



Immigration Litigation Bulletin

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SEPTEMBER-NOVEMBER 2017

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Ninth Circuit Stays in Part Injunction Against Implementation of Presidential Proclamation Imposing Entry Conditions on Certain Nationals from Eight Countries

In *Hawaii v. Trump*, ___ F.3d ___, 2017 WL 5343014 (9th Cir. Nov 13, 2017) (Hawkins, Gould, Paez), in a two paragraph order, the Ninth Circuit granted in part and denied in part the government's motion for an emergency stay of the preliminary injunction entered by the district court in Hawaii which had enjoined the implementation of the Presidential Proclamation of September 24, 2017, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."

That Proclamation, among other matters, imposes tailored entry restrictions on certain nationals from eight countries. The entry restrictions apply to nationals of five countries whose nationals were subject to Executive Order 13780 (Somalia, Syria, Libya, Iran, and Yemen) and for na-

tionals of three additional countries, North Korea, Chad, and Venezuela.

For example, for countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranian nationals seeking nonimmigrant student and exchange visitor visas. For countries that are valuable counterterrorism partners but have information-sharing deficiencies (Chad, Libya, and Yemen), the proclamation only suspends entry of nationals seeking immigrant visas and non immigrant business, tourist visas.

The district court in Hawaii, which had previously enjoined the government from implementing parts of the now expired EO 13780, concluded as it had done previously, first that the Proclamation lacked "sufficient find-

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Divided Ninth Circuit panel holds "admitted in any status" in INA § 240A(a)(2) plainly encompasses both lawful and unlawful status

In *Saldivar v. Sessions*, ___ F.3d ___, 2017 WL 5150293 (9th Cir. November 7, 2017) (Reinhardt, Kozinski, Wardlaw), the Ninth Circuit held that the phrase "admitted in any status" under INA § 240A(a)(2), the cancellation of removal statute for certain permanent residents, plainly encompasses every status recognized by immigration statutes, lawful or unlawful.

The petitioner, apparently entered the United States in 1993, as a child, when he was waved through inspection at the port of entry in San Ysidro. He subsequently married a U.S. citizen and in 2006 adjusted his status. However, in 2012 he was convicted of a controlled substance violation and on that basis DHS placed him in removal proceedings.

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Presidential Proclamation

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ings that the entry of more than 150 million nationals from six specified countries would be 'detrimental to the interests of the United States,'" a precondition which the court held was necessary to properly invoke INA §212(f). Second, it found that the Proclamation "plainly discriminates based on nationality" because it is "antithetical to both [INA §202(a)], and the founding principles of this Nation."

State v. Trump, __ F.Supp.3d __, 2017 WL 46639560 (D. Hawaii Oct 17, 2017) (Watson, J.).

The Ninth Circuit affirmed the injunction as to foreign nationals who have a "close familial relationship" with a person in the United States.

The Ninth Circuit, quoting the Supreme Court's opinion in *Trump v. Int'l Refugee Assistance Project*

("IRAP"), 137 S. Ct. 2080, 2088 (2017), stayed the preliminary injunction except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States" and it affirmed the injunction as to foreign nationals who have a "close familial relationship" with a person in the United States. Consistent

with its prior interpretation of IRAP, the Ninth Circuit stated that persons

with a close family relationship include "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins." As for entities, the court cited IRAP in its holding that the relationship must be "formal, documented, and formed in the ordinary course, rather than for the purpose of evading Proclamation 9645."

The parties have filed their merits briefs with the Ninth Circuit Court of Appeals, and the government has also filed a request for stay with the Supreme Court.

"Admission in any status" includes unlawful status

The IJ determined that petitioner was deportable as charged, and following the parties' briefing on the issue, also determined that, even if petitioner had been waved through in 1993, he still was statutorily ineligible for cancellation because he could not establish the requisite seven years of continuous residence in the United States after being "admitted in any status." On appeal, the BIA affirmed the IJ's decision, relying on *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002), where it had held that admission with procedural regularity, such as being waved through the border by an immigration office, "is not tantamount to 'admission in any status,' either immigrant or non-immigrant."

The court rejected the government's contention that it owed deference to the BIA's interpretation in *Matter of Blancas-Lara*. The court found instead that "because the text of the INA 'unambiguously bars' the BIA's interpretation, 'that is the end

of the analysis,' and we must remand so that the Board may apply 240A(a)(2) in light of our holding."

