



Immigration Litigation Bulletin

Vol. 20, Nos. 10-11

OCTOBER-NOVEMBER 2016

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Third Circuit Strikes Down The Definition Of A Crime Of Violence At 18 U.S.C. § 16(b) As Unconstitutionally Vague

In *Baptiste v. Attorney General*, 841 F.3d 601 (3d Cir. 2016), the Third Circuit held that in light of the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the definition of a "crime of violence" in 18 U.S.C. § 16(b) is void for vagueness under the Due Process Clause of the Fifth Amendment. The court joined the majority of courts that have considered the question and concluded that *Johnson* does render § 16(b) void for vagueness (Sixth, Seventh, Ninth, and Tenth Circuits). The Fifth, Second, and Eight Circuits have concluded otherwise.

The case involved a citizen of Trinidad who entered the United States as an LPR in 1972. On December 15, 1978, he was convicted

of atrocious assault and battery, and on April 8, 2009, he was convicted of second-degree aggravated assault. Both convictions were under New Jersey law. In June 2013, DHS instituted removal proceeding against the petitioner, alleging that based on his 2009 conviction, he was removable as an alien convicted of a crime of violence pursuant to 18 U.S.C. § 16 and, therefore, an aggravated felony, and based on both his 1978 conviction and his 2009 conviction, as an alien convicted of "two or more crimes involving moral turpitude." The IJ and the BIA found petitioner removable as charged.

The court initially determined that petitioner's 2009 conviction was a "crime of violence" under § 16(b). The

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Eighth Circuit Holds that it Has Jurisdiction to Review Denials of Administrative Closure

In *Gonzalez-Vega v. Lynch*, 839 F.3d 738 (8th Cir. 2016) (Wollman, Arnold, Kelly), the Eighth Circuit held that denial of administrative closure by either the IJ or the BIA is subject to judicial review for abuse of discretion.

The petitioner, a Mexican citizen, who entered the United States unlawfully in 2004, was found removable by an IJ for being present without being admitted. The petitioner, who was ineligible for the

usual forms of relief requested that his case be administratively closed. He explained to the IJ that his wife had given birth to his son in the United States in 2014, and that the son could eventually sponsor him when he turned 21. Petitioner also maintained that the son would suffer extreme hardship without his paternal care and financial support and that potential future changes in law and executive policy could make his removal a lower administrative priority

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Definition of “Crime of Violence” Voided for Vagueness

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court applied the categorical approach to find that reckless second-degree aggravated assault does, in the ordinary case, present a substantial risk of the intentional use of force, reckless second-degree aggravated assault in New Jersey is categorically a crime of violence pursuant to § 16(b).

The court then considered the question presented by the petitioner, namely that his 2009 conviction was not for an aggravated felony because the incorporated definition of a crime of

violence in § 16(b) is unconstitutionally vague. The court agreed with petitioner’s argument that the Supreme Court’s decision in *Johnson*, where the Court invalidated the residual clause in ACCA because, it “produce[d] more unpredictability and arbitrariness than the Due Process tolerates,” compelled it to invalidate § 16(b). Because Congress provided no guidance how to interpret 16(b), “courts are left to undertake the § 16(b) analysis guided by nothing more than other judicial decisions that can lay no better claim to making sense of the indeterminacy of the analysis in a

“Courts are left to undertake the § 16(b) analysis guided by nothing more than other judicial decisions that can lay no better claim to making sense of the indeterminacy of the analysis in a principled way than we have today.”

principled way than we have today,” explained the court. Accordingly, the court found 16(b) invalid and consequently petitioner could not be removed as an aggravated felon.

However, the court determined that recklessly causing serious bodily injury to another under circumstances manifesting extreme indifference to the value of human life is categorically a CIMT. Because petitioner’s 2009 conviction was for a CIMT, the court found that the BIA correctly determined that, together with his 1978 Conviction, petitioner is removable as an alien convicted of two or more CIMTs.

Contact: Jesse M. Bless, OIL

☎ (b) (6)

Denial of Administrative Closure Subject to Judicial Review

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than the removal of other aliens. The IJ denied petitioner’s request for administrative closure, emphasizing that his infant son would not turn 21 within a reasonable time, and the lack of a pending visa application made the anticipated duration of closure indefinite.

Petitioner appealed the decision to the BIA and also requested that the BIA to exercise its own independent authority to grant administrative closure. The BIA upheld the IJ’s decision but did not rule on petitioner’s second request.

The Eight Circuit held that it had jurisdiction to review the denial of a motion for administrative closure. The court reversed its prior decision in *Hernandez v. Holder*, 606 F.3d 900 (8th Cir. 2010), where it had held that it lacked jurisdiction to review the denial of a motion for administrative closure because there was no meaningful standard by which to review that decision.

