



◆ Immigration Litigation Bulletin ◆

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“Prison Mailbox Rule” Applies to Immigration Petitions for Review

In *Chavarria-Reyes v. Lynch*, __ F.3d __, 2016 WL 7487730 (7th Cir. December 30, 2016) (Easterbrook, Bauer, Posner), the Seventh Circuit held that the petition for review was timely-filed because it had been deposited in the detention facility’s mail system before the thirty-day filing deadline had expired. The court reasoned that “if intra-prison filing satisfies a jurisdictional requirement for civil litigation, it can equally satisfy a jurisdictional requirement for administrative litigation.” The court joined the Second, Fifth, and Ninth Circuits that have also held that the prison mailbox rule applies to immigration petitions for review.

On the merits, petitioner contended that the IJ erred because he did not notify him of the opportunity to apply for pre-conclusion voluntary departure. The government contended that the court lacked jurisdiction to consider the claim because petitioner had been convicted of a CIMT and because voluntary departure is a discretionary remedy.

The court ruled that it could consider petitioner’s claim because it presented a question of law. The court then agreed with petitioner that the IJ had violated his regulatory duty to advise petitioner of his option to request early

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DHS Publishes Interim Rule on T Nonimmigrant Status

On December 19, 2016, the Department of Homeland Security (DHS) amended its regulations governing the requirements and procedures for victims of human trafficking who seek T nonimmigrant status. 81 Fed. Reg. 92266 (December 19, 2016). The interim rule states that the regulations were amended to conform with legislation enacted after the initial rule was published in 2002: the Trafficking Victims Protection Reauthori-

zation Act of 2003 (TVPA 2003), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA 2008), and Titles VIII and XII of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).

The TVPA and subsequent reauthorizing legislation provide

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Mail Box Rule Applies in Immigration Proceedings

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voluntary departure under INA § 240B(a), and the BIA's ruling in *Matter of Cordova*, 22 I&N Dec. 966 (1999 BIA)(*en banc*). The court nonetheless agreed with the government's contention that petitioner had failed to exhaust his claim because he had not raised it to the BIA. The court explained that "exhaustion means not just taking an appeal to the Board but also presenting an argument, so that the Board has 'an opportunity to pass upon the particular legal arguments and contentions that [the alien] now raises.'"

The fact that petitioner was *pro se* and was "in the dark about what the IJ did wrong," is a not sufficient reason to make inapplicable the exhaustion requirement, said the court. The court reasoned that "[r]equiring the BIA to

dredge through a record and find all of the things an IJ might have done but didn't do, plus all those the IJ did do, and then evaluate both actions and inactions against a long list of administrative requirements and prohibitions, would prolong and complicate all immigration proceedings."

The court noted, however, that the unexhausted error could still be cured if petitioner moved to reopen, or "the Attorney General consents to a reopening on the basis of this established error of law." The court also suggested that EOIR revise its procedural checklists "to

reflect all entitlements within the scope of a statute or regulation."

The court also suggested that EOIR revise its procedural checklists "to reflect all entitlements within the scope of a statute or regulation."

Judge Posner wrote a dissenting opinion criticizing the "Immigration Court" and how the IJ conducted petitioner's hearing, but also noting "a shortage of immigration judges that has subjected them to crushing workloads." He would have found that petitioner had put the BIA on notice of his claim because he argued that he had been denied due process at his immigration hearing.

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☎ (b) (6)

T-Visas Interim Rule Published

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various means to combat trafficking in persons, including tools to effectively prosecute and punish perpetrators of trafficking in persons, and to protect victims of trafficking through immigration relief and access to federal public benefits.

The T nonimmigrant status is one type of immigration relief available to victims of severe forms of trafficking in persons who assisted a law enforcement agency (LEA) in the investigation or prosecution of the perpetrators of these crimes. The INA permits DHS to grant T nonimmigrant status to individuals who are or were victims of a severe

form of trafficking in persons, who have complied with any reasonable request by an LEA for assistance in an investigation or prosecution of crime involving acts of trafficking in persons (or who are under 18 years of age or are unable to cooperate due to physical or psychological trauma). See INA § 101(a)(15)(T)(i)(I), (III).

