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# Immigration Litigation Bulletin

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## LITIGATION HIGHLIGHTS



## Inside



## Limitations on Judicial Review of Expedited Removal Orders Under INA § 242(e) Do Not Violate The Suspension Clause

In ***Castro v. DHS***, 835 F.3d 422 (3d Cir. 2016) (*Smith*, Hardiman, Shwartz), the Third Circuit held that "Congress may, consonant with the Constitution, deny habeas review in federal court of claims relating to an alien's application for admission to the country, at least as to aliens who have been denied initial entry or who, like Petitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country."

The case involved the consolidated habeas petitions filed by twenty-eight families from Central America who sought to prevent, or at least postpone, their expedited removal from this country. Hours within their illegal crossings into the United States in late 2015, petitioners were apprehended by CBP agents within close proximity to the border. Because none of the petitioners presented immigration papers, they were all placed in expedited removal proceedings under INA § 235(b).

Following their apprehensions, all petitioners expressed fear of returning to their home countries of El Salvador, Honduras, and Guatemala. Accordingly, each of them was referred to an Asylum Officer (AO) for a credible fear interview. The AOs determined that none of the petitioners had a credible fear of persecution or torture if returned to their home countries. Petitioner then requested and were granted a *de novo* review of their asylum and torture claim by an Immigration

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## FY 2016 Amendments to the Visa Bulletin

**By Aric A. Anderson, OIL**

On November 20, 2014, President Obama addressed the nation and announced certain Executive Actions on immigration. Some of those November 2014 Executive Actions impacted OIL's litigation in obvious ways (*e.g.*, revised removal priorities, and the expansion of the provisional unlawful presence waiver), while others gave rise to high-profile litigation (*e.g.*, the preliminary injunction against Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), affirmed last term by an evenly divided Supreme Court). In other ways, however, the Executive Actions were not immediately newsworthy, or they had less immediate impact on OIL's litigation.

This article discusses one such change, namely, amendments to the Visa Bulletin for individuals seeking to immigrate on the basis of their family relationship to a United States citizen or lawful permanent resident.*

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# Definition of "Crime of Violence" Voided for Vagueness

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Judge (IJ). The IJ concurred with the AOs' decisions and all petitioners were referred back to DHS to complete the expedited removal process.

Each of the petitioning family then filed a separate habeas petition contending *inter alia*, that the credibility review process violated their Fifth Amendment due process rights. The habeas petitions were consolidated for purpose of determining the jurisdiction of the court to adjudicate the claims. The district court held that the INA § 242(e) unambiguously foreclosed judicial review. The court also determined that the Suspension Clause did not require that judicial review be available to address any of Petitioners' claims, and therefore that § 242(e) does not violate the Suspension Clause.

**"The Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'**

The Third Circuit, reviewing the appeal *de novo*, also held that subject to three narrow issues outlined in the statute, the court lacked jurisdiction over petitioners' claims. Petitioners sought to avoid the jurisdictional bar by arguing that their orders were not issued under INA § 235(b)(1). The court found the argument "untenable" given that they did not dispute that an expedited removal order was outstanding as to each. The court said that petitioners were attempting to create ambiguity where none existed, and that Congress' intent to narrowly circumscribe judicial review of expedited removal orders was clear.

The court then considered petitioner's contention that § 242 operated as an unconstitutional suspension of the writ by stripping courts of habeas jurisdiction over all but a few narrow questions. Petitioners claimed that the Supreme Court's Suspension Clause jurisprudence, outlined in *INS v. St. Cyr*, 533 U.S. 289 (2001) and *Boumediene v. Bush*, 553 U.S. 723 (2000), as well as a series of cases from the "finality-era" when the decisions of the Executive to admit, exclude, or deport aliens were final, established their right to invoke the Suspension Clause to challenge their removal orders.

The government, on the other hand, argued generally that the Suspension Clause cases were inapposite. The government relied instead on a long line of Supreme Court decisions beginning with *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), expressing the plenary power doctrine, and in particular the power of the political branches over aliens at the border seeking initial admission. Under the plenary power doctrine, aliens who seek initial admission lack constitutional due process protections concerning their application for admission and therefore, contended the government, petitioners have no procedural due process rights to vindicate in habeas.

The court agreed with the government that petitioners could not invoke the Suspension Clause but for somewhat different reasons. The court explained that *Boumediene* contemplates a two step-inquiry to determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause. First, a court must determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause due to some attribute of the petitioner or to the circumstances surrounding his arrest or detention. Only after confirming that the petitioner is not so prohibited may courts then turn to the question whether the substitute for habeas is adequate and effective to test the legality of the petitioner's detention.

The court then determined that petitioners' Suspension Claim could not "clear *Boumediene*'s first hurdle—that of proving their entitlement *vel non* to the protections of the Suspension Clause." The court explained that "the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.' []Petitioners were each apprehended within hours of surreptitiously entering the United States, so we think it appropriate to treat them as 'alien[s] seeking initial admission to the United States.' [] And since the issues that Petitioners seek to challenge all stem from the Executive's decision to remove them from the country, they cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them." Therefore, the court saw no need to reach the second question under *Boumediene*.

The court also rejected petitioner's argument that *St. Cyr* and the finality–era cases established their right to invoke the Suspension Clause. *St. Cyr* involved the claim of a lawful permanent resident "whose entitlement to broad constitutional protections is undisputed," said the court. The court also noted that the line of Supreme Court cases suggesting that, once inside the United States, aliens acquire constitutional rights, was inapplicable here because petitioners were seeking initial entry and were apprehended immediately after their entry.

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# FURTHER REVIEW PENDING: Update on Cases & Issues

### Citizenship – Equal Protection

On November 9, 2016, the Supreme Court will hear 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 petition for certiorari argued that the Second Circuit erred in both the equal protection ruling and the remedy. Merits briefs have been filed by the government, *Morales-Santana*, and several groups as *amici curiae*.

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### Mandatory Detention

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

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### Asylum —Unable or Unwilling to Control

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

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### Crime of Violence — Vagueness

On October 3, 2016, the Supreme court granted 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 is due November 14, 2016.

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### Good Moral Character

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

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# Summaries Of Recent Federal Court Decisions

## FIRST CIRCUIT

**First Circuit Upholds Denial of Withholding of Removal to Guatemalan Alien Who Received Death Threats and Was Shot**

In ***Hernandez-Lima v. Lynch***, 836 F.3d 109 (*Howard*, Lynch, Barron) (1st Cir. 2016), the First Circuit ruled that death threats received by the petitioner did not rise to the level of persecution. "Death threats rise to the level of persecution only when 'so menacing as to cause significant actual suffering or harm.'", Here the evidence only showed that the threats were empty and there was also a lack of evidence that they caused the petitioner non-physical suffering.

The court further held that, with respect to a later shooting the petitioner suffered, and the extortion and violence that his relatives suffered, petitioner's speculation about the perpetrators' motives did not show a nexus to a protected ground.

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**Asylum Applicant Failed to Corroborate Her Story Rendering Her Ineligible for Relief**

In ***Bahta v. Lynch,*** 835 F.3d 65 (1st Cir. August 2016) (*Lipez*, Selya, and Thompson), the First Circuit held that because the petitioner could not corroborate her story and she bore the burden of proof to substantiate the facts underlying her asylum claim, she was ineligible for relief. The court also concluded that the petitioner's timeline was "murky," and that the agency acted justifiably in expecting more persuasive corroborating evidence than provided.