The court explained that the BIA in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), “supplied the missing standard.” In *Avetisyan* the BIA said that when IJs and the BIA decide such a motion, they should consider, the reason administrative closure is sought, the reason administrative closure is opposed, the likelihood the other action being pursued outside of removal proceedings will succeed, the anticipated duration of the closure, the responsibility of either party in contributing to any current or anticipated delay, and the ultimate outcome of the removal proceeding once it commences.

Here, the court determined that the IJ in denying the motion for administrative closure, gave appropriate consideration and

“committed no clear error of judgment in weighing” the factors articulated in *Avetisyan*. Accordingly, the court affirmed the BIA’s affirmation of that denial. The court, however, concluded that the BIA should have addressed petitioner’s request that it exercise its independent authority to grant administrative closure. The court found that the BIA opinion focused only on the IJ’s decision and that it failed to address petitioner’s request.

Therefore, the court held that since it was unclear “whether the BIA heard and thought” about petitioner’s alternative request, it abused its discretion. The court remanded the case to the BIA to consider whether petitioner’s request warrants a favorable exercise of discretion.

Contact: Jeremy Bylund, OIL

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Since it was unclear “whether the BIA heard and thought” about petitioner’s alternative request, it abused its discretion.

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

On November 30, 2016, the Supreme Court heard argument in *Jennings v. Rodriguez*, No. 15-1204, challenging the Ninth Circuit's 2015 opinion, 804 F.3d 1060, which held that all aliens detained pending completion of their removal proceedings, including criminals and terrorists, must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. Under that ruling, such bond hearings must be afforded automatically every six months, the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, and the length of the alien's detention must be weighed in favor of release. The 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.

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 alien's merits brief was filed December 16, 2016; the government brief is due January 18, 2017.

Contact: Patrick J. Glen, OIL

☎ (b) (6)

Crime of Violence – Vagueness

On January 17, 2017, the Supreme court will hear 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.

Contact: Bryan Beier, OIL

☎ (b) (6)

Good Moral Character

On October 12, 2016, the Ninth Circuit granted 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 court granted the parties' motion to file simultaneous supplemental briefs, which were filed on December 17, 2016. *En banc* argument is set for January 18, 2017.

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 “Falsus In Uno, Falsus In Omnibus” Inferences Are Allowed In Credibility Determinations

In *Quezada-Caraballo v. Lynch*, 841 F.3d 32 (1st Cir. 2016) (Howard, Lynch, Kayatta), the First Circuit held that the IJ properly drew a “*falsus in uno, falsus in omnibus*” (false in one thing, false in everything) inference in finding that the petitioner’s credibility was undermined by her admission to providing false statements and documents to DHS in her application for a good-faith-marriage waiver to a Petition to Remove Conditions on Residence (Form I-751). The court explained that petitioner’s misrepresentations about the duration and scope of her cohabitation with her ex-husband “were directly material to her claim that she had married him in good faith.”

The court further noted that it had previously held that “the REAL ID Act gives an IJ discretion to draw a ‘*falsus in uno, falsus in omnibus*’ inference.”

Contact: Enitan O. Otunla, OIL


■ First Circuit Holds That Counsel’s Ineffectiveness and Petitioner’s Minor Tardiness Constitute Exceptional Circumstances Warranting Reopening

In *Murillo-Robles v. Lynch*, 839 F.3d 88 (1st Cir. 2016) (Howard, Selya, Kayatta), the First Circuit held that petitioner’s counsel provided ineffective assistance because she neglected to inform the IJ that petitioner was likely en route to the hearing and then having arrived late, counsel should have moved to reopen the hearing or alert the IJ to petitioner’s arrival. “Had the attorney done her job in anything close to

a competent manner, the odds are good that the case would have been reopened then and there,” explained the court.

The court concluded that given the ineffective assistance of counsel, “the minor extent of the petitioner’s tardiness” and the fact that “petitioner’s previous attorneys pulled the rug out from under him time and again,” the BIA should have found that these factors constituted exceptional circumstances for reopening. Accordingly, the court held that the BIA abused its discretion in finding that “the circumstances that prevented the petitioner from having his day in court were unexceptional and by denying the motion to reopen.”

Contact: Sabatino F. Leo, OIL



■ First Circuit Holds Asylum Applicant Failed to Establish Nexus Between Her Family or Political Beliefs and Persecution

In *Giraldo-Pabon v. Lynch*, 840 F.3d 21 (Howard, Selya, Lipez) (1st Cir. 2016), the First Circuit upheld the BIA’s denial of a motion to reopen because petitioner, a citizen of Colombia, failed to establish a nexus between her family membership or her social work and violent acts committed by Colombian criminal gangs. Petitioner, who last reentered unlawfully into the United States in 2013, sought to reopen her removal proceedings and presented evidence of drug gang-related acts of violence against two of her cousins in Colombia. Petitioner asserted that her safety and security in Colombia were jeopardized by her extended family’s ongoing involvement in a narco-trafficking cartel. The IJ denied the motion because it was untimely and that the time exception to reopening

was inapplicable. On appeal, the BIA concluded that petitioner had not made out a prima facie case for any of the forms of relief sought.

