



Immigration Litigation Bulletin

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DHS Begins Implementation of Executive Orders on Immigration Enforcement and Border Security

In two memoranda dated January 20, 2017, DHS Secretary Kelly provided guidance to the immigration agencies (USCIS, CBP, ICE) on the implementation of the Executive Orders on the enforcement of the immigration laws in the interior and at the U.S. borders.

In the memo entitled "Enforcement of the Immigration Laws to Serve the National Interest," Secretary Kelly stated that, with extremely limited exceptions "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws." All of those in violation of the immigration laws may be subject to enforcement proceedings, up to and including removal from the United States. The memo states that "in faithfully executing the immigration laws, Department personnel should take enforcement actions in accordance with applicable law."

The guidance makes clear, however, that ICE should prioritize for removal several categories of removable aliens who have committed crimes, beginning with those convicted of a criminal offense. Those are aliens subject to removal under INA Sections 212(a)(2), (a)(3), and (a)(6)(C), 235(b) and (c), and 237(a)(2) and (4).

The DHS Secretary directs ICE to "devote available resources to expanding the use of the Criminal Alien Program in any willing jurisdiction in the United States. To the maximum extent possible, in coordination with the Executive Office for Immigration Review (EOIR), removal proceedings shall be initiated against aliens incarcerated in federal, state, and local correctional facilities under the Institutional Hearing and Removal Program pursuant to section 238(a) of the INA, and administrative removal processes, such as those under section 238(b) of the INA, shall be used in all eligible cases."

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Peruvian LPR Ordered Removed for Having Voted Unlawfully in Federal Elections

In *Fitzpatrick v. Sessions*, 847 F.3d 913 (7th Cir. 2017) (*Easterbrook*, Williams, Sykes), the Seventh Circuit affirmed the BIA's precedent decision in *Matter of Fitzpatrick*, 26 I&N Dec. 599 (BIA 2015), finding a Peruvian, lawful permanent resident alien, removable under INA § 237(a)(6) as an alien who unlawfully voted in a state or federal election in violation of 18 U.S.C. § 611.

The petitioner, a citizen of Peru, had lived in the United States for three years when she applied for a driver's license in Illinois. She stated that when filling out the forms at the Department of Motor Vehicles she displayed her green card and her Peruvian passport – but she admits that she also checked a box claiming to be a citizen of the United States. In 2006, petitioner twice voted in elec-

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Implementation of Executive Orders On Immigration and Border Security

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The memo states that unless otherwise directed, DHS personnel may initiate enforcement actions against removable aliens encountered during the performance of their official duties. DHS personnel should act consistently with the President's enforcement priorities as identified in his executive order and any further guidance issued by the Director of ICE, the Commissioner of CBP, and the Director of USCIS prioritizing the removal of particularly dangerous aliens, such as convicted felons, gang members, and drug traffickers.

DHS personnel, however, can exercise prosecutorial in individual cases. The memo states that "[t]he exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis in consultation with the head of the field office component, where appropriate, of CBP, ICE, or USCIS that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field

Office Director, ICE Special Agent-in-Charge, or the USCIS Field Office Director, Asylum Office Director or Service Center Director."

Among other provisions in the memo, DHS Secretary said that he was "establishing the Victims of Immigration Crime Engagement (VOICE) Office within the Office of the Director of ICE, which will create a programmatic liaison between ICE and the known victims of crimes committed by removable aliens."

The Secretary also directs the immigration agencies to establish a program to collect authorized civil fines and penalties.

The memo also rescinds the Privacy Act guidance of January 7, 2009, and states that DHS will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents.

Border Security

In the memo entitled "Implementing the President's Border Security and Immigration Enforcement Improvement Policies," also dated February 20, 2016, the DHS

Secretary provided guidance to CBP and ICE on the enforcement of the immigration laws at the borders and the expanded use of detention consistent with the INA provisions.

In particular, ICE will release aliens from custody only under limited circumstances, such as when removing them from the country, when an alien obtains an order granting relief by statute, when it is determined that the alien is a U.S. citizen, legal permanent resident, refugee, or asylee, or that the alien holds another protected status, when an arriving alien has been found to have a credible fear of persecution or torture and the alien satisfactorily establishes his identity and that he is not a security or flight risk, or when otherwise required to do so by statute or order by a competent judicial or administrative authority.