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**Asylum Applicant Failed to Demonstrate Objectively Well-Founded Fear Persecution as Christian in China**

In ***Chen Qin v. Lynch***, 833 F.3d 40 (1st Cir. 2016) (Torruella, *Lynch*, Thompson), the First Circuit held that petitioner failed to demonstrate an objectively reasonable well-founded fear of persecution in China because of her prior attendance at an underground Christian church.

The court determined that "a risk of detention or arrest without more" did not constitute persecution. The court also held that the State Department Report did not establish a "pattern or practice" of persecution against unregistered house churches, and was not sufficiently related to the alien's own situation to be persuasive. Because the petitioner was unable to show that she fears harm on account of a protected ground, the court denied her application for asylum and withholding of removal.

> **The court determined that "a risk of detention or arrest without more" did not constitute persecution.**

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**First Circuit Rejects Petitioner's Proposed Social Group, Upholds Denial of Asylum and Withholding of Removal**

In ***Vega-Ayala v. Lynch,*** 833 F.3d 34 (1st Cir. 2016) (*Lynch*, Thompson, Kayatta), the First Circuit held that the petitioner failed to establish that the proposed group, "Salvadoran Women in Intimate Relationships with Partners Who View Them as Property," qualifies as a particular social group because it is neither based on an immutable characteristic nor is socially distinct. "There was no evidence that Salvadoran society regards her proposed group as distinct," said the court.

**First Circuit Holds Asylum Applicant Failed to Establish Nexus Between His Membership in His Immediate Family and Threats from the Man Who Killed His Father**

In ***Marin-Portillo v. Lynch***, 834 F.3d 99 (1st Cir. 2016) (*Torruella*, Kayatta, Barron), the First Circuit held that petitioner failed to establish that threats from the man who was prosecuted for killing his father bore a nexus to a protected ground. The court held that the mere fact that the killer exclusively targeted members of the family did not demonstrate that kinship ties, rather than a desire for retaliation or deterrence, prompted the threats.

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**First Circuit Upholds Adverse-Credibility Determination Based on Inconsistent Statements**

In ***Legal v. Lynch***, 838 F.3d 51 (1st Cir. 2016) (*Howard*, Torruella, Lynch), the court upheld the agency's determination that the Haitian petitioner was not credible and therefore unable to establish his eligibility for asylum. The court held that substantial evidence supported the determination where petitioner swore to the asylum officer that he was never physically harmed in Haiti but testified in removal proceedings that he was beaten in Haiti by political opponents.

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### ■ First Circuit Holds Applicant's Misrepresentation of Identity Was Willful

In ***Li v. Lynch***, 837 F.3d 127 (1st Cir. 2016) (Barron, Howard, *Lynch*), the First Circuit held that substantial evidence supported the agency's finding that the Chinese applicant was removable and ineligible for adjustment of status and voluntary departure because the misrepresentation of his name, citizenship, and nationality in order enter the United States under the Visa Waiver Pilot Program was a willful misrepresentation to obtain an immigration benefit.

The court rejected the applicant's argument that he lacked knowledge of the falsity of his fraudulent document, finding his repeated reliance on the fraudulent document substantial evidence of willfulness.

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## THIRD CIRCUIT

### ■ Third Circuit Upholds Determination that Immigration Judges Lack Jurisdiction to Adjudicate Waivers of Inadmissibility for U Visa Applicants

In ***Sunday v. Att'y Gen. of U.S.***, 832 F.3d 211 (3d Cir. 2016) (Fisher, *Chagares*, Barry), the Third Circuit held that Immigration Judges lack jurisdiction to adjudicate waivers of inadmissibility for aliens seeking a U Visa. The court distinguished *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014), noting that the Seventh Circuit failed to account for the regulations limiting the jurisdiction of Immigration Judges. "This result does not deny Sunday the opportunity to obtain a waiver of inadmissibility altogether—his application should be directed to a different government agency, DHS. Finally, the court rejected the argument that the Constitution requires a proportionality review.

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## FIFTH CIRCUIT

### ■ BIA Decision Denying Cancellation of Removal and Remanding for Voluntary Departure Is a Final Order for Purposes of Judicial Review

In ***Holguin-Mendoza v. Lynch***, 835 F.3d 508 (5th Cir. 2016) (Dennis, Haynes, Graves) (per curiam), the Fifth Circuit held that a BIA decision resolving the merits of an appeal but remanding for further proceedings regarding voluntary departure is a final order of removal subject to judicial review. The court noted that its decision was in line with the persuasive authority of the decisions of the other circuit courts that had considered the matter.

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### ■ Fifth Circuit Defers to BIA Precedent on Inadmissibility Bar and Rejects Adjustment Applicant's Request for Permission to Re-apply for Admission *Nunc Pro Tunc*

In ***Zermeno v. Lynch***, 835 F.3d 514 (5th Cir. 2016) (*Stewart*, Clement, Haynes), the Fifth Circuit deferred to the BIA's interpretation in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), that an alien who had been illegally present in the United States for more than a year is permanently inadmissible to the United States unless he or she remains outside the United States for at least ten years following the most recent departure.

**An alien who had been illegally present in the United States for more than a year is permanently inadmissible to the United States unless he or she remains outside the United States for at least ten years following the most recent departure.**

The court found that the BIA's interpretation was "consistent with the statutory language. In fact, the statute requires an alien to wait ten years after departing the United States and then seek the Secretary of Homeland Security's consent prior to returning." The court also ruled that an alien may not request permission to re-apply for admission as provided under INA § 212(a)(9)(C)(ii)'s exception *nunc pro tunc*, after returning to the United States unlawfully.

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### ■ Fifth Circuit Holds Adjustment of Status Is Not an Application for Admission for Purposes of Removability under 8 U.S.C. §§ 1227(a)(1)(A), 1182(a)(7)(A)

In ***Marques v. Lynch,*** 834 F.3d 549 (5th Cir. August 19, 2016) (Higginbotham, *Southwick*, Higginson), the Fifth Circuit held that the cross-reference in 8 U.S.C. § 1227(a)(1)(A) to Section 1182(a)(7)(A) unambiguously provides that the documentation requirements under the latter section do not apply to an alien who adjusts his status in the United States following an earlier admission.

The court held that no deference was owed to the agency's interpretation of adjustment of status as an "application for admission" in this context because the statutory scheme was not ambiguous. The court relied on *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), holding that the language of § 1182(h) was unambiguous and rejecting the agency's interpretation that a post-

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entry adjustment constituted an admission.

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**■ Fifth Circuit Holds Company Not Liable For Employment Verification Violations Because It Did Not Have Fair Notice That Its Corporate Attestation Practice Was Not Permitted**

In *Employer Solutions Staffing Group v. OCAHO*, 833 F.3d 480(5th Cir. 2016) (Davis, Prado, *Southwick*), the Fifth Circuit held that under the version of the Form I-9 applicable to this case, corporate attestation was permissible. Therefore, the employer was not liable for employment verification violations under 8 U.S.C. § 1324a(b)(1)(A), when a corporate representative reviewed employees' documents in one location, and a corporate representative in another location attested on the Form I-9 to having performed that function. The court held that it is within the agency's discretion to prohibit corporate attestation, but this employer "lacked fair notice that corporate attestation was prohibited."

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**■ Fifth Circuit Holds 8 C.F.R. § 245a.2(u)(4) Does Not Operate to Undo Alien's Factual "Admission"**

In ***Gomez v. Lynch,*** 831 F.3d 652(5th Cir. 2016) (Davis, *Smith*, Higginson), the Fifth Circuit held that 8 C.F.R. § 245a.2(u)(4)'s language, stating that expiration of temporary resident status returns an alien "to the unlawful status held prior to" his adjustment, does not operate to undo a factual admission that occurred when he was in lawful status. The court concluded that "admission" and "status" are fundamentally distinct concepts and that, because there are no detailed distinctions between and among various forms of unlawful status, there is no status of "present without admission" to which the alien could return.