Applicants for T nonimmigrant status must be physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto, on account of trafficking in persons, including physical presence on account of the alien having been allowed entry into

the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking. See INA § 101(a)(15)(T)(i)(II). In addition, an applicant must demonstrate that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States. See INA § 101(a)(15)(T)(i)(IV). T nonimmigrant status allows eligible individuals to remain in the United States for a period of not more than 4 years (with the possibility for extensions), receive work authorization, receive federal public benefits, and apply for derivative status for certain eligible family members. See INA §§ 101(a)(15)(T)(ii) and 214(o).

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.

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☎ (b) (6)

Mandatory Detention

Following argument in *Jennings v. Rodriguez*, No. 15-1204, the Supreme Court requested simultaneous supplemental briefing from the parties, due 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 released 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. The Court is holding 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. 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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☎ (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 alien's merits brief was filed December 16, 2016; the government brief was filed January 18, 2017.

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☎ (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 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. There are four related petitions for certiorari, and numerous other cases at various stays in the courts of appeals. The government's merit brief was filed on November 14, 2016; the alien's brief was filed December 14, 2016.

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☎ (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. The parties' simultaneous supplemental briefs were filed on December 17, 2016.

Contact: Aimee Carmichael, OIL

☎ (b) (6)



Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds Alien Failed to Provide Sufficient Corroborating Evidence of Past Persecution or an Objectively Reasonable Basis for Future Persecution

In *Rivera-Coca v. Lynch*, 844 F.3d 374 (1st Cir. 2016) (Kayatta, Selya, Barron), the First Circuit held that substantial evidence supported the agency's conclusion that, even assuming the alien was credible, he failed to provide sufficient corroborating evidence to support his asylum claim or a plausible explanation for why such evidence was unavailable.

The petitioner, a Honduran national who owned an accounting firm in Honduras, claimed that he had been threatened and assaulted by members of the National Party because he had removed some of their political propaganda posters from his walls and windows of his office. Although he reported the incidents to the police, he claimed that they never investigated the matter. Fearing for his safety and that of his family, petitioner took his family to his mother-in-law's house (five or six hours away). He claimed that despite his relocation he continued to be threatened.

Petitioner left Honduras and entered the United State without

documentation in May 2011. When apprehended by Border Patrol agents, he told them that he intended to work in the United States for a couple of years and then return home. Subsequently, petitioner was placed in removal proceedings where he applied for asylum, withholding, and CAT protection, based on his recent experiences in Honduras.

The IJ did not find him credible in light of several inconsistencies in his testimony and the lack corroborating evidence. Alternatively, the IJ determined that even if petitioner was fully credible the mistreatment that he allegedly suffered did not rise to the level of past persecution, and did not justify a well-founded fear of future persecution.

On appeal, the BIA affirmed the IJ's holding that, even presuming the petitioner to be credible, he had not carried either his burden of explaining the lack of corroborating evidence or of showing that what he had experienced rose to the level of persecution.

The court agreed with the BIA's finding that the petitioner had not produced the corroborating evidence that the IJ reasonably required, nor "adequately explain his failure to supply corroborating evidence." Accordingly, the court held that "the IJ's and the BIA's lack-of-corroboration rationale is supported by substantial evidence in the record considered as a whole."

The court further held that the petitioner had not identified any objectively reasonable basis for his fear of future persecution other than general information regarding the political climate in Honduras, which was insufficient to establish a well-founded fear of persecution. "The petitioner might have been afraid, but he has not identified an objectively reasonable basis for that fear," concluded the court. Consequently, the court also upheld the denial of withholding.

