was assaulted and tortured. When a policeman came to his house to investigate the incident, he refused to go further when petitioner told him that his colleagues had done it. Petitioner was treated at the hospital and shortly

after his discharge he returned to the U.S. using a false passport.

In 2010, petitioner was charged, convicted, and imprisoned for illegal reentry, and then turned over to DHS for removal proceedings. The IJ found him credible, but denied the claim for withholding because the persecution “was solely an effort to extort money by rogue police officers,” and that the threat came from them and not from the government. The IJ also denied CAT

finding that petitioner could relocate to another part of Mexico. On appeal, the BIA affirmed the IJ decision but also noted that petitioner's withholding claim also failed because petitioner did not to prove that the harm he suffered “was fueled by any political motives.” The BIA also held that “the country is aggressively targeting corrupt government elements” and that Barajas-Romero “could relocate out of the area.”

The court rejected the government's contention that the “one central reason” for persecution standard for asylum also applied to withholding of removal claims. Because the panel found the language unambiguous, it afforded no deference to the BIA's interpretation, in *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), that Congress, in enacting the REAL ID Act, intended to have the “one central reason” standard also apply to withholding of removal. Accordingly it remanded the withholding claim to the BIA to determine petitioner's eligibility under the correct standard: “a reason” rather than “one central reason.”

The court also held that, for CAT protection, “there is no ‘rogue police’ exception,” as the torture need not

be both by a public official and also that the official is acting in his official capacity. Moreover, the court noted that under *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015), although

a petitioner bears the ultimate burden to prove he would be tortured if returned to his country, the petitioner does not bear the burden under 8 C.F.R. § 1208.16(c)(3) to show that it is impossible to avoid torture by internally relocating within a country. Because *Maldonado* was decided after the BIA issued its

decision, the court also remanded the case to the BIA to evaluate the factors for CAT protection under the *Maldonado* standard.

Contact: Tim Ramnitz, OIL

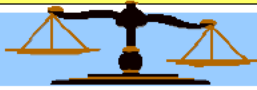
☎ (b) (6)

■ **Ninth Circuit Holds California's Witness Tampering Statute is Not a Categorical Crime Involving Moral Turpitude**

In *Duran Escobar v. Lynch*, 846 F.3d 1019 (9th Cir. 2017) (Berzon, Christen, Nguyen), the Ninth Circuit held that the IJ and BIA erred by finding that CPC § 136.1(a), California's witness tampering statute, is categorically a crime involving moral turpitude.

The petitioner, a native and citizen of El Salvador, entered the United States illegally on October 4, 1989. On July 19, 2000, she then affirmatively applied for asylum, withholding of removal, and protection CAT protection claiming that she and her family “were mistreated and threatened by the guerrillas.” Her application was not granted and on September 11, 2000, she was placed in removal proceedings as an

(Continued on page 10)



Summaries Of Recent Federal Court Decisions

(Continued from page 9)

alien present in the United States without being admitted or paroled. Petitioner admitted removability, but applied for cancellation of removal based on hardship to her minor U.S. citizen son, Carlos. The IJ ruled that petitioner was statutorily ineligible for cancellation of removal because she had been convicted of a CIMT. On April 19, 2001, petitioner pleaded no contest to violating California Penal Code section 136.1(a), California's witness tampering statute. On appeal the BIA also concluded that section 136.1(a) is categorically a CIMT.

The court found the BIA's interpretation unpersuasive and reviewed, *de novo* the statute. The court found that the California witness tampering statute was overly broad and not a categorical CIMT because the statute criminalizes conduct that is not intentionally fraudulent and that does not require "an intent to injure someone, an actual injury, or a protected class of victims." The court then declined to decide whether the modified categorical approach applied, because the parties had not briefed the divisibility issue on appeal. Instead it remanded to the BIA to decide the issue of divisibility and, if necessary, the application of the modified categorical approach.

Contact: Yanal Yousef, OIL

☎ (b) (6)

■ Ninth Circuit Holds that an Inadmissibility Waiver Cannot Be Used to Waive Disqualifying Convictions for Purposes of Cancellation of Removal

In *Guerrero-Roque v. Lynch*, 845 F.3d 940 (9th Cir. 2017) (Kozinski, Gilman, Friedland) (*per curiam*), the Ninth Circuit concluded that an applicant for cancellation of removal under INA § 240A(b)(1) cannot use an INA § 212(h) waiver of inadmissibility to overcome a conviction that serves as a bar to cancellation of removal.

The petitioner, a Mexican citizen, illegally entered the United States in

1980 and was deported in 1985. He returned to the United States without permission in 2003. Two weeks after his last reentry, he was placed in removal proceedings and charged with being removable as an alien present in the country without having been either admitted or paroled. Ten years later, in February 2013, after protracted hearings, the IJ denied the request for cancellation. The IJ found that petitioner was statutorily ineligible for such relief because he had been convicted of several crimes in the state of Washington involving either moral turpitude or a controlled substance. The BIA affirmed, concluding that petitioner could not rely upon § 212(h) to waive his convictions for cancellation of removal purposes.