The court agreed with the Fifth Circuit's decision in *Tula-Rubio v. Lynch*, 787 F.3d 288 (5th Cir. 2015), where that court had also applied the plain meaning of the statute and held that "any status" includes lawful and unlawful status.

Accordingly, the court found the government's argument that "in any status" means 'in any lawful status' . . . facially incorrect."

Dissenting. Judge Kozinski wrote that the majority's interpretation that immigrant status means both lawful and unlaw-

ful status defies "structure, precedent and common sense. . . . My colleagues misread the INA, trample our precedent and turn their backs on Chevron, all to create a giant loophole that will enable thousands to lie their way to relief that Congress

never intended them to have. The Fifth Circuit got it wrong and the Ninth follows them down the rabbit hole. It's time for another opinion."

Contact: Sergio Sarkany, OIL

☎ (b) (6)

"My colleagues misread the INA, trample our precedent and turn their backs on Chevron, all to create a giant loophole that will enable thousands to lie their way to relief that Congress never intended them to have"

FURTHER REVIEW PENDING: Update on Cases & Issues

Mandatory Detention

The Supreme Court heard reargument in *Jennings v. Rodriguez*, No. 15-1204, on October 3, 2017. Following original argument, the Court requested simultaneous supplemental briefing from the parties which were filed January 31, 2017, addressing whether the constitution requires particular limits on detention of aliens caught at the border entering illegally, or bond hearings after a particular period, or a particular standard and burden on a particular party to determine whether an alien must be release on bond. In the underlying Ninth Circuit's 2015 opinion, 804 F.3d 1060, that court held that all aliens detained pending completion of their removal proceedings, including criminals and terrorists, must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. Under that ruling, such bond hearings must be afforded automatically every six months, the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, and the length of the alien's detention must be weighed in favor of release.

The Court is holding the government's petitions for a writs of certiorari in two related cases, *Shanahan v. Lora*, No. 15-1204, and *Duke v. Preap*, No. 16-1363. The *Lora* petition challenges the Second Circuit's 2015 opinion, 804 F.3d 601, including 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. The *Preap* petition challenges the Ninth Circuit decision, 831 F.3d 1193, that a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration

custody immediately.

Contact: Sarah Wilson, OIL-DCS

☎ (b) (6)

Crime of Violence — Vagueness

The Supreme Court heard reargument in *Sessions v. Dimaya*, No. 15-1498, on October 2, 2017. On January 17, 2017, the Court heard original argument on the government's petition for a writ of certiorari 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 numerous related petitions for certiorari,

and other cases at various stages in the courts of appeals.

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☎ (b) (6)

Cancellation — Ambiguous Conviction Record

The Ninth Circuit has ordered the government to respond to the alien's petition for panel and en banc rehearing challenging the court's published opinion in *Marinelarena v. Sessions*, 869 F.3d 780. The petition seeks panel rehearing on the question of whether California Penal Code § 182(a)(1), conspiracy, is divisible; and seeks en banc rehearing on the question of whether *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), which held that if there is uncertainty over whether the alien was convicted of disqualifying offense the alien has not satisfied his burden of proof for cancellation of removal, remains good law in light of the Supreme Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013). The government response is due by December 18, 2017.

Contact: Patrick Glen, OIL

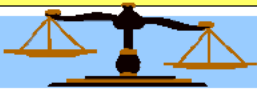
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Noted...

EOIR recently released statistics on the impact of Executive Order (EO) 13767: Border Security and Immigration Enforcement Improvements, which called for Attorney General Jeff Sessions to assign immigration judges to immigration detention facilities.

Pursuant to the President's Executive Order, over one hundred immigration judges have been mobilized to Department of Homeland Security detention facilities across the country, including along the southern border. This mobilization includes both in-person assignments and dockets heard via video teleconferencing (VTC).

Comparing the results of the surge to historical scheduling and outcome data, EOIR has projected that the mobilized immigration judges have completed approximately 2,700 more cases than expected if the immigration judges had not been detailed. This means that completed cases by detailed immigration judges have outpaced expected home court deferrals, resulting in a positive net effect on the nationwide caseload. Also, immigration judges mobilized to surge sites completed approximately 21 percent more cases on detail than the historical, expected performance of nondetailed immigration judges at the same base locations.



Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit, Assuming Jurisdiction Exists over Denials of Sua Sponte Reopening, Rules No Due Process Errors

In *Matias v. Sessions*, 871 F.3d 65 (1st Cir. 2017) (Kayatta, Thompson, Barron) the First Circuit ruled that, assuming that the court had jurisdiction to review legal and constitutional claims related to the BIA's denial of sua sponte reopening, petitioner had shown no due process errors in either the translation at the hearing or the brevity of the BIA's analysis.

The court explained that "To prevail on a translation-based due-process claim, allegations of translation difficulties are not enough; the petitioner must show that 'a more proficient or more accurate interpretation would likely have made a dispositive difference in the outcome of the proceeding.'" Here, the court found that had presented no evidence that the alleged mistranslations had any impact the outcome.

Contact: Allison Frayer, OIL

☎ (b) (6)

THIRD CIRCUIT

■ Third Circuit Vacates § 16(b) Crime of Violence Removal Order

In *Mateo v. Att'y Gen. of U. S.*, 870 F.3d 228 (3d Cir. 2017) (McKee, Jordan, Vanaskie), the Third Circuit relying on *Baptiste v. Attorney General*, 841 F.3d 601, 621 (3d Cir. 2016), held that 18 U.S.C. § 16(b), as incorporated into the INA is unconstitutionally vague. Mateo had been convicted of conspiracy to commit Robbery of a Motor Vehicle under 18 Pa. Cons. Stat. §§ 903 & 3702.

The court first explained that "[b]ecause the consequences of deportation are . . . severe, we take this opportunity to clarify that the vagueness doctrine should be applied in the civil immigration context just as it is applied in the criminal context, and that lesser degrees of specificity are not sufficient to overcome a vagueness challenge. The court then applied its prior holding in *Baptiste*, noting that the Sixth, Ninth, and Eleventh Circuits have all similarly deemed the provision to be void for vagueness in immigration cases.

Contact: Matthew Connelly, OIL

☎ (b) (6)

■ Third Circuit Holds Time Bar in 8 C.F.R. § 1003.2(c) Applies to Motions to Reopen Seeking Protection under Convention Against Torture

In *Bamaca-Cifuentes v. Att'y Gen. of U.S.*, 870 F.3d 108 (3d Cir. 2017) (McKee, Cowen, Fuentes), the Third Circuit held the time bar in 8 C.F.R. § 1003.2(c) applies to motions to reopen removal proceedings where an alien seeks CAT protection. The court found that it was "clear from the unambiguous text of 8 C.F.R. § 1003.2(c) that the time and number restrictions in that regulation apply to all motions to reopen removal proceedings, regardless of the motion's underlying basis for relief." The court then ruled that because the petitioners submitted evidence of ongoing problems, they failed to demonstrate a material change in country conditions since their hearing before an Immigration Judge. Accordingly, the court held that "the BIA's failure to address Petitioners' underlying claims for protection under the CAT was not an abuse of discretion."

Contact: Todd Cochran, OIL

☎ (b) (6)

■ Third Circuit Holds Record Evidence Compels the Conclusion the Alien Is Entitled to Withholding of Removal

In *Mendoza-Ordonez v. Att'y Gen. of U.S.*, 869 F.3d 164 (Ambro, Restrepo, Nygaard) (3d Cir. 2017), the Third Circuit ruled that the record compelled the conclusion that petitioner was entitled to withholding of removal where the evidence revealed that he had encountered politically motivated death threats, Honduran Government inaction, a perpetrator and local judge who shared a political affiliation in opposition to his political opinion, and evidence of a politically corrupt justice system that failed to reign in politically motivated violence.