**The court concluded that the petitioner's five year stay in Mexico, during which she worked and renewed her work visa on at least one occasion, was not a necessary consequence of her flight from persecution**

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**■ Fifth Circuit Holds Alien Failed to Establish an Exception to the Firm Resettlement Bar to Asylum**

In ***Ramos Lara v. Lynch***, 833 F.3d 556 (5th Cir. 2016) (Stewart, Prado, *Southwick),* the Fifth Circuit held that petitioner failed to establish the applicability of an exception to the firm-resettlement bar for asylum such that the denial of her application on that ground was proper. After noting that the substantial evidence standard of review applied to the BIA's factual determinations about firm resettlement, the court concluded that the petitioner's five year stay in Mexico, during which she worked and renewed her work visa on at least one occasion, was not a necessary consequence of her flight from persecution in Bolivia.

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## SIXTH CIRCUIT

**■ Sixth Circuit Holds Government's Position Was Substantially Justified Notwithstanding Errors and Denies EAJA Fees Request**

In ***Amezola-Garcia v. Lynch,*** 835 F.3d 553 (6th Cir. 2016) (Boggs, *Rogers*, Berg (E.D. Mich., by designation)), the Sixth Circuit held that petitioner failed to show he warranted an award of attorney fees because the government's position was justified "as a whole."

The government had recommended remand to allow the agency to address a possible error in its voluntary departure analysis, but prevailed on the alien's challenges regarding eligibility for withholding of removal and whether the BIA was required to refer his appeal to a three-member panel. The court published its ruling, initially issued on August 26, 2016, on the government's motion.

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**■ Sixth Circuit Upholds Denial of Withholding of Removal and Rejects Petitioner's Claim of Right to Review by Three-Member BIA Panel**

In ***Amezola-Garcia v. Lynch***, __ F.3d __, 2016 WL 4978375 (6th Cir. September 19, 2016) (Boggs, *Rogers*, Berg (E.D. Mich., by designation)) , the Sixth Circuit published its April 11, 2016 decision (645 Fed.Appx. 368) holding that the agency properly denied withholding of removal based on the alien's membership in a family group where the vast majority of his relatives continued to live safely in Mexico.

The court also rejected the alien's assertion that the BIA was required to assign his appeal to a three-member panel. Finally, the court adopted the government's recommendation that proceedings be remanded to allow the agency to address a possible error in its voluntary departure analysis.

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### ■ Sixth Circuit Holds that Solicitation of Prostitution Constitutes a Crime Involving Moral Turpitude

In ***Reyes v. Lynch***, 835 F.3 556 (6th Cir. 2016) (*Moore*, Rogers, Sentelle) the Sixth Circuit held that an alien's conviction for solicitation of prostitution in violation of the Codified Ordinances of Hamilton, Ohio § 533.09 was a crime involving moral turpitude. The court gave *Chevron* deference to previous decisions of the BIA holding that prostitution involves moral turpitude. The court concluded that solicitation of prostitution was no less "base, vile, and depraved" than the act of prostitution itself.

> **The court concluded that solicitation of prostitution was no less "base, vile, and depraved" than the act of prostitution itself.**

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## SEVENTH CIRCUIT

### ■ Seventh Circuit Applies Criminal Review Bar and Rejects Alien's Alleged Legal Claims

In ***Salgado-Gutierrez v. Lynch***, 834 F.3d 800 (7th Cir. 2016) (Bauer, Posner (concurring), *Sykes)*, the Seventh Circuit held that an error by the BIA with respect to its analysis of the alien's particular social group was harmless because the agency's internal-relocation finding was unreviewable and dispositive of the asylum and withholding claims. The court further concluded that the government did not commit a *Chenery* violation when it cited a Seventh Circuit decision that was issued after the BIA's decision because that citation additionally supported the findings already made by the BIA.

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### ■ Seventh Circuit Remands for Agency to Reconsider Whether a Conviction for Misrepresenting a Social Security Number Is a Crime Involving Moral Turpitude

In ***Arias v. Lynch,*** 834 F.3d 823 (7th Cir. 2016) (Posner, Ripple, *Hamilton*), the Seventh Circuit granted a petition for review filed by an Ecuadorian alien who was convicted of misrepresenting a social security number. Observing that the circuits are currently split (the Fifth and Eighth Circuits say "yes," the Ninth says "no"), the court expressed approval for the Ninth Circuit's view that fraudulent use of a social security number is not categorically a crime involving moral turpitude. However, the court remanded the case to the BIA in light of the "vacuum of authoritative guidance" created by *Silva-Trevino II*, 26 I&N Dec. 550, 553 (Att'y Gen. 2015).

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### ■ Vagueness, Inherent Implausibility, and Inconsistencies in Petitioner's Testimony Supported The Agency's Adverse-Credibility Determination

In ***Santashbekov v. Holder,*** 834 F.3d 836 (7th Cir. 2016) (*Hamilton*, Flaum, Ripple), the Seventh Circuit held that substantial evidence supports the agency's adverse-credibility determination, which relied on vagueness and inherent implausibility in the petitioner's testimony, as well as the alien's inconsistent testimony regarding important dates relating to his claim for relief.

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### ■ Seventh Circuit Upholds Agency's Adverse-Credibility Determination Regarding Petitioner's Fear of Forced Sterilization in China

In ***Yang v. Lynch***, 832 F.3d 817 (7th Cir. 2016) (Bauer, *Manion*, Kanne), the Seventh Circuit held that substantial evidence supported the agency's determination that the petitioner was not credible and that he did not adequately corroborate his asylum claim, based on his fear of forced sterilization in China. The court also held that the alien waived his claims for withholding of removal and protection under the Convention Against Torture because he failed to raise them on appeal to the BIA.

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### ■ Seventh Circuit Upholds Denial of Withholding of Removal and CAT Protection for Insufficient Evidence

In ***Lozano-Zuniga v. Lynch***, 832 F.3d 822 (7th Cir. 2016) (Manion, *Rovner*, Blakey (by designation)), the Seventh Circuit held that an asylum applicant from Mexico failed to establish eligibility for withholding of removal on account of his religion or proposed particular social group of men returning from the United States who may be perceived to have money, because he did not show he likely would be persecuted on those grounds. The court also held that the applicant failed to show that it was more likely than not that he would be tortured at the hands of, or with the acquiescence of, a government official.

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### Seventh Circuit Denies Panel Rehearing of Adverse Credibility Ruling

In ***Yuan v. Lynch***, 827 F.3d 648 (7th Cir. 2016) (*Kanne*, Sykes, Hamilton), the Seventh Circuit denied the government's petition for panel rehearing. The petition sought rehearing of a published decision, granting the petition for review and remanding this asylum case. In the published decision, the court ruled that the adverse-credibility determination upheld by the BIA was flawed because the purported inconsistencies cited by the Board were easily explained, trivial, or immaterial. The court also ruled that both the BIA and the Immigration Judge failed to address the potential explanations offered by the alien.

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### Seventh Circuit Upholds Continuance Denial Where Relief Was Speculative

In ***Cadavedo v. Lynch***, 835 F.3d 779 (7th Cir. 2016) (Rovner, Sykes, *Hamilton*), the Seventh Circuit upheld the denial of a continuance to allow an petitioner to challenge the USCIS's finding that his prior marriage fraud barred him from receiving any future immigration benefits.

