U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 18, Nos. 10-11 **October-November 2014**

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Applicant For Adjustment Who Falsely Claimed Citizenship on a Form I-9 When Seeking Private Employment is Inadmissible

In *Dakura v. Holder*, 772 F.3d 994 (4th Cir. November 24, 2014) (Motz, *King*, Keenan), the Fourth Circuit held that private employment is a benefit under the INA such that an alien who falsely claims to be a U.S. citizen when completing Form I-9 is inadmissible under INA § 212(a)(6)(C)(ii)(I).

Petitioner, a citizen of Ghana, entered the United States on January 16, 2008, with a nonimmigrant F-1 student visa. However, he subsequently stopped attending school and overstayed his visa. On August 5, 2009, DHS instituted removal proceedings against the petitioner. During the pendency of the proceedings petitioner married a United States citizen, and then applied for adjustment of status. The IJ and subsequently the BIA determined that he was inadmissible under the false claim bar and denied the application for adjustment.

The court rejected petitioner's contention that private employment is not an immigration benefit within the meaning of § 212(a)(6)(C)(ii)(I). "The Form I-9 constitutes an important component of the INA's regulatory scheme to prevent unauthorized aliens from obtaining private employment, which is prohibited by § 1324a.

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Former OIL Director Thomas W. Hussey Retires

Former OIL Director Thomas W. Hussey and most recently OIL's Special Immigration Counsel, retired in early October after a long and distinguished career at the Department of Justice.

Thom Hussey joined OIL at its founding in 1983. He received a B.A. in economics from George Washington University in 1972, having interrupted his undergraduate studies to serve with the United States Marines in Vietnam in 1968-69. Mr. Hussey received his Juris Doctor from the University of Virginia in 1975, and then clerked for Judge Stanley Harris on the District of Columbia Court of Appeals. He joined the Department of

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Thomas W. Hussey

Executive Actions on Immigration

The following summary and selected Q & As are reproduced from the USCIS web site.

On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation. These initiatives include:

►Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to young people who came to this country before turning 16 years old and have been present since January 1, 2010, and extending the period of DACA and work authorization from two years to three years.

►Allowing parents of U.S. citizens and lawful permanent residents who have been present in the country since January 1, 2010, to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents* program, provided they pass required background checks | Details Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens.

►Modernizing, improving and clarifying immigrant and nonimmigrant programs to grow our economy and create jobs.

►Promoting citizenship education and public awareness for lawful permanent residents and providing an option for naturalization applicants to use credit cards to pay the application fee.

Key Questions and Answers

When will USCIS begin accepting applications related to these executive initiatives?

USCIS expects to begin accepting applications for the: Expanded DACA program approximately 90 days after the President's November 20, 2014, announcement; and Deferred action for parents of U.S. citizens and lawful permanent residents (Deferred Action for Parents of Americans and Lawful Permanent Residents) approximately 180 days after the President's November 20, 2014, announcement.

How many individuals does USCIS expect will apply?

Preliminary estimates show that roughly 4.9 million individuals may be eligible for the initiatives announced by the President. However, there is no way to predict with certainty how many individuals will apply. USCIS will decide applications on a case-by-case basis and encourages as many people as possible to consider these new initiatives.

Will there be a cutoff date for individuals to apply?

The initiatives do not include deadlines. Nevertheless, USCIS encourages all eligible individuals to carefully review each initiative and, once the initiative becomes available, make a decision as soon as possible about whether to apply.

How long will applicants have to wait for a decision on their application?

The timeframe for completing this new pending workload depends on a variety of factors. USCIS will be working to process applications as expeditiously as possible while maintaining program integrity and customer service. Our aim is to complete all applications received by the end of next year before the end of 2016, consistent with our target processing time of completing review of applications within approximately one year of receipt.

Q5: Will USCIS need to expand its workforce and/or seek appropriated funds to implement these new initiatives?

A5: USCIS will need to adjust its staffing to sufficiently address this new workload. Any hiring will be funded through application fees rather than appropriated funds.

What security checks and anti-fraud efforts will USCIS conduct to identify individuals requesting deferred action who have criminal backgrounds or who otherwise pose a public safety threat or national security risk?

USCIS is committed to maintaining the security and integrity of the immigration system. Individuals seeking deferred action relief under these new initiatives will undergo thorough background checks, including but not limited to 10-print fingerprint, primary name and alias name checks against databases maintained by DHS and other federal government agencies. These checks are designed to identify individuals who may pose a national security or public safety threat, have a criminal background, have perpetrated fraud, or who may be otherwise ineligible to request deferred action. No individual will be granted relief without passing these background checks. In addition, USCIS will conduct an individual review of each case. USCIS officers are trained to identify indicators of fraud, including fraudulent documents. As with other immigration requests, all applicants will be warned that knowingly misrepresenting or failing to disclose facts will subject them to criminal prosecution and possible removal from the United States.

Refer to the USCIS web site for the most currently available information.

FURTHER REVIEW PENDING: Update on Cases & Issues

Conviction - Possessing Illegal Drug Paraphernalia

On January 14, 2015, the United States Supreme Court will hear argument on the alien's petition for *certiorari* in ***Mellouli v. Holder***, No. 13-1034 (U.S.) to review an Eighth Circuit decision (published at 719 F.3d 995) holding him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on a drug paraphernalia conviction. The Eighth Circuit ruled that the BIA precedent *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (2009), is entitled to deference regarding drug paraphernalia offenses under the laws of States that have enacted the Uniform Controlled Substances Act. The government's brief was filed on November 20, 2014.

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Consular Non-Reviewability

On October 6, 2014, the Supreme Court granted the government's petition for certiorari in ***Kerry v. Din***, from the Ninth Circuit's published decision, 718 F.3d 856. The government presented the questions: 1) whether a consular officer's denial of a visa to a U.S. citizen's alien spouse impinges upon a fundamental liberty interest of the citizen that is protected under the Due Process Clause; and 2) whether a U.S. citizen whose constitutional rights have been affected by denial of a visa to an alien is entitled to challenge the denial in court and to require the government, in order to sustain the denial, to allege what it believes the alien did that would render him ineligible for a visa. The government's merits brief was filed on November 26, 2014.

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Standard of Review Nationality Rulings

The Ninth Circuit granted *en banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder***, 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and- convincing and clear, convincing, and unequivocal standards are functionally the same. On March 17, 2014, an *en banc* panel heard oral argument.

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Torture– Internal Relocation

On September 19, 2014, an *en banc* panel of the Ninth Circuit heard argument in ***Maldonado v. Holder***, No. 09-71491. A panel of the court had ordered the parties to file supplemental briefs on whether case should be heard en banc in the first instance to consider: (1) whether there is a conflict in our case law between *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011), and *Hasan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004), regarding which party bears the burden of proof on internal relocation; and (2) whether *Hasan* and *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008), improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible." The government's *en banc* merits brief argued that the court should clarify its conflicting precedents regarding the burden and standard for internal relocation as it relates to protection from torture, and that the court should abrogate its precedents permitting review of fact issues in cases of criminal aliens challenging CAT denials.