The court initially indicated that although one’s family can constitute a protected social group, petitioner had failed to show that she could establish the necessary nexus between the feared persecution and her group membership. Accordingly, the court found no abuse of discretion in that determination.

“Mere opposition to crime, without more, does not constitute a political opinion.”

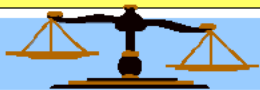
The court also held that “mere opposition to crime, without more, does not constitute a political opinion.” Thus, petitioner’s involvement in starting a prayer group with a cousin—who has apparently not been harmed, helping people in social projects, and her vocal opposition to criminal enterprises was insufficient to show that she would face harm on account of her political opinions. The court further concluded that the alien’s CAT arguments were waived because she referred to them in a perfunctory manner in her brief.

Contact: John F. Stanton, OIL


■ First Circuit Holds That Alien Failed To Support His Motion To Reopen With New, Material Evidence

In *Bbale v. Lynch*, 840 F.3d 63 (Thompson, Selya, Stahl) (1st Cir. 2016), the First Circuit held that the petitioner’s timely motion to reopen was fatally flawed because he did not sufficiently articulate the testimony to be presented on reopening. “This flaw is fatal because we—like the BIA—are unable adequately to assess the materiality of the proffered testi-

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mony,” said the court. Moreover, the court explained that petitioner failed to support his motion with the requisite “affidavits or other evidentiary material” as required under 8 C.F.R. § 1003.2(c)(1). “A party’s factual assertions in pleadings are not evidence and are not sufficient to establish material facts,” concluded the court.

The court further found that petitioner’s proposed testimony was not “new,” as it was previously available. Nonetheless, the court recommended that petitioner be considered for prosecutorial discretion in light of his family ties in the United States and political opposition to the ruling regime in his native country, Uganda. “The administration’s enforcement priorities strongly indicate that the petitioner should be a candidate for prosecutorial discretion. After all, a removal decision should not be made or effectuated ‘under a misapprehension of the governing departmental policy,’” said the court.

Contact: Ashley Martin, OIL

☎ (b) (6)

SECOND CIRCUIT

■ Second Circuit Declines to Review Unexhausted Procedural Due Process Claim and Holds Substantial Evidence Supports Adverse Credibility Determination

In *Li v. Lynch*, 839 F.3d 144 (2d Cir. 2016) (Winter, Cabranes, Restani, (by designation)) (*per curiam*), the Second Circuit declined to review petitioner’s claim that the IJ’s reliance on written notes from her asylum interview violated her due process rights because she failed to exhaust it. “Although not jurisdictional, issue exhaustion is mandatory and hence waivable by the Government,” said the court.

The court also held that substantial evidence supported the agency’s adverse credibility determination based on inconsistencies related to the timing of petitioner’s forced abortion, detention of her husband, and forced insertion of an IUD. The court also held that, although the agency improperly rejected petitioner’s China Democracy Party claim on the ground that her family, who are not members, remain in China unharmed, there was a “dearth of evidentiary support for an identifiable threat of future persecution.”

Contact: Thankful Vanderstar, OIL

☎ (b) (6)

■ Second Circuit Holds An Electronic Record Produced Under The Electronic System For Travel Authorization Is Sufficient To Establish Waiver Of Rights

In *Enes de Vasconcelos v. Lynch*, 841 F.3d 114 (2d Cir. 2016) (Kearse, Jacobs, Parker), the Second Circuit held that the Electronic System for Travel Authorization (“ESTA”) record created as part of an alien’s entry as a Visa Waiver Program participant was sufficient to demonstrate that petitioner waived his rights to a hearing before an immigration judge.

The petitioner, a citizen of Portugal and native of Angola, last entered the country on June 25, 2012, at the port-of-entry at Champlain, New York on the Canada–United States border. Approximately two months earlier, petitioner had submitted via the ESTA an application to participate in the VWP, in which he provided biographical, passport, and other information necessary to determine his eligibility. In October 2014, petitioner, while incarcerated at the Nassau County Correctional Center in East Meadow, New York for failing to pay child sup-

port, was interviewed by an immigration officer who determined that he was removable for failing to depart within the time allowed by his VWP admission.

The court rejected petitioner’s contention that the government need to obtain a physically signed I-94W, to show that he entered under the VWP, notwithstanding the implementation of the new ESTA electronic system. The court held that “an ESTA

“An ESTA record showing that a petitioner submitted an ESTA application and thereby certified that he waived his right to a hearing is sufficient to establish waiver.”

record showing that a petitioner submitted an ESTA application and thereby certified that he waived his right to a hearing is sufficient to establish waiver.” The court reasoned that if the government was precluded from relying on the ESTA’s electronic certification of waiver, it would be impossible for DHS to implement the more modern and secure visa waiver system envisioned by Congress.

The court explained that that the ESTA record was a record generated by public officials in the ordinary course of their duties and was presumed reliable. “That presumption may be rebutted by evidence that ‘the sources of information or other circumstances indicate a lack of trustworthiness,’ or by evidence that contradicts or impeaches the record’s contents,” said the court.