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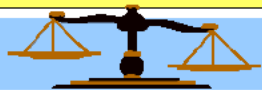
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■ First Circuit Holds Alien Seeking to Adjust Status Must Demonstrate Bona Fides of Her Marriage Even When USCIS Has Approved an Immediate Relative Petition

In *Wen Yuan Chan v. Lynch*, 843 F.3d 539 (1st Cir. December 13, 2016) (Barron, Selya, Stahl), the First Circuit held that when an alien in removal proceedings applies for adjustment of status based on her marriage to a United States citizen, the IJ retains jurisdiction to inquire into the bona fides of the marriage even if USCIS already has approved an immediate relative petition on the alien's behalf.

The petitioner, a Chinese citizen, entered the United States in February of 2006 on a non-immigrant visitor's visa. Within two months of her entry, she married Sui Wah Chan, a U.S. citizen, who promptly filed papers with USCIS to adjust the immigration status of both the petitioner and her son. USCIS refused to recog-

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nize the marriage, however, and rejected her application for adjustment of status in October of 2007.

On December 12, 2007, DHS instituted removal proceedings against the petitioner as an overstay. While those removal proceedings were pending, Sui Wah Chan filed another I-130 "immediate relative" visa petition, to recognize his marriage to the petitioner. USCIS approved this second petition in October of 2008. On October 28, 2010, the petitioner filed applications for an adjustment of status and a waiver of inadmissibility in the removal proceeding.

The IJ found that petitioner's testimony was not credible and that, based on the evidence presented, her "marriage at the time of its inception was not bona fide." Accordingly, he denied adjustment. Additionally, the IJ found that petitioner was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i) because she was attempting to procure an immigrant visa through a fraudulent marriage, and under 8 U.S.C. § 1182(a)(2)(A)(i)(I) due to her 2008 nolo contendere plea to a Connecticut assault charge which was a CIMT. Therefore he denied the waiver as a matter of discretion and on the merits.

On appeal, the BIA affirmed the IJ, and explicitly rejected the petitioner's contention that her approved I-130 petition stripped the IJ of jurisdiction to consider whether her marriage was bona fide.

Preliminarily, the First Circuit determined that it had jurisdiction

because petitioner's contention that the IJ did not have jurisdiction to consider the bona fides of the anchoring marriage was a colorable legal question. It then concluded, in an issue of first impression, that "when an alien in removal proceedings applies for adjustment of status based on her marriage to a United States citizen, the IJ has jurisdiction to inquire into the bona fides of the anchoring marriage even if USCIS already has approved an I-130 petition to the alien's behoof."

The court then considered petitioner's challenge to the IJ's finding that the marriage was a sham. The court noted that the couple married after an acquaintance that spanned no more than two months. Almost immediately thereafter, the petitioner moved out of state for a lengthy period of time, leaving her new husband behind. "This sequence of events supports an inference that the petitioner never intended to establish a life with Sui Wah Chan," said the court. Moreover, the court noted that the record reflected that their marriage was an arrangement. "Sui Wah Chan stated: 'I wanted to marry her because I wanted someone ... to help me.... In return, I would help her with her green card.'" Therefore, the court concluded that "given the paucity of the petitioner's proffer, the agency's 'sham marriage' determination was consistent with the 'reasonable, substantial, and proba-

bative evidence on the record considered as a whole.'"

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☎ (b) (6)

■ **First Circuit Holds Alien Failed to Establish Egregious Fourth Amendment Violation and 8 C.F.R. § 287 Does Not Provide Aliens with Enforceable Rights**

Given the paucity of the petitioner's proffer, the agency's 'sham marriage' determination was consistent with the 'reasonable, substantial, and probative evidence on the record considered as a whole.'"

In *Corado-Arriaza v. Lynch*, 844 F.3d 74 (1st Cir. 2016) (*Lynch*, Lipez, Kayatta), the First Circuit held that the BIA properly affirmed the denial of petitioner's motion to suppress because he failed to demonstrate an egregious violation of the Fourth Amendment.