The court initially held that petitioner was not found to be inadmissible on the grounds of his shoplifting or marijuana possession, but on being present in the U.S. without inspection. Therefore the § 212(h) waiver provision did not apply to his inadmissibility finding. The court also held, that the waiver provision cannot be used to excuse convictions that bar relief under § 240A(b) because "§ 212(h) permits the Attorney General to waive only a ground of inadmissibility; it cannot waive a conviction that bars cancellation of removal."

Contact: Tiffany Walters, OIL

☎ (b) (6)

■ Ninth Circuit Holds Conviction Under Oregon Drug Statute Does Not Constitute an Aggravated Felony Drug Trafficking Offense

In *Sandoval v. Yates*, 847 F.3d 697 (McKeown, Fisher, W. Fletcher) (9th Cir. 2017), the Ninth Circuit held that a conviction for delivery of a controlled substance under Oregon Re-

vised Statutes § 475.992(1)(a) is not a categorical an aggravated felony. The court determined that the Oregon definition of "delivery" includes mere solicitation, and that the federal Controlled Substances Act does not punish soliciting delivery of controlled substances. The court summarily concluded that because no "commercial element" is included in the Oregon statute, it is not a categorical match to an "illicit trafficking" offense. Moreover, because the Oregon law is indivisible

with respect to whether an "attempt" is accomplished by solicitation, the court held that the modified categorical approach does not apply.

Contact: Song Park, OIL

☎ (b) (6)

TENTH CIRCUIT

■ Tenth Circuit Grants Motion to Amend Published Decision

In *Ting Xue v. Lynch*, ___ F.3d ___, 2017 WL 370739 (10th Cir. January 23 2017) (Murphy, Briscoe, Phillips), granted the government's motion to amend its prior decision reported at 841 F.3d 1162. Previously, the court mistakenly used the phrase "clear error review" to describe its review of agency facts, but the decision now states the proper standard, substantial evidence review.

Contact: Allison Frayer, OIL

☎ (b) (6)

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

ELEVENTH CIRCUIT

■ Eleventh Circuit Affirms Marriage-Fraud Denial Despite Dueling Affidavits from Ex-Spouse

In *Rojas v. Sec'y, Dep't of Homeland Sec.*, ___ F.3d ___, 2017 WL 164314 (11th Cir. January 17, 2017) (Tjoflat, Jordan, and Pryor) (*per curiam*), the Eleventh Circuit upheld USCIS denial of an I-360 self-petition for adjustment of status based on marriage fraud. The court held that USCIS reasonably concluded that the plaintiff's first marriage was fraudulent based on an affidavit from the ex-spouse. The court rejected the alien's argument that a subsequent affidavit from that ex-spouse alleging the earlier statement was coerced rendered reliance upon the earlier affidavit unreasonable.

Contact: Tim Belsan, OIL

☎ (b) (6)

DISTRICT COURTS

■ Central District of California Orders the Government to Provide Bond Hearings for Unaccompanied Minors

In *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal. January 20, 2017) (Gee, J.), the United States District Court for the Central District of California, in an unpublished opinion, granted plaintiffs' motion to enforce Paragraph 24A of the *Flores* settlement agreement by providing unaccompanied minors ("UACs") in the care and custody of the Department of Health and Human Services' Office of Refugee Resettlement ("HHS" / "ORR") with a bond hearing in front of an immigration judge.

The court found that Paragraph 24A of the Agreement was not superseded by operation of law because (1) both the Trafficking Victims Protection Reauthorization Act ("TVPPRA")

and the Homeland Security Act, in relevant part, are silent on the subject of bond hearings, (2) the *Flores* Agreement remains consistent with federal immigration laws requiring bond hearings for immigrant detainees and poses no irreconcilable conflict with the TVPPRA's safety and placement provisions, and (3) the Government's construction of the TVPPRA so as to preclude UACs in ORR custody from receiving bond hearings should be rejected because it could result in the indefinite detention of UACs without the due process protection offered to adult detainees.

Contact: Sarah Fabian, OIL

☎ (b) (6)

■ District of Rhode Island Finds ICE and Its Agents Liable for Unlawfully Issuing Detainer

In *Morales v. Chadbourne*, No. 12-cv-00301-M-LDA (D.R.I. January 24, 2017) (*McConnell, J.*), in an unpublished opinion, the District of Rhode Island granted summary judgment for a U.S. citizen in her Federal Tort Claims Act ("FTCA") and *Bivens* suit stemming from a near-24 hour overdetention by the Rhode Island Department of Correction, after receiving an Immigration and Customs Enforcement ("ICE") detainer.

The court found that the agent issued the detainer without probable cause and is personally liable under *Bivens* because he improperly inferred a lack of United States citizenship and failed to properly investigate in the Government's databases. The court further held that the ICE Field Director at the time is personally liable for failing to supervise and train his agents on how to lawfully issue detainees. Finally, the court rejected the argument that Rhode Island caused the overdetention.