Under the authority of the INA, the DHS Secretary stated that he will be expanding the use of expedited removal. To date, expedited removal has been exercised only for aliens encountered within 100 air miles of the border and 14 days of entry, and aliens who arrived in the United States by sea other than at a port of entry. DHS will publish in the Federal Register a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the INA that expands the category of aliens subject to expedited removal.

The memo directs ICE and CBP to implement the provisions of INA §235(b)(2)(C) and to the extent possible return aliens to contiguous countries from which they arrived, pending the outcome of removal proceedings.

The memo directs USCIS to enhance asylum referrals and credible fear determinations and to increase the operational capacity of the Fraud Detection and National Security Directorate.

LPR Ordered Removed for Having Voted Unlawfully

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tions for federal officials. Subsequently, in 2007 she applied for citizenship and in response to a question she described her voting history. DHS then instituted removal proceedings against her under § 237(a)(6) as an alien who had unlawfully voted. An IJ and later the BIA found petitioner removable as charged.

The Seventh Circuit rejected petitioner's defense that a state motor vehicles clerk implicitly authorized her to vote, noting that the clerk offered no assistance and told the alien "it's up to you." The petitioner, of her own

volition, checked the box on the voter registration form falsely indicating she was a citizen. "Registration to vote simply does not imply authorization to vote in any election one chooses," said the court. The court also noted that petitioner was well educated and understands English. "It is not too much to ask that she find out before voting whether an alien can cast a ballot in a federal election."

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(b) (6)

FURTHER REVIEW PENDING: Update on Cases & Issues

Citizenship – Equal Protection

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

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☎ (b) (6)

Mandatory Detention

Following argument in *Jennings v. Rodriguez*, No. 15-1204, the Supreme Court requested simultaneous supplemental briefing from the parties 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.

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☎ (b) (6)

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. Sessions*, 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.

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Crime of Violence – Vagueness

On January 17, 2017, the Supreme Court heard argument on the government's petition for a writ of certiorari in *Sessions 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 rul-

ing 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 seven related petitions for certiorari, and numerous other cases at various stages in the courts of appeals.

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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. Sessions*, 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.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Holds BIA Acted within Its Discretion in Denying Motion to Reopen and Reconsider

In *Cardona v. Holder*, 848 F.3d 519 (1st Cir. 2017) (Thompson, Selya, Lipez), the petitioner, a citizen of Guatemala, challenged the BIA's denial of her motion to reopen the denial of asylum and withholding. Petitioner who entered illegally on April 17, 2013, conceded her deportability but sought asylum based on an emotionally, physically, and sexually abusive relationship with a man whom she had dated in Guatemala named Juan Carlos. She claimed that to escape Carlos's physical and sexual violence, she made arrangements to travel to the United States. Before the IJ petitioner claimed that she belonged to two potential social groups — "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination" and "women in domestic relationships who are unable to leave."

The IJ found that petitioner's testimony was not credible and alternatively that her proposed social groups were not cognizable under the INA. The IJ also determined that petitioner could avoid the claimed persecution by relocating within Guatemala. On appeal the BIA acknowledged that in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), an intervening decision, it had held that, depending upon the circumstances of an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable social group but concluded that the petitioner "has not shown that she was in a domestic relationship and does not fit within the particular social group that she claims." The

BIA did not address the other issues and dismissed the appeal.

Petitioner then sought reopening claiming that the BIA had erred in citing *Matter of A-R-C-G-* in its decision because that case was decided after she had submitted her appeal brief, and that in any case she should have had a chance to submit a brief on that issue. The BIA rejected Petitioner's arguments and denied her motion to reopen and reconsider.

The First Circuit rejected petitioner's assertion that the BIA should not be permitted to cite a case in its decision denying her appeal from the IJ that was decided after she submitted her brief to the BIA. The court said it was "counsel's role to be alert to changes in the law," and that if the BIA had failed to cite *Matter of A-R-C-G-* when it reviewed the IJ's decision, could have been "grounds for remand from this court." Accordingly, the court held that the BIA was acting within its "broad discretion" in citing the case.

