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Immigration Litigation Bulletin

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En Banc Ninth Circuit, Holds that BIA Decision Deciding Some Claims for Relief But Remanding Others Is Not A Final Order Of Removal

On December 15, 2014, the Ninth Circuit Court of Appeals, in a unanimous *en banc* opinion, held that when the BIA issues a decision that denies relief in part but remands other claims for relief to an IJ for further proceedings, the BIA decision is not a final reviewable order of removal and does not trigger the thirty-day window in which to file a petition for review. ***Abdisalan v. Holder***, __F.3d__, 2014 WL 7012402 (9th Cir. Dec. 15, 2014).

The court's holding creates a relatively bright line rule regarding what constitutes a final order of removal for judicial review purposes, consistent with the government's position on this issue. However, as will be discussed in more detail below, the decision is not without its caveats.

Abdisalan is a native and citizen of Somalia who submitted an application for asylum and related protection to the Department of Homeland Security. She claimed that in Somalia, she was forced to undergo female genital mutilation and also was kidnapped and raped by members of a rival clan.

In removal proceedings, an immigration judge denied Abdisalan's asylum application as time-barred, but granted withholding of removal. In 2008, the BIA dismissed Abdisalan's appeal of the asylum denial and remanded proceedings to the immigration judge to complete the background checks for withholding. Abdisalan did not seek judicial review of the 2008 decision.

The background checks were completed in 2009, and the order

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ICE Enforcement and Removal Operations Report

The Immigration and Customs Enforcement (ICE) released on December 19, a summary report of its Fiscal Year (FY) 2014 civil immigration enforcement and removal operations. The report highlighted some of the operational factors that affected ICE operations and contributed to the number of ICE's FY 2014 removals, which was 315,943, down from 368,644 in FY 2013. In particular, the report noted that the surge of illegal border crossings in the Rio Grande Valley (RGV) in South Texas and significant increase in Central American migrants presented unique challenges to ICE's immigration enforcement efforts.

The following are excerpts from the ICE report.

The Surge in the Rio Grande Valley

In 2014, the United States experienced an unprecedented surge of illegal border crossings in the RGV, particularly by unaccompanied children and family units from Cen-

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Finality of Orders

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granting her withholding of removal was entered at that time. Abdisalan filed an administrative appeal with the BIA, again challenging the pretermission of her asylum application. The BIA, construing the appeal as an untimely motion to reconsider its 2008 decision, dismissed the appeal in 2010. The case was again remanded to the IJ for background checks, as the previously completed checks had expired during the administrative appeals process. A petition for review was filed with the Ninth Circuit within thirty days of the BIA's decision.

Upon completion of the background checks, the IJ again entered an order granting Abdisalan withholding of removal in 2011. A timely petition for review of that decision was filed and the two petitions were consolidated for review. The government did not contest the court of appeals' jurisdiction to review the petitions. After oral argument, the court requested supplemental briefing on the issue of whether it had jurisdiction to review the petitions at all. In the supplemental briefing, the government agreed with Abdisalan that under BIA precedent, she appropriately petitioned for review from the immigration judge's 2011 order. The government acknowledged that under certain Ninth Circuit precedent, such a petition would be deemed untimely and thus outside the court's jurisdiction.

The panel issued a published decision in September 2013, dismissing the petitions for review. The panel majority construed its decision as dictated by circuit precedent and otherwise consistent with the BIA's own approach to finality. Judge Watford dissented.

The government agreed with Abdisalan that the rule should be that a removal order is final and reviewable only when all proceedings have been completed, regardless of whether the order has been issued by the BIA or the immigration judge.

Government Agrees to En Banc Rehearing

Abdisalan then sought *en banc* rehearing. Consistent with the position advocated by the government, Abdisalan contended that the final order of removal was the immigration judge's 2011 decision concluding proceedings, not the 2008 BIA decision dismissing her asylum claim. Abdisalan asserted that the panel's decision deepens an intra-circuit split and is contrary to the agency's own statement of when an order becomes final, while undermining principles of judicial economy and certainty.