The petitioner, a citizen of Guatemala, entered the United States in June 2005 on a B-2 visitor visa. He never departed. On February 27, 2013, petitioner was apprehended while working as a cook in a restaurant in Wellesley, Massachusetts. On that date he was questioned by four ICE agents who asked if he "Gustavo Gomez." Petitioner told them that he was not Gustavo Gomez but Gustavo Corado-Arriaza. Petitioner later learned that Gustavo Gomez was a man who had worked at the restaurant before him. When the ICE agent asked petitioner for his identification, he provided his Guatemalan driver's license. He was then handcuffed and continued to be questioned. The ICE agents apparently real-

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ized that he was not the individual they were looking for but nonetheless arrested him for overstaying his visa. Petitioner was then served with an NTA charging him as an overstay.

To support the charge of removability, the DHS attorney submitted a copy of petitioner's passport and the I-94 Arrival/Departure Form.

The I-94 listed his name as "Gustavo Alberto Corado Arriaza," his date of birth as June 6, 1981, and his citizenship as Guatemalan. It also listed his arrival date as June 27, 2005. The DHS attorney also stated that the I-94 was already in possession of DHS well before petitioner's arrest and that the Form I-94 played no role in his arrest subsequently. Petitioner moved to suppress the evidence, namely his passport and the I-94 contending that they were obtained as the result of an "egregious" violation of the Fourth Amendment. The IJ denied the motion finding that petitioner had failed to "allege[] facts in his declaration which, even if true, would provide a reason to suppress the contested evidence." On appeal the BIA affirmed the denial of the motion, and also held that even if the alleged facts were true and the arrest was illegal, petitioner had not met his burden of establishing a prima facie egregious violation of the Fourth Amendment.

The court agreed with the BIA that even if petitioner's seizure

violated the Fourth Amendment the violation was not egregious. "We also need not spell out the

precise conduct that would rise to the level of an egregious violation, [] because it is plain from 'the totality of the circumstances' that the conduct here fell short," said the court. The court also held that the alleged violations of 8 C.F.R. § 287 by ICE agents do not warrant sup-

pression because the regulation does not provide aliens with any enforceable rights.

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☎ (b) (6)

SECOND CIRCUIT

■ Second Circuit Holds That Requiring Employers to Ensure Full and Timely Completion of I-9 Forms is Neither Arbitrary Nor Capricious

In *Buffalo Transportation, Inc. v. United States*, 844 F.3d 381 (2d Cir. 2016) (Newman, Lynch, Droney), the Second Circuit upheld a civil penalty of \$75,600 for an employer's violation of the INA's employment eligibility verification requirements.

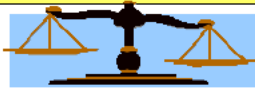
Buffalo Transportation, located in Buffalo, New York, provides transportation services to individuals for medical appointments. On August 22, 2013, ICE notified Buffalo Transportation of a scheduled audit of its Forms I-9 to occur on

August 28, 2013. At the audit, ICE found that six of the completed Forms I-9 had technical or procedural errors and allowed Buffalo Transportation to correct those errors. ICE also found, however, that all 54 of the completed Forms I-9 were not created within three business days of the employees' hiring dates, and that Buffalo Transportation did not properly retain completed Forms I-9 for 84 former employees. On March 14, 2014, ICE served Buffalo Transportation with a Notice of Intent to Fine in the amount of \$794.75 per violation for total of \$109,675.50

Buffalo Transportation requested a hearing before an ALJ. Both Buffalo Transportation and ICE submitted briefing and evidence in support of their motions for a summary decision. The ALJ granted in part both Buffalo Transportation's and ICE's motions for summary decision. The ALJ found Buffalo Transportation to have committed 81 violations for not retaining the Forms I-9 and 54 violations for current employees for Forms I-9 not prepared within three business days of hire. The ALJ also determined that the fines assessed by ICE were excessive, and adjusted the penalty to \$600 per violation for the former employees and \$500 per violation for the current employees. Thus, the total fine that the ALJ assessed was \$75,600.