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Jurisdiction – Final Order

On May 7, 2014, the Ninth Circuit granted *en banc* rehearing, with government acquiescence, and vacated its published panel decision in ***Abdisalan v. Holder***, 728 F.3d 1122, which held that an unsuccessful asylum claim was necessarily final at time of remand of the successful withholding of removal claim to update her background checks, but ruled that it lacked jurisdiction to review the alien's challenge to the agency's ruling that the asylum application was untimely. The government response defended the judgment, but conceded that the court's precedents on finality are inconsistent and in need of correction *en banc*.

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Conviction – Categorical Approach - Divisibility

In a December 18, 2014 response to a *sua sponte* request of the Ninth Circuit, the government recommended en banc rehearing in *Rendon v. Holder*, 764 F.3d 1077, if the panel does not correct the errors in its discussion of *Descamps v. United States* and divisibility.

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Asylum – State Dept Investigations

The Ninth Circuit requested a government response to the alien's petition for *en banc* or panel rehearing challenging the Court's published decision in ***Angov v. Holder***, 736 F.3d 1263, which held that the alien has the right to obtain documents, identities of investigators and witnesses, and testimony of the State employees involved in the investigation of his asylum claims by the Consulate in Romania. The government opposed rehearing on May 9, 2014.

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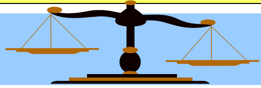

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ First Circuit Remands for a Well-Reasoned Decision on an Indonesian Christian's Eligibility for Asylum

In *Panoto v. Holder*, 770 F.3d 43 (1st Cir. 2014) (Lynch, *Stahl*, Barron), the First Circuit held that the BIA failed to give a sufficient reason why an Indonesian Christian, who learned that a bomb had been placed outside her place of worship in December 2000, and who experienced a violent ferryboat hijacking at the hands of Muslim extremists in June 2001, failed to establish past persecution. The court concluded that these incidents, if deemed credible, "surpass garden-variety unpleasantness and harassment such that she could meet the standard for past persecution."

The court remanded the case to the BIA to address whether state action or inaction caused or resulted in the alleged harm but also noted that the BIA could rest its decision on remand on alternate grounds, such as credibility or timeliness.

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■ BIA Properly Denied Reopening Where Applicant was Ineligible for Adjustment

In *Taveras-Duran v. Holder*, 767 F.3d 120 (1st Cir. 2014) (*Lynch*, Lipez, Howard), the First Circuit held that the BIA did not abuse its discretion in denying reopening, where the petitioner was ineligible for adjustment of status based on his failure to comply with a previous voluntary departure order. Under INA § 240B(d), an alien who voluntarily fails to depart the United States within the time period specified is not eligible to adjust his or her status for ten years.

The court rejected petitioner's argument that he was ineligible only because the BIA had not vacated the order, concluding that his "ineligibility for adjustment in status arises not from the [BIA's] decision, but from his decision to stay in the country after the deadline for voluntary departure passed."

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■ First Circuit Court of Appeals Affirms District Court's Decision on *Matter of Rojas* Issue

In *Castaneda v. Souza,* 769 F.3d 32 (1st Cir. October 6, 2014) (Torruella, Thompson, *Dyk* (by designation)), the First Circuit, in two consolidated habeas cases, affirmed the decisions of the District Court for the District of Massachusetts granting petitioners' writs of habeas corpus. The court held that the "when . . . released" clause of INA § 236(c) was not ambiguous and requires the government to take certain criminal aliens into immigration custody within a reasonable period after their release from criminal custody.

Petitioners were not subject to mandatory detention under § 236(c) because the government failed to take them into mandatory custody within a reasonable period of time.

One petitioner was arrested and detained in March 2013, four and a half years after her conviction for a drug offense and release in 2008. The other petitioner was arrested and detained by ICE on June 20, 2013, more than four years after his release from state custody following also a drug conviction. Both sought a bond hearing, and when that was denied, they both filed petition for writ of habeas corpus. The district court granted the petitions and the government appealed.

The court partially rejected the Fourth Circuit's reasoning in *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012), and held that the petitioners were not subject to mandatory detention under § 236(c) and were entitled to individualized bond hearings because the government failed to take them into mandatory custody within a reasonable period of time. The court explained that Justice Kennedy's concurrence in *Demore v. Kim*, 538 U.S. 510 (2003), suggests that an unreasonable delay by the government in pursuing deportation proceedings could make mandatory detention under § 236(c) constitutionally suspect and therefore requires a limiting construction. The court disagreed with the Third Circuit's decision in *Sylvain v. Att'y Gen.*, 714 F.3d 150 (3d Cir. 2013), and concluded that the government does not lose power or authority to act under the statute when it fails to take an alien into custody within a reasonable period of time because it retains the power to hold a criminal alien, and deny bond, under § 236(a).

"Mandatory detention of individuals such as the petitioners appears arbitrary on its face," said the court. "We are left to wonder whether the petitioners' sudden arrest and detention is not 'to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons,' which would offend due process."

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SECOND CIRCUIT

■ Second Circuit Holds Reporting Unauthorized Pregnancies was Active Assistance in Persecution

In *Meng v. Holder*, __ F.3d __, 2014 WL 5510901 (2d Cir. Novem-

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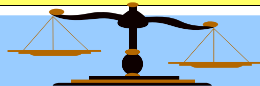

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ber 3, 2014)(Winter, *Raggi*, Carney), the Second Circuit held that petitioner actively assisted in persecution under INA § 208(b)(2)(A)(i) when, for two decades, she reported unlawful pregnancies to China's family planning authorities, knowing that many of the women reported would be subjected to involuntary abortions or sterilization.

The court ruled the conduct was not passive and was integral to persecution because reporting violations was critical to initiating the persecutory scheme of enforcement. In particular, the court found that with knowledge that "forced abortions and sterilizations were the typical punishment meted out to women she reported for unauthorized pregnancies," petitioner "voluntarily continued to serve for more than two decades as a public security officer and to report women for unauthorized pregnancies." Accordingly, petitioner was found ineligible for asylum and restriction on removal.

The court declined to determine whether petitioner's 14–day detention and beatings rose to the level of "torture," because she had not established that it was more likely than not that she will be tortured if removed to China.

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■ **Second Circuit Holds that the BIA is Required to Make an Explicit Determination as to the Alien's Nationality**

In *Urgen v. Holder*, 768 F.3d 269 (2d Cir. October 2, 2014) (Winter, Parker, Hall) (*per curiam*), the Second Circuit held that the BIA was required to make an explicit determination as to petitioner's nationality in adjudicating his asylum application. "A finding with respect to the asylum applicant's nationality is therefore necessary because without it as a reference, the agency cannot analyze an applicant's claim of well-founded fear of persecution. The agency's failure to resolve the issue here — and the BIA's corresponding refusal to consider [petitioner's] testimony or the merits of his claims — is particularly troubling because [petitioner] alleged a fear of persecution and torture in both Nepal and China."

The court further held that petitioner, who asserted that he was a stateless Tibetan born in Nepal, cannot be required to establish his nationality through documentary evidence alone to support his asylum application. "While we have recognized that an applicant's 'nationality, or lack of nationality, is a threshold question in determining his eligibility for asylum,' there is no requirement that this showing be made through non-testimonial evidence. Such a requirement directly contradicts the statute and controlling precedent, and it 'ignore[s] the proposition that an applicant can meet his burden of proof based on credible testimony alone."