On the merits, the court concluded that the petitioner failed to show factually that she had the "domestic relationship" with her boyfriend upon which she based her proposed social groups.

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☎ (b) (6)

■ First Circuit Holds Rhode Island Law Prohibiting the Manufacture, Delivery, or Possession with Intent to Distribute a Controlled Substance Is Divisible

In *Swaby v. Yates*, 847 F.3d 62 (Barron, Stahl, Lipez) (1st Cir. 2017), the First Circuit held that Rhode Island General Laws § 21-28-4.01(a)

(4)(i) is divisible and subject to the modified categorical approach because the nature of the controlled substance is an element of the offense.

The petitioner, a Jamaican citizen, entered the United States on a tourist visa in May 1996, and he adjusted to lawful permanent resident status on May 14, 2010. On September 4, 2013, he pled nolo contendere in Rhode Island Superior Court to three counts of manufactur-

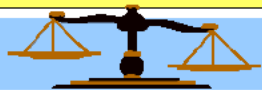
ing, delivering, or possessing with intent to distribute a controlled substance—to wit, marijuana.

On the basis of that conviction, DHS instituted removal proceedings and the IJ ordered his removal for having been convicted of a violation of any federal or state law "relating to a controlled substance" under

INA § 237(a)(2)(B)(i). Due to an oversight, petitioner was removed to Jamaica but then brought back to pursue his appeal to the BIA. The BIA affirmed the IJ's ruling and also rejected petitioner's contention that his conviction did not qualify as a removable offense under *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015).

The court concluded that the record of conviction established that the petitioner's offense involved marijuana, rendering him removable. However, the court rejected the BIA's application of the categorical approach under *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), concluding that there is a realistic probability that the state would prosecute a controlled substance that is not on the federal schedule of controlled substances where that substance is listed on the state schedule. The court then agreed with the govern-

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ment's contention that petitioner conviction was a removal offense under the modified categorical approach. The court found that "the relevant plea documents suffice to make clear that [petitioner's] convictions were for the manufacturing, delivering, or possessing with intent to distribute marijuana" and clearly do relate to a controlled substance violation.

The court also upheld the denial of the alien's application for cancellation of a removal as a matter of discretion, after reviewing petitioner's assertion that the IJ had erred in balancing the hardships, and finding the absence of a question of law.

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☎ (b) (6)

■ First Circuit Holds the Date of Conviction, Not the Date of Commission, Determines Aggravated Felony Bar's Application to § 212(c) Eligibility

In *Holder v. Sessions*, 848 F.3d 500 (1st Cir. February 17, 2017) (Thompson, Kayatta, Barbadoro), the First Circuit held that the alien was not eligible for relief under former INA § 212(c) because his aggravated felony conviction occurred after the effective date of the aggravated felony bar to § 212(c) relief in the Immigration Act of 1990.

The court concluded that applying the bar to a conviction post-dating the change in law would not produce an impermissibly retroactive effect and rejected the alien's argument that, under *Vartelas v. Holder*, 566 U.S. 257 (2012), the date of the commission of his offense—which was prior to the addition of the aggravated felony bar—should dictate § 212(c) eligibility.

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☎ (b) (6)

FOURTH CIRCUIT

■ Fourth Circuit Holds an Asylee Who Adjusts Status to Lawful Permanent Resident Is Removable without Asylum Termination Proceedings

In *Mahmood v. Sessions*, 849 F.3d 187(4th Cir. February 22, 2017) (Niemeyer, Traxler, Diaz), the Fourth Circuit held that an asylee who adjusts status to lawful permanent resident no longer holds asylee status and is removable without asylum termination proceedings.

The petitioner, a citizen of Pakistan was granted asylum in the United States in 1997. In 2011, he applied for adjustment of his asylum status under INA § 209(b). His application was granted in 2012. DHS thereafter sought to deport petitioner for having, over the years, obtained several immigration benefits by fraud.

