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Immigration Litigation Bulletin

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Inside

New Executive Order Suspends For Ninety Days Entry of Nationals From Six Designated Countries

On March 6, 2017, the President issued Executive Order 13780 on "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 *Fed. Reg.* 13209 (March 9, 2017). The E.O. finds that the "unrestricted entry" of nationals of Iran, Lybia, Somalia, Sudan, Syria, and Yemen "would be detrimental to the interests of the United States," because the conditions in those countries present heightened threats, given in particular that "each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zone."

The E.O. reiterates that it is the "policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the [U.S. Refugee Admissions Program] USRAP."

Accordingly, Section 2 of the E.O. suspends for ninety days, effective from March 16, 2017, the entry into the United States of nationals from those countries and, among other things, directs DHS, State, and the DNI to conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat."

Section 3 of the E.O. provides categorical exceptions and case-by-

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Court of Appeals Adverse Credibility Project – Report for 2017

The Adverse Credibility Project was established 14 years ago as a means to track decisions issued by the courts of appeals that specifically make a ruling on the agency's adverse credibility determinations. The decisions include opinions, memorandum dispositions, and orders – that is, decisions that are unpublished and published, non-precedent and precedent. The "database" or source for obtaining these decisions are the paper copies of decisions that the clerks' offices send to OIL and electronic copies of decisions obtained by OIL paralegals, including the electronic copies of adverse decisions that the Adverse Support Team (headed by Angela Green) obtains.

The data compiled in the tables below reflect relevant decisions issued by the courts of appeals in 2016, the most recent year for which complete data are available. The tables tally all decisions in which – regardless of the ultimate outcome of the petition for review – the appellate

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Executive Order Focuses on Homeland Security

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case waivers for nationals of the six designated countries. The suspension of entry only applies to nationals of those countries who are outside the United States and did not have a valid visa on January 27, 2017. The suspension does not apply to any lawful permanent resident of the United States, any foreign national who has a valid document that permits travel to the United States to seek entry and admission, such as advance parole document, foreign nationals who have been granted protection such as asylum or refugee status, and to foreign nationals on diplomatic or diplomatic type visas.

Section 3(c) of the E.O. provides that notwithstanding the suspension of entry of nationals from the six designated countries, consular officers and CBP officials have discretion on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national from one of those countries if "if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would pose undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest." The E.O. also provides a list of situations where a waiver would be appropriate.

Among other actions, Section 6 the E.O. suspends the travel of refugee into the United States under the USRAP for 120 days, also subject to same waivers under Section 3 of the E.O. The E.O also limits the number of refugee admissions for FY 2017 to not more than 50,000.

The E.O. directs DHS to expedite the completion and implementation of the biometric entry-exit tracking system as was recommended by the National Commission on Terrorists Attacks Upon the United States. The E.O. directs the State Department to suspend the Visa Interview Waiver Program "and ensure compliance with section 22 of the INA which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions."

The March 6 E.O. specifically revokes E.O. 13769 noting that the "enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign national with no prior or substantial connection to the United States."

District Court in Hawaii Blocks Implementation of Sections 2 & 6 of E.O. 13,780

On March 29, the District Court in Hawaii entered a preliminary injunction blocking the government from implementing Sections 2 and 6 of E.O. 13, 780. ***Hawai'i v. Trump***, __ F.Supp.3d __, 2017 WL 1167383 (D. Hawai'i March 29, 2017) (Watson, J.).

The plaintiffs, the State of Hawai'i and an American citizen who is the Imam of the Muslim Association of Hawai'i, claimed that that the E.O. inflicted injuries upon residents of Hawaii, and injuries to the Imam, his family, and members of his Mosque.

The court found that the plaintiffs had Article III standing and that the State plaintiff had identified monetary and intangible injuries to the University of Hawaii. The court found that the Imam had standing because "he alleged injuries that were "personal, concrete, and particularized," namely that the effects of the E.O would be "devastating" to him, his wife and children, and that he and members of his Mosque would not be able to associate as freely with those of other faiths.

The court then explained its conclusion that the plaintiffs had met their burden of showing that they were likely to succeeds on the merits, that they would suffer irreparable harm in the absence of preliminary relief, and that the balance of equities tipped in the plaintiffs' favor, and that the injunction was in the public interest.

In particular, the court determined that the E.O. violated the Establishment Clause noting that "the historical context and 'the specific sequence of events leading up to' the adoption of the challenged Executive Order are as full of religious animus, invective, and obvious pretext as is the record here." The court rejected the government's contention that it should give deference to the President and should not to look beyond the exercise of his discretion taken on the basis of a facially and legitimate and bona fide reason.

The court determined that a nationwide preliminary injunction was appropriate because plaintiffs were likely to prevail on their Establishment Cause claim. The court declined the government suggestion to limit the injunction to Section 2(c) of the E.O. The court explained that "the entirety of the Executive Order runs afoul of the Establishment Clause where 'openly available data []supports a commonsense conclusion that a religious objective permeated the government's action,' and not just Section 2(c)."

The government has appealed the decision, and a Ninth Circuit panel is scheduled to hear oral arguments on May 15, 2017.

Credibility Project Update

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court has either approved of, or reversed, the adverse credibility holding reached by the immigration judge or Board of Immigration Appeals regarding asylum, withholding of removal, and/or protection under the Convention Against Torture. Petitions for review in which the decision does not decide an adverse credibility issue are not counted, even if the immigration judge or Board made an adverse credibility determination. Cases in which the court upheld the agency's adverse credibility determination, although granting the petition for review on a different issue, would be included in the data. However, a petition denied because of, for example, a failure to demonstrate the requisite nexus, without addressing any credibility issues, would not.