Stateless Tibetan born in Nepal, cannot be required to establish his nationality through documentary evidence alone to support his asylum application.

Accordingly the case was remanded to the BIA with instructions "to make an explicit determination with respect to [petitioner's] country of nationality and citizenship."

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■ **Second Circuit Rules that Concessions to Removability in Removal Proceedings are Admissible Despite Egregious Fourth Amendment Violations**

In *Vanegas-Ramirez v. Holder*, 768 F.3d 226 (2d Cir. September 25, 2014) (*Chen*, Livingston, Droney), the Second Circuit held that petitioner's voluntary concession of removability was independently admissible removability evidence, notwithstanding the allegedly egregious and illegal search and seizure that led to the initiation of the removal proceedings.

The petitioner was arrested and detained for removal from the United States during an early morning raid by federal agents, which uncovered evidence of petitioner's Guatemalan citizenship. After being transferred from New York, where he had been residing, petitioner was scheduled to appear for removal proceedings in Texas. Petitioner moved to change the venue of the removal proceedings to New York. In his motion, he voluntarily conceded his removability from the United States. The motion to change venue was granted. At his hearing in New York, petitioner moved, *inter alia*, to suppress all evidence of his removability, including the concessions of removability that he had made in his venue change motion, and to terminate proceedings claiming that the raid by federal agents violated the Fourth and Fifth Amendments. The IJ denied petitioner's motion to suppress and his request for asylum. The BIA affirmed without deciding whether the government raid was egregious.

Before the Second Circuit petitioner contended that his concessions of removability were inadmissible as "fruit" of an illegal search and seizure by the government. The court declined to reach the issue of whether petitioner had established an egregious Fourth Amendment violation, because, even assuming so for the sake of argument, the court said that it had previously held that "an alien's

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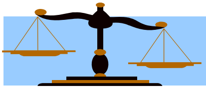

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voluntary concessions of removability during his removal proceedings are admissible as independent evidence, notwithstanding the fact that these proceedings resulted from unlawful arrests."

The court also upheld the denial of petitioner's asylum application holding that a single, decades-old attack on petitioner's family did not establish a well-founded fear of persecution. "No 'reasonable person' in [petitioner's] circumstances would fear persecution if he were returned to Guatemala," said the court.

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■ **Conviction for Unlawful Possession of Ammunition Is a Crime Relating to a Firearms Offense and Thus an Aggravated Felony**

In *Oppedisano v. Holder*, 769 F.3d 147 (2d Cir. 2014) (Parker, *Lynch,* and Carney), the Second Circuit, held that petitioner's conviction for unlawful possession of ammunition, in violation of 18 U.S.C. § 922(g)(1), was an aggravated felony as defined in INA § 101(a)(43)(E)(ii), a crime relating to a firearms offense. The court deferred to the BIA's construction of the "relating to" phrase as descriptive and inclusive of the crimes referenced in subsection (E)(ii), in light of the "common sense" function of the parenthetical in § 101(a)(43) and other subsections of the INA.

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■ **Alien's 1997 Aggravated Felony Conviction Valid for Immigration Purposes Despite State *Vacatur***

In *Sutherland v. Holder*, 769 F.3d 144 (2d Cir. 2014) (Cabranes, Wesley, Livingston) (*per curiam*), the Second Circuit held that an alien's 1997 state conviction for a controlled substance offense constituting an aggravated felony rendered her removable despite the state court's intervening *vacatur.* The court found that petitioner had sought and obtained *vacatur* of her conviction solely for rehabilitative reasons and to avoid adverse immigration consequences.

The court held that the case was controlled by Saleh *v. Gonzales*, 495 F.3d 17 (2d Cir.2007), where it had held that the BIA had reasonably concluded "that an alien remains convicted of a removable offense for federal immigration purposes when the predicate conviction is vacated simply to aid the alien in avoiding adverse immigration consequences and not because of any procedural or substantive defect in the original conviction." Accordingly, the court found that it lacked jurisdiction over the petition for review.

The court rejected petitioner's contention that private employment is not an immigration benefit within the meaning of the false claim bar.

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THIRD CIRCUIT

■ **Third Circuit Holds Application of Stop-Time Rule to Petitioner's Pre-IIRIRA Conviction was Not Impermissibly Retroactive**

In *Guzman v. Holder*, 770 F.3d 1077 (3d Cir. 2014) (Greenaway, *Rendall*, Krause), the Third Circuit held that application of the stop-time rule to the petitioner's pre-IIRIRA conviction did not impermissibly and retroactively render him ineligible for relief.

The court rejected the government's argument that there were no retroactivity issues because cancellation of removal did not exist prior to IIRIRA, but agreed that, because petitioner was ineligible for relief at the time of his conviction, the stop-time rule did not attach a "new disability" to his pre-IIRIRA conviction.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds Stop-Time Rule is Impermissibly Retroactive as Applied to Alien's Pre-IIRIRA Offense**

In *Jaghoori v. Holder*, __ F.3d __, 2014 WL 6434876 (4th Cir. November 18, 2014) (Niemeyer, Duncan, *Thacker*), the Fourth Circuit held that the stop-time rule could not be applied retroactively to the petitioner's 1995 CIMT conviction because to do so would cause new legal consequences to attach to criminal conduct completed before the passage of IIRIRA. The majority reasoned that, although the petitioner's 1995 CIMT conviction only rendered him removable in conjunction with a second CIMT committed in 2010, the petitioner had a settled expectation in his opportunity to request relief from removal at the time of his 1995 guilty plea.

In a dissenting opinion, Judge Niemeyer would have found that IIRIRA's stop-time rule imposed no new disability on petitioner and thus did not have any retroactive effect. "The inability to commit a future crime cannot be considered a new disability because [petitioner] was never entitled to commit crimes in the first place. [Petitioner] had no greater right to commit crimes before IIRIRA was enacted than he did thereafter," explained the dissenter.

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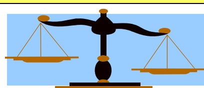

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Fourth Circuit Upholds the Denial of an Untimely Motion to Reopen

In *Lin v. Holder*, 771 F.3d 177 (4th Cir. 2014) (*Duncan*, Agee, Diaz), the Fourth Circuit held that the BIA's acted within its discretion in denying petitioner's second untimely motion to reopen his removal proceedings. Petitioner contended, *inter alia*, that material and previously unavailable documents demonstrated changed country conditions in China and established that he would face fines and forced sterilization if repatriated. Distinguishing *Chen v. Holder*, 742 F.3d 171 (4th Cir. 2014), the court held that the petitioner failed to authenticate the evidence he submitted, to provide new or previously unavailable evidence relevant to conditions in his home province in China, and to discredit the 2007 State Department's Profile.

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Fourth Circuit Upholds Denial of Asylum And Withholding For Failure To Demonstrate That Government Was Unable or Unwilling to Control the Persecutors

In *Mulyani v. Holder*, __ F.3d __, 2014 WL 5906578 (4th Cir. November 14, 2014)(Niemeyer, Duncan, *Thacker),* the Fourth Circuit held that petitioner, a Christian from Indonesia, did not qualify for asylum and consequently withholding of removal, because she failed to demonstrate that the Indonesian government was unable or unwilling to protect her from the alleged Muslim persecutors.