An IJ found that petitioner's travel pattern "represented a concerted effort by him to avoid using his authorized travel documents to return to Pakistan, which he denied was his intention when he applied for them," and that his use of three Pakistani passports showed that he made misrepresentations on his application for travel documents. The IJ also determined that petitioner was ineligible for a waiver of inadmissibility under INA § 209(c). On appeal, the BIA affirmed and also concluded that under *Matter of C-J-H*, 26 I&N Dec. 284, "aliens whose status was adjusted from asylee to lawful permanent resident no longer qualify as asylees."

Before the Fourth Circuit petitioner contended that he was still an

asylee and that his status could only be terminated under the procedure set forth in INA § 208(c). Therefore, because the Attorney General had not pursued those procedures, he argued, he could not be deported, and the BIA had erred as a matter of law in concluding otherwise.

The court determined that under the plain reading of 209(b), petitioner lost his status as an "asylee" when he obtained the status of lawful permanent resident. "In his new status, he is, like every other lawful permanent resident, subject to removal for procuring an immigration benefit by fraud or willful misrepresentation of a material fact," said the court.

Had he remained an "asylee" he would have been protected from deportation and removal except as provided in § 208(c). The court further explained that "Congress, with the enactment of § 209, can be seen as deciding sensibly that, where an alien voluntarily seeks adjustment under § 209(b) and gains the advantages of lawful permanent residency, he gives up the absolute right to have the protections of his asylum status adjudicated before removal."

The court also determined that even assuming that INA § 209(b) were ambiguous, the court would defer to the BIA's interpretation in *Matter of C-J-H*, 26 I&N Dec. 284 (BIA 2014). It concluded that "the BIA in *C-J-H* reached a reasonable conclusion in holding that, with adjustment, the alien relinquished his asylum status."

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☎ (b) (6)

The court concluded that "under the plain reading of 209(b), petitioner lost his status as an "asylee" when he obtained the status of lawful permanent resident.

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■ Fourth Circuit Defers to BIA's Reasonable Construction of the Relevant Date of Admission for Purposes of Section 237(a)(2)(A)(i)'s Five-Year Clock

Under INA § 237(a)(2)(A)(i), any alien who “is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission” can be subject to removal. In *Sijapati v. Boente*, 848 F.3d 210 (4th Cir. February 1, 2017) (Traxler, Keenan, and Wynn), the Fourth Circuit held that the phrase “the date of admission” is ambiguous as how to identify the relevant date of admission when an alien has multiple admissions.

The petitioner’s conviction on December 12, 2007, of a crime involving moral turpitude, occurred more than five years after he was first admitted to the United States on January 25, 2001. But the BIA relied upon its decision in *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), to determine that petitioner’s relevant “date of admission” was January 18, 2003: the date he was most recently admitted to the United States after taking a brief vacation abroad.

Applying *Chevron*, the court first determined that the INA was silent as to which admission should be used in determining an alien’s removability under § 237(a)(2)(A)(i). The court then deferred to the BIA’s interpretation *Matter of Alyazji* holding that it was not “arbitrary, capricious, or manifestly contrary to the statute.”

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☎ (b) (6)

■ Fourth Circuit Holds Good Faith Marriage Determination Is a Mixed Question of Law and Fact, Which the Court Reviews De Novo

In *Upatcha v. Sessions*, __ F.3d __, 2017 WL 699095 (4th Cir. February 22, 2017) (Harris, Traxler, Diaz),

the Fourth Circuit held that the BIA applied the incorrect standard of review regarding whether a marriage was entered into good faith under INA § 216(c)(4)(B).

The petitioner, while living in Thailand, was introduced by her sister to Sergio Gonzalez, a naturalized United States citizen living in South Carolina. Because of the distance between them, petitioner and Gonzalez courted primarily through emails and phone calls. But Gonzalez also made a one-week trip to Thailand to visit petitioner, and during that trip petitioner accepted his marriage proposal. Petitioner then entered the United States on a fiancé visa on July 13, 2008, and five days later she married Gonzalez. As a result of the marriage petitioner became a lawful permanent resident on a conditional basis.