This project's results were used to support the adoption of the REAL ID Act amendments. The project now monitors results in both pre- and post-REAL ID Act cases. The current purpose of the project is to determine the extent to which the courts of appeals are applying those amendments. The underlying assumption is that the courts' conscientious application of the amendments should be reflected in higher government win rates in post-REAL ID Act cases. This has been true across the board, and in the Ninth Circuit, for the past five years.

RESULTS

Total number of credibility-related decisions remained steady at close to 200.

The chart shows that the number of relevant decisions in 2016 was 196, compared with 200 in 2015. By contrast, in 2014 the number was about 45% larger, 291. As usual, the Ninth Circuit issued the highest number of decisions addressing the EOIR's credibility findings (91 in 2016, up from 66 in 2015 but down from 122 in 2014). As in 2015, the second-place circuit in 2016 was the Second Circuit. In 2016, the Second Circuit number was 63, up from 52 in 2015, but down from 93 in 2014. None of the other circuits had numbers out of single digits.

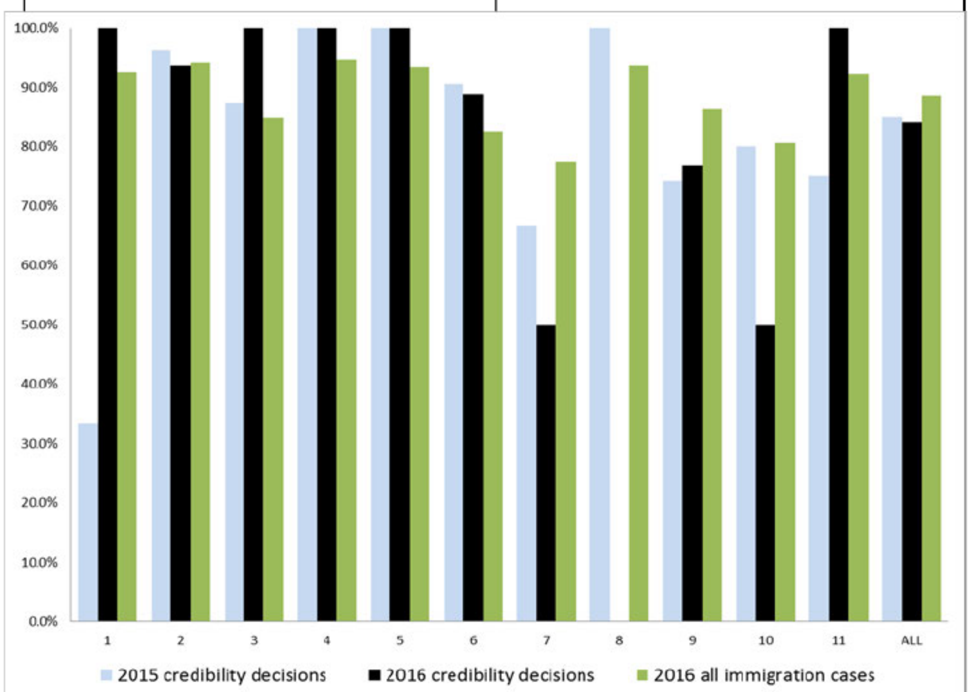
Overall win percentage decreased, but only slightly, from 2014 to 2016.

The overall win percentage in adverse-credibility-related cases in 2016 was 84.2%, compared with 85.0% in 2015 and 85.6% in 2014. In 2016, the win percentage in credibility-related cases was lower than the win percentage in all asylum cases (89.9%) and in all immigration cases (88.7%). In 2015, the win percentage in credibility-related cases (85.0%) also was slightly lower than for asylum cases generally (86.1%) and for immigration cases generally (86.9%). In 2014, the credibility win percentage (85.6%) was higher than the asylum win percentage (81.3%), but lower than the immigration win percentage (89.1%).

Adverse-credibility-related losses occurred in fewer circuits in 2016 than in 2015. During 2016, the win percentage rose in four circuits and declined in four circuits.

Credibility losses were reported in 2016 in five circuits: the Second, Sixth, Seventh, Ninth, and Tenth. In contrast, in 2015, losses occurred in eight circuits: the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh. In 2014, there were losses in six circuits: the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh. Between 2015 and 2016, win rates went up in four circuits: the First (33.1% to 100.0%), Third (87.5% to 100.0%), Ninth (74.2% to 76.9%), and Eleventh (75.0% to 100.0%). They went down in four other circuits: the Second (96.2% to 93.7%), Sixth (90.5% to 88.9%), Seventh (66.7% to 50.0%), and Tenth (80.0% to 50.0%).

Percentage of credibility-related cases decided under the REAL ID Act continued to increase, with win rates generally continuing to be higher in post-



Credibility Project Update

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REAL ID Act cases than in pre-. The win rate in post-REAL ID Act cases declined slightly, but the rate in pre-cases rose.

Decisions are categorized by whether they did or did not involve application of the changes introduced by the REAL ID Act. In 2016, 91.3% of the credibility-related decisions were decided under the REAL ID Act; in 2015, that percentage was 90.0%, and in 2014 it was 79.0%. The win percentage circuit-wide in 2016 was considerably higher for post-REAL ID Act determinations (85.5%) than for pre-REAL ID Act decisions (70.6%). The corresponding numbers in 2015 were 87.2% and 65.0%, and in 2014, 87.8% and 77.0%.

In 2016, the Ninth and Second Circuits – the same circuits with the biggest numbers of all credibility decisions – had the largest numbers of post-REAL ID Act decisions. The Ninth Circuit had 77 (84.6% of all its credibility decisions) and the Second had 62 (98.4%). Among the individual circuits, only the Second and Sixth Circuits had a higher win rate for pre-REAL ID cases than for post-REAL ID cases, and these reflected only one or two pre-REAL ID Act cases, respectively.

The Ninth Circuit showed declining numbers and win rates.