Before the Second Circuit, Buffalo transportation argued that the violations were "procedural" rather than substantive, and that ICE should have issued a warning rather than imposing fines. It also contended that the fines imposed were unreasonably high.

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The court accorded *Skidmore* deference to a policy memorandum from 1997 outlining the difference between “substantive” violations and “technical or procedural” violations (for which a “good faith” defense may be available). The court noted that the agency has greater expertise “when it comes to determining which omissions are substantive and which ought to be excused,” and found that that failing to prepare Forms I-9 within three business days of hire was a substantive violation of the INA and its accompanying regulations.

The court further concluded that the ALJ calculation of the penalty was an “allowable judgment here in determining the amount of the fines after properly assessing the various factors, including the seriousness and number of the violations.”

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☎ (b) (6)

THIRD CIRCUIT

■ **Third Circuit Holds Underlying Conviction Was Not Vacated for Immigration Reasons and Use of Subsequent Deferred Adjudication as Basis for Removal Would Violate Due Process**

In *Rivas v. Att'y Gen. of the U.S.*, 844 F.3d 392 (Ambro, Shwartz, Fuentes) (3d Cir. 2016), the Third Circuit held that the BIA erred in concluding that an alien's prior drug convictions had been vacated to avoid immigration consequences.

The petitioner, a citizen of the Dominican Republic, was admitted as an LPR when he was two years old. In September 2013, he was convicted of the purchase, receipt, and intentional possession of phencyclidine (“PCP”) in Philadelphia Municipal Court, and was sentenced to eighteen months' probation.

Following these convictions, DHS initiated removal proceedings alleging that he was subject to removal pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) for having been convicted of two state law violations relating to a controlled substance. Petitioner then petitioned the Municipal Court for relief from his convictions under the Pennsylvania Post Conviction Relief Act (“PCRA”). He argued that he received ineffective assistance of counsel because his trial counsel failed to advise him of the possible immigration consequences arising from his conviction and for advising him not to appeal the trial verdict. The Municipal Court denied the PCRA petition and then, by agreement of the parties, vacated the guilty verdicts and placed Rivas on pretrial probation for three years as part of a deferred adjudication agreement. The Commonwealth agreed to withdraw the charges if petition successfully completed his pretrial probation.

Thereafter, petitioner moved to terminate his removal proceedings on the ground that his convictions, which constituted the basis

for his potential removal, had been vacated. His motion also averred that “[t]he sentences have not been vacated solely to avoid the immigration consequences of his conviction.” The IJ found that since petitioner's trial counsel testified at the PCRA hearings that he did advise petitioner of the immigration conse-

quences of an adverse judgment, and since the Municipal Court denied the PCRA petition, the IJ was “convinced that the primary and probably the only reason for the conviction vacatur was to permit the respondent to avoid the [i]mmigration consequences of his

drug conviction.” On appeal the BIA agreed with the IJ reasoning but also found that even if petitioner's convictions had been vacated on substantive grounds, the terms of the order vacating the convictions still amounted to a “conviction” under the INA.

The court disagreed with the IJ and BIA's conclusions. First, the court noted that “to determine whether a vacated conviction is nonetheless a conviction for immigration purposes, the IJ must examine the state court record to identify the reasons why the state court vacated the conviction . . . the IJ may rely only on reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction.” The court found that the facts relied upon by the

“To determine whether a vacated conviction is nonetheless a conviction for immigration purposes, the IJ must examine the state court record to identify the reasons why the state court vacated the conviction.”

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IJ “do not show that the state court vacated the convictions to allow Rivas to avoid their immigration consequences.”

The court also faulted the BIA because “like the IJ, [it] erred in failing to restrict itself to the factual record and impermissibly speculated about the ‘secret motives of state judges and prosecutors.’”