On October 20, 2008—approximately three months after entering the country—petitioner initiated divorce proceedings against Gonzalez. That divorce, which became final in February 2009, ended petitioner’s conditional residency. Petitioner then filed for a “hardship waiver” under § 216(c)(4). DHS denied the request, citing discrepancies between the couple’s divorce decree and the evidence provided by petitioner. As a result, DHS terminated petitioner’s conditional permanent resident status and charged her with deportability.

Petitioner renewed her “good faith marriage” waiver request before the IJ. The IJ heard testimony from petitioner and her former husband. Based on the “totality of the evi-

dence,” the IJ held that petitioner was not credible and that she could not show that she had entered into her marriage in good faith. The BIA found no error in the adverse credibility finding or in the IJ’s determination that petitioner not satisfied the good faith standard under § 216(c)(4)(B).

The court explained that a good faith marriage determination is a “mixed question of law and fact subject to a hybrid standard of review.”

The Fourth Circuit held that the BIA had correctly reviewed the IJ’s credibility finding for clear error, but that it “should have reviewed de novo the IJ’s ultimate legal judgment that the undisputed facts and credited evidence did not meet the good faith standard of § 216a(c)(4)(B).” The court explained that a good faith marriage determination is a “mixed question of law and fact subject to a hybrid standard of review.” The court rejected the government’s argument that the case should turn solely on the adverse credibility finding because neither the IJ nor the BIA rested solely on the credibility finding. Accordingly it remanded the case to the BIA to exercise de novo review in evaluating the IJ’s findings regarding the evaluations of the good faith marriage

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☎ (b) (6)

FIFTH CIRCUIT

■ Fifth Circuit Holds First-Offender Pardon Does Not Constitute a Full-and-Unconditional Pardon for Purposes of Demonstrating Good Moral Character

In *Nguyen v. USCIS*, 847 F.3d 750 (5th Cir. 2017) (Jolly, Smith,

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Graves), the Fifth Circuit affirmed the district court's summary judgment, holding that USCIS's interpretation that an automatic, first-offender pardon under Louisiana law is not a "full and unconditional executive pardon" under 8 C.F.R. § 316.10(c)(2)(i).

The petitioner, a lawful permanent resident, was convicted in 2004 of the state crime of conspiracy to commit false or altered lottery tickets and received a suspended sentence of two years' imprisonment and two years' active probation. After completing probation, she was granted an automatic first-offender pardon. Petitioner then applied for naturalization. USCIS denied the application and stated in its reaffirmance of the denial that her conviction, an aggravated felony, permanently prevented her from demonstrating good moral character and thus from being naturalized.

The court held that under Louisiana law, an automatic first offender pardon does not restore "a status of innocence" and, accordingly, "does not preclude consideration of a first felony conviction in adjudicating a person as a habitual offender. Accordingly, petitioner is permanently barred from naturalizing for lack of good moral character."

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☎ (b) (6)

SEVENTH CIRCUIT

■ Seventh Circuit Holds Alien's Minor Support for Undesignated Terrorist Group Disqualified Her from Asylum

In *S.A.B. v. Boente*, 847 F.3d 542 (7th Cir. 2017) (Posner, Easterbrook, Sykes), the Seventh Circuit held that an Ethiopian alien's provision of "minor material support" to the Oromo Liberation Front ("OLF"), as well as her failure to show that she

should not have reasonably known the OLF was a terrorist group, disqualified her from asylum and withholding of removal.

The petitioner came to the United States in 2004 on a visitor's visa that expired in December of that year. But rather than leave the United States she affirmatively applied for asylum and withholding of removal. When an asylum officer deemed her claims not credible, she was placed in removal proceedings where she renewed her claims. She claimed that if removed to Ethiopia she would be tortured by the Ethiopian government because of her past membership in the OLF.

The IJ found that that petitioner was not entitled to asylum or withholding because she has provided material support to OLF a terrorist organization. However the IJ found her eligible for deferral of removal under CAT. The BIA upheld that decision.

Petitioner then unsuccessfully applied to USCIS to waive the terrorism bar under INA § 212(d)(3)(B)(i).