The number of credibility-related decisions was 91 in 2016, up from 66 in 2015 but down from 122 in 2014. The win percentage was 76.9%, up from 74.2% in 2015 but down from 80.3% in 2014. Focusing on the impact of the REAL ID Act, the number of post-REAL ID Act cases in 2016 was 77, 84.6% of all credibility decisions in the Ninth Circuit. In 2015, it was 56, representing 84.8% of all credibility decisions, and in 2014, it was 79, representing 64.8% of all credibility decisions.

Between 2015 and 2016, win rates in the Ninth Circuit rose for both pre- and post-REAL ID Act cases. The win rate for pre- was 64.3%, compared with 60.0% in 2015. The win rate for post- was 79.2%, compared with 76.8% in 2015. The win rates for both pre- and post-REAL ID Act cases were higher in 2014 (69.8% and 86.1%, respectively) than for 2016. Within the Ninth Circuit, the win rates in post-REAL ID Act cases continue to surpass those in pre-REAL ID Act cases, mirroring the circuit-wide pattern.

Contact: Alison R. Drucker, OIL
☎ (b) (6) [redacted]

2016 Credibility Decisions

Circuits	win (%)	win (#)	loss (%)	loss (#)	overall win % (all immigr. cases)
1st/pre REAL ID	0.0%	0	0.0%	0	
1st/post REAL ID	100.0%	1	0.0%	0	
1st/total	100.0%	1	0.0%	0	92.7%
2d/pre REAL ID	100.0%	1	0.0%	0	
2d/post REAL ID	93.5%	58	6.5%	4	
2d/total	93.7%	59	6.3%	4	94.2%
3d/pre REAL ID	0.0%	0	0.0%	0	
3d/post REAL ID	100.0%	8	0.0%	0	
3d/total	100.0%	8	0.0%	0	84.9%
4th/pre REAL ID	0.0%	0	0.0%	0	
4th/post REAL ID	100.0%	6	0.0%	0	
4th/total	100.0%	6	0.0%	0	94.7%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	5	0.0%	0	
5th/total	100.0%	5	0.0%	0	93.5%
6th/pre REAL ID	100.0%	2	0.0%	0	
6th/post REAL ID	85.7%	6	14.3%	1	
6th/total	88.9%	8	11.1%	1	82.6%
7th/pre REAL ID	0.0%	0	0.0%	0	
7th/post REAL ID	50.0%	4	50.0%	4	
7th/total	50.0%	4	50.0%	4	77.5%
8th/pre REAL ID	0.0%	0	0.0%	0	
8th/post REAL ID	0.0%	0	0.0%	0	
8th/total	0.0%	0	0.0%	0	93.7%
9th/pre REAL ID	64.3%	9	35.7%	5	
9th/post REAL ID	79.2%	61	20.8%	16	
9th/total	76.9%	70	23.1%	21	86.3%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	50.0%	1	50.0%	1	
10th/total	50.0%	1	50.0%	1	80.6%
11th/pre REAL ID	0.0%	0	0.0%	0	
11th/post REAL ID	100.0%	3	0.0%	0	
11th/total	100.0%	3	0.0%	0	92.3%
TOTAL	84.2%	165	15.8%	31	
Total/pre REAL ID	70.6%	12	29.4%	5	
Total/post REAL ID	85.5%	153	14.5%	26	

Win percentage in all asylum cases circuitwide -- 89.9%

Win percentage in all immigration cases circuitwide -- 88.7%

FURTHER REVIEW PENDING: Update on Cases & Issues

Citizenship – Equal Protection

On November 9, 2016, the Supreme Court heard argument in ***Lynch v. Morales-Santana***, No. 15-1191, challenging the Second Circuit's 2015 opinion, 804 F.3d 520, which severed, as a violation of equal protection, a distinction between unwed mothers and unwed fathers in the physical presence requirements of the 1952 statute providing for citizenship at birth of a child born abroad where only one of the parents is a U.S. citizen. The court extended the requirements for unwed mothers to unwed fathers. The same equal protection issue deadlocked the Supreme Court in *Flores-Villar v. United States*, 564 U.S. 210 (2011) (with Justice Kagan recused). The government argued that the Second Circuit erred in both the equal protection ruling and the remedy.

Contact: Andy MacLachlan, OIL
☎ (b) (6) [redacted]

Mandatory Detention

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

Contact: Sarah Wilson, OIL-DCS
☎ (b) (6) [redacted]

Aggravated Felony - Sexual Abuse of a Minor

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

Contact: Patrick J. Glen, OIL
☎ (b) (6) [redacted]

Crime of Violence — Vagueness

On January 17, 2017, the Supreme Court heard argument on the government's petition for a writ of certiorari in ***Lynch v. Dimaya***, No. 15-1498, challenging the judgment of a divided Ninth Circuit panel (803 F.3d 1110) that the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the aggravated-felony provision of the immigration laws, is unconstitutional in view of *Johnson v. United States*, 135 S. Ct. 2521 (2015) (striking down the "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)). The government contends that review is warranted because that ruling is incorrect, strikes down a federal statute, conflicts with a decision of another court of appeals, and is already causing substantial disruption to the enforcement of the immigration laws and several criminal laws. There are four related petitions for certiorari, and numerous other cases at various stays in the courts of appeals.

Contact: Bryan Beier, OIL
☎ (b) (6) [redacted]

Good Moral Character

On January 18, 2017, an en *banc* panel of the Ninth Circuit heard argument on the government petition for rehearing en banc in ***Ledezma-Cosino v. Lynch***, challenging the panel's decision, 819 F.3d 1070, holding that the "habitual drunkard" bar to good moral character is unconstitutional under the Equal Protection Clause. The panel majority concluded that the provision targeted an underlying medical condition, alcoholism, and held "that, under the Equal Protection Clause, a person's medical disability lacks any rational relation to his classification as a person with bad moral character[.]" In its petition for rehearing, the government argued: 1) there are not two similarly situated classes of aliens, and 2) even assuming such classes, the statutory provision is rationally related to Congress's intent to limit eligibility for relief and benefits to those who do not present risks to public health and safety.