The court also disagreed with the BIA that petitioner “stood ‘convicted’ for purposes of the immigration laws under the terms of the deferred adjudication agreement.” The court explained that DHS never lodged an additional charge and as a result, petitioner “never received notice charging him as removable on the basis of the terms of the 2015 deferred adjudication agreement, entered almost two years after the convictions identified in the Notice to Appear.”

The court concluded that removing petitioner “on the basis of a deferred adjudication in 2015 would base his removal on an entirely different factual ground from that set forth in the Notice to Appear and would violate [petitioner’s] due process rights to notice of the bases for his removal.” Accordingly, the court granted the petition and effectively terminated the proceedings against the petitioner.

In a footnote, though, the court indicated that “if the immigration authorities wish to pursue

[petitioner’s] removal based on an assertion that he stands “convicted” of a controlled substance offense as a result of the

terms of his deferred adjudication, then they can initiate removal proceedings anew by serving notice to Rivas stating the grounds upon which he is charged with removability.”

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☎ (b) (6)

The IJ and BIA erred because they failed “to restrict itself to the factual record and impermissibly speculated about the ‘secret motives of state judges and prosecutors.’”

FOURTH CIRCUIT

■ Fourth Circuit Holds Maryland Statute is Not a Categorical “Sexual Abuse of a Minor” Aggravated Felony

In *Larios-Reyes v. Lynch*, 843 F.3d 146 (4th Cir. 2016) (Harris, Niemeyer, Gregory, JJ.), the Fourth Circuit ruled that a Salvadoran alien’s criminal conviction under Maryland Criminal Law Article § 3-307(a)(3)—prohibiting sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least four years older than the victim—does not categorically match the elements of the Fourth Circuit’s generic federal definition of “sexual abuse of a minor.” Thus, the alien was not removable as an aggravated felon.

Contact: Karen L. Melnik, OIL

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NINTH CIRCUIT

■ Ninth Circuit Denies Rehearing Preserving its Holding That Asylum Applicant Failed to Establish Retaliation for Whistleblowing Claim Amounting to Persecution on Account of a Political Opinion

In *Lkhagvasuren v. Lynch*, 828 F.3d 1080 (9th Cir. 2016) (as amended December 30, 2016) (Wallace, Schroeder, Kozinski) (*per curiam*), the Ninth Circuit adopted 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 and held that substantial evidence supported the BIA’s conclusion that the alien failed to present evidence that his purported persecutors were motivated by his anticorruption beliefs, or that the corruption was connected to government actors.

On December 30, 2016, the court denied a combined petition for *en banc* and panel rehearing, but issued an amended opinion, clarifying that the court was assuming without deciding that *Matter of N-M-* may be applied for the purpose of identifying whether an applicant has established the required factual nexus between any purported political whistleblowing and actual persecution as those terms are defined in the REAL ID Act.

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DISTRICT COURTS

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■ **Southern District of Florida Dismisses Alien's Challenge to Adjustment Denial, Finding Alien Granted TPS Failed to Maintain Continuously a Lawful Status.**

In *Duron v. Swacina*, 2016 WL 7217176 (S.D. Fla. December 12, 2016) (*King, J.*) (unpublished), the Southern District of Florida dismissed a complaint seeking review of the denial of an alien's adjustment of status application. The alien entered without inspection in 1997, later obtained Temporary Protected Status ("TPS"), married a lawful permanent resident, traveled on advance parole, and then sought adjustment of status. He argued that he was eligible to adjust because, under 8 U.S.C. § 1254a(f)(4), he was considered to be a lawful nonimmigrant.

The court found that the plain language of that subsection applies only while an alien is in TPS and does not operate to erase unlawful status accrued prior to TPS. Alternatively, the court held that USCIS's reasoned and consistent interpretation of §§ 1255(a), (c), and 1254a(f)(4) was entitled to *Skidmore* deference.

Contact: Ubaid ul-Haq, OIL-DCS

☎ (b) (6)

The automatic stay does not violate due process because it is for a limited period of time and affords the government an opportunity to appeal a bond determination before a detainee might flee.