The Seventh Circuit upheld the finding that petitioner "knowingly supported a terrorist organization to which she belonged." The court noted that petitioner, while living in Addis Ababa "with ready access to radio and television" had to be aware of the "numerous reports of OLF violence between 2001 and 2004." Therefore she could not use the "escape hatch" under § 212(a)(3)(B)(iv)(VI)(dd), that she shouldn't have been expected to know that the organization was a terrorist organization. Accordingly, petitioner was ineligible for asylum and withholding of removal.

The court also declined to review USCIS's denial of a terrorist exemption and held that the BIA properly denied a motion to reopen seeking review of USCIS's decision because the BIA had no authority to review terrorist exemptions.

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☎ (b) (6)

Petitioner could not use the "escape hatch" under § 212(a)(3)(B)(iv)(VI)(dd), that she shouldn't have been expected to know that the organization was a terrorist organization.

■ Seventh Circuit Applies Circumstance-Specific Approach to Affirm That Violation of a No-Contact Provision Is a Violation of a Protective Order under INA § 237(a)(2)(E)(ii)

In *Garcia-Hernandez v. Boente*, 847 F.3d 869 (7th Cir. 2017) (Kanne, Sykes, Hamilton), the Seventh Circuit held that, because INA § 237(a)(2)(E)(ii)

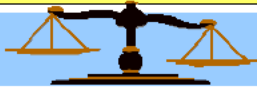
does not require a "conviction" but instead focuses on what a court "determines," the categorical approach does not apply to determine removability for aliens who violated a protective order, and instead the circumstance-specific approach applies. "Even if a state court does not impose severe punishment for an alien's violation of a domestic protective order, the immigration consequences may be severe, as in this case," said the court.

Applying the circumstance-specific approach, the court held that the record showed the alien violated a "no-contact" provision of a protective order, and deferred to *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011), which found that the violation of a no-contact provision satisfied § 237(a)(2)(E)(ii).

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EIGHTH CIRCUIT

■ Eighth Circuit Holds Alien Failed to Show Membership in Her Proposed Social Group

In *Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017) (Colloton, Smith, Wollman), the Eighth Circuit upheld an order of the BIA finding petitioner ineligible for asylum and withholding of removal because she had failed to show that she was a member of a particular social group.

The petitioner, citizen of Honduras, claimed that she had been abused in the past by Elvis Santos, her former domestic partner, and that she feared future abuse by Santos if she were forced to return to Honduras. She testified that although Santos initially was very kind to her, he became abusive when she learned that she was pregnant. Petitioner did not report the incidents to the police because the nearest police station was three hours away from her home and also was afraid that Santos would take "revenge" on her if she reported him. Eventually petitioner left this relationship in 2009 and with her son moved away to another town. In 2013 petitioner began another relationship which resulted in another pregnancy. Santos then learned that she had a son with another man, leading her to fear that Santos would kill her and her son Gerardo "out of jealousy." Petitioner then traveled to the United States with the infant son, and was apprehended near Hidalgo, Texas on June 14, 2014.

Petitioner claimed that she was a member of a particular social group composed of "Honduran women in domestic relationships who are unable to leave their relationships."

The IJ denied the claim finding that even if she had established that she suffered past persecution, she had not demonstrated that the harm that she had suffered was on account

of her membership in her proposed particular social group. The IJ also denied CAT protection finding that there was a "dearth of evidence" regarding torture by the Honduran government. On appeal the BIA affirmed.

The Eight Circuit agreed with the BIA's finding that petitioner failed to demonstrate that she was a member of her proposed particular social group. Moreover she was able to live safely in Honduras for five years after leaving her abuser and the abuser never sought to find her or otherwise harm her during that time. The court declined to address whether her proposed particular social groups were cognizable or whether the mistreatment she has suffered or allegedly will suffer rose to the level of persecution. The court also upheld the denial of CAT protection, finding no evidence of mistreatment by the Honduran government.