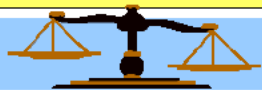
Contact: Sabatino F. Leo, OIL

☎ (b) (6)

■ Third Circuit Holds Absent Finding that Organization's Leaders Authorized Terrorist Activity, Organizations Cannot Be Deemed Tier III Terrorist Organizations

In *Uddin v. Att'y Gen. of U.S.*, 870 F.3d 282 (3d Cir. 2017) (Greenaway, Shwartz, Rendell), the Third Circuit held that "unless the agency finds that party leaders authorized terrorist activity committed by its members, an entity such as the Bangladesh National Party (BNP) cannot be deemed a Tier III terrorist organization." The BIA had found petitioner, a citizen of Bangladesh, ineligible for withholding of removal because he was a member of the BNP, a major political party in his homeland which qualified as a Tier III terrorist organization under INA § 212(a)(3)(B)(vi)(III). Thus, petitioner's

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membership in the BNP rendered him ineligible for withholding. The BIA pointed to terrorist acts by BNP members. But it did not find that BNP leadership authorized any of the terrorist activity committed by party members.

The court explained that “requiring a finding of authorization simply formalizes common sense notions as to what a terrorist

organization is. If a single member of the Democratic or Republican Party committed a terrorist act, we would not impute terrorist status to the entire group, absent some showing that party leadership authorized the act.” Thus said the court, “the acts of any single member of the

BNP can transform the organization into a terrorist group.” The court further noted that the BIA itself has stated in some cases, “[e]vidence of authorization may be direct or circumstantial, and authorization may be reasonably inferred from, among other things, the fact that most of an organization’s members commit terrorist activity or from a failure of a group’s leadership to condemn or curtail its members’ terrorist acts.”

Concurring, Judge Greenaway opined that a group should not be declared a Tier III terrorist organization based on the actions of a subgroup unless the subgroup is “significant” and unless the subgroup is subordinate to, or affiliated with, the larger group.

Contact: Daniel Smulow, OIL

☎ (b) (6)

“If a single member of the Democratic or Republican Party committed a terrorist act, we would not impute terrorist status to the entire group, absent some showing that party leadership authorized the act.”

FIFTH CIRCUIT

■ **Fifth Circuit Holds BIA Properly Denied Alien’s Motion to Reconsider Where She Failed to Present New Evidence or Facts and Waived Her Ineffective Assistance of Counsel Claim before the Court**

In *Lowe v. Sessions*, 872 F.3d 713 (Smith, Owen, Higginson (dissenting)) (5th Cir. 2015), the Fifth

Circuit concluded that the BIA acted within its discretion by denying petitioner’s motion to reconsider the denial of her motion to reopen wherein she argued before the agency that her 2007 adjustment of status did not constitute “any entry” for purposes of 8 U.S.C. § 1227(a)(1)(E)(i), without presenting new evidence or facts as required by the regulation for motions to reopen. The court also concluded that because she did not address her ineffective assistance of counsel claim before the court, she waived the opportunity to contest whether her former counsel was, in fact, ineffective.

Contact: Sheri R. Glaser, OIL

☎ (b) (6)

■ **Fifth Circuit Holds Confinement in a Substance Abuse Felony Punishment Facility Constitutes a Term of Imprisonment under the INA**

In *Calvillo Garcia v. Sessions*, 870 F.3d 341 (5th Cir. 2017) (Smith, Owen, Higginson), the Fifth Circuit held that the BIA’s published decision in *Matter of Calvillo Garcia*, 26 I&N Dec. 697 (BIA 2015), that confinement in a substance abuse felony punishment facility as a condition of community supervision constitutes a “term of imprisonment” under the INA is consistent with the plain meaning

of “term of imprisonment,” as defined in INA § 101(a)(48)(B) to include a “period of incarceration or confinement ordered by a court.”

Contact: Andrew O’Malley, OIL

☎ (b) (6)

SEVENTH CIRCUIT

■ **Seventh Circuit Holds Alien Who Concealed His Service in the Serb Army During the Bosnian War When Applying for Refugee Status Was Removable for Procuring His Status by Willful Misrepresentation of a Material Fact**

In *Asentic v. Sessions*, 873 F.3d 974 (7th Cir. 2017) (Manion, Kanne, Sykes), the Seventh Circuit held that the alien’s failure to disclose his military service on his refugee application was a willful misrepresentation of material fact that rendered him removable. Despite the alien’s claim that a caseworker from the International Organization for Migration advised him to omit his military service, the court determined that the misrepresentation was voluntary and deliberate and disclosure of the military service would have resulted in further investigation. The court further concluded that it lacked jurisdiction to review the discretionary denial of a waiver under INA § 237(a)(1)(H).