The court held that an applicant who seeks asylum based on past persecution must establish that the government was responsible for the persecution, or that it was unable or unwilling to control the persecutors. The court found that petitioner never notified the police or any other governmental authorities about the persecution she claims to have suffered. Moreover, a 2008 Department of State report observed that the Indonesian government maintains programs to replace damaged churches and ease religious tension, and that the government has successfully prosecuted perpetrators of religiously motivated violence. Accordingly, the court upheld the denial of withholding and held that it lacked jurisdiction to review whether the asylum application was timely.

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> **BIA's conclusion that failure to register as a sex offender was categorically a CIMT, was an unreasonable construction of the statutory language and not entitled to deference under *Chevron*.**

Failure to Register as a Sex Offender is Categorically Not a Crime Involving Moral Turpitude

In *Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014) (Traxler, Davis, *Niemeyer*), the Fourth Circuit held that petitioner was not subject to removal under INA § 237(a)(2)(A)(ii), because he had not been convicted of two CIMTs.

The petitioner, a citizen of Sudan, was ordered removed by the BIA on the ground that he had been convicted of two crimes "involving moral turpitude" — a 2010 conviction for sexual battery, in violation of Va.Code Ann. § 18.2–67.4, and a 2011 conviction for failing to register as a sex offender in violation of Va.Code Ann. § 18.2–472.

The Fourth Circuit held that violating a registration law, in this case the failure to register as a sex offender in violation of Va. Code Ann § 18.2-472.1, was categorically not a CIMT. The court compared the offense "much like the failure to register for the military draft, neither of which constitutes a *malum in se* offense." The Fourth Circuit joined the Third and the Tenth Circuits in holding that the BIA's conclusion in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), that failure to register as a sex offender was categorically a CIMT, was an unreasonable construction of the statutory language and not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Accordingly, the registration offenses was not a CIMT, the court found that the BIA erred as a matter of law in relying on that conviction as a basis to order petitioner's removal.

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Fourth Circuit Holds Alien Derivative Child Must Have Been Under 21 on Date of Admission to Adjust Status as the Minor Child of a K-1 Alien Fiancée

In *Regis v. Holder*, 769 F.3d 878 (4th Cir. 2014) (*Agee,* Duncan, Diaz), the Fourth Circuit ruled that petitioner could not adjust his status as the minor child of a K-1 alien fiancée because he was already over 21 – and , therefore, no longer a "minor child" – at the time he was admitted on the basis of his K-2 derivative visa.

After agreeing with the BIA that the INA is ambiguous with respect to the time at which a K-2 visa holder's age is fixed for the purpose of establishing adjustment eligibility, the court gave *Chevron* deference to the BIA's "well-reasoned" determination that the date of admission should control.

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Summaries Of Recent Federal Court Decisions

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■ **Fourth Circuit Holds IJ's Willful Misrepresentation Finding Contained Legal and Factual Errors**

In *Yang v. Holder*, __ F.3d __, 2014 WL 5462529) (4th Cir. October 29, 2014)(Motz, *King,* Davis), the Fourth Circuit held that the IJ committed a legal error by conflating adverse credibility with fraud and willful misrepresentation, and concluding that petitioner willfully misrepresented material facts when applying for asylum. The court said that willful misrepresentation must be shown by clear and convincing evidence in order to render an alien inadmissible under INA § 212(a)(6)(C)(i). The court further held that the IJ erred in concluding that petitioner's inconsistencies were willful and material to his claim.

Willful misrepresentation must be shown by clear and convincing evidence in order to render an alien inadmissible under INA § 212(a)(6)(C)(i).

The court also reversed the agency's conclusion that petitioner had abandoned his adjustment application for failure to submit updated biometric data. The government had conceded that the record contained no evidence that the INS complied with its legal obligation to "notify the respondent of the need to provide biometrics and other biographical information."

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■ **Fifth Circuit Rules Alien Knowingly and Intelligently Waives His Right to Appeal When the IJ Advises Alien of His Right to Appeal or to Seek Relief but the Alien Declines**

In *Martinez-Martinez v. Holder*, 769 F.3d 897 (5th Cir. 2014) (Davis, Smith, Clement) (*per curiam*), the Fifth Circuit held that the question of whether or not an alien had knowingly and intelligently waived his right to appeal was a fact-specific inquiry reviewed under the substantial evidence standard.

Here, because the IJ explained petitioner's appellate rights, petitioner said he did not wish to apply for relief, and he accepted the IJ's decision as final, no reasonable factfinder could conclude that the petitioner did not knowingly and intelligently waive his right to appeal.

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■ **Denying Panel Rehearing, Divided Fifth Circuit Panel Adheres to Ruling that Straw-Purchaser's Conviction is an "Illicit Trafficking in Firearms" Aggravated Felony**

In *Franco-Casasola v. Holder*, __ F.3d __, 2014 WL 5454842 (5th Cir. October 23, 2014) (Owen, *Southwick,* Graves (dissenting)), the Fifth Circuit held that an alien's conviction for violating 18 U.S.C. § 554(a), which prohibits purchasing items intended for export in violation of United States law, constitutes an "illicit trafficking in firearms" aggravated felony.

In its prior unpublished opinion, the court had stated that it would not analyze whether *Descamps* altered circuit precedent because neither party had argued that it did. The court substituted a new opinion concluding that the statutory requirement that the defendant's actions be "contrary to any law or regulation of the United States" effectively "incorporates as divisible elements" the "finite, though lengthy, list of every statute and regulation" restricting the export of items from the United States, including, as relevant here, provisions of the Arms Export Control Act and related regulations.

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■ **Fifth Circuit Holds Minor Alien Who Unlawfully Entered the United States and Never Obtained Lawful Status Cannot Derive Citizenship from Naturalized Parent**

In *Gonzalez Gonzalez v. Holder*, __ F.3d __, 2014 WL 5347576 (5th Cir. October 21, 2014) (*Stewart,* Wiener, Costa), the Fifth Circuit held that the petitioner, who illegally entered the United States and who did not adjust his status to that of a lawful permanent resident until after his eighteen birthday did not derive citizenship from his naturalized parent under former 8 U.S.C. § 1432(a). The court declined to join either side of the circuit split on the issue of whether LPR status was a requirement for derivative citizenship under the second clause of § 1432(a)(5), finding that the petitioner failed to satisfy either the interpretation of the BIA and the Ninth and Eleventh Circuits that LPR status is required, or the interpretation of the Second Circuit that the former statute allows for something less than LPR status – an objective and official manifestation of intent to reside permanently in the United States. Because the petitioner entered illegally and had only a pending I-130 filed by his naturalized father at the time of his eighteenth birthday, he failed to satisfy either interpretation of the statute.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds Aggravated Felon Who Adjusted Status after Admission Is Not Ineligible for Waiver under INA § 212(h)**

In *Stanovsek v. Holder,* 768 F.3d 515 (6th Cir. 2014) (*Rogers,*

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Steeh (by designation) Boggs (dissenting) ,the Sixth Circuit joined the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits in holding that an applicant who adjusted his status after admission is eligible for a hardship waiver under INA § 212(h). The BIA had held that petitioner was ineligible for a § 212 (h) waiver under *Matter of Rodriguez*, I&N Dec. 784 (BIA 2012). because he had been convicted of an aggravated felony after adjusting his status.