Contact: Aimee Carmichael, OIL
☎ (b) (6) [redacted]

Withholding – "One Central Reason"

On April 19, 2017, the government filed a petition for rehearing en banc challenging the Ninth Circuit's published decision in ***Barajas-Romero v. Sessions,*** 846 F.3d 351, which held that "a reason," rather than the "one central reason" standard applicable to asylum, is the standard for nexus in mixed-motive withholding of removal cases.

Contact: Jesi Carlson , OIL
☎ (b) (6) [redacted]

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds Res Judicata Does Not Apply to the Court's Plenary Jurisdiction to determine Citizenship

In ***Miranda v. Sessions***, 853 F.3d 69 (1st Cir. 2017) (*Lynch*, Souter, and Baldock), the First Circuit, in an issue of first impression, held that petitioner's claim of *res judicata* "was immaterial" to the court's jurisdiction to consider petitioner's citizenship claim. The petitioner was once deemed to be a naturalized U.S. citizen by an IJ, even though the USCIS had denied that claim. Subsequently, petitioner was placed in removal proceedings because of a drug conviction. This second IJ refused to apply *res judicata* because doing so would "frustrate [ ] Congressional intent." Instead, the IJ determined that petitioner was not a U.S. citizen because he had been legitimated by his father under both Angolan and Massachusetts law and thus could not have derived citizenship through his mother's 1995 naturalization. The IJ ordered petitioner removed and the BIA affirmed that decision.

Before the First Circuit, petitioner again argued that the doctrine of *res judicata* should have been applied by the second IJ and his removal proceedings should have been terminated. The court determined that the *res judicata* issue was "immaterial" because the court had to adjudicate first whether petitioner was indeed a U.S. citizen. In particular, the court held that the criminal alien bar at INA § 242(a)(2)(C), and the statute governing nationality claims at INA § 242(b)(5), granted the court plenary jurisdiction to decide whether petitioner was subject to removal for having committed an aggravated felony.

The court rejected the petitioner's legal claim that his paternity had not been legitimated under the laws of Cape Verde, Angola, and Massachusetts. Therefore, the court ruled that petitioner did not derive citizenship through his mother's naturalization pursuant to 8 U.S.C. § 1432(a) (1996), and dismissed the petition for review for lack of jurisdiction.

Contact: Anthony Payne, OIL
☎ (b) (6) [redacted]

SECOND CIRCUIT

■ Second Circuit Holds That Immigration Judges Are Not Required to Determine Whether Removal Is Proportional to The Grounds of Removal Because Removal Is Not a Punishment

In ***Marin-Marin v. Lynch***, 852 F.3d 192 (2d Cir. 2017) (Hall, Livingston, *Garaufis* (by designation)), the Second Circuit held that neither the Fifth nor the Eighth Amendments required IJs to determine whether removal is constitutionally proportionate to the grounds for removal because removal is not a punishment.

The court held that it was "settled that deportation, being a civil procedure, is not punishment and the cruel and unusual punishment clause of the Eighth Amendment accordingly is not applicable."

The petitioner, a citizen of Equador who had entered the United States unlawfully in 2013, to live with his mother in Connecticut, claimed that the IJ and the BIA were required to conduct a proportionality analysis to determine whether his removal was excessive when compared to the noncriminal ground for his removal. The court held that it was "settled that deportation, being a civil procedure, is not punishment and the cruel and unusual punishment clause of the Eighth Amendment accordingly is not applicable."

Contact: Jessica Dawgert, OIL
☎ (b) (6) [redacted]

■ Second Circuit Holds Alien Failed to Establish He Met the Definition of "Child" in INA § 101(c)(1)

In ***Bueno Gil v. Sessions***, 851 F.3d 184 (2d Cir. 2017) (Walker, Hall, *Chin*), the Second Circuit held that the petitioner did not derive United States citizenship through his father because he was not a "child," as defined in INA § 101(c)(1), because the elimination of legal distinctions between children born in and out of wedlock under Dominican law did not occur before his sixteenth birthday. The court also concluded that the petitioner did not qualify as a "child" based on New York law, because he failed to identify any legal authority suggesting that New York has eliminated all legal distinctions between children based on the marital status of their parents.

Contact: Lisa Damiano, OIL
☎ (b) (6) [redacted]

■ Second Circuit Remands Criminal Alien's Claim for Humanitarian Asylum for the BIA to Determine its Timeliness under Matter of F-P-R-

In ***Linares-Urrutia v. Sessions***, 850 F.3d 477 (2d Cir. March 7, 2017) (*Jacobs*, Sack, Carney), the Second Circuit directed the BIA to determine whether, under *Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008), the alien's claim for humanitarian asylum was timely, given the Canadian border document in the record indicating he was in Canada for four hours within one year of filing his asylum application. The court commented that the BIA's interpretation of the phrase "last arrival in the United States," in *F-P-R-* was "problematical and could easily be read to produce absurd results." The court dismissed the criminal alien's factual challenges

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to statutory asylum, withholding of removal, and CAT protection for lack of jurisdiction.

Contact: M. Jocelyn Lopez Wright, OIL
☎ (b) (6) [redacted]

FOURTH CIRCUIT

■ Fourth Circuit Holds Nuclear Family Relationship Was At Least One Central Reason for Harm

In ***Cantillano Cruz v. Sessions***, 853 F.3d 122 (4th Cir. 2017) (Motz, *Keenan*, Thacker), the Fourth Circuit held that substantial evidence did not support the agency's finding that the asylum applicant, a native and citizen of Honduras, failed to establish a nexus between the harm she endured and a protected ground. The court reasoned that the IJ and the BIA applied an "improper and excessively narrow interpretation of the evidence relevant to the statutory nexus requirement."