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☎ (b) (6)

■ **Seventh Circuit Concludes Attorney General’s Regulations Allow Immigration Judges to Grant a Nonimmigrant Waiver to U-Visa Applicants**

In *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017) (Bauer, Easterbrook, Hamilton), the Seventh Circuit reaffirmed its holding in *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014), that IJs could consider a

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nonimmigrant waiver of inadmissibility for U-visa applicants. The BIA had not identified any provision subtracting from the Attorney General's delegation of powers over immigration to immigration judges in 8 C.F.R. § 1003.10(a). It also ruled that alternative arguments offered to support the BIA's disclaimer of waiver authority premature, and better addressed on remand.

Contact: Rob Tennyson, OIL

☎ (b) (6)

■ **On Rehearing, Seventh Circuit Holds Alien Whose Removal Order Was Reinstated Is Not Eligible to Apply for Asylum after Accepting the Government's Concession of Alien's Standing to Challenge an Immigration Judge's Refusal to Consider His Asylum Request**

In *Garcia v. Sessions*, 873 F.3d 553 (Manion, Rovner, Coleman (by designation)) (7th Cir. October 11, 2017), the Seventh Circuit ruled that an alien subject to a reinstated order of removal is not eligible to apply for asylum. In a prior decision (reported at 859 F.3d 406), the court had held that the alien lacked standing to challenge the refusal to consider him for asylum after his removal order was reinstated. In line with the government's suggestion, the court granted panel rehearing.

The court announced that a majority of the court voted to overrule the portion of the circuit precedent (*Delgado-Arteaga v. Sessions*, 856 F.3d 1109 (2017)) upon which the panel's no-standing ruling was based. Reaching the merits, the court ruled that 8 U.S.C. § 1231(a)(5) unambiguously bars aliens with reinstated or-

ders of removal from obtaining asylum.

Contact: Lisa M. Arnold, OIL

☎ (b) (6)

■ **Seventh Circuit Holds Conviction under Illinois Felon-in-Possession of a Firearm Statute Does Not Qualify as an Aggravated Felony**

Felony possession of a firearm is not an "aggravated felony" because the state statute criminalizes felony possession of an air rifle, while the corresponding federal statute does not.

In *Rodriguez-Contreras v. Sessions*, 873 F.3d 579 (7th Cir. 2017) (Bauer, Easterbrook, Manion), the Seventh Circuit, held that a violation of 720 ILCS 5/24-1.1(a) (felony possession of a firearm) is not an "aggravated felony"

because the state statute criminalizes felony possession of an air rifle, while the corresponding federal statute does not.

Contact: Robert Stalzer, OIL

☎ (b) (6)

EIGHTH CIRCUIT

■ **Eighth Circuit Holds in Bona Fide Marriage Case that the Agency Violates an Alien's Right to Cross-Examine a Government Affiant When It Denies a Request to Subpoena the Affiant**

In *Patel v. Sessions*, 868 F.3d 719 (Gruender, Murphy, Kelly) (8th Cir. 2017), the Eighth Circuit joined the Seventh and Ninth Circuits in holding that an IJ cannot premise the denial of a good faith marriage waiver on an agency-produced affidavit from an ex-spouse admitting to marriage fraud and meanwhile deny the alien's request to subpoena the ex-spouse for cross-examination. The court explained the government "can't nullify" an alien's right under INA § 240(b)(4)

(B) to cross-examine witnesses "by presenting written declarations rather than live testimony."

Contact: Tim Ramnitz, OIL

☎ (b) (6)

■ **Eighth Circuit Holds Substantial Evidence Supported the Immigration Judge's Finding an Alien's Marriage Was Fraudulent**

In *Abuya v. Sessions*, 873 F.3d 650 (8th Cir. 2017) (Loken, Murphy, Melloy), the Eighth Circuit held that the alien entered into a sham marriage for the purpose of procuring adjustment of status. The court concluded that the testimony and documentary evidence submitted by the DHS constituted substantial evidence that supported the IJ's finding that the alien's marriage to a United States citizen was fraudulent under INA § 212(a)(6)(C)(i) and that the alien was therefore removable pursuant to INA § 237(a)(1)(A).