The Sixth Circuit ruled that "[t]he statutory language however is clear and unambiguous that a § 212 (h) waiver is precluded after a conviction of an aggravated felony only when the removable person had attained the status of lawful permanent resident at the time of his or her lawful entry into the United States."

In a dissenting opinion, Judge Boggs would have found the BIA"s decision to be a reasonable interpretation of the statute because it also "avoids the nonsensical result of treating LPRs differently under § 212(h) based on how they acquired their LPR status, which the majority concedes ought to be immaterial."

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■ **Sixth Circuit Holds that Petitioner's Due Process Rights Were Not Violated by His Agreement to Withdraw an Application for Relief in Exchange for a Continuance**

In *Suarez-Diaz v. Holder*, 565 Fed. Appx. 414 (6th Cir. October 10, 2014) (Daughtrey, McKeague, *McDonald*), the Sixth Circuit ruled that petitioner who agreed to withdraw his application for CAT protection, in exchange for a continuance from the IJ, did not have his due process rights violated. The court stated that while such an agreement may constitute a due process violation, no such violation took place in this case, as the IJ fully apprised petitioner of the consequences of withdrawing his application. The court also held that the IJ did not abuse his discretion in denying the continuance based on the facts of the individual case.

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■ **Service of a Notice to Appear Stops Time for Cancellation of Removal, Even if it Omits the Hearing Date and Includes an Erroneous Charge**

In *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014) (Boggs, *Sutton*, Stranch), the Sixth Circuit held that a notice to appear stops an alien's accrual of physical presence in the United States even if it fails to include a hearing date. The Sixth Circuit joined the Fourth and Seventh Circuits in deferring to the BIA's interpretation in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), that the stop-time provision only identifies the specific form an alien must receive to cease his accrual of physical presence. The court also held that a notice to appear remains valid for stop-time purposes even if it is later amended to include a corrected charge of removability.

The court held that a notice to appear remains valid for stop-time purposes even if it is later amended to include a corrected charge of removability.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Petitioner's Due Process Rights Were Not Violated by IJ's Refusal to Allow Him to Cross-Examine Preparer of I-213**

In *Antia-Perea v. Holder*, 768 F.3d 647 (7th Cir. 2014) (Kanne, Rovner, *Dow* (by designation)), the Seventh Circuit held that the IJ properly admitted the Form I-213 to establish alienage and that the petitioner was not entitled to cross-examine the preparer of the form, as he had not shown that the I-213 was unreliable. The court also held that evidence submitted by the petitioner suggesting that he was born in Puerto Rico was insufficient to overcome information in the I-213 that he voluntarily stated he was born in Columbia. Lastly, the court held that the BIA's denial of the petitioner's motion to reopen was not an abuse of discretion, as his claims for asylum-related relief and protection from removal were speculative.

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■ **Seventh Circuit Holds Violation of California Statute Constitutes "Sexual Abuse of a Minor," and Is Therefore an Aggravated Felony**

In *Velasco-Giron v. Holder*, __F.3d __, 2014 WL 7011468 (7th Cir. September 26, 2014) (*Easterbrook*, Manion, Posner (dissenting)), the Seventh Circuit held that the petitioner's conviction under Cal. Penal Code § 261.5(c), which makes it a crime to engage in sexual intercourse with a person under the age of 18, if the defendant is at least three years older, categorically constitutes "sexual abuse of a minor," and therefore is an aggravated felony. The court agreed with the BIA that the term "sexual abuse of a minor" was ambiguous, giving *Chevron* deference to the BIA's decision to adopt 18 U.S.C. § 3509(a)(8), and not a different section of the Criminal Code, as a guide in identifying the types of crimes that constitute sexual abuse of a minor.

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Seventh Circuit Holds That the IJ Applied the Wrong Standard in Determining Continuous Physical Presence for Cancellation of Removal

In *Lopez-Esparza v. Holder*, 770 F.3d 606 (7th Cir. 2014) (*Posner,* Flaum, Sykes), the Seventh Circuit in a case in which petitioner could not remember the dates he traveled outside the United States, testified inconsistently about those dates, and presented evidence that contradicted his testimony, ruled that the IJ applied the wrong standard – "that imperfect recollection precludes a finding of continuous residence" – in determining whether petitioner met his burden of establishing that he did not have any disqualifying breaks in his physical presence in the United States. "Perfect recollection isn't part of the burden of proving continuous residence, and it couldn't be because it would be inconsistent with the preponderance standard. 8 C.F.R. § 1240.8 (d). A witness's testimony may reveal a bad memory without necessarily vitiating his testimony and so preventing him from carrying his burden of proof," said the court.

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Eighth Circuit Dismisses Petitioner's Claim of a Fourth Amendment Violation During a Traffic Stop and Holds IJ Did Not Violate His Due Process Rights

In *Chavez-Castillo v. Holder*, 771 F.3d 1081 (8th Cir. 2014) (*Murphy*, Smith, Gruender), the Eighth Circuit held there was no Fourth Amendment violation where Mexican citizen provided no evidence that a traffic officer stopped him because of his race and other evidence indicated he was speeding prior to the traffic stop. The court also held that the IJ did not violate the petitioner's due process by admitting into evidence the officer's affidavit and the Record of Deportable/ Inadmissible Alien (Form I-213).

The court explained that that the police officer's affidavit and Form I–213 were admissible because they were "probative as they contradicted petitioner's assertion that he was stopped because of his race." "Both documents were also 'presumptively reliable' and thus 'fundamentally fair' because they were produced by 'public officials during the ordinary course of their duties," explained the court.

The police officer's affidavit and Form I–213 were admissible because they were "probative as they contradicted petitioner's assertion that he was stopped because of his race."

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EIGHTH CIRCUIT

Eighth Circuit Holds Recklessly Making Terroristic Threats Constitutes A Crime Involving Moral Turpitude

In *Avendano v. Holder*, 770 F.3d 731, (8th Cir. 2014) (*Colloton*, Shepherd, Kelly), the Eighth Circuit held that the petitioner's conviction for recklessly making terroristic threats in violation of Minnesota law constituted a crime involving moral turpitude.

The petitioner, a citizen of El Salvador illegally entered the U.S. in 1998, but later received TPS. In January 2012, during an argument with his girlfriend in the presence of their children, petitioner grabbed a knife and told his girlfriend to follow him into the bathroom. Petitioner's girlfriend instructed one of the children to call the police; officers came and arrested petitioner. He pleaded guilty to making terroristic threats in violation of Minn.Stat. § 609.713 subd. 1. That statute, in relevant part, forbids "threaten[ing], directly or indirectly, to commit any crime of violence with purpose to terrorize another … or in a reckless disregard of the risk of causing such terror."

The court also held that the petitioner failed to raise a question of law or constitutional claim to invoke the court's jurisdiction over the BIA's denial of his motion to remand.