Here, the court concluded that, even though petitioner had shown that there were some potential irregularities in the administrative record, indicating that he might not have entered the United States under the VWP, “we cannot say that any reasonable adjudicator would be compelled to reach that conclusion.” Accordingly, the court agreed with the

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BIA that petitioner was not entitled to an IJ hearing.

Contact: Jamie M. Dowd, OIL

☎ (b) (6)

THIRD CIRCUIT

■ Third Circuit Holds Counterfeit Controlled Substance Conviction is Not an Aggravated Felony

In *Singh v. Lynch*, 839 F.3d 273 (3d Cir. 2016) (Ambro, Jordan, *Sciri- ca*), the Third Circuit held that the BIA erred in determining that the alien's conviction for "knowingly creating, delivering, or possessing with intent to deliver, a counterfeit controlled substance" under 35 Pa. Stat § 780-113(a)(30), was categorically an aggravated felony. The court denied the government's request to remand to allow the BIA to apply the modified categorical analysis in the first instance, and determined that: (1) the controlled substance at issue was an element of the statute and not simply a means of committing the offense; (2) the plea agreement and plea colloquy showed that the drug identity was not a federally controlled substance; (3) the elements of the crime of conviction did not sufficiently match the elements of the generic federal offense, and therefore the conviction was not for an aggravated felony; and (4) the BIA erred in conducting a "realistic probability" inquiry.

Contact: Elizabeth Chapman, OIL

☎ (b) (6)

■ Fifth Circuit Holds A State Crime Can Constitute An "Illicit Trafficking In A Controlled Substance" Aggravated Felony Even If It Does Not Qualify As A "Drug Trafficking Crime"

In *Flores-Larrazola v. Lynch*, 840 F.3d 234 (5th Cir. 2016) (Davis, Elrod, Higginson), the Fifth Circuit held that an alien convicted of recklessly

possessing with the intent to deliver at least ten pounds of marijuana for remuneration has engaged in "illicit trafficking in a controlled substance" such that he is an aggravated felon as defined at 8 U.S.C. § 1101(a)(43) (B), and therefore ineligible for cancellation of removal. The court concluded that "illicit trafficking in a controlled substance" includes, but is not limited to, the "drug trafficking crime" defined in 18 U.S.C. § 924(c)(2), and thus "the *mens rea* required to commit the former is not required to commit the latter."

Contact: David H. Wetmore, OIL

☎ (b) (6)

FIFTH CIRCUIT

■ Fifth Circuit Holds A Continuation Of Ongoing Violence and Renewed Threats Against The Petitioner Were Not Sufficient To Demonstrate Changed Country Conditions

In *Mandeep Singh v. Lynch*, 840 F.3d 220 (5th Cir. 2016) (Smith, Clement, Graves) (*per curiam*), the Fifth Circuit held that the BIA did not abuse its discretion in denying petitioner's out-of-time motion to reopen removal proceedings in order to allow him to pursue claims for asylum, withholding, and CAT.

The petitioner, a citizen of India, claimed that he was threatened and injured by members of rival political party in India—the Akali Dal (Badal) party—for refusing to join their ranks. The IJ and BIA denied petitioner's request for asylum, withholding, and CAT protection, and he never appealed. Petitioner then filed an untimely motion to reopen asserting that the Indian police had threatened him and wrongly accused him of re-

ceiving terrorist training in Pakistan. The BIA determined that there were no changes in the country conditions, nor that those conditions had substantially deteriorated since petitioner's order of removal.

In upholding the BIA's denial, the court concluded that "a motion to reopen can be denied where the evidence of changed conditions shows only a continuance of ongoing violence in the home country." Moreover, evidence of new threats and violence against the petitioner's mother and targeting of the petitioner by Indian police amounted to "a change in personal circumstances and does not constitute

changed country conditions," said the court.

Contact: Kristen Giuffreda Chapman, OIL

☎ (b) (6)

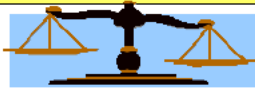
■ Fifth Circuit Holds That Persons Believed To Be Wealthy Based On Time In United States Do Not Constitute Particular Social Group

In *Gonzalez-Soto v. Lynch*, 841 F.3d 682 (5th Cir. 2016) (Barksdale, Haynes, Higginson) (*per curiam*), the Fifth Circuit held that the perception of wealth is not sufficiently particular or socially visible to be cognizable as a particular social group for withholding of removal.

The petitioner, a citizen of Mexico, claimed that he would face persecution in Mexico because he will be perceived to have wealth for having lived in the United States.

The court held that "we do not recognize economic extortion as a form of persecution under immigra-

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tion law, nor do we recognize wealthy [citizens of a different nation] as a protected group.' Further, persons believed to be wealthy because they are returning to their home country from the United States do not constitute a sufficiently particular social group to support an application for withholding of removal."