The petitioner claimed that she feared persecution on account of her nuclear family ties to her husband Johnny Martinez (Martinez), whom she suspected had been murdered by his employer. Between 2001 and 2007, Martinez worked for the Honduran government as a border patrol agent. However, in 2007, he obtained new employment working as the personal bodyguard to Danny Avila, who claimed to be a fisherman. For about five years, Martinez accompanied Avila on extended "fishing trips." According to the testimony, Avila worked with organized crime groups in Honduras and Colombia that were engaged in the trafficking of drugs and firearms. In May 2012, Martinez told petitioner that because of Avila's criminal conduct, he planned to quit his job and to return to his employment as a border patrol agent. One week later, in June 2012, Martinez accompanied Avila on another "fishing trip," but Martinez did not return. When petitioner and Martinez's uncle Isaias, questioned Avila about Martinez's whereabouts, Avila told them to stop asking questions. After Isaias stated that he and petitioner would "put [in] a police report," Avila threatened that they would suffer the same fate as Martinez. Feeling threatened, eventually petitioner left Honduras.

The IJ found petitioner's testimony credible. He concluded that petitioner was a member of a cognizable particular social group, namely, the "nuclear family members of Johnny Martinez." Even though the two never married, the IJ concluded that they lived together as domestic partners and were considered a married couple. However, the IJ further found that petitioner failed to show that she had experienced persecution and feared future persecution "on account of her membership in the nuclear family" of Martinez. The IJ instead determined that the "main reason" Avila had threatened petitioner was to deter her from contacting the police. The BIA affirmed the IJ's decision noting that Avila's threats constituted "[h]arm meted out by a private actor for personal reasons or solely on general levels of crime and violence in Honduras."

The court initially noted that the BIA and IJ had properly concluded, and the government had not disputed, that by virtue of her domestic partnership with Martinez, petitioner was a member of a cognizable particular social group, namely, "the nuclear family of Johnny Martinez."

The court initially noted that the BIA and IJ had properly concluded, and the government had not disputed, that by virtue of her domestic partnership with Martinez, petitioner was a member of a cognizable particular social group, namely, "the nuclear family of Johnny Martinez."

The court then concluded that the applicant's nuclear family relationship was at least one central reason for the harm she endured in Honduras. The court explained that the "BIA and IJ shortsightedly focused on Avila's articulated purpose of preventing [petitioner] from contacting the police, while discounting the very relationship that prompted her to search for her husband, to confront Avila, and to express her intent to contact the police." Accordingly the court concluded that any past persecution by Avila was "on account of" her membership in the nuclear family of Martinez."

Contact: Yanal Yousef, OIL
☎ (b) (6) [redacted]

SIXTH CIRCUIT

■ Sixth Circuit Holds Alien May Qualify for Special Rule Cancellation without Disproving Possibility of Government Surveillance between Time of Arrival and Time of Apprehension

In ***Lopez v. Sessions***, 851 F.3d 626 (6th Cir. 2017) (*Sutton*, Clay, Griffin), the Sixth Circuit held that the Guatemalan alien, who was apprehended half an hour after crossing the U.S.-Mexico border in May 2001, nevertheless showed that he may be eligible for special rule cancellation of removal as "a registered ABC class member who has not been apprehended at the time of entry after December 19, 1990." The court agreed that entry without apprehension requires freedom from "official restraint," including government surveillance. However, it ruled that surveillance should be treated as equivalent to an affirmative defense, with

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the government bearing the burden of proof.

Contact: Colin Tucker, OIL
☎ (b) (6) [redacted]

SEVENTH CIRCUIT

■ **Seventh Circuit Holds Alien Failed to Demonstrate He Was Denied Due Process and BIA Properly Construed Alien's New Evidence on Appeal as a Motion to Remand and Properly Denied the Motion for Failure to Establish the New Evidence Was Previously Unavailable**

In ***Barragan-Ojeda v. Sessions***, 853 F.3d 374 (7th Cir. 2017) (Posner, *Ripple*, Rovner), the Seventh Circuit held that the petitioner failed to demonstrate that he was denied due process in the IJ's consideration of his asylum claim. The court also concluded that the BIA did not err in construing petitioner's new allegations on appeal as a motion to remand and properly denied the motion for failure to establish that the new evidence was previously unavailable.

Contact: Suzanne Nicole Nardone, OIL
☎ (b) (6) [redacted]

■ **Seventh Circuit Remands for the BIA to Consider Evidence of Changed Country Conditions in Sudan and South Sudan**

In ***Arej v. Sessions***, 852 F.3d 665 (7th Cir. 2017) (*Posner*, Sykes, Hamilton), the Seventh Circuit held that the BIA legally erred in ignoring evidence of changed country conditions in Sudan and South Sudan. Judge Sykes, concurring in the judgment, found that the BIA did not ignore evidence because it considered the totality of the record. However, she found that it remained legal error to deny a motion to reopen with only a generic assurance that the BIA considered the totality of the record. The court vacated the BIA's order and remanded to consider evidence of changed country conditions.

Contact: Jamie Dowd, OIL
(b) (6) [redacted]

■ **Seventh Circuit Holds Alien Lacks Standing to Challenge a Regulation Limiting His Relief to Withholding of Removal Because Asylum Is Discretionary**

In ***Delgado-Arteaga v. Sessions***, 852 F.3d 635 (7th Cir. 2017) (*Bauer*, Flaum, Hamilton), the Seventh Circuit rejected as moot the alien's challenge to the Department of Homeland Security's legal authority to issue final orders of removal under 8 U.S.C. § 1228(b), because the immigration judge had vacated the DHS's final order of removal. The court also held that the alien, subject to expedited removal, lacked standing to challenge the regulation limiting his relief to withholding of removal because he was not entitled to the discretionary relief of asylum.