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Eighth Circuit Holds Change in Alien's Age Constituted a Fundamental Change in Circumstances Such that Her Life or Freedom Would Not Be Threatened in Hong Kong

In *Ming Li Hui v. Holder,* 769 F.3d 984 (8th Cir. 2014) (Wollman, Loken, and *Murphy*), the Eighth Circuit held that substantial evidence supported the BIA's conclusion that a change in petitioner's age to adulthood constituted a fundamental change in circumstances effecting her claim, such that it rebutted the presumption that her life or freedom would be threatened if she returned to Hong Kong.

The petitioner, a native of Hong Kong, entered the United States on February 2, 2004, with a nonimmigrant visa and remained past its expiration. When petitioner was placed in removal proceedings on November 10, 2008, she applied for asylum, withholding of removal, and CAT protection. She claimed that as a child she was subject to physical and emotional abuse by her mother. As a result, petitioner contended that she was subject to past persecution on account of her membership in a particular social group, namely "Chinese daughters [who are] viewed as property by virtue of their position

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within a domestic relationship. The IJ assumed that petitioner had suffered past but concluded that the government had rebutted the presumption by showing a fundamental change in circumstances, namely that petitioner was now an adult, and was able to live alone. Accordingly, the IJ denied all claims. The BIA affirmed.

In upholding the denial of all claims, the court concluded that petitioner's "age was a fundamental change in circumstances such that her life or freedom would not be threatened if she returned to Hong Kong."

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NINTH CIRCUIT

■ Ninth Circuit Holds that Good Moral Character Eligibility Requirement Ends When the Nicaraguan Adjustment and Central American Relief Act Application Is Filed

In *Aragon-Salazar v. Holder,* 769 F.3d 699 (9th Cir. 2014) (*Smith*, Korman, Callahan (dissenting)), the Ninth Circuit held on issue of first impression, that the Nicaraguan Adjustment and Central American Relief Act (NACARA) allowing special rule cancellation of removal, unambiguously required an applicant to demonstrate good moral character during the 7-year period before the application for relief, and did not require the applicant to demonstrate good moral character after that period.

The IJ denied had denied petitioner's application for NACARA special rule cancellation on the basis that he was unable to establish good moral character because he had given false testimony for the purpose of obtaining an immigration benefit, either by fabricating incidents during the NACARA interview to make himself seem more important or by minimizing incidents during the merits hearing to avoid the persecutor bar. The BIA affirmed, holding that the seven-year period during which good moral character is required did not end on the date petitioner filed his application, but rather extended until a final administrative decision was issued.

In rejecting the BIA's interpretation the court found that under the plain language of NACARA "the period of time for which an applicant must show good moral character refers to the period of seven years 'immediately preceding the date of [the NACARA] application.'" The court then found that if petitioner had given false testimony, he did so after the seven-year period, and was not barred from NACARA relief.

> **Under the plain language of NACARA "the period of time for which an applicant must show good moral character refers to the period of seven years 'immediately preceding the date of [the NACARA] application.'"**

Dissenting, Judge Callahan opined that NACARA special rule cancellation is ambiguous, and that a NACARA applicant's responsibility to maintain good moral character continues after the filing of an application for relief.

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■ Attempted Arson Qualifies as an Aggravated Felony under Modified Categorical Analysis

In *Sandoval-Gomez v. Holder*, 768 F.3d 904 (9th Cir. 2014) (Gould, N.R. Smith, *England* (by designation)), the Ninth Circuit held that California Penal Code § 455 is divisible, and that an alien's conviction for attempted arson need not contain a federal jurisdictional element to qualify as an "offense described in" 18 U.S.C. § 8441(i) and thus an aggravated felony under INA. § 101(a)(43)(E)(i). The court noted that its ruling regarding the jurisdictional element conflicts with the Third Circuit's holding in *Bautista v. Att'y Gen. of the U.S.*, 744 F.3d 54 (3d Cir. 2014), but is consistent with precedent from the Second, Fifth, Seventh, and Eighth Circuits.

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■ Ninth Circuit Reverses Denial of Motion to Reopen an *In Absentia* Removal Order Based on Lack of Notice

In *Velasquez-Escovar v. Holder*, __ F.3d __, 2014 WL 4800084 (9th Cir. September 29, 2014) (Silverman, *Tallman*, Rawlinson (dissenting)), the Ninth Circuit held that the BIA abused its discretion in concluding that petitioner was not entitled to actual notice of her hearing because, upon service of her Notice to Appear (NTA), she failed to correct an invalid address on that document. The court declined to apply the address correction requirement in 8 C.F.R. § 1003.15(d)(1), reasoning that the BIA did not cite or "invoke" the regulation and that holding petitioner to that requirement without a corresponding advisal on her NTA would contradict the BIA's decision in *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001) (*en banc*).

In a dissenting opinion, Judge Rawlinson would have found that the BIA had not abused its discretion by "imposing an obligation that has been memorialized in a regulation" and that it was incumbent on the petitioner to provide her correct address in writing.

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■ Providing the Government Multiple Opportunities to Establish Removability Does Not Deprive Alien of Due Process

In *Padilla-Martinez v. Holder*, 770 F.3d 825 (9th Cir., 2014) (Duffy, *Gould*, Smith), the Ninth Circuit held that the BIA's did not violate petitioner's due process rights by *sua sponte* remanding case to the IJ for further proceedings. The BIA decided, contrary to the IJ's decision, that the California court plea documents the government submitted did not establish the petitioner's removability as an alien convicted of an aggravated felony because they did not identify the drug petitioner sold. On remand, the government submitted the plea transcript containing petitioner's admission that the drug was methamphetamine.

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■ Ninth Circuit Holds Alien's Conviction for Criminal Impersonation is Categorically a Crime Involving Moral Turpitude

In *Hernandez de Martinez v. Holder*, 770 F.3d 823 (6th Cir. 2014) (Nelson, Silverman, Smith) (*per curiam*), the Ninth Circuit held that petitioner's conviction for criminal impersonation by assuming a false identity with intent to defraud, in violation of Arizona Revised Statutes § 13-2006 (A)(1), was categorically a CIMT, because the statute explicitly requires proof of fraudulent intent. The court rejected petitioner's argument that her conviction did not categorically involve moral turpitude because she used a false Social Security number only to obtain employment. The court reaffirmed the principle, that crimes requiring proof of an "intent to defraud" necessarily involve moral turpitude.

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■ Ninth Circuit Determines that Government Failed to Present Clear and Convincing Evidence that Alien's California Conviction Was an Aggravated Felony Drug Trafficking Offense

In *Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014) (Noonan, *Hawkins,* Christen), the Ninth Circuit, *sua sponte* amended its September 29, 2014 decision. The amended order still held that the government did not establish that the petitioner's conviction under Cal. Health & Safety Code § 11351 is an aggravated felony and controlled substance offense under the modified categorical approach. However, the court removed from the amended decision its reasoning that the record of conviction in this case was distinguishable from the conviction documents present in *Cabantac v. Holder*, 736 F.3d 787 (9th Cir. 2013).