Contact: Enitan Otunla, OIL

☎ (b) (6)

SIXTH CIRCUIT

■ Sixth Circuit Upholds Rejection of Particular Social Group Claim Based on *Matter of A-R-C-G* Where Petitioner Was Able to Leave Abusive Relationship

In *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016) (*Keith, McKeague, White*), the Sixth Circuit upheld the BIA's rejection of an petitioner's domestic-violence-based particular social group claim based in part on the determination that she had not established the proposed group's immutability and she was able to leave the abusive relationship.

The petitioner, a citizen of Zimbabwe, legally entered the United States on January 19, 2002, but failed to depart when her visa expired. She then filed an affirmative asylum application, which was not granted and she was placed in removal proceedings. In her initial asylum application she claimed that she was married to an abusive husband who beat and threatened her, causing her to have miscarriages.

The IJ initially determined that petitioner was not credible because her claim changed from a battered wife's story of domestic abuse at the hands of her husband to a political asylum story from an anti-government activist. However, on appeal, the BIA remanded for further factual develop-

ment regarding her claim of domestic abuse. On remand, the IJ again denied petitioner's claim finding her not credible, but also found she unable to demonstrate that her status in the domestic relationship with her husband was or is immutable because she could not show that she was unable to leave the abusive relationship and therefore failed to show that she was a member of this "particular social group." On appeal, the BIA affirmed the denial.

The Sixth Circuit first found that substantial evidence supported the IJ's adverse credibility determination, and that petitioner had failed to present sufficient corroborative evidence to rehabilitate her discredited testimony. The court also held that petitioner did not prove that she was part of a group with the requisite common, immutable characteristic, distinguishing the facts of her case from those of *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).

Contact: Alexander Lutz, OIL

☎ (b) (6)

■ Sixth Circuit Grants In Part And Denies In Part EAJA Fee Motion

In *Sakhawati v. Lynch*, 839 F.3d 476 (*Gilman, White, Stranch*) (6th Cir. 2016), the Sixth Circuit awarded \$15,653.76 in attorney fees and expenses. The court decided that the petitioner, a citizen of Bangladesh, did not have "unclean hands" although the "government might well be correct that Sakhawati is a "bad person" for her fraud and use of dual identities. The court reasoned that the petitioner's alleged misconduct did not affirmatively seek to take advantage of the government's action in

her appeal. The court stated that the claims the petitioner raised on appeal were sufficiently related, avoiding any need to apportion her attorney fees. The court concluded the statutory rate of \$125.00 per hour was appropriate.

Contact: Nancy Friedman, OIL

☎ (b) (6)

SEVENTH CIRCUIT

■ Seventh Circuit Rules Government Met Its Burden To Show That Alien Is Removable For Having Engaged In A Fraudulent Marriage For Immigration Benefits

In *Vidinski v. Lynch*, 840 F.3d 912 (*Williams, Hamilton*) (7th Cir. 2016), the Seventh Circuit determined that hearsay evidence regarding out-of-court statements that petitioner's purported

spouse made to immigration agents regarding the sham nature of their marriage contained sufficient indicia of reliability to be admissible.

The petitioner, a citizen of Bulgaria, entered the United States as a visitor in 1998, and overstayed his visa. In 2002 he married a U.S. citizen who subsequently filed a visa petition to grant him permanent residence. Following and investigation into the bona fides of the marriage, petitioner's wife admitted that her marriage to had been fraudulent. Petitioner paid her a total of more than \$5,000 over the course of the marriage, but she never lived with him and never had sexual relations with him. Petitioner was then placed in removal proceedings, where he also sought cancellation of removal.

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At the removal hearing, the government presented the testimony of the ICE agent who had investigated the marriage in connection with a marriage fraud ring in the Chicago area. Petitioner refused to testify. The IJ determined that the agent's testimony was detailed and consistent and supported by his contemporaneous memorandum about his interview with petitioner's U.S. spouse. Accordingly, the IJ determined that petitioner's marriage had been fraudulent and also denied his request for cancellation. The BIA adopted the IJ's decision and also denied a subsequent motion to reopen based on ineffectiveness of counsel.

The court found that, although the statements by petitioner's wife were hearsay, "that hearsay had sufficient indicia of reliability for use in these administrative proceedings," because her "admissions of fraud were admissions against her own penal interest, making it unlikely that she was lying." The evidence was "detailed and consistent, with indications of reliability, and it was corroborated by available documentary." Accordingly the court found that the IJ did not err by finding that the government had proven marriage fraud by clear and convincing evidence.

The court also held that petitioner's statutory and constitutional rights to cross-examine witnesses were not violated where two witnesses failed to appear following the proper issuance of a subpoena by the Immigration Judge. The court noted that when it became apparent that petitioner's U.S. spouse had not appeared in response to the subpoena, "neither attorney asked the immigration judge to

follow through and request enforcement through the district court."