Contact: Max Weintraub, DCS

☎ (b) (6)

INDEX TO CASES SUMMARIZED IN THIS ISSUE

<i>Barajas-Romero v. Lynch</i>	09
<i>Duran Escobar v. Lynch</i>	09
<i>Flores v. Meese</i>	11
<i>Guerrero-Roque v. Lynch</i>	10
<i>Iruegas-Valdez v. Yates</i>	06
<i>Jabateh v. Lynch</i>	07
<i>L.H. v. Kerry</i>	11
<i>Lovano v. Lynch</i>	06
<i>Morales v. Chadbourne</i>	11
<i>Park v. Att'y Gen. of the U.S.</i>	05
<i>Rivera v. Lynch</i>	07
<i>Robledo-Soto v. Lynch</i>	07
<i>Rojas v. Sec'y, DHS</i>	11
<i>Sandoval v. Yates</i>	10
<i>Sotnikau v. Lynch</i>	05
<i>Swaby v. Yates</i>	04
<i>Ting Xue v. Lynch</i>	10
<i>Velazquez-Banegas v. Lynch</i>	07
<i>Villatoro-Ochoa v. Lynch</i>	08
<i>Wang v. Lynch</i>	08
<i>Washington v. Trump</i>	01
<i>Xiang v. Lynch</i>	08
<i>Ye Xian Jing v. Lynch</i>	04

■ Central District of California Upholds Consular Officer's Visa Refusal, Declining to Extend Due Process Protections to Nonimmigrant Visas

In *L.H. v. Kerry*, 14-cv-06212 (C.D. Cal. January 27, 2017) (Wilson, J.), in an unpublished decision, district court granted the government's motion to dismiss a challenge to the State Department's refusal of a visa on consular non-reviewability grounds. Citing Justice Kennedy's opinion in *Kerry v. Din*, the court held that the refusal of a nonimmigrant visa to visit family members does not trigger due process protections. The court rejected the alien's attempt to extend the Ninth Circuit's limited exception to the doctrine in *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008), allowing a court to engage in limited review, to familial relationships in the nonimmigrant visa context.

Contact: Sherease Pratt, OIL-DCS

☎ (b) (6)

INSIDE OIL

Congratulations to **Papu Sandhu**, **Derek Julius**, and **Melissa Neiman-Kelting** for having been promoted to Assistant Directors.

Mr. **Papu Sandhu** joined the Office of Immigration Litigation in 1995 through the Attorney General's Honors Program. He currently serves as Assistant Director of the Operations Team. Mr. Sandhu is also the Professional Responsibility Officer for both sections of OIL. Prior to his current position as Assistant Director of the Operations Team, he served as Acting Assistant Director of one of OIL-Appellate's litigating teams from September, 2016, to January, 2017. In 2005, Mr. Sandhu served a 6-month detail with the Office of Legal Counsel.

Mr. Sandhu received his B.A. from Cornell University, and his law degree from Boston College Law School. He is a member of the Massachusetts Bar.

Mr. **Derek Julius** now serves as Assistant Director at OIL-Appellate, where he previously served as a Senior Litigation Counsel and Trial Attor-

ney on the Ginsburg team.

Mr. Julius joined the Department through the Attorney General's Honors Program as an EOIR Attorney Advisor, later serving as a Trial Attorney at OIL's District Court Section and the Commercial Litigation Branch's Fraud Section. He earned his B.A., summa cum laude, from DePaul University, his J.D., *magna cum laude*, from Indiana University School of Law, and currently is pursuing a master's in international human rights law at the University of Oxford. He has presented on immigration law topics, legal writing, leadership, and diversity at numerous Department seminars; the National Advocacy Center; the Refugee Studies Centre, University of Oxford; multiple law schools; and the Federal Bar Association's Immigration Conference.

After interning with the Baltimore Immigration Court and for OIL in 2002, **Ms. Mellissa Neiman-Kelting** joined OIL through the Attorney General's Honors Program in 2004. She began her career on the Walters (now Flynn) Team as a line

attorney. In 2007, she was asked to join the Appellate Team, where she served for two years until being promoted to Senior Litigation Counsel on the McKay Team in October 2009.

Ms. Neiman-Kelting has been on the faculty for OIL trainings at the NAC and in the office. In addition, she acts as a liaison between OIL and the Circuit Mediators for the courts of appeals. For her work at OIL, Ms. Neiman-Kelting has been awarded the Rookie of the Year Award in 2006 and a Special Commendation for Outstanding Service in 2010. Ms. Neiman-Kelting earned her undergraduate degree from Illinois Wesleyan University and her J.D. from the George Washington University School of Law.

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 (b) (6) or at (b) (6).



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

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

(b) (6)

Chad Readler

Principal Deputy Assistant
Attorney General

August E. Flentje

Acting Assistant Attorney General
Civil Division

David M. McConnell, Director

Michelle Latour, Deputy Director
Ernesto Molina, Deputy Director
Donald E. Keener, Deputy Director
Office of Immigration Litigation

Francesco Isgrò, Editor

Andrew MacLachlan, Assistant Editor