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■ Ninth Circuit, Rejecting BIA's Precedent, Holds Car Theft Conviction Does Not Bar Cancellation of Removal Although Alien Presented an Inconclusive Conviction Record

In *Almanza-Arenas v. Holder*, __ F.3d __, 2014 WL 5801416 (9th Cir. November 10, 2014) (*Pregerson,* Fisher, Gwin), the Ninth Circuit rejected *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (2009), and held that a violation of California Vehicle Code § 10851(a), that criminalized act of driving or taking vehicle not one's own, "with intent either to permanently or temporarily deprive the owner thereof" of title to or possession of her property is not categorically a CIMT.

A violation of California Vehicle Code § 10851(a), that criminalized act of driving or taking vehicle not one's own, "with intent either to permanently or temporarily deprive the owner thereof" of title to or possession of her property is not categorically a CIMT.

The court explained that the statute of conviction proscribes both conduct that does not amount to a crime of moral turpitude (temporary taking) and conduct that would constitute a crime of moral turpitude (permanent taking). The elements of his statute of conviction are neither "the same as, or narrower than, those of the generic offense." Thus, said the court, petitioner's "conviction under California Vehicle Code § 10851(a) is not categorically a crime of moral turpitude."

The court next considered whether the statute was divisible, thus permitting the application of the modified categorical approach. The court determined that § 10851(a) provides alternative means by which the offense may be committed, not alternative elements. "In other words, § 10851(a) is an indivisible statute because it 'describes a single crime that can be committed in a variety of ways depending on the intent of the actor' said the court. The court also found support in the jury instructions for § 10851 noting that the "jury need not agree on how long the actor intended to deprive a vehicle owner of possession of her vehicle; instead the jury need only agree that 'the defendant ... intended to deprive the owner of possession or ownership of the vehicle for any period of time.'" Accordingly, the court found that the BIA erred by applying the modified categorical approach to examine petitioner's record of conviction.

The court further held that the BIA erred when it determined that, where the record of conviction was inconclusive, the petitioner was ineligible for cancellation of removal. The court found that its prior decision in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*),

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NINTH CIRCUIT

where it had held that an applicant fails to establish his eligibility for cancellation when he provides inconclusive conviction record, was abrogated in part by *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

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■ **Ninth Circuit Holds BIA Has the Authority to Reopen Proceedings to Allow Alien to Apply for Adjustment of Status with the USCIS**

In *Tarlock Singh v. Holder*, __ F.3d __, 2014 WL 5861965 (9th Cir. November 13, 2014) (Berzon, *Fisher* & Christen), the Ninth Circuit held that the BIA erred in concluding that it lacked authority to reopen an arriving alien's removal proceedings to allow him to pursue adjustment before the USCIS. The court disagreed with the BIA's characterization of the alien's motion as a request to stay the removal order, finding that reopening was implicated and that the stay regulation in no way restricted the BIA's broad power to reopen. The court declined to accord deference to *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), on which the BIA relied, holding that *Yauri* contravened the plain language of 8 C.F.R. § 1003.2(a), which allows the BIA to reopen any case at any time. The court remanded for the BIA to exercise its discretion as to reopening.

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■ **Ninth Circuit Holds Alien's Use of Another Person's Social Security Number Without Consent to Obtain Employment is a CIMT**

In *Ibarra-Hernandez v. Holder*, 770 F.3d 1280 (9th Cir. 2014) (Nelson, Silverman, M. Smith) (*per curiam*), the Ninth Circuit held that an alien's conviction for identity theft, under Arizona Revised Statutes § 13-2008(A), is not a categorically a CIMT because the statute is divisible and not every variation of the crime requires proof of fraud.

However, the alien's plea colloquy revealed that she used a real person's Social Security number without consent to obtain employment. Thus, the court, applying the modified categorical approach, held that she committed theft involving fraud, which the BIA reasonably ruled to be a CIMT.

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■ **Ninth Circuit Gives Deference to *Matter of Rotimi* in Concluding that the Time Applicant Spent Awaiting Approval of Adjustment Application Does Not Count toward INA § 212(h)'s Lawful Residency Requirement**

In Cervantes v. Holder, 772 F.3d 583 (9th Cir. 2014) (Schroeder, Graber, *Bybee*), the Ninth Circuit deferred to the BIA's decision in *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008), in concluding that the petitioner was ineligible for an extreme hardship waiver because time spent awaiting adjudication of an adjustment of status application did not count toward INA § 212(h)'s lawful residency requirement. Additionally, the court remanded to the agency for further proceedings relating to whether the petitioner, whom the agency found inadmissible based on two crimes of moral turpitude, was eligible for the petty offense exception in 8 U.S.C. § 1182(a)(2)(A)(i)(I) in relation to one of those crimes.

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Petitioner was ineligible for an extreme hardship waiver because time spent awaiting adjudication of an adjustment of status application did not count toward INA § 212(h)'s lawful Residency.

■ **Ninth Circuit Denies Government's Motion but Amends Earlier Opinion To Limit the Extension of *Ren*'s Notice-and-Corroboration Requirement**

In *Lai v. Holder*, __ F.3d __, 2014 WL 5573318 (9th Cir. November 4, 2014) (Wardlaw, *Fisher*, Dawson (by designation)), the Ninth Circuit, in a published order denied the government's motion to amend to excise language that appeared to extend *Ren*'s notice-and-corroboration requirement, covering aliens whose applications were denied by the agency for failure to meet their burdens of proof, to aliens found incredible. But the court concurrently filed an amended opinion explicitly limiting the extension of *Ren* to situations where the court rejects all bases for the Immigration Judge's adverse credibility determination.

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■ **Ninth Circuit Defers to BIA's Published Decision Holding Reckless Endangerment under Arizona Law is Categorically a Crime Involving Moral Turpitude**

In *Leal v. Holder*, __ F.3d __, 2014 WL 5742137 (9th Cir. November 6, 2014) (*Nelson*, Silverman, and Smith), the Ninth Circuit held that the BIA reasonably determined in *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012), that petitioner's conviction on charge of felony endangerment under Arizona law based on his excessive voluntary intoxication, combined with his creation of substantial, actual risk of imminent death of another person, constituted morally turpitudinous conduct, thus making him ineligible for cancellation of removal

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The court specifically found that the interpretation in *Matter of Leal*, where the BIA determined that a finding of moral turpitude under the INA requires that a perpetrator have committed a reprehensible act with some form of scienter, was a permissible construction of the INA. The court rejected the argument that a lack of awareness of risk due to voluntary intoxication could not support a CIMT finding, holding that such lack of awareness due to voluntary intoxication can serve as a proxy for actual awareness. However, the court emphasized, " that our holding rests largely on the grave resulting harm involved in this crime: a substantial, actual risk of imminent death to another person."

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■ Ninth Circuit Rules Alien's Right To Confidentiality was Violated; Substantial Evidence Did Not Support the Adverse Credibility Determination; and the Agency Failed to Justify its Rejection of Evidence

In *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014) (Farris, Hurwitz, Friedman (by designation)) (*per curiam*), the Ninth Circuit held that petitioner's right to confidentiality was violated when his arrest documents, contained in his asylum application and disclosing facts related to his claim, were delivered to Kenyan police.

The court also found that substantial evidence did not support the BIA's adverse credibility determination as the cited discrepancies were trivial. Finally, the court determined that the BIA failed to adequately consider key documents when denying petitioner's claim for CAT protection.