Contact: Anna Juarez, OIL
☎ (b) (6) [redacted]

■ **Seventh Circuit Assumes U.S. Citizen Spouse Had a Constitutionally Protected Interest in Her Alien Spouse's Visa Refusal, but Refusal Was Nonetheless Facially Legitimate and Bona Fide**

In ***Hazama v. Tillerson***, 851 F.3d 706 (7th Cir. 2017) (*Wood*, Easterbrook, Williams), the Seventh Circuit affirmed on the merits the district court's dismissal of the complaint.

The petitioner, Samira Hazama, a U.S. citizen, is married to Ahmed Abdel Hafiz Ghneim, a citizen of the Palestinian Authority where she currently resides. Hazama filed a petition for an immigrant visa on behalf of Ghneim. The petition was approved by USCIS. However, following an interview with a consular officer in Jerusalem, the visa was denied. The consular officer again denied the visa on January 22, 2015, on the basis that Ghneim had personally engaged in terrorist activities because as a 13-year-old boy in Palestine, he had thrown rocks at Israeli soldiers.

The court assumed "for the sake of argument," as the Supreme Court did in *Din*, that Hazama had a constitutionally protected interest in the grant of a visa to her husband.

Hazama and Ghneim then filed a petition for a writ of mandamus in the district court for the Northern District of Illinois, where Hazama resides. The district court concluded that it lacked subject-matter jurisdiction over the petition, because review was precluded under the Supreme Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753(1972), and *Kerry v. Din*, 135 S.Ct. 2128 (2015).

The court assumed "for the sake of argument," as the Supreme Court did in *Din*, that Hazama had a constitutionally protected interest in the grant of a visa to her husband. However, the court explained that because consular decisions are generally not subject to review, "[a]ll we can do is to look at the face of the decision, see if the officer cited a proper ground under the statute, and ensure that no other applicable constitutional limitations are violated. Once that is done, if the undisputed record includes facts that would support that ground, our task is over."

The court found that, "even if ... Hazam was entitled to a reasoned explanation of the denial," the visa refusal was facially legitimate and

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bona fide because – in the absence of bad faith – the letter denying the visa, cited a proper statutory ground of inadmissibility, no applicable constitutional limitations were violated, and the decision was factually supported.

Contact: Derry Riedel, OIL-DCS
☎ (b) (6) [redacted]

■ Seventh Circuit Rejects Claim That 90-Day Filing Window for a Motion to Reopen Can Be Measured from a Decision Denying Reconsideration and Holds No Abuse of Discretion in Denying Ineffective Assistance of Counsel

In *Yusev v. Sessions*, 851 F.3d 763 (7th Cir. March 23, 2017) (*Wood*, Flaum, Rovner), the Seventh Circuit held that the 90-day filing window for filing a motion to reopen is measured from the BIA's decision dismissing an alien's appeal of a removal order, and not from a subsequent decision denying reconsideration. Otherwise, the court explained, "any petitioner wanting some extra time could just file a new motion to reconsider and have the clock reset." The court also held the BIA did not abuse its discretion in denying the alien's ineffective assistance of counsel claim based on lack of due diligence and lack of prejudice.

Contact: Tim Ramnitz, OIL
☎ (b) (6) [redacted]

EIGHTH CIRCUIT

■ Eighth Circuit Holds That Petitioner's Failure to Appear at Removal Hearing Was Not Because of Exceptional Circumstances

In Alvarado-Arenas v. Sessions, 851 F.3d 827 (8th Cir. March 22, 2017) (*Colloton*, Melloy, Shepherd), the Eighth Circuit held that petitioner failed to establish that his failure to appear at a removal hearing was due to exceptional circumstances. The court held that, even assuming the petitioner's absence from the country could be an exceptional circumstance, the BIA reasonably concluded that petitioner was in the United States at the time removal proceedings were initiated with the filing of a Notice to Appear.

Contact: Katherine Smith, OIL
☎ (b) (6) [redacted]

■ Eighth Circuit Holds Kansas Municipal Court Judgments Constitute Convictions for Immigration Purposes

In *Dominguez-Herrera v. Sessions*, 850 F.3d 411 (8th Cir. March 7, 2017) (Riley, *Kelly*, Wollman), the Eighth Circuit held that Kansas municipal court judgments for theft are convictions for immigration purposes under INA § 101(a)(48). The court further reasoned that the aliens' convictions constitute crimes involving moral turpitude because, to sustain a conviction for theft in Kansas, a defendant must be shown to have specifically intended to deprive the owner permanently of the possession, use, or benefit of the owner's property.

Contact: Sabatino F. Leo, OIL
☎ (b) (6) [redacted]

The court ruled that secondhand warnings predicated on rumors did not amount to past persecution and substantial evidence supported the agency's objectively reasonable fear finding on the merits.

■ Eighth Circuit Holds BIA Applied Correct Standard of Review and Asylum Applicant Failed to Show Secondhand Threats Amounted to Past Persecution or an Objectively Reasonable Fear of Future Persecution

In *Lemus-Arita v. Sessions*, __ F.3d __, 2017 WL 1371418 (Colloton, *Gruender*, Kelly) (8th Cir. April 17, 2017), the Eighth Circuit held that the BIA applied the correct standard of review in affirming the IJ's finding that the petitioner failed to establish an objectively reasonable fear of future harm. Addressing the merits of the petitioner's asylum claim, the court ruled that secondhand warnings predicated on rumors did not amount to past persecution and substantial evidence supported the agency's objectively reasonable fear finding on the merits.