The court concluded that, given the fraud finding, the alien's eligibility to adjust status was speculative at the time the agency considered his continuance request. The court also concluded that the alien had no due process rights to the purely discretionary relief he sought and noted that he failed to avail himself of the multiple opportunities to challenge the fraud finding.

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### Seventh Circuit Holds Regulation Applying Heightened Hardship Standard Is a Valid Exercise of Attorney General's Discretion

In ***Cisneros v. Lynch***, 834 F.3d 857(7th Cir. 2016) (*Wood,* Manion, Hamilton), the Seventh Circuit rejected petitioner's argument that 8 C.F.R. § 1212.7(d), which states that the Attorney General will not favorably exercise discretion for aliens who are inadmissible due to violent or dangerous crimes unless the denial results in "exceptional and extremely unusual hardship," conflicted with the "extreme hardship" standard in § 212(h) of the statute.

> **The court ruled that the regulation at 8 C.F.R. § 1212.7(d), was a valid exercise of the Attorney General's authority, expressly granted by section 212(h), to set the terms for exercising her discretion**

The court ruled that under *Chevron* the regulation was a valid exercise of the Attorney General's authority, expressly granted by section 212 (h), to set the terms for exercising her discretion. The court also rejected petitioner's claim that the BIA improperly applied the regulation to his case. Noting that the BIA's decision showed that it followed the regulation and asked whether, given [petitioner's] eligibility for relief, a favorable exercise of discretion was merited.

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### Seventh Circuit Upholds BIA's Authority to Limit Scope of Remand upon Granting Motion to Reopen

In ***Turkhan v. Lynch***, 836 F.3d 843 (*Wood*, Bauer, Williams) (7th Cir. 2016), the Seventh Circuit upheld the decision of the IJ and the BIA that the BIA's prior order reopening the proceeding for further consideration in the light of changed country conditions did not entitle the alien to further consideration of his application for relief from removal under INA § 212(c).

The court, however, found troubling. "Turkhan's is 'an unusual case.' It has been pending for roughly 23 years. The immigration judge opined that '[t]he record clearly shows that [Turkhan] ha[s] been rehabilitated for the offense [he] . . . Committed' 26 years ago. Turkhan has no family in Iraq. To the contrary, all his family is here, and lawfully so."

Contact: Sunah Lee, OIL
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### Seventh Circuit Holds That Substantial Evidence Supports Immigration Judge's Adverse Credibility Finding

In ***Fuller v. Lynch,*** 833 F.3d 866 (7th Cir. 2016) (*Wood,* Posner (dissent), Rovner), the Seventh Circuit held that it lacked jurisdiction to review the agency's determination that the alien's conviction for attempted sexual assault constituted a particularly serious crime rendering him ineligible for withholding of removal.

The court held that the alien had not credibly established that he was bisexual based (1) on his inability to recall details of his shooting; (2) his misstatements regarding his sisters' names and how many sisters he had, and calling his sister his mother; (3) his misrepresentations on his asylum application; and (4) his inadequate explanation as to how he obtained letters the Immigration Judge refused to credit.

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☎ (b) (6) [redacted]

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## EIGHTH CIRCUIT

### ■ Eighth Circuit Remands to Allow Adjustment Applicant to Present Rebuttal Evidence to Challenge Information on Form I-213 and Holds that Presumption of Reliability of TECS-II Information Was Rebutted

In ***Rodriguez-Quiroz v. Lynch***, 835 F.3d 809 (8th Cir. 2016) (*Wollman*, Loken, Benton), the Eighth Circuit held that the Immigration Judge's refusal to allow an alien to examine immigration officers about the preparation of an I-213 Record of Deportable Alien, which evidenced that the alien had told immigration officers that he entered the United States without inspection, was prejudicial error where there were unexplained inconsistencies between the draft and the final version of that document. The court further held that any presumption of regularity regarding information about a departure record from the TECS computer system was rebutted by evidence, unaddressed by the agency, of the alien's presence in the United States after the time of departure indicated in the system.

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### ■ Eighth Circuit Holds It Lacks Jurisdiction to Review Time-Barred Asylum Claim and Upholds Denial of Withholding of Removal Due to Failure to Establish Nexus

In ***Cambara-Cambara v. Lynch***, 837 F.3d 822 (8th Cir. 2016) (*Loken*, Riley, Shepherd), the Eighth Circuit held that it lacked jurisdiction to review the decision by the BIA that the aliens' asylum claims were time-barred. The court also upheld the BIA's denial of withholding of removal, reasoning that the petitioners failed to show that criminal gangs targeted members of their family because of familial relationships, as opposed to because, as prosperous businessmen, those family members were obvious targets for extortion.

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**Petitioners failed to show that criminal gangs targeted members of their family because of familial relationships, as opposed to because, as prosperous businessmen, those family members were obvious targets for extortion.**

### ■ Adam Walsh Act Bars APA and Constitutional Challenges to USCIS's Discretionary Implementation of its "No Risk" Analysis

In ***Bremer v. Johnson,*** 834 F.3d 925 (8th Cir. 2016) (*Colloton*, Gruender, Shephard), the Eighth Circuit affirmed in part, reversed in part, and remanded in part a class action challenging a provision in the Adam Walsh Act that bars a citizen previously convicted of a "specified offense against a minor" from "filing" an immigration petition for a foreign spouse or child absent a discretionary determination that the citizen "poses no risk" to the alien.

The court concluded that USCIS's process and procedures governing the no-risk determination are part of what Congress intended to shield from judicial review. The court affirmed dismissal of the constitutional retroactivity and due process claims because they did not raise colorable challenges to the Secretary's exercise of discretion. The court remanded one claim, regarding USCIS's interpretation of the term "filing," because it presented a predicate legal issue outside of the scope of the discretionary analysis.

Contact: Sarah Wilson, OIL-DCS
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### ■ Eighth Circuit Holds Alien's Three-Count Fraud Conviction Qualifies as Aggravated Felony Because Aggregate Loss Exceeded $10,000

In ***Sokpa-Anku v. Lynch,*** 835 F.3d 793 (8th Cir. 2016) (Wollman, *Loken*, Benton), the Eighth Circuit held that the alien's conviction for three counts of medical-assistance fraud (each of which involved a loss of less than $10,000, but which together totaled over $20,000 in losses) qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i). The court reasoned that, under the circumstance-specific approach of *Nijhawan v. Holder*, 557 U.S. 29 (2010), the loss amounts were properly aggregated to meet the $10,000 threshold because the counts were from a single conviction, and the total loss was directly tied to the counts covered by that conviction.

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## NINTH CIRCUIT

### ■ Ninth Circuit Remands for Agency to Reconsider Whether a Federal Conviction for Sponsoring Animal Fighting Is a Crime Involving Moral Turpitude

In ***Ortega-Lopez v. Lynch,*** 834 F.3d 1015 (9th Cir. 2016) (Pregerson, Bea (concurring), *Owens*), the Ninth Circuit granted the petition for review and remanded the case to the Board of Immigration Appeals to reconsider whether a conviction for sponsoring or exhibiting an animal in an animal-fighting venture, under 7 U.S.C. § 2156(a)(1) (2007), is a categorical crime involving moral turpitude in light of *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010). The court noted that while

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non-fraudulent crimes involving moral turpitude often involve harm to a protected class of human victim, the agency decisions did not address whether cockfighting involved such a protected class.