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■ Ninth Circuit Holds an Alien's Forgery Conviction was Categorically a Crime Involving Moral Turpitude

In *Espino-Castillo v. Holder*, 770 F.3d 861 (9th Cir. 2014) (Wallace, *Schroeder*, Fletcher), the Ninth Circuit upheld the IJ and BIA's finding that petitioner was ineligible for cancellation of removal because his Arizona forgery conviction constituted a CIMT. In so doing, the court rejected the petitioner's contention that the conviction should not be considered a CIMT because the underlying conduct involved the use of false information to obtain employment, and found its prior decision in *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) is now in tension with intervening and controlling Supreme Court authority.

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ELEVENTH CIRCUIT

■ Eleventh Circuit Holds that Florida Conviction for Aggravated Eluding Is a Crime of Violence

In *Dixon v. U.S. Att'y General*, 768 F.3d 1339 (11th Cir. 2014) (*Wilson*, W. Pryor, Rosenbaum), the Eleventh Circuit held that petitioner's conviction for aggravated eluding was categorically a crime of violence. The court distinguished the risk of violence inherent in fleeing from a police officer in a vehicle from the risks commonly associated with driving under the influence, and concluded that the desperation of the individual fleeing from law enforcement creates a substantial risk that physical force will be used. The court additionally determined that the petitioner's jail term, imposed upon him following a probation revocation, constituted a term of imprisonment under the INA.

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■ Eleventh Circuit Holds that It Lacked Jurisdiction to Consider the BIA's Denial of a Motion to Reopen Which Involved a Discretionary Decision

In *Butalova v. U.S. Attorney General* , 768 F.3d 1179 (11th Cir. 2014) (Hull, Marcus, Fay) (*per curiam*), the Eleventh Circuit held, as a matter of first impression, that it lacked jurisdiction to consider the BIA's decision to deny the petitioner's motion to reopen seeking new relief for the first time, when the BIA's resolution of the motion to reopen required a discretionary determination pertaining to the new relief. The court concluded that the BIA's finding that petitioner had not established that she "was battered or was the subject of extreme cruelty" by her U.S. citizen spouse under 8 U.S.C. § 1154(a)(1)(A)(iii) was a discretionary decision not subject to review under the INA § 242(a)(2)(B)(ii), and that it lacked jurisdiction over the petitions for review.

The BIA's finding that petitioner had not established that she "was battered or was the subject of extreme cruelty" by her U.S. citizen spouse under 8 U.S.C. § 1154(a)(1)(A)(iii) was a discretionary decision not subject to review.

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D.C. CIRCUIT

■ D.C. Circuit Reverses and Remands to AAO for More Thorough "Specialized Knowledge" Analysis

In *Fogo de Chao v. U.S. Department of Homeland Security*, __ F.3d __, 2014 WL 5327688 (D.C. Cir. October 21, 2014) (Kavanaugh (dissenting), *Millett*, Wilkins) a divided panel of the D.C. Circuit rejected the USCIS Administrative Appeals Office's

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California Second Degree Burglary

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rationale for denying Fogo de Chao's specialized knowledge (L-1B) petition filed on behalf of a churrasqueiro chef. In rejecting the decision below, the majority refused to give *Chevron* deference to the AAO's unpublished decision in the case. Nonetheless, the court deferred without further analysis to agency internal interpretive memoranda. Noting the vague use of the term "specialized knowledge" in statute and regulation, and the AAO's seeming departure from guidance in agency interpretive memoranda, the court remanded for further clarification.

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DISTRICT COURTS

■ **Court Lacks Subject Matter Jurisdiction to Review USCIS's Revocation of Defunct Company's I-140 Immigrant Petition for Alien Worker**

In ***Rajasekaran v. Hazuda,*** (D. Neb. November 3, 2014) (*Kopf, J.*), the District of Nebraska entered summary judgment in favor of the Government holding that it lacked subject matter jurisdiction to review United States Citizenship and Immigration Services' ("USCIS's") revocation of an I-140 immigrant petition for alien worker filed by a company no longer in operation. The court held that because USCIS's decision to revoke approval of an I-140 petition is "wholly discretionary" under 8 U.S.C. § 1155, the decision is not made reviewable by the agency's alleged noncompliance with the derogatory notice requirement of 8 C.F.R. § 103.2(b)(16).

The court also held *sua sponte* that it lacked subject matter jurisdiction to review USCIS's denial of the alien worker's I-485 adjustment of status application under 8 U.S.C. § 1252(a)(2)(B)(i).

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PENDING LITIGATION

■ **Northern District of California Denies Motion to Dismiss Complaint Challenging Delays in Rendering Reasonable Fear Determinations and Certifies Nationwide Class**

In *Alfaro-Garcia v. Johnson*, 14-cv-1775-YGR (N.D. Cal. November 21, 2014) (Gonzalez Rogers, J.), the Northern District of California denied the government's motion to dismiss and granted plaintiffs' motion for class certification. The court concluded that 8 C.F.R. § 208.31(b) imposes an enforceable, mandatory, and non-discretionary duty on USCIS to render reasonable fear determinations within 10 days of referral. The court also certified a national class of individuals who (1) are or will be subject to a reinstated removal order or a final administrative removal order; (2) express a fear of return to the country of removal; and (3) who have not received a reasonable fear determination within 10 days of referral to USCIS.

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Adjustment Denial Upheld Where Applicant Claimed Citizenship of Form I-9

(Continued from page 1)
As a result, the reference in the false claim bar to the provisions of § 1324a leaves no room for doubt that private employment constitutes a 'benefit' under the INA," explained the court. The court hen found that petitioner had falsely claimed to be a United States citizen on Forms I–9 in seeking the immigration benefit of private employment and therefore upheld the denial of adjustment.

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INSIDE OIL — FORMER OIL DIRECTOR THOMAS HUSSEY RETIRES

Justice in 1977 as a member of the Civil Division's Information and Privacy Section. From 1979 to 1983, Mr. Hussey was associated with McKenna, Conner & Cuneo, specializing in federal court litigation. He returned to the Civil Division in 1983, to serve as an Assistant Director in the Office of Immigration Litigation. Mr. Hussey was elevated to Deputy Director in 1987.

A retirement dinner honoring Thomas W. Hussey was held at Carmine's Restaurant. Shown above, Francesco Isgro, OIL Director David McConnell, Thomas Hussey, Deputy Assistant Attorney General Leon Fresco, August Flentje

In 1995, Attorney General Reno tasked Deputy Director Hussey with providing counsel to Senator Alan Simpson and the Senate Judiciary Committee on what became the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

In May 1999, Mr. Hussey was appointed as OIL's Acting Director and in December 1999, he was selected as the new Director of OIL.

In 2000-2001, Mr. Hussey organized multi-agency delegations headed by the Department of State to negotiate with the governments of Vietnam, Laos, and Cambodia for the repatriation of their citizens ordered removed from the United States. In 2002, Mr. Hussey provided support and counsel for the "migration" of the INS immigration functions to the new Department of Homeland Security.

In February 2011, Mr. Hussey resigned as Director of OIL and was appointed as OIL's Special Immigration Counsel, a position he held until his retirement.

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 202-616-4877 or at francesco.isgro@usdoj.gov.

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

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