The court also upheld the denial of the motion to reopen, finding that petitioner had not shown how he was prejudiced by the inadequate argument in the initial appeal.

Contact: Song Park, OIL

☎ (b) (6)

■ Seventh Circuit Holds That Immigration Judge Properly Developed The Record

The court held that the IJ properly developed the record of proceedings by asking petitioner specific questions about his cancellation hardship.

In *Perez-Fuentes v. Lynch*, 842 F.3d 506 (7th Cir. 2016) (*Bauer*, Posner, Easterbrook), the Seventh Circuit upheld the BIA's denial of petitioner's application for cancellation of removal. The IJ had found that petitioner "failed to meet any of the requirements necessary for cancellation of removal," and that he did not merit cancellation of removal as a matter of discretion. The BIA affirmed the IJ's denial and also rejected petitioner's contention that his due process rights had been violated because the IJ had failed to fully develop the record.

The court initially determined that it had jurisdiction to consider the procedural sufficiency of an immigration hearing because it raised a legal question. The court held that the IJ properly developed the record of proceedings by asking petitioner specific questions about his cancellation hardship. The court concluded that petitioner's witness exclusion claim was not properly exhausted and, alternatively, that it was meritless because petitioner admitted that he had no other witnesses who could provide better testimony. The court also rejected the petitioner's claim that the IJ failed to consider documentary evi-

dence because petitioner did not show how this evidence was central to his claim.

Contact: Juria Jones, OIL

☎ (b) (6)

EIGHTH CIRCUIT

■ Eighth Circuit Holds Past Persecution Does Not Establish Presumption Of Future Torture

In *Martine v. Lynch*, 840 F.3d 1002 (8th Cir. 2016) (Wollman, Arnold, Kelly) (*per curiam*), the Eighth Circuit found that the fact that petitioner was originally admitted as refugee, which necessarily required a showing of past persecution, did not give rise to presumption that he would likely be tortured if removed to his native country of Haiti.

The petitioner was admitted to the United States as a refugee with his family in 1993, when he was six years old. He became an LPR in 1994. In 2010 petitioner fled from officers in his vehicle, eventually colliding with another vehicle and injuring its occupants. Police found 54 individual baggies containing what was later determined to be 8.68 grams of cocaine base in Martine's car. A jury convicted petitioner of, among other things, second degree drug trafficking. Based on that offense, petitioner was placed in removal proceedings and he in turn applied for CAT protection. The IJ and the BIA determined that he was not eligible for CAT protection.

Petitioner argued that the BIA erred in affirming the IJ because the IJ applied the wrong legal standard when it failed to grant him a presumption that he had a well-founded fear of future persecution based on past persecution. Petitioner claimed that because he was originally admitted as a refugee—which necessarily required a showing of past persecution—he was entitled to the presump-

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tion of a well-founded fear of persecution upon his return to Haiti. The court held that, unlike asylum, a showing of past persecution did not establish a presumption under the law regarding the likelihood of future torture upon removal.

The court also determined that to extent that petitioner was challenging the BIA's factual determinations, the court was without jurisdiction to consider his claims given fact that he was removable for having committed drug trafficking offense.

Contact: Carmel Morgan, OIL

☎ (b) (6)

NINTH CIRCUIT

■ Ninth Circuit Holds Applicants for Cancellation of Removal Must Establish Hardship to a Qualifying Relative at the Time the Immigration Judge Adjudicates the Application

In *Mendez-Garcia v. Lynch*, 840 F.3d 655 (9th Cir. 2016) (Silverman, Ikuta, Watford), the Ninth Circuit held that the BIA reasonably applied *Matter of Isidro-Zamorano*, 25 I&N Dec. 829 (BIA 2012), to deny cancellation of removal to two individuals whose sons no longer met the statutory definition of "child" at 8 U.S.C. § 1101(b)(1) at the time their applications were adjudicated.

Applying *Chevron*, the court first determined that the statute does not specify that an applicant for cancellation must meet the requirement as of a certain time. The court then determined that the BIA could reasonably have determined that §1229b(b)(1)(D) requires an alien seeking cancellation to establish hardship to a qualifying relative as of the time the IJ adjudicates the alien's application. The court found that the BIA's interpretation in *Matter of Isidro-Zamorano* was consistent with the language of the statute.

Judge Watford wrote separately, explaining that the petitioners' procedural due process claims failed because of their lack of diligence.

Contact: Janice Redfern, OIL

☎ (b) (6)

■ Ninth Circuit Holds that the Reinstatement Statute Applies to Aliens Previously Removed Under an Expedited Removal Order at the Border

In *Tellez v. Lynch*, 839 F.3d 1175 (9th Cir. 2016) (Kozinski, Bybee, Walter (by designation)), the Ninth Circuit held that an alien had previously "entered" the United States for the purpose of the reinstatement statute's "reentry" requirement, where that alien was previously removed under an expedited removal order issued at a U.S. border-crossing checkpoint. The court based its holding on the plain meaning of the terms "entry" and "removed," as well as congressional intent. The court also held that an alien's successful entry into the United States by being waved through by border officials still constitutes an illegal entry when the alien lacked valid documentation to enter.