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**■ Ninth Circuit Holds Alien's California Criminal Threat Conviction Is a Crime of Violence and an Aggravated Felony**

In ***Hernandez v. Lynch***, 831 F.3d 1127 (9th Cir. 2016) (Wallace, Schroeder, *Smith),* the Ninth Circuit held that an alien's conviction for criminal threats under California Penal Code § 422 is a categorical crime of violence and that the § 664 "attempt" portion did not alter the crime-of-violence determination. The court also held that the alien's § 422 conviction, which is a wobbler offense punishable under California law as a felony or misdemeanor, is an aggravated felony because the superior court designated it a felony and sentenced him to 365 days in jail. The panel thus found the alien removable under 8 U.S.C. § 1101(a)(43)(F) and ineligible for cancellation of removal.

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**■ Ninth Circuit Amends Opinion and Denies Rehearing of Ruling that Reinstatement Order Was Not Issued Prematurely and Prosecutorial Discretion Memos Are Not a Change in Law Requiring Remand**

In ***Morales de Soto v. Lynch***, the Ninth Circuit amended its prior decision reported at 824 F.3d 822 (9th Cir. 2016), rejecting the petitioner's argument that ICE abused its discretion by reinstating her removal order before the time had expired for her to appeal the denial her I-212 waiver application, and declining the alien's request for remand to permit ICE to reconsider the exercise of its discretion in light of prosecutorial discretion memos released after the petitioner's reinstatement order was issued. The court added a sentence stating that petition for review was not barred by the statute's jurisdictional bar on collateral attacks on expedited orders of removal.

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**■ Ninth Circuit Holds That for Mandatory Immigration Detention to Apply, It Must Begin A "Very Short Time" After Release From Criminal Custody**

> **Under INA § 236(c), immigration officials must detain criminal or terrorist aliens "immediately," to mean within a "very short time," of their release from non-immigration custody.**

In ***Preap v. Johnson*** 831 F.3d 1193 (9th Cir. 2016) (*Nguyen*, Kleinfeld, Friedland), the Ninth Circuit ruled, in two companion cases, that to trigger mandatory detention under INA § 236(c), immigration officials must detain criminal or terrorist aliens "immediately," to mean within a "very short time," of their release from non-immigration custody. In so holding, the Ninth Circuit rejected the government's interpretation of the statute set forth in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

In ruling that Section 1226(c) unambiguously requires immediate detention, and that the loss of mandatory detention authority is not a sanction for a missed deadline, the Ninth Circuit rejected decisions from four other circuits that have ruled on those issues. The court noted however, that "the government's position has been rejected by most district courts to consider the question and, most recently, by three of six judges sitting *en banc* in the First Circuit."

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**Ninth Circuit Holds Venue Is Proper Where Withholding-Only Proceedings Are Completed, But Rules Transfer to the Proper Venue Was Not in the Interest of Justice**

In **Bibiano *v. Lynch,*** 834 F.3d 966 (9th Cir. 2016) (*Pregerson,* Tashima, Callahan), the Ninth Circuit held that while INA § 242(b)(2) is not jurisdictional, venue is proper where withholding-only proceedings are completed. The court nevertheless determined that it was not in the interest of justice to transfer the case to the Eleventh Circuit and remanded for the BIA to reconsider the petitioner's persecution and torture claims.

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**■ Ninth Circuit Holds Petitioner's Expunged Conviction Still Rendered Him Ineligible for Relief Because His Probation Placed Limits on His Liberty**

In ***Reyes v. Lynch,*** 834 F.3d 1104 (9th Cir. 2016) (*Kleinfeld,* McKeown, Ikuta), the Ninth Circuit held that the petitioner's controlled-substance conviction, even though it had later been expunged, nonetheless rendered him ineligible for adjustment of status or cancellation of removal. The court concluded that the terms of the petitioner's probation entailed sufficient restraints on his liberty for it to constitute a conviction for immigration-law purposes.

The court explained that California law treats defendants who are in a similar position to petitioner as though "both the arrest and the conviction ... never ... occurred," for most

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purposes. Congress, however, is entitled to take a different position, and did. This is because California cannot "dictate how the term 'conviction' is to be construed under federal law."

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**California cannot "dictate how the term 'conviction' is to be construed under federal law."**

**■ Ninth Circuit Upholds Regulation Precluding Alien Whose Removal Order Has Been Reinstated From Being Considered for Asylum**

In ***Perez-Guzman v. Lynch***, 835 F.3d 1066 (9th Cir. 2016) (*Fisher*, Smith, Nguyen), the Ninth Circuit held that the Attorney General's regulation, 8 C.F.R. § 1208.31(e), which provides for reference of an alien's case to an immigration judge for "consideration of the request for withholding of removal only," precludes an alien subject to a reinstated removal order from applying for asylum and is a reasonable interpretation of the statutory scheme that is entitled to *Chevron* deference. Based on the agreement of both parties, the court remanded for further consideration of the alien's application for withholding of removal and CAT protection in light of intervening circuit precedent.

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**■ Ninth Circuit Reverses Adverse Credibility Finding and Holds Agency Erred by Not Providing Notice Regarding Corroborative Evidence to an "Otherwise Credible" Alien**

In ***Bhattarai v. Lynch,*** 835 F.3d 1037 (9th Cir. 2016) (*Fletcher*, Murguia, Owens), the Ninth Circuit held that the agency's adverse credibility determination was unsupported by the record. The court additionally reversed the Immigration Judge's finding that the alien failed to provide corroborating evidence. Because the court deemed the alien "otherwise credible," it determined that the Immigration Judge erred by failing to give him notice and an opportunity to provide additional corroborative evidence or explain why it was not reasonably available.

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**■ Ninth Circuit Holds Indonesian Christian Presented Material Evidence of Changed Country Conditions**

In ***Salim v. Lynch,*** 831 F.3d 1133 (9th Cir. 2016) (*Reinhardt*, Wardlaw, Korman (by designation)), the Ninth Circuit held that the BIA abused its discretion in concluding the alien's evidence of changed country conditions for Indonesian Christians was "cumulative" of the evidence submitted during his underlying removal proceedings. The court also held that the BIA did not sufficiently consider whether written statements from the alien and his sister demonstrated an individualized risk of future persecution based on the alien's membership in a disfavored group.

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**■ Ninth Circuit Reaffirms that BIA Decision Denying Relief but Remanding for Voluntary Departure Proceedings Is Final Order of Removal**

In ***Surinder Singh v. Lynch***, 831 F.3d 1133 (9th Cir. 2016) (Kozinski, O'Scannlain, Gould) (*per curiam*), the Ninth Circuit reaffirmed circuit precedent that a BIA decision denying relief and protection but remanding only for voluntary departure proceedings is a final reviewable removal order. Because petitioner failed to petition for review with 30 days of the BIA decision but waited until the voluntary departure proceedings had been completed, the court dismissed the petition as untimely. Both parties had argued in supplemental briefing that circuit precedent was incorrect, but the court did not order a rehearing *en banc*.

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**■ Ninth Circuit Holds Government Failed to Make Threshold Evidentiary Showing that the Material Support Bar May Applies**

In ***Budiono v. Lynch***, 837 F.3d 1042 (9th Cir. 2016) (Pregerson, *Tashima*, Callahan (*dissenting*)), the Ninth Circuit held that the government was required to make a threshold evidentiary showing that each requirement of the material support bar could be met before the alien was required to provide evidence demonstrating that the bar did not apply to him. The court applied the same burden-of-proof framework that it applies in the context of the persecutor bar.

The court concluded that there was insufficient evidence demonstrating Jemaah Muslim Attaqwa qualified as a Tier III terrorist organization, and accordingly granted the alien's withholding of removal application.

Dissenting in part, Judge Callahan concluded that the panel imposed too high an evidentiary burden on the government, and suggested that the proper remedy in petitioner's case was to remand it to the BIA to apply the proper legal standard.