Contact: Kevin J. Conway, OIL

☎ (b) (6)

NINTH CIRCUIT

■ **Applying the Modified Categorical Approach, the Ninth Circuit Holds that Misdemeanor Assault Pursuant to Ariz. Rev. Stat. § 13-1203(A)(1) is a Crime of Domestic Violence Under INA § 237(a)(2)(E)**

In *Cornejo Villagrana v. Sessions*, 870 F.3d 1099 (9th Cir. 2017) (Kleinfeld, Wardlaw, Peterson (by designation)) the Ninth Circuit held that the alien's statute of conviction, Ariz. Rev. Stat. § 13-1203, is divisible, and that the record showed he was convicted under subsection (A) (1), which requires intentionally or knowingly causing physical injury to another. Because intentionally or knowingly causing physical injury necessarily requires the use of violent force, the court concluded that the alien was convicted of a crime of vio-

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lence under 18 U.S.C. § 16(a), and thus, a domestic violence offense, despite evidence from his plea colloquy indicating he only intended to “insult or provoke” his victim.

Contact: Corey Farrell, OIL

☎ (b) (6)

■ Ninth Circuit Affirms District Court’s Determination that USCIS Correctly Denied an Unlawfully Present Alien’s I-485 Application Based on his Failure to “Grandfather” in Under INA § 245(i)

In *Hsiao v. Hazuda*, 869 F.3d 1034 (9th Cir. 2017) (Clifton, Friedman, Rice (sitting by designation)), the Ninth Circuit affirmed the district court’s determination that USCIS correctly denied an unlawfully present alien’s I-485 application for adjustment of status based on the alien’s failure to “grandfather” in under 8 U.S.C. § 1255(i). The panel held that the agency’s denial of the alien’s prior I-140 immigrant worker visa petitions on the merits, and not as a result of circumstances that may have changed after the filing of the petitions, is dispositive of whether the previous petitions were “meritorious in fact” for the purpose of qualifying for grandfathering under the statute. The panel further held that, although USCIS may have had the option to reconsider the merits of the alien’s previous I-140 immigrant worker visa petitions in light of new evidence he submitted, the agency was not required to do so.

Contact: Glenn Girdharry, OIL-DCS

☎ (b) (6)

■ Ninth Circuit Holds IJ Must Make an Explicit Competency Finding When Indicia of Incompetency Present

In *Mejia v. Sessions*, 868 F.3d 1118 (9th Cir. 2017) (Graber, Murguia, Davila (by designation)), the Ninth Circuit held that the BIA abused its discretion by failing to explain why

it allowed the Immigration Judge to ignore procedural requirements in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), where the alien displayed “clear indicia” of mental incompetency. The court held that the indicia of mental incompetency triggered a duty of the Immigration Judge to make a competency finding, even though safeguards were in place during the proceeding.

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☎ (b) (6)

■ Ninth Circuit Holds That *Moncrieffe* Did Not Abrogate *Young’s* Holding that an Inconclusive Record of Conviction Renders an Alien Ineligible for Relief

In *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017) (Tashima (dissenting), Silverman, Graber), the Ninth Circuit rejected the alien’s and amicus’s arguments that *Moncrieffe v. Holder*, 569 U.S. 184 (2013), overruled the court’s decision *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*), holding that an alien cannot carry the burden of demonstrating eligibility for relief by establishing an inconclusive record of conviction. The court also held that the California conspiracy statute, Cal. Penal Code § 182(a)(1), is divisible as to the specific object crime.

Contact: Tim Ramnitz, OIL

☎ (b) (6)

TENTH CIRCUIT

■ Tenth Circuit Holds Asylum is Not Available to Aliens with Reinstated Removal Orders

In *R-S-C v. Sessions*, 869 F.3d 1176 (10th Cir. 2017) (Ebel, Lucero)

the Tenth Circuit agreed with every court which has considered this issue and held that aliens subject to a reinstated order of removal are not eligible for asylum. Although the court determined that there is ambiguity between the Immigration and Nationality Act’s asylum and reinstatement provisions, it afforded *Chevron* deference to the agency’s interpretation of these provisions. Thus, the court concluded that the regulations barring asylum to aliens in reinstatement proceedings constitute a reasonable interpretation of the INA.