Contact: Jamie M. Dowd, OIL

☎ (b) (6)

NINTH CIRCUIT

■ Ninth Circuit Holds Oregon Drug Statute Does Not Constitute an Aggravated Felony Drug Trafficking Offense

In *Sandoval v. Yates*, 847 F.3d 697 (9th Cir. 2017) (McKeown, Fisher, W. Fletcher), the Ninth Circuit determined that Oregon Revised Statutes § 475.992(1)(a) is not a categorical aggravated felony because its definition of "delivery" includes mere solicitation, and the federal Controlled Substances Act does not punish soliciting delivery of controlled substances. The court further concluded, without analysis, that because no "commercial element" is included in the Oregon statute, it is not a categorical match to an "illicit trafficking" offense. Moreover, because the Oregon law is indivisible with respect to whether an "attempt" is accom-

plished by solicitation, the court held that the modified categorical approach does not apply.

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☎ (b) (6)

DISTRICT COURTS

■ Southern District of Texas Affirms Denial of L-1A Multinational Executive Visa

In *Grinin v. Johnson*, ___ F.Supp.3d ___, 2016 WL 7242538) (Rosenthal, J.) [S.D. Tex.]. On December 15, 2016, in a decision later published, the Southern District of Texas held that the Administrative Appeals Office (AAO) did not act arbitrarily or capriciously in denying a corporation's employment-based visa petition to classify the beneficiary as an immigrant multinational executive, where the AAO relied on the insufficiency of reliable evidence that the beneficiary met the statutory and regulatory criteria. The court noted the unexplained inconsistencies between the corporation's descriptions of the beneficiary's job, the failure to identify the authorized official who prepared the document, and evidence that the beneficiary performed non-managerial duties, including a contract purporting to outsource and delegate management activities to the foreign parent.

Contact: Christina Parascandola, OIL

☎ (b) (6)

■ Northern District of Florida R&R Recommends Affirming Denial of L-1A "New Office" Intracompany Manager Transferee Petition

In *MG Global Investment, LLC v. United States*, No. 15-cv-535 (N.D. Fla. February 13, 2017) (Timothy, C.M.J.), the Chief Magistrate Judge for the Northern District of Florida recommended summary judgment

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

for the government in a case alleging that USCIS unlawfully denied plaintiff's petition for classification as an L-1A nonimmigrant intracompany manager transferee pursuant to 8 U.S.C. § 1101(a)(15)(L). The plaintiff sought to transfer the beneficiary from an overseas office to its "new office" in Florida.

In recommending the agency's denial be upheld, the court concluded that the evidence insufficiently demonstrated the beneficiary's proposed job duties were "primarily managerial"; that he would manage professionals or an "essential function" to qualify as a personnel or function manager, respectively; and that the new office could support a managerial position within one year as required under 8 C.F.R. § 214.2 (l)(3)(v)(C).

Contact: Kathyne Gray, OIL-DCS

☎ (b) (6)

■ Central District of California Dismisses APA challenge to Adjustment of Status Denial for Lack of Finality Due to Ongoing Removal Proceedings

In *Osorio v. USA*, No. 16-cv-8743 (C.D. Cal. February 14, 2017) (Wilson, J.), the district court granted the government's motion to dismiss and dismissed the husband-and-wife plaintiffs' Administrative Procedure Act challenge to USCIS denial of the husband's adjustment of status application. The district court held that it lacked subject-matter jurisdiction because USCIS had served plaintiffs with a notice to appear in removal proceedings and filed that notice with the Executive Office of Immigration Review and, consequently, the denial was not a final agency decision.

Contact: Briana Yuh, OIL-DCS

☎ (b) (6)

■ District Court in Washington State Retains Injunction Against Parts of EO 13769

In the litigation in *State of Washington v. Trump*, 2017 WL 526497 (9th Cir. February 9, 2017) (Canby, Clifton, Friedland), the district court for the W.D. Washington had entered on February 3, 2017, a TRO enjoining the government from enforcing sections 3(c), 5(a), 5(b), 5(c), and 5(e) of EO 13769. On February 9, 2017, the Ninth Circuit denied an emergency motion for administrative stay in a *per curiam* order.

On February 10, 2017, there was a *sua sponte* request that a vote be taken by the Circuit on whether to reconsider the February 9, 2017 order *en banc*, and based on representations made by the government regarding an anticipated new EO, on February 16, 2017, the panel stayed proceedings. In regards to the district court proceedings, the district judge issued an order on February 14, 2017, finding no need to continue with preliminary injunction briefing, but allowing discovery and motions to proceed.