The government agreed that the case should be reheard *en banc*. The government agreed that the panel's decision deepened an intra-circuit conflict regarding when aliens should seek judicial review of BIA decisions that deny some forms of relief or protection but remand to an immigration judge for further proceedings. The government asserted that the panel's approach was inconsistent with the BIA's own approach to the finality of agency decisions, as set forth in *Matter of M-D-*, 24 I&N Dec. 138, 141-42 & n.3 (BIA 2007). The government noted that this was particularly so because the 30-day filing deadline is mandatory and jurisdictional. Both parties agreed that it was important for the court to clarify *when* aliens should petition for review in these and similar circumstances. More specifically, the government agreed with Abdisalan that the rule should be that a removal order is final and reviewable *only* when *all* proceedings have been completed, regardless of whether the order has been issued by the BIA or the immigration judge.

Intra- and Inter-Circuit Split Concerning Finality of Removal Orders

In a majority of cases, it is not difficult to ascertain when an alien should file a petition for review — the thirty-day clock begins to run when the BIA issues a decision that affirms the immigration judge's order of removal in its entirety. However, in some cases, an alien seeks multiple forms of relief from deportation in a single application. When that occurs (like in *Abdisalan*), some forms of relief might be granted, while others are denied or require a remand to the immigration judge for further proceedings. This hybrid type of decision, otherwise referred to as a "mixed" decision, often leaves aliens and attorneys wondering when to file a petition for review. When the BIA issues its decision? Or, at the conclusion of the remanded proceedings, when the immigration judge issues his/her order? Which order constitutes the "final order of removal" for purposes of judicial review? The implications are profound- if the correct deadline is missed, an alien may miss his or her ability to challenge the denial of immigration relief. Alternatively, if the petition is filed too soon, it may be dismissed as premature, which also consumes time and resources for the petitioner, the courts and the government alike.

Prior to the court's opinion in *Abdisalan*, the Ninth Circuit's authority on this issue was in conflict. In *Li v. Holder*, 656 F.3d 898 (9th Cir. 2011), the panel held that "where the [BIA] denies relief and remands pursuant to 8 C.F.R. § 1003.1(d)(6) for background checks required for alternative relief, [it has] jurisdiction to consider an appeal of the final order denying relief," i.e., the BIA's decision, not the final order of the immigration judge. *Id*. at 904. This approach, accepting jurisdiction over the BIA's denial of relief or protection despite a contemporaneous remand of proceedings to the immigration judge, is also consistent with Ninth Circuit precedent holding that a BIA decision denying relief or protection

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FINALITY OF ORDERS

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but remanding for consideration of voluntary departure is a final, reviewable order of removal. *See Pinto v. Holder*, 648 F.3d 976 (9th Cir. 2011). However, in *Go v. Holder*, 640 F.3d 1047 (9th Cir. 2011), the BIA denied asylum and withholding of removal, but remanded for further proceedings regarding the alien's eligibility for protection under the Convention Against Torture ("CAT"). The alien did not file a petition for review until after the final decision by the BIA on his CAT claim, but the court construed that petition as encompassing all final decisions made by the agency during the course of proceedings, not just the final denial of the CAT claim. *See id*. at 1051-52.

Outside of the Ninth Circuit, there is some disagreement among the courts of appeals regarding these finality questions, but the positions of the courts that have thus far addressed the issue are nuanced and evolving. The panel's decision in *Abdisalan* was consistent with the Seventh Circuit's decision in *Viracacha v. Mukasey*, 518 F.3d 511 (7th Cir. 2008), and in conflict with the Eighth Circuit's decision in *Goromou v. Holder*, 721 F.3d 569, 576 n.6 (8th Cir. 2013). The Third Circuit has held that finality and jurisdiction will be governed by whether the remand has the potential to affect the ultimate grant of relief. *See Vakker v. Attorney General*, 519 F.3d 143, 146-48 (3d Cir. 2008) (BIA decision remanding proceedings was not a final order of removal, as evidence could surface rendering the alien ineligible for withholding of removal); *Yusupov v. Attorney General*, 518 F.3d 185, 196 & n.19 (3d Cir. 2008)(BIA's decision was the final order where deferral of removal was granted and no evidence could render the alien ineligible for such protection).