The court concluded that the regulations barring asylum to aliens in reinstatement proceedings constitute a reasonable interpretation of the INA.

Justice Neil Gorsuch participated in the oral argument but not in the decision, in this case.

Contact: Tim Ramnitz, OIL

☎ (b) (6)

■ Tenth Circuit Holds BIA Abused Discretion in Denying Motion to Reopen Where Significant Increase in Level of Persecution Constitutes Material Change in Country Conditions

In *Qiu v. Sessions*, 870 F.3d 1200 (10th Cir. 2017) (Phillips, McKay, McHugh), the Tenth Circuit held that a significant increase in the level of persecution constitutes a material change in country conditions, rather than indicating a continuation of adverse conditions. The court further held that the Board abused its discretion in determining the alien had not submitted sufficient evidence of changed country conditions where the record contained numerous country condition reports, articles, and a letter from alien’s mother that supported alien’s claim of worsening conditions.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds a Waiver of Inadmissibility under INA § 212(h) is Not Available in Conjunction with an Application for Special Rule Cancellation of Removal

In *Arevalo v. U.S. Attorney General*, 872 F.3d 1184 (11th Cir. 2017) (J. Carnes, Fay, Goldberg (by designation)) (*per curiam*), the Eleventh Circuit joined the Ninth Circuit in holding that the BIA's interpretation in *Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012), that an applicant for special rule cancellation of removal is not eligible for a waiver of inadmissibility under INA § 212(h) is entitled to deference under *Chevron*.

Contact: William Minick, OIL

☎ (b) (6)

DISTRICT COURTS

■ Southern District of Texas Finds LPR's Two Week Vacation Requires New Lawful Admission for Naturalization Eligibility

In *Pineda v. Duke*, No. 4: 15-cv-02179 (S.D. Tex. September 11, 2017) (*Johnson, M.J.*), the District Court for the Southern District of Texas granted the Government's motion for summary judgment of a suit seeking *de novo* review under 8 U.S.C. § 1421(c) of the denial of an application for naturalization. The court held that plaintiff's January 2000 controlled substance conviction rendered him inadmissible when he returned from a two week vacation in Honduras, even though he was a lawful permanent resident. The court further determined that an LPR must show lawful admission for permanent residence every time that he enters the

country. In reaching its conclusions, the court looked solely to the Certified Administrative Record, without requiring the parties to engage in discovery.

Contact: J. Max Weintraub, OIL-DCS

☎ (b) (6)

■ District of District of Columbia Denies Preliminary Injunction in MAVNI Lawsuit, Finding No Likelihood of Success on the Merits

In *Nio v. U. S. Dept. of Homeland Security*, No. 17-cv-998 (D.D.C. September 6, 2017) (*Huvelle, J.*), the District of Columbia denied the preliminary injunction motion brought by eight plaintiffs in the Military Accessions Vital to National Interest (MAVNI) program. Plaintiffs sought a preliminary injunction to enjoin Department of Homeland Security from implementing enhanced background checks conducted by the Department of Defense ("DoD") prior to naturalization and prevent the DoD from reviewing its Form N-426, Certification of Military Service, process. The court found that plaintiffs had not suffered irreparable harm at the hands of DoD, and denied any injunctive relief against that agency.

Although the court did find that USCIS's delay in adjudicating the naturalization applications had caused plaintiffs to suffer irreparable harm, plaintiffs had not shown a likelihood of success on the merits of their APA claims. The enhanced security screenings are not arbitrary and capricious under 5 § 706(2) because the policies respond to national security. The court further found that although this policy has the characteristics of a legislative rule, the Plaintiffs are not likely to succeed on the merits of their notice-and-comment claim given the national security concerns. Finally,

the record did not support a finding of unreasonable delay under APA § 706(1).

Contact: Colin Kisor, OIL-DCS

☎ (b) (6)

Western District of New York Permits Parole Applicants to Proceed with Class Action, Issues Preliminary Injunction, Orders Bond Hearings at Six Months of Detention

In *Abdi v. Duke*, 17-cv-00721 (W.D.N.Y. November 17, 2017) (*Wolford, J.*), the Western District of New York denied respondents' motion to dismiss and granted petitioners' motion for preliminary injunction in a class action alleging that the ICE Field Office in Batavia, New York routinely and improperly denies parole requests of arriving aliens. Petitioners asked the court to order (re) adjudication of parole requests in compliance with ICE memoranda and directives, and to require a bond hearing for any putative class member detained at least six months. The court indicated that the continued detention of asylum-seekers who have passed credible fear interviews, without being afforded minimal procedural protections, would result in extreme or very serious irreparable damage.