■ District Court in California Dissolves TRO in Light of Preliminary Injunction entered by District Court for the W.D. Washington

In *Mohammed v. United States*, No. 17-cv-0786 (Otero, J.) (C.D. Cal.), the court had issued a nationwide TRO on January 31, 2017, enjoining the government from "removing, detaining, or blocking the entry of Plaintiffs, or any other person from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen with a valid immigrant visa; [and] from cancelling validly obtained and issued immigrant visas of Plaintiffs." At a hearing on February 21, 2017, on the merits of the government's motion to dissolve the TRO, the court granted the government's motion, finding that the preliminary injunction issued in *State of Washington* (W.D. Wash.) was broader than the

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OIL TRAINING

Building Blocks of Asylum and Withholding Eligibility

When: Friday, May 5 and Monday, May 8, 2017

Location: Liberty Square Building
Rm LL-100, 450 Fifth Street, N.W.,
Washington, D.C.

Registration deadline: April 17

Contact: Jennifer Lightbody

TRO in this case and, thus, Plaintiffs could not show irreparable harm.

■ District Court Enjoins Application of E.O. 13769 to LPRs

In *Arab American Civil Rights League v. Trump*, No. 17-10310 (Roberts, J.) [E.D. Mich.]. The court entered a nationwide permanent injunction on February 2, 2017, that enjoins the application of the EO 13769 to lawful permanent residents. The government moved to dissolve the permanent injunction on February 7, 2017. The motion was fully briefed as of February 20, 2017.

Twelve More Immigration Judges Are Invested

On February 2, EOIR announced the investiture of 12 new immigration judges who had been appointed by former Attorney General Loretta E. Lynch appointed. They are:

Victoria L. Argumedo, who has been assigned to the San Francisco Immigration Court, is a graduate of the University of Vermont and Golden Gate University School of Law.

Steven D. Caley, who will sit in the Aurora Immigration Court, is a graduate from Hanover College and New York University School of Law.

Ila C. Deiss, who has been assigned to the San Francisco Immigration Court is a graduate of the University of California at Davis and the City University of New York School of Law.

Deborah K. Goodwin, who will sit in Miami Immigration Court, is a graduate of the Wilson College and the State University of New York at Buffalo School of Law. She was formerly an assistant chief counsel for ICE, in San Francisco.

Stephanie E. Gorman, who has been assigned to the Houston Immigration

Court, is a graduate from California State University Sacramento, the Thomas Jefferson School of Law, and the University of San Diego School of Law. She had previously served as a SAUSA for the U.S. Attorney's Office, Middle District of Florida.

Richard A. Jamadar, has been assigned to the Houston Immigration Court. He is a graduate from the University of the West Indies Faculty of Law and from the Washington University School of Law. He was formerly an assistant chief counsel for ICE in Orlando, Fla.

Julie Nelson, who will sit in the San Francisco Immigration Court is a graduate from Biola University and the California Western School of Law. She previously served as an assistant chief counsel for ICE in Eloy, Az.

Emmett D. Soper, who has been assigned to the Arlington Immigration Court, is a graduate from Carleton College and the University of Oregon School of Law. He previously served as an associate general

counsel in the EOIR's Office of the General Counsel.

Jem C. Sponzo, who has been assigned to the New York City Immigration Court, is a graduate from Hamilton College and the University of Connecticut School of Law. She was formerly a trial attorney for the Office of Immigration Litigation.

Arwen Ann Swink, who has been assigned to the San Francisco Immigration Court, is a graduate from California State University San Marcos and the University of California Hastings College Of Law.

Veronica S. Villegas, who will sit in the Los Angeles Immigration Court is a graduate from the California State University Fullerton and the Loyola Law School. She was previously in private practice and had also served as an assistant district counsel for the former INS

With these latest investitures, EOIR has for the first time in its history more than 300 immigration judges.

The *Immigration Litigation Bulletin* is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at (b) (6) or at (b) (6)



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

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