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# Summaries Of Recent Federal Court Decisions

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### ■ District Court Lacks Jurisdiction Over Class Action Suit Alleging Right to Counsel at Government Expense for Minors in Removal Proceedings

In *J.E.F.M v. Lynch*, *837 F.3d 1026* (9th Cir. 2016) (Kleinfeld, *McKeown*, M. Smith), the Ninth Circuit held that the INA barred jurisdiction in federal district court of the aliens' class action challenge asserting a constitutional and statutory right to counsel at government expense on behalf of all unrepresented minors in removal proceedings in the Ninth Circuit.

The court held that the minor aliens' right-to-counsel claims "arise from" their removal proceedings within the meaning of INA §§ 242(a)(5) and 242(b)(9), and thus they can only raise those claims in a petition for review after exhausting the administrative process.

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### ■ Ninth Circuit Holds that Being Listed as a Derivative Beneficiary in Parent's Relief Application Does Not Equate to an Admission for Purposes of Cancellation of Removal

In *Fuentes v. Lynch*, 837 F.3d 966 (9th Cir. 2016) (Silverman, Fisher, Watford) (*per curiam*), the Ninth Circuit held that an alien was not "admitted in any status" for purposes of the residency requirement for cancellation of removal for certain lawful permanent residents where he was listed as a derivative beneficiary on his mother's asylum and NACARA applications and received work authorization in the United States. The court declined to address whether the alien's own NACARA application would constitute an admission, as he failed to exhaust the argument.

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## TENTH CIRCUIT

### ■ Tenth Circuit Holds That the Definition of "Crime of Violence" under 18 U.S.C. § 16(b) Is Unconstitutionally Vague

In *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016) (*Briscoe*, Holmes, Moritz), the Tenth Circuit held that the INA's definition of "crime of violence" under INA § 101(a)(43)(F), which expressly incorporates 18 U.S.C. § 16(b)'s definition of that same term, is unconstitutionally vague in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

> **A BIA decision disagreeing with a prior judicial interpretation of an ambiguous statutory provision, was not effective in the Tenth Circuit until the court had approved its interpretation.**

Contact: Sunah Lee, OIL
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### ■ Tenth Circuit Holds That BIA Precedent Disagreeing With Prior Interpretation Went Into Effect Only After the Court Approved its New Interpretation of Ambiguous Statutory Provision

In *Gutierrez-Brizuela v. Holder*, 834 F.3d 1142 (10th Cir. 2016) (*Gorsuch*, McKay, Bacharach), the Tenth Circuit held that the BIA's decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), disagreeing with a prior judicial interpretation of an ambiguous statutory provision, was not effective in the Tenth Circuit until the court had approved its interpretation.

Consequently, the court concluded that the applicant was eligible to adjust status under INA § 245(i) under earlier judicial precedent – excusing inadmissibility under INA § 212(a)(9)(C)(i)(I) for the acquisition of more than one year of unlawful presence before an unlawful reentry – because he filed the application before the court adopted the Board's interpretation in *Matter of Briones*, which found such an applicant ineligible for adjustment of status.

Contact: Monica Antoun, OIL
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### ■ Tenth Circuit Rejects Challenge to Non-LPR Expedited Removal Process

In *Osuna-Gutierrez v. Johnson*, 838 F.3d 1030 (10th Cir. 2016) (Briscoe, *Ebel*, Bacharach), the Tenth Circuit upheld the expedited removal order procedures in 8 U.S.C. § 1228, INA § 238, for aliens convicted of aggravated felonies who are not lawful permanent residents. The court held that Congress empowered the Attorney General to create expedited-removal proceedings, which does not require an order of removal from an immigration judge; authority was properly transferred to the Department of Homeland Security; and the expedited-removal process was properly applied here because the alien's felony conviction under the federal Controlled Substances Act was an aggravated felony.

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## ELEVENTH CIRCUIT

### ■ Eleventh Circuit Holds Alien's Florida Drug-Sale Conviction Is "Illicit Trafficking" Aggravated Felony

In *Spaho v. U.S. Att'y Gen.*, 837 F.3d 1172 (11th Cir. 2016) (Marcus, Jordan (dissenting), *Walker* (by desig-

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nation)), the Eleventh Circuit held that the alien's conviction under Florida Statute § 893.13(1)(a)(1) constituted an "illicit trafficking" aggravated felony, making him removable. The court held the Florida statute is divisible by its actus-reus elements and concluded that, although some of the statute's actus-reus elements do not qualify as illicit trafficking, the alien was convicted of selling a controlled substance, which does. Judge Jordan dissented, concluding that the majority opinion conflicts with Eleventh Circuit precedent.

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**■ Eleventh Circuit Holds That Abusing an Elderly or Disabled Adult under Florida Law Is Categorically a Crime Involving Moral Turpitude**

In ***Gelin v. U.S. Att'y Gen.***, 837 F.3d 1236 (11th Cir. 2016) (*Hull*, Martin (*dissenting*), Wright (E.D. Ark., by designation)), the Eleventh Circuit held that a conviction under Florida Statute § 825.102(1), which proscribes abuse of an elderly person or disabled adult, is categorically a crime involving moral turpitude because it requires both a sufficiently culpable state of mind—the defendant must intend injury or a real likelihood of injury—and subjective knowledge of the victim's vulnerable status. Judge Martin dissented, concluding that the statute requires neither intent to injure nor knowledge of the victim's vulnerable status.

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## DISTRICT COURTS

**■ District of South Carolina Upholds Ability-to-Pay Regulation and Affirms USCIS's Application of it to Petitioner that Failed to Meet Its Burden of Proof**

In ***Four Holes v. Rodriguez***, No. 15-cv-3858 (D. S.C. September 9, 2016) (*Childs, J.*), the District of South Carolina denied a cattle farm's ("Four Holes") motion to set aside USCIS's denial of the I-140 petition it filed on its employee's behalf. The court determined that the ability-to-pay regulation at 8 C.F.R. § 204.5(g)(2) is not *ultra vires*. The court further concluded that the protocol set forth in 8 C.F.R. § 103.2(b)(2)(8) superseded USCIS's 2004 memorandum requiring requests for evidence. As for whether Four Holes had met its burden of proof, the court reasoned that USCIS's finding was neither arbitrary nor capricious—Four Holes failed to submit any audited, authenticated, or probative financial documents substantiating its ability to pay.

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> **The position of "churrasqueiro" or gaucho chef at Fogo de Chao restaurant involves "specialized knowledge."**

**■ District of District of Columbia Determines that Position of Churrasqueiro "Involves Specialized Knowledge" but that Petitioner had failed to Establish that the Beneficiary Possessed such Knowledge**

In ***Fogo de Chao (Holdings), Inc. v. U.S. Dep't of Homeland Security***, No. 15-cv-1272 (D.D.C. September 26, 2016) (*Walton, J.*), the District of the District of Columbia granted in part and denied in part the parties' cross-motions for summary judgment. Rejecting the agency's decision denying an L-1B visa, the court found that substantial evidence supported the conclusion that the position of churrasqueiro chef involves "specialized knowledge."

The court rejected the agency's conclusion that the company's on-the-job training could be given to local hires, characterizing this observation as an impermissible "labor market test." After concluding that the position of churrasqueiro qualified for an L-1B visa, the court found that plaintiffs had not adequately established that the named beneficiary possessed that specialized knowledge.