Unanimous En Banc Court Creates "Bright-Line" Rule

On December 15, 2014, the Ninth Circuit issued a unanimous *en banc* decision in *Abdisalan* which overruled *Li v. Holder*, 656 F.3d 898 (9th Cir. 2011), as well as *Annachamy v. Holder*, 733 F.3d 254 (9th Cir. 2013), to the extent it relied on *Li*. The Ninth Circuit "adopt[ed] a straightforward rule: when the Board of Immigration Appeals issues a decision that denies some claims but remands any other claims for relief to an immigration judge [] for further proceedings (a "mixed" decision), the BIA decision is not a final order of removal with regard to any of the claims, and it does not trigger the thirty-day window in which to file a petition for review." *See* Slip Op. at 4-5. Rather, judicial review should only be sought at the conclusion of the proceedings, after either the immigration judge has issued a decision and the time for filing an administrative appeal has passed, or the BIA has issued a final decision after appeal from the immigration judge's decision. Any petition for review filed prior to the conclusion of the proceedings would be premature and the court would not have jurisdiction for lack of a final order of removal.

"When the BIA issues a decision that denies some claims but remands any other claims for relief to an immigration judge [] for further proceedings (a "mixed" decision), the BIA decision is not a final order of removal."

Beyond this relatively straightforward holding, however, there are two exceptions in the court's opinion. First, the court noted that its holding meant that a number of currently pending petitions for review would be deemed premature and thus presumptively outside the court's jurisdiction, and that the time for filing a proper and timely petition for review from the remanded proceedings may well have passed. In order to not "punish these petitioners for [the Ninth Circuit's] own doctrinal inconsistency," the court held "that any pending petitions rendered premature by today's decision shall be treated as automatically ripening into timely petitions upon the completion of remanded proceedings, regardless of whether those proceedings have already concluded." *See* Slip Op. at 18. This holding is of limited temporal importance, however, as it "extends only to petitioners whose petitions for review were filed in this court before [December 15, 2014]." *Id*.

Second, despite the seemingly absolute nature of the court's holding, *see, e.g.*, Slip Op. at 17 ("When the BIA remands to the IJ for *any* reason, no final order of removal exists until all administrative proceedings have concluded."), it declined to revisit its case law regarding remands where the BIA denies all claims of relief but remands for further consideration of voluntary departure. *See* Slip Op. at 17 n.8 (citing *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011), and *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1361-62 (9th Cir. 1995)). Specifically, the court opined that "[u]nder the facts of this case, we need not revisit our rule that the BIA's decision is a final order of removal when it remands for consideration of voluntary departure but denies all other forms of relief." *Id*. This distinction is hard to reconcile with *Abdisalan's* holding, which is that a remand "for *any* reason" renders the BIA decision non-final for purposes of judicial review.

In light of its holding regarding finality, the court held that it had jurisdiction to consider Abdisalan's challenge to the BIA's determination that her asylum application was time-barred, but remanded the case for the BIA to address in the first instance whether an asylum applicant's credible and uncontradicted testimony regarding her date of entry meets the statutory "clear and convincing evidence" standard for timeliness.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction – Equitable Tolling

On January 16, 2015, the Supreme Court granted the alien's petition seeking *certiorari* review of ***Mata v. Holder***, in which the Fifth Circuit held that it lacks jurisdiction to review the BIA's decision denying a request for equitable tolling of the 90-day filing deadline for motions to reopen. In its response to the petition for certiorari, the government argued that the Fifth Circuit holding is erroneous. Merits briefs for petitioner and the government are both due March 2, 2015. The Supreme Court appointed amicus counsel to defend the judgment below.

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Conviction - Possessing Illegal Drug Paraphernalia

On January 14, 2015, the United States Supreme Court heard 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.