Contact: Melissa Neiman-Kelting, OIL
☎ (b) (6) [redacted]

■ Eighth Circuit Holds Alien Had Burden to Show Extrajudicial Killing Bar Did Not Apply Where Record Evidence Indicated it May Apply

In *Maric v. Sessions*, __ F.3d __, 2017 WL 1379197 (8th Cir. April 18, 2017) (*Loken*, Murphy, Kelly), the Eighth Circuit held that an alien, who applied for a discretionary waiver of removal under INA § 237(a)(1)(H), had the burden to show the mandatory bar for extrajudicial killing, INA § 212(a)(3)(E), did not apply.

The petitioner is a citizen of Bosnia and Herzegovina, part of the former Yugoslavia. He was admitted into the United States as a refugee with his wife and two children in September 1999 and became an LPR 2001. In January 2011, DHS instituted removal proceedings against the petitioner charging that he had obtained immigration benefits by fraud or willful misrepresentation of a material fact. After a hearing, the IJ found petitioner removable because, at the time of his admittance and adjustment of status, he concealed that he had served in

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the Army of the Serb Republic, Vojska Republika Srpske ("VRS"), from January 2, 1995 to January 27, 1996, a period that encompassed the July 1995 massacre of thousands of Bosnian Muslim prisoners in Srebrenica, Bosnia and Herzegovina. Petitioner then applied for a discretionary waiver of deportation under § 237(a)(1)(H). The IJ found petitioner ineligible for this relief because he failed to prove he is not an alien who "committed ... assisted, or otherwise participated in" extrajudicial killings under color of law of any foreign nation. INA § 212(a)(3)(E)(iii). On appeal the BIA affirmed the IJ's decision.

Before the Eight Circuit, petitioner contended that the BIA had erred by not requiring the government to prove by clear and convincing evidence that he was inadmissible under § 212(a)(3)(E). The court held that under the plain language of the statute and governing regulations, petitioner had the burden under INA § 240(c)(4)(A) and 8 C.F.R. § 1240.8(d) to establish eligibility for the waiver because the DHS had provided evidence indicating that the bar "may apply." "The BIA properly placed on [petitioner] the burden to prove that the statutory bar to waiver relief in INA § 212(a)(3)(E)(iii) did not apply," concluded the court.

Contact: Paul F. Stone, OIL
☎ (b) (6) [redacted]

NINTH CIRCUIT

■ Ninth Circuit Holds That Presence in the Commonwealth of the Northern Mariana Islands at Time United States Immigration Laws Became Applicable Constitutes a Continuing Application for Admission

In *Minto v. Sessions*, __ F.3d __, 2017 WL 1371420 (9th Cir. April 17, 2017) (Kozinski, Hawkins, *Bea*), the Ninth Circuit held that the petitioner, a citizen of Bangladesh, who was present in the Commonwealth of the Northern Mariana Islands (CNMI) on the date the Immigration and Nationality Act became applicable there, was an applicant for admission.

The court further held that the petitioner's application was a continuing one by his mere presence in the CNMI. Thus, the court concluded that the petitioner was properly found to be inadmissible under INA § 212(a)(7)(A)(i)(I) because he lacked a valid entry document at the time of his removal proceedings.

> **The Ninth Circuit held that, for the purpose of determining eligibility for a waiver of inadmissibility, a conditional permanent resident was not materially different from a legal permanent resident.**

Contact: Ashley Martin, OIL
☎ (b) (6) [redacted]

■ Ninth Circuit Holds Conditional Permanent Resident Alien Ineligible for Waiver of Inadmissibility Because of an Aggravated Felony Conviction

In ***Eleri v. Sessions***, 852 F.3d 879 (9th Cir. 2017) (Nguyen, Owens, *Korman* (by designation)), the Ninth Circuit held that, for the purpose of determining eligibility for a waiver of inadmissibility, a conditional permanent resident was not materially different from a legal permanent resident.

The court further held that even if the statute were ambiguous, the interpretation of the BIA was based on a permissible construction, and concluded that the conditional permanent resident alien was ineligible for a waiver of inadmissibility.

Contact: Colette J. Winston, OIL
☎ (b) (6) [redacted]

■ En Banc Panel Overrules Circuit Precedent Regarding Evidentiary Standard for Assessment of Private Persecution Claims

In *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. March 8, 2017) (*Wardlaw*), after granting rehearing *en banc* and vacating its prior panel decision in *Bringas-Rodriguez v. Lynch*, 835 F.3d 891 (9th Cir. 2016), the Ninth Circuit overruled *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), to the extent that it held that the failure to report private persecution to government authorities creates a "gap" in the evidence or imposes a higher evidentiary standard to establish governmental inability or unwillingness to protect an asylum applicant who fails to report private persecution.

The petitioner, a citizen of Mexico, sought asylum, withholding of removal, and CAT protection. Claiming that he was physically and sexually abused as a child on account of his sexual orientation. He submitted evidence that Mexico was unable or unwilling to control his persecutors. Both the IJ and the BIA found petitioner's testimony credible, and both acknowledged that sexual orientation and identity can establish membership in a "particular social group." Nevertheless, both the IJ and the BIA denied petitioner relief, in part based on a conclusion that his evidence was insufficient to demonstrate that the Mexican government was unable or unwilling to control the private individuals who attacked him.

A divided panel of the Ninth Circuit agreed, relying primarily on

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Castro-Martinez v. Holder, 674 F.3d 1073 (9th Cir. 2011), which interpreted the "unable or unwilling to control" standard as requiring proof that the police are unable or unwilling to control the sexual abuse of children generally. The panel majority adopted the IJ's conclusion that it was unlikely that the Mexican government would take no action to control the "abuse of children."