■ **District of Arizona Upholds Constitutionality of the Bond Regulations Permitting Government to Seek Automatic Stay of Bond Determination.**

In *Altayar v. Lynch*, No. 16-cv-2479 (D.Ariz. December 20, 2016) (*Murray, J.*), the District of Arizona dismissed a habeas petition challenging the constitutionality of 8 C.F.R. § 1003.19(i)(2), which permits ICE to seek an automatic stay of 90 days of any bond decision by an IJ pending further review before the BIA of ICE's independent de-

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termination that the alien should not in fact be released from custody.

The district court reasoned that the automatic stay does not violate due process because it is for a limited period of time and affords the government an opportunity to appeal a bond determination before a detainee might flee, which might otherwise occur if the parties must await adjudication of a formal stay motion. In dicta, the district court suggested a stay of one year might be unconstitutional, but noted a 90-day stay does not come close to crossing the constitutional line.

Contact: Erez Reuveni, OIL-DCS

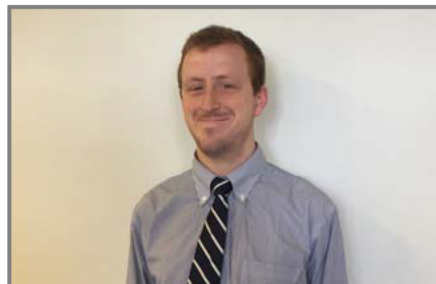
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OIL Winter/Spring Interns

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Elizabeth Lopresti graduated from the University of Missouri with a major in Anthropology. She is currently a 2L at The George Washington University Law School. Last Summer, she interned with the U.S. Attorney's Office for the Western District of Missouri.

Nathan Roy graduated from Connecticut College with a major in Government and a minor in History. He is a 2L at American University Washington College of Law. He served as a judicial intern for the Philadelphia Immigration Court last summer and



interned for the ICE Office of the Chief Counsel at the Arlington Immigration Court last fall semester.

Rebeka Rieth graduated from Texas A&M University with a major in Eng-

lish Rhetoric and a minor in Religious Studies. She is currently a 3L at Pepperdine University School of Law, where in addition to her JD, she will graduate with a Certificate in Alternative Dispute Resolution from the Straus Institute for Dispute Resolution.



INSIDE OIL

Civil Division Awards

Congratulations to the following OIL employees who were recognized at the December 8, 2016, Civil Division Awards Ceremony: Paralegal **Aleatha Coleman**, received the Award for Excellence in Paralegal Support; Legal Assistant **Lisha Jones**, received the Award for Excellence in Administrative Support; Trial Attorney **Christina Greer**, received the Rookie of the Year Award; Trial Attorneys **Jennifer Bowen** and **Neelam Ihsanullah**, received the Special Commendation Award.

Winter/Spring Interns

OIL welcomes the following Winter/Spring interns:

Jessica Lesnau joins us from Fort Worth, Texas, where she lives with her husband, Alan, and golden retriever puppy, Tucker. She graduated from the University of Texas at Austin with a dual major in Government and Spanish-Hispanic Studies and went on to work as a high school Spanish teacher. In May 2017, Jessica will graduate from Texas A&M University School of Law. After graduation, she will enter

the Attorney General Honors Program as a Judicial Law Clerk at the Houston Immigration Court.

Mackenzie Cover graduated from the University of Tennessee with a double major in Political Science and Global Studies. She is currently in her second year of law school at the University of Notre Dame. She interned in Washington D.C. last

summer at USCIS.

Michael Knortz is a 3L at the University of Connecticut School of Law. He graduated from UConn with a major in History and minor in Human Rights. Before law school he volunteered in South America and worked at Lawyers Without Borders

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Mckenzie Cover, Michael Knortz, Elizabeth LoPresti, Jessica Lesnau

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 Isgro at (b) (6) or at (b) (6)



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the Executive's
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