Contact: Carmel Morgan, OIL

☎ (b) (6)

■ Ninth Circuit Holds That an Alien Who Fraudulently Enters the United States under the Visa Waiver Program Is Subject to the Program's Limitations

In *Riera-Riera v. Lynch*, 841 F.3d 1077 (9th Cir. 2016) (Schroeder, Bybee, Smith (by designation)), the Ninth Circuit held that an alien's fraudulent entry under the Visa Waiver Program prevented him

from requesting any relief from removal except asylum.

The petitioner, a citizen of Peru, had fraudulently entered the United States under an Italian passport in order to gain the benefits of the VWP.

He claimed that since he is not now, and never has been, an alien eligible for lawful admission under the VWP, he is not subject to its limitation.

In an issue of first impression, the court held that the statute enacting the VWP was ambiguous and deferred to regulations applying the VWP's limitations on adjustment to aliens who present fraudulent or counterfeit travel documents.

Contact: Stefanie Hennes

☎ (b) (6)

■ Ninth Circuit Holds That *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), Should Be Applied Retroactively

In *Lemus v. Lynch*, 842 F.3d 641 (9th Cir. 2016) (Rawlinson, Nguyen, Ponsoor (D. Mass., by designation)), the Ninth Circuit held that the retroactivity analysis set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), applied, rather than that of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in determining eligibility for cancellation.

In *Holder v. Martinez Gutierrez*, the Supreme Court reversed the line of Ninth Circuit decisions that allowed imputation of a parent's years of residency under 8 U.S.C. § 1229b (a), instead holding that the BIA's contrary construction of the statute, as set forth in *Matter of Escobar*, 24 I&N Dec. at 235, was reasonable and

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therefore entitled to deference. In *Escobar*, the BIA had interpreted the statute as requiring that an alien satisfy the years of residency requirement independently, without imputing a parent's residence period.

Petitioner argued *Martinez Gutierrez* announced a new rule of law and that, under *Chevron Oil Co.* its holding should not be applied retroactively to him. Specifically, he claimed that he relied on the then-controlling authority of this court in 2011 when he made the decision to plead guilty and exposed himself to a risk of removal. Had he known that he would be ineligible for cancellation of removal, he might not have pleaded guilty and might instead have opted to hold the government to its burden to prove the charge against him beyond a reasonable doubt.

The court determined that *Chevron Oil* was inapplicable principally because the court had already applied the rule disallowing imputation retroactively. The court then applied the *Montgomery Ward* factors and found that the balance tipped against petitioner such that he could not impute his stepfather's years of residence to qualify for cancellation of removal.

Contact: Carmel Morgan, OIL

☎ (b) (6)

TENTH CIRCUIT

■ Tenth Circuit Holds Applicant Failed To Establish Past Persecution Or A Well-Founded Fear Of Future Persecution On Account Of Religion

In *Xue v. Lynch*, 841 F.3d 1162 (10th Cir. 2016) (*Murphy*, Briscoe, Phillips), the Tenth Circuit held that petitioner failed to establish that his past mistreatment on account of his religious activities rose to the level of persecution or that he would be singled out for mistreatment in the future where his family continued to safely practice Christianity in China.

The court noted a possible tension between the BIA's treatment of persecution claims as questions of law and the court's review of those claims as factual questions, though the court concluded that it was unnecessary to reach the issue in this case.

Contact: Allison Frayer, OIL

☎ (b) (6)

DISTRICT COURTS

■ Southern District of Florida Dismisses Programmatic Challenge to USCIS's Controlled Application Review and Resolution Program ("CARRP")

In *UI-Haq Khan v. USCIS*, No. 1:15-cv-23406 (S.D. Fla. September 30, 2016) (Gayles, J.), the Southern District of Florida granted the government's partial motion to dismiss the plaintiff's programmatic challenge to CARRP, which is USCIS policy for screening applicants for immigration benefits for national security concerns. The court held that the plaintiff's claim that USCIS issued a "pre-textual" denial of his naturalization application did not provide him standing for a programmatic challenge because the plaintiff is entitled to de novo review of his naturalization application under 8 U.S.C. § 1421(c). The court denied the plaintiff's request to conduct discovery regarding CARRP.

Contact: John Inkeles, OIL-DCS

☎ (b) (6)

■ Northern District Of Illinois Enters Judgment Nullifying ICE Detainers And Requiring ICE to Issue Arrest Warrants

In *Moreno v. Napolitano*, No. 1:11-5452 (N.D. Ill. November 28, 2016) (Lee, J.), the District Court for the Northern District of Illinois entered a judgment against defendants, nullifying past detainers and permanently enjoining the issuance

of future detainers in the Chicago Area of Responsibility, which covers six states.