On rehearing *en banc*, the Ninth Circuit held that the evidence petitioner adduced before the agency — credible written and oral testimony that reporting was futile and potentially dangerous, that other young gay men had reported their abuse to the Mexican police to no avail, and country reports and news articles documenting official and private persecution of individuals on account of their sexual orientation — satisfied the court's longstanding evidentiary standards for establishing past persecution and compelled the conclusion that petitioner suffered past persecution that the Mexican government was unable or unwilling to control. The court also held that petitioner was entitled to a presumption of future persecution and remanded to the BIA to consider whether the presumption was rebutted.

In dissent, Judge Bea, joined by Judge O'Scannlain, opined that the majority failed to properly apply the substantial evidence standard. "Despite my colleagues' faithful recitation of the proper standard of review, they effectively replace it with a much lower standard in violation of Supreme Court precedent and our nation's immigration law," wrote Judge Bea.

Contact: John Blakeley, OIL
☎ (b) (6) [redacted]

■ Temporary Protected Status Constitutes "Admission" Required to Adjust Status

In ***Ramirez v. Brown***, __ , F.3d __No. 14-35633 (*McKeown*, Tallman, Christen) (9th Cir. March 31, 2017, the Ninth Circuit held that the statute creating TPS, an immigration benefit that prevents removal to countries affected by war or natural disasters, unambiguously treats aliens with TPS as being "admitted" as required by 8 U.S.C. § 1255(a), and the petitioner TPS holder was eligible to obtain lawful permanent residence, even though he had earlier entered the United States without inspection. In so holding, the panel joined the Sixth Circuit and rejected a contrary ruling from the Eleventh Circuit.

> **The court held that the petitioner TPS holder was eligible to obtain lawful permanent residence, even though he had earlier entered the United States without inspection.**

Contact: Ashley Young Martin, OIL
☎ (b) (6) [redacted]

TENTH CIRCUIT

■ Tenth Circuit Holds Giving False Information in the Course of an Investigation Does Not Constitute a Crime Involving Moral Turpitude

In ***Flores-Molina v. Sessions***, 850 F.3d 1150 (10th Cir. March 7, 2017) (*McHugh*, Phillips, Matheson), the Tenth Circuit held that Denver Municipal Code § 38-40 is not a categorical crime involving moral turpitude (CIMT) because the minimum conduct proscribed by the statute – "knowingly and willfully" giving false information to an investigating city official – falls outside the "impair or obstruct the government by deceit" articulation of CIMT that has been applied to fraud and fraud-like statutes. The court further concluded that giving "false information" need not involve "depraved" conduct under the general CIMT definition, as the information need not be believable or affect the investigation.

Contact: Rebecca Hoffberg Phillips, OIL
☎ (b) (6) [redacted]

DISTRICT COURTS

■ Central District of California Affirms Denial of EB-5 Immigrant Investor Visa Petition

In ***Binbin Lei v. USCIS***, No. 15-cv-9654 (C.D. Cal. March 23, 2017) (Olguin, J.), the Central District of California granted summary judgment in an action challenging USCIS's denial of an EB-5 immigrant investor visa petition. The court ruled that USCIS's decision to deny the EB-5 petition was neither arbitrary nor capricious. The court held that the administrative record supported the USCIS Administrative Appeal Office's decision that the alien had never adequately demonstrated the lawful source of her (or her husband's) funding.

Contact: Glenn Girdharry, OIL-DCS
☎ (b) (6) [redacted]

■ Northern District of Illinois Affirms Denial of EB-5 Immigrant Investor Visa Petition

In ***Jane Doe v. USCIS***, No. 15-cv-10958 (N.D. Ill February 28, 2017) (Coleman, J.), the Northern District of Illinois granted summary judgment in an action challenging USCIS's denial of an EB-5 immigrant investor visa petition. The court rejected plaintiff's argument that USCIS acted in an arbitrary and capricious manner by denying plaintiff's petition when it had previously approved other investors' petitions based on the same investment project, holding the petitioner had no right to rely on the fact that the agency had approved other petitions filed by other investors. The court also held that the adminis-

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trative record supported USCIS's determination that the petitioner's investment would not satisfy the job creation requirement necessary to obtain EB-5 classification.

Contact: Heather Sokolower, OIL-DCS
☎ [redacted]

■ District of Columbia Dismisses APA Challenge to DHS Rules Permitting Foreign Students Lawfully Present on F-1 Visas to Apply for Work Authorization

In ***Washington Alliance of Technology Workers v. DHS***, No. 16-cv-1170 (D.D.C. April 19, 2017) (Walton, J.), the District Court for the District of Columbia granted the government's motion to dismiss, dismissing a lawsuit seeking to enjoin two DHS rules promulgated in 1992 and 2016 permitting foreign students lawfully present on F-1 visas to apply for work authorization. Plaintiff, an organization representing technology workers, claimed the rules unlawfully increased job competition for its members and exceeded DHS's statutory authority. The court held that plaintiff lacked Article III standing to challenge the 1992 Rule, and that while they successfully alleged competitor standing to challenge the 2016 Rule, they failed to plausibly allege procedural or substantive violations of the Administrative Procedure Act as to the 2016 Rule. The court did not address the merits of plaintiff's suit.

Contact: Erez Reuveni, OIL-DCS
☎ [redacted]

Naturalization of Individual Convicted of Defrauding the Government Revoked

In ***United States v. Sangoleye***, No. 1:16-cv-10673 (N.D. Ill. April 25, 2017)(Chang, J.), the court revoked the naturalization of an individual convicted of embezzling National Institutes of Health grant funds intended for biomedical research. Defendant admitted that she had lied to immigration officers about whether she had ever committed a crime of offense for which she had not been arrested. The court held that the defendant's naturalization was illegally procured, and procured by willful misrepresentation and concealment of material facts.

Contact: Aaron Petty of OIL-DCS
☎ [redacted]

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