The court ordered the government to "comply with their internal directive concerning parole hearing [s]" and, after six months of detention, to "provide individualized bond hearings and establish by clear and convincing evidence that an asylum-seeker is a flight risk or a danger to the community to justify continued detention." In so holding, the court found that INA § 235(b) "contains an implicit time restriction requiring . . . a bond hearing for detained asylum-seekers after six months of confinement."

Contact: J. Max Weintraub, OIL-DCS

☎ (b) (6)

New OIL Trial Attorneys



Christin Whitacre, Nelle Seymour, Abby Leach, Jonathan Ross

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or Society and received the David B. Newman and Kathryn R. Newman Prize for Trial Advocacy. Prior to joining OIL as an Honors Attorney for the Radford Team, she clerked for Judges David S. Schell and David Bernhard at the Fairfax Circuit Court in Fairfax County, Virginia.

Nelle Seymour received her B.A. from the University of Richmond in 2010 and her J.D. / M.P.H. through Northeastern University School of Law and Tuft University School of Medicine in November of 2016. Before moving to Boston for graduate school, Nelle lived and worked in D.C. for a few years, first with a law firm and then with an international women's rights organization. Nelle completed two internships with OIL-Appellate as a law student and is grateful for this opportunity to return as a member of the team.

Jonathan Ross joins OIL after two years as an attorney advisor at the Charlotte Immigration Court. He is a graduate of the University of North Carolina at Greensboro, with degrees in international business and Asian studies. During law school, he advanced his interest in immigration law by co-founding the school's chapter of the International Refugee Assistance Project (IRAP). In addition, Jonathan worked at OIL as an intern for two semesters. In 2015 he obtained his J.D. and M.A. from American University.

Abby Leach obtained her B.S. in Psychology from the University of Mary Washington in 2012, and her J.D. from the Catholic University of America, Columbus School of Law in May of 2017. She returns to OIL after spending two semesters as a volunteer intern and the summer of 2016 as a SLIP, all while as a member of the Payne team.

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Noted...

Based on a new information-sharing partnership between USCIS and the Social Security Administration (SSA), foreign nationals in certain categories or classifications can now apply for work authorization and a social security number using a single form – the updated Form I-765, Application for Employment Authorization.

To lawfully work in the United States, foreign workers in some categories and classifications need both an employment authorization document (EAD) from USCIS, and a Social Security number (SSN) from the SSA. Previously, applicants needed to submit a Form I-765 to USCIS for an EAD, and then submit additional paperwork in-person at their local Social Security office to obtain an SSN.

INSIDE OIL

Congratulations to OIL's Senior Litigation Counsel **Jennifer J. Keeney**, who was the recipient of the John Marshall Award at The Attorney General's 65th Annual Awards Ceremony.

The John Marshall Awards are the Department's highest awards offered to attorneys, for contribution in specialized area of legal performance. Ms. Keeney received her awards for providing legal advice in immigration litigation involving the criminal removal grounds. Among the reasons stated for the award, was Ms. Keeney's "comprehensive knowledge and understanding of the criminal removal statutes, the governing case law, and the rigorous analyses applicable to complex immigration questions are virtually unmatched. . . In all that she does, Ms. Keeney's work reflects the highest standards of a DOJ attorney, and she is truly deserving of this award."



Jennifer Keeney, Dave McConnell, Ernie Molina, Papu Sandhu

OIL recently welcomed the following new attorneys:

Christin Mitchell received her B.A. in English from the College of William and Mary in 2008, and her J.D. from

American University Washington College of Law ("WCL") in 2016. She previously worked as an investigator for the Family Permanency Project at the Children's Law Center in Washington, D.C., and as a legal

assistant for the Immigrant Justice Clinic at WCL's Clinical Program. While in law school, she interned for OIL in the spring of 2016. She was also president of the Mock Trial Hon-

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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 Isgro at (b) (6) - (b) (6) or at (b) (6).



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

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