ICE may now only issue an immigration detainer if an ICE officer has probable cause to conclude that an individual is a removable non-citizen and: (1) has obtained a warrant of arrest; or (2) has reason to believe that the individual is likely to escape before a warrant can be obtained. The judgment also nullified all existing immigration detainers and ordered ICE to provide notice to every law enforcement agency and correctional institution that may house a member of the class. The judgment is stayed for 60 days while the government determines whether it will appeal the court's order.

Contact: Colin Kisor, OIL-DCS

☎ (b) (6)

■ Eastern District Of Virginia Orders Release Of Unaccompanied Alien Child, Finding Family Reunification Procedures Unconstitutional

In *D.B. v. Cardall*, No. 1:15-cv-745 (Cacheris, J.) (E.D. Va. Nov. 22, 2016), the District Court for the Eastern District of Virginia ordered the HHS Office of Refugee Resettlement ("ORR") to release petitioner's son from its custody. This case involves an unaccompanied alien child who was taken into custody by CBP in 2013 and transferred to ORR custody under the provisions of the Trafficking Victims Protection Reauthorization Act of 2006. The court held that ORR's family reunification processes do not afford parents sufficient procedural due process, finding that ORR did not provide petitioner with particularized reasons for denying her family reunification request and failed to provide a fulsome administrative review process. Accordingly, the court held that ORR should have provided petitioner an adversarial process after it denied the petitioner's application.

Contact: Kate Goettel, OIL-DCS

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OIL's New Attorneys

(Continued from page 12)

Virginia Gordon received a B.S. in Physics and Psychology from Stonehill College and a M.Ed. in Postsecondary Administration and Student Affairs from the University of Southern California. She previ-



ously taught high school physics and college writing, administered the student involvement and new student orientation programs at a small college, and served with the Peace Corps in Belize. She became interested in immigration issues while in Belize and subsequently pursued a JD from the Thomas R. Kline School of Law at Drexel University. Formerly a Fall 2013 OIL intern, she returns to OIL after serving for two years as an Attorney Advisor in the Arlington Immigration Court.

Jessica Strokus received a B.A. in Politics & International Affairs from Wake Forest University in 2013 and a J.D. from Wake Forest Uni-



versity School of Law in 2016. Jessica was formerly a Summer 2014 intern and a Summer 2015 SLIP at OIL.

Madeline Henley re-joins OIL after a hiatus from DOJ during which she taught legal rhetoric at the Ameri-



can University Washington College of Law. After law school and a District Court clerkship, Madeline joined OIL via the Honors Program and worked here for three years, followed by seven years with the Torts Branch (FTCA Staff). She is a graduate of Haverford College and received her J.D., magna cum laude, from the State University of New York at Buffalo.

Barbara Leen graduated from The George Washington University with a degree in International Affairs. She obtained her J.D. from the Uni-



versity of Connecticut School of Law. She began her career in immigration law as an attorney advisor for EOIR in Philadelphia. She held several positions at EOIR's Office of the General Counsel before serving as a counsel for Senator Dianne Feinstein on the Senate Judiciary Committee. She returned to EOIR in 2011 as Counsel to the Director.

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Executive Office for Immigration Review Swears in Five Immigration Judges

On November 4, 2016, EOIR Chief Immigration Judge Mary Beth Keller presided over the investiture of five new Immigration Judges during a ceremony held at the U.S. Court of Appeals for the Federal Circuit, in Washington, D.C.

After a thorough application process, Attorney General Loretta E. Lynch appointed Kerri A. Calcador, Randall Wilson Duncan, Rico M. Sogocio, Karen M. Donoso Stevens, and Dean S. Tuckman to their new positions. "With these appointments, EOIR now has 296 immigration judges, setting a new all-time high for our immigration judge corps," said CIJ Keller.

INSIDE OIL

OIL recently welcomed the following seven new attorneys:

Victoria Braga graduated from the University of Notre Dame in 2011 with



degrees in Political Science and Arabic. She received her J.D. from The George Washington University Law School in 2014. Formerly a Fall 2012 OIL intern, she returns to OIL following a two-year clerkship at the Boston Immigration Court.

David Kim graduated from Yale College in 2009 and from the Northwestern School of Law in 2014. He comes to OIL after having worked for two



years as an attorney advisor at the San Antonio Immigration Court.

Remi da Rocha-Afodu returns to OIL after a two-year stint at the Office of the Chief Counsel, U.S. Customs and Border Protection, where she worked as a Staff Attorney. Prior to



joining OIL in 2006, Remi served as a Contract Attorney assigned to the Civil Division's Commercial Litigation Branch, where she worked on the Winstar Litigation. Remi is a graduate of the University of Lagos, Nigeria, and the Georgetown University Law Center.

Lindsay Donahue received her B.A. in Asian Studies from Scripps Col-



lege in 2010 and her J.D. from the University of Washington in 2016. While in law school, she interned at OIL in Summer 2014, Summer 2015, and Fall 2015.

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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)



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Benjamin Mizer

Principal Deputy Assistant
Attorney General

Leon Fresco

Deputy 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