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**■ District of District Columbia Dismisses Challenge to DHS's Authority to Promulgate Rule Providing Work Authorization to H-4 Spouses of H-1B Workers**

In ***Save Jobs USA v. Dep't of Homeland Security***, No. 15-cv-615 (D.D.C. September 27, 2016) (*Chutkan, J.*), the court granted the government's motion for summary judgment, dismissing a lawsuit seeking to enjoin a rule permitting H-4 visa holders who are spouses of H-1B workers to apply for work authorization. Plaintiff claimed the rule unlawfully increased job competition for its members, former technology workers. The court held that plaintiff lacked Article III standing to challenge the Rule because it failed to demonstrate any imminent increase in competition particular to its members. The court also stated in dicta that Congress had delegated authority to DHS to promulgate a rule authorizing H-4 visa holders to work, such that DHS's interpretation of its authority under the INA was not unreasonable and the H-4 Rule was a valid exercise of that authority.

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# Changes to the Visa Bulletin

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### A. Allocation of family-based immigrant visas

Congress has provided that certain family relationships to a United States citizen or lawful permanent resident are a reason for an otherwise-eligible individual to obtain an immigrant visa to enter the United States. Some aliens – "immediate relatives" – are not subject to numerical limitation. However, all other qualifying family members are subject to limits. Section 201(c) of the INA provides the formula to compute the "worldwide level of family-sponsored immigrants under this subsection for a fiscal year." Section 203(a) of the INA allocates those numbers among classes of relations. There are also caps on the number of visas available to citizens of particular countries. Because demand exceeds supply, an individual who is the beneficiary of an approved visa petition obtains "a place in line." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2198 (2014) (opinion of Kagan, J.).

The Department of State ("DOS") and Department of Homeland Security ("DHS") share administration of the visa system. DHS, U.S. Citizenship and Immigration Services ("USCIS"), determines whether to grant a petition to recognize the beneficiary as the qualifying relative of the petitioning citizen or lawful permanent resident. The filing of the visa petition with USCIS establishes the priority date. DOS administers the visa numbers, and announces the availability of visas to approved beneficiaries in its monthly Visa Bulletin.

The availability of a current, approved visa petition is relevant to DOS's decision whether to issue an immigrant visa. For purposes of OIL's litigation, immediately available visas are relevant because they are a requirement for an alien present in the United States to adjust status to lawful permanent residence, without need to proceed abroad. *See* 8 C.F.R. §§ 245.1(g), 1245.1(g) (identifying the Visa Bulletin as the source of whether visas are immediately available). Regulations allocate the jurisdiction over such applications between USCIS and Immigration Judges.

In the bulk of OIL's work defending against petitions for review of final orders of removal, the currency of a visa petition arises in two contexts. An alien may challenge the denial of a continuance or administrative closure pending the currency of his visa petition. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). Or an Immigration Judge or the Board could deny a motion to reopen or remand to allow an alien to seek adjustment of status. In that setting, the applicant must make a prima facie showing of eligibility for relief, which – for aliens in a preference category who are not immediate relatives – means showing that a visa is immediately available or (at least) would be immediately available upon approval of a pending visa petition. 8 C.F.R. § 1003.2(a), (c)(1); *see Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002); *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) (implementing regulations allowing concurrent filing of adjustment application and visa petition).

**Until the September 2015 Visa Bulletin, determining whether someone had an immediately available visa was a simple process.**

Until the September 2015 Visa Bulletin, determining whether someone had an immediately available visa was a simple process. *See* 8 C.F.R. §§ 245.1(g), 1245.1(g). All one had to do was open the Bulletin, find the spot on the family-based immigration table (a matrix of the preference category and the nationality of the beneficiary), and determine whether the visa's priority date was before the date listed in the table.

### B. The November 2014 Executive Action affecting visas

The demand for immigrant visas and the limits set by Congress led to long delays. *Scialabba*, 134 S. Ct. at 2199 (opinion of Kagan, J.). It is in the interest of aliens desiring to immigrate to decrease that delay, and they (apparently) observed that the system of allocating visas left some visas unused. Thus, when the President announced his Executive Actions on immigration, he issued a memorandum calling for officials to develop, among other things, "recommendations to ensure that administrative policies, practices, and systems use all of the immigrant visa numbers that the Congress provides for and intends to be issued, consistent with demand." Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century, *available at* https://www.whitehouse.gov/the-press-office/2014/11/21/presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s. The following month, DOS and DHS published a request for information in the Federal Register, asking stakeholders for help formulating ideas to make sure that all visas are used. 79 *Fed. Reg.* 74858, 78460 (Dec. 30, 2014) (questions 15 and 16).

The administration released a report in July 2015 that summarized its plans. Modernizing & Streamlining Our Legal Immigration System for the 21st Century ("M&S"), *available at* https://www.whitehouse.gov/sites/default/files/docs/

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final_visa_modernization_report1.pdf. That report acknowledged the existence of statutory caps on visas that could only be changed by legislation. M&S at 27. That report indicated, "Over the last five years, State has averaged a 98 percent use of visa numbers authorized by statute, leaving some visa numbers unused due to systemic inefficiencies." M&S at 14.

The report made three recommendations affecting the availability of visas.** The Visa Bulletin would be updated to "ensure that the maximum number of available visas is issued every year, while also minimizing the potential for visa retrogression." M&S at 29. DOS would also increase visa allocations for the first three quarters of each fiscal year "in order to ensure that fewer numbers are left for the final quarter, thereby ensuring that visa numbers issued are as closely aligned with statutory mandates as possible." M&S at 29. And, in September, the last month of the fiscal year, the scheduling of appointments would be changed to "allow for the scheduling of additional cases when necessary in order to maximize the numbers of visas used, consistent with the annual limits." M&S at 30.

These plans were implemented in the October 2015 Visa Bulletin, the first Bulletin released in fiscal year 2016. The Bulletin now provides two tables for family-based visa petitions, named "Final Action Dates For Family-Sponsored Preference Cases"*** and "Dates For Filing Family-Sponsored Visa Applications." The second chart has more recent dates, i.e., it is more favorable to an alien awaiting a visa. The two tables appear on the Visa Bulletin each month, and each month USCIS (at https://www.uscis.gov/visabulletininfo) will announce which table must be used.

When the change was implemented, USCIS explained that the changes "will help ensure that the maximum number of immigrant visas are issued annually as intended by Congress, and minimize month-to-month fluctuations in Visa Bulletin final action dates." USCIS Announces Revised Procedures for Determining Visa Availability for Applicants Waiting to File for Adjustment of Status, *available at* https://www.uscis.gov/news/uscis-announces-revised-procedures-determining-visa-availability-applicants-waiting-file-adjustment-status. USCIS indicated that the first table was the "date[] when visas may finally be issued," while the second was the "earliest date[] when applicants may be able to apply." *Id.* USCIS explained:

> If USCIS determines that there are more immigrant visas available for a fiscal year than there are known applicants for such visas, we will state on this page that you may use the Dates for Filing Visa Applications chart. Otherwise, we will indicate on this page that you must use the Application Final Action Dates chart to determine when you may file your adjustment of status application.

https://www.uscis.gov/visabulletininfo.

**C. Two issues arising from the existence of two tables**

The regulations governing Immigration Judges and the Board provide that the Visa Bulletin is the source for determining whether a visa is immediately available for adjustment applicants. 8 C.F.R. § 1245.1(g). That regulation was written when there was one table, and now there are two. How will the Board (or an OIL attorney) determine whether a visa is current? Some cases are obvious: if it is not current on either table, it should not be immediately available; if it is current on both tables, it should be available. But what if is current on the second table but not on the first? Does it matter whether USCIS said the alien could rely on the second table at the time of the filing or adjudication? Perhaps. But USCIS also explained that this second table exists to show the "earliest date[] when applicants may be able to apply" and not the "date[] when visas may finally be issued." Such would seem to support the conclusion that the second table can never be consulted to determine whether an alien seeking to reopen has established prima facie eligibility for adjustment of status.

**USCIS also explained that this second table exists to show the "earliest date when applicants may be able to apply" and not the "date when visas may finally be issued."**

It is possible and even foreseeable that an alien will have a current visa according to the second, more favorable table, and will file a motion to reopen in a month when USCIS says she can use that table, but – before the Board adjudicates the motion – USCIS will have changed to say that the alien must use the first table, on which she does not have a current visa available. Visa retrogression is not a new phenomenon, even if the presence of this new table would seem to increase the number of times it occurs. It is worth recalling that the Board has a policy of holding applications in abeyance if an alien who files a motion to reopen when he has a current visa no longer has a current visa at the time of adjudication by the agency. *Matter of Ho*, 15 I&N Dec. 692 (BIA 1976).

# Changes to the Visa Bulletin

## A. FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

| **Family-Sponsored** | All Chargeability Areas Except Those Listed | CHINA-mainland born | INDIA | MEXICO | PHILIPPINES |
|---|---|---|---|---|---|
| F1 | 15SEP09 | 15SEP09 | 15SEP09 | 22MAR95 | 01JUL05 |
| F2A | 15NOV14 | 15NOV14 | 15NOV14 | 01SEP14 | 15NOV14 |
| F2B | 01FEB10 | 01FEB10 | 01FEB10 | 15SEP95 | 01DEC05 |
| F3 | 01DEC04 | 01DEC04 | 01DEC04 | 15NOV94 | 15JUN94 |
| F4 | 08OCT03 | 01JAN03 | 01JAN01 | 22APR97 | 15MAR93 |

*NOTE: For September, F2A numbers EXEMPT from per-country limit are authorized for issuance to applicants from all countries with priority dates earlier than 01SEP14. F2A numbers SUBJECT to per-country limit are authorized for issuance to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning

## B. DATES FOR FILING FAMILY-SPONSORED VISA APPLICATIONS

The chart below reflects dates for filing visa applications within a timeframe justifying immediate action in the application process. Applicants for immigrant visas who have a priority date earlier than the application date in the chart below may assemble and submit required documents to the Department of State's National Visa Center, following receipt of notification from the National Visa Center containing detailed instructions. The application date for an oversubscribed category is the priority date of the first applicant who cannot submit documentation to the National Visa Center for an immigrant visa. If a category is designated "current," all applicants in the relevant category may file applications, regardless of priority date.

The "C" listing indicates that the category is current, and that applications may be filed regardless of the applicant's priority date. The listing of a date for any category indicates that only applicants with a priority date which is **earlier** than the listed date may file their application.

Visit www.uscis.gov/visabulletininfo for information on whether USCIS has determined that this chart can be used (in lieu of the chart in paragraph 4.A.) this month for filing applications for adjustment of status with USCIS.

| Family-Sponsored | All Chargeability Areas Except Those Listed | CHINA-mainland born | INDIA | MEXICO | PHILIPPINES |
|---|---|---|---|---|---|
| F1 | 01JAN10 | 01JAN10 | 01JAN10 | 01APR95 | 22DEC05 |
| F2A | 22NOV15 | 22NOV15 | 22NOV15 | 22NOV15 | 22NOV15 |
| F2B | 08FEB11 | 08FEB11 | 08FEB11 | 22MAY96 | 01FEB06 |
| F3 | 22AUG05 | 22AUG05 | 22AUG05 | 01MAY95 | 01AUG95 |
| F4 | 15JUN04 | 15JUN04 | 01MAY04 | 01JUN98 | 15JUL93 |

## Mary Beth Keller Appointed Chief Immigration Judge

On September 21, 2016, EOIR announced Attorney General Loretta E. Lynch's appointment of MaryBeth Keller to the position of chief immigration judge. In this capacity, Judge Keller is responsible for overseeing the administration of EOIR's 58 immigration courts across the United States.

"After a very careful selection process, I am pleased to announce EOIR's next chief immigration judge," said Director Juan P. Osuna. "Judge Keller's 28 years of experience at EOIR provide her with an in-depth knowledge of the agency's history and operations, which will greatly assist her in leading our immigration judge corps during this time of tremendous change, challenge, and opportunity for the Nation's immigration court system."

Immediately prior to her current position, and beginning in February 2008, Judge Keller served EOIR as the assistant chief immigration judge (ACIJ) for issues of judge conduct and professionalism. She also supervised courts and served as the agency representative and chief negotiator dealing with the National Association of Immigration Judges employee union.

Judge Keller received a Bachelor of Arts degree in 1984 from the Catholic University of America and a Juris Doctor in 1987 from the University of Virginia School of Law. From July 2004 to February 2008, Judge Keller served as general counsel at EOIR. During that time, from July 2006 to February 2008, she served as acting ACIJ for Conduct and Professionalism, and from October 2004 to April 2006, she served as acting chief administrative hearing officer.

From 1988 to 2004, Judge Keller served as a senior manager and as an attorney at the Board of Immigration Appeals, EOIR. From 1987 to 1988, she served as a judicial law clerk in the 5th Judicial District of Iowa, in Des Moines, Iowa.

## Conversation with Marshall Golding

*(Continued from page 18)*

ing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases"), and *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984) (holding that "evidence derived from [unlawful] arrests [by INS officers] need not be suppressed in an INS civil deportation hearing," absent "egregious violations of Fourth Amendment or other liberties").

The conversation with Marshall, who does not have plans to retire, was moderated by OIL's Director of Special Immigration Projects, Francesco Isgro. The program is part of a series of interviews with OIL attorneys who have made significant contributions in immigration law.

By Don Scroggin, OIL

**OIL TRAINING CALENDAR**

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training.oil@usdoj.gov

**INDEX TO CASES SUMMARIZED IN THIS ISSUE**

# INSIDE OIL

## OIL Celebrates Its Longest Serving Attorney, Marshall Golding

On September 9, 2016, OIL celebrated its longest- (and DOJ's second longest-) serving attorney, Marshall Golding, who shared with younger attorneys his perspective of some sixty-two years of legal practice in public service.

After graduating from Yale University and Columbia Law School (J.D. 1952), Marshall started his legal career in 1954 with the U.S. military before working with the City Attorney of White Plains, New York. He joined the Department's Criminal Division in 1957, working in the General Crimes and Appellate sections, before joining OIL at its founding in 1983.

***Francesco Isgrò, Marshall Golding***

First as a criminal prosecutor and later as defender of the Attorney General in civil immigration cases, Marshall participated in a long line of prominent cases before U.S. Courts of Appeals and the Supreme Court, including, the famous appeal of Dr. Benjamin Spock and William Sloane Coffin (Marshall's former Yale classmate), *U.S. v. Spock*, 416 F.2d 165 (1st Cir. 1969), regarding Spock's and Coffin's criminal convictions for conspiracy to avoid the draft. He also handled the colorful *Billie Sol Estes v. United States*, 335 F.2d 609 (5th Cir. 1964), in which the Court affirmed plaintiff's criminal convictions for mail fraud and conspiracy.

Marshall also handled two much-cited and quoted Supreme Court cases dear to the hearts of all OIL attorneys: *INS v. Abudu*, 485 U.S. 94, 107, 111 (1988) (holding that the proper standard for BIA review of motions to reopen was the highly deferential abuse of discretion standard and emphasized the "strong public interest in bring-

*(Continued on page 17)*

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.



If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at [redacted] or at [redacted]

Office of Immigration Litigation

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

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