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Consular Non-Reviewability

On February 23, 2015, the Supreme Court will hear argument on 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 (family/marital unity) 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.

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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) which party bears the burden of proof on internal relocation for CAT; and (2) whether the court improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible."

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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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Conviction – Divisibility Inconclusive Record

On January 15, 2015, the Ninth Circuit *sua sponte* directed the parties to file simultaneous briefs addressing whether ***Almanza-Arenas v. Holder*** should be reheard *en banc*. The panel ruled (771 F.3d 1184) that California's unlawful-taking-of-a vehicle statute is not divisible, but even assuming divisibility, the record of conviction discharged the alien's burden of proving eligibility for relief from removal and held the Board's precedent decision (*Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009)) to be erroneous. The briefs are due March 9, 2015.

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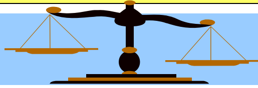

Summaries Of Recent Federal Court Decisions

SECOND CIRCUIT

Second Circuit Holds Imposition of Fine and Sanction for Non-payment Did Not Constitute Past Persecution, But Nonetheless Could Support A Well-Founded Fear of Persecution Depending on Evidence Showing Authorities Continuing Interest in Collecting the Fine

In *Chen v. Holder*, __ F.3d __, 2014 WL 6844695 (2nd Cir., December 5, 2014) (Chin, Carney, *Raggi)*, the Second Circuit held that a Chinese asylum applicant, who had been fined in 1996 by the local Chinese officials for violating the population control program, did not suffer past economic persecution even though the fine amounted to more than twenty times his annual income. The court explained that, although the fine '"was certainly 'extraordinarily severe' and 'particularly onerous,'" and as such "may have the potential to impoverish or to deprive a person of life's necessities in the future, a person has not suffered past persecution until payment or collection efforts actually have such persecutive effects." The court also determined that the termination of petitioner's farming leasehold by the Chinese authorities after he had departed to the United States did not amount to past persecution because the sanction did not impose economic hardship on petitioner.

The court, however, determined that the imposition of the fine, combined with the termination of the petitioner's family's farming leasehold, could support a well-founded fear of future persecution where the record indicated that authorities would pursue payment and where payment of the fine would reduce the applicant to an impoverished existence. Accordingly, the court remanded the case for the BIA to consider, among other matters whether Chinese officials have a continuing interest in collecting the outstanding fine and the petitioner's inability to make payment without being deprived of life's necessities or rendered impoverished.

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FOURTH CIRCUIT

Fourth Circuit Holds that Common-Law Larceny Is Not an Aggravated Felony Theft Offense

In *Omargharib v. Holder*, __F.3d__, 2014 WL 7272786 (4th Cir. December 23, 2014) (Niemeyer, Wynn, *Floyd*), the Fourth Circuit determined that grand larceny pursuant to Virginia Code 18.2-95, which incorporates a common-law definition of larceny, does not constitute an aggravated felony theft offense under INA § 101(a)(43)(G), because the statute is indivisible as a matter of law and the BIA erred in applying the modified categorical approach to find otherwise.

> **"The use of the word 'or' in the definition of a crime does not automatically render the crime divisible."**

The court agreed with the BIA that the Virginia grand larceny statute does not categorically match the INA's theft offense crime because Virginia law treats fraud and theft as the same for larceny purposes, while the INA defines them separately. Specifically, a fraud offense under INA § 101(a)(43)(M) only applies if the loss to the victim exceeds $10,000, and Virginia fraud does not require a $10,000 threshold. Therefore, the Court agreed, Virginia larceny "sweeps more broadly" than the INA's fraud offense and does not categorically constitute an aggravated felony under the INA.

However, the Court held the Virginia larceny statute indivisible under *Descamps v.United States, 133 S. Ct. 2276 (2013)*, and explained that the BIA consequently erred by proceeding to apply the modified categorical. While the Virginia statute defines larceny in the disjunctive to include "wrongful or fraudulent" takings, the court disagreed with the government's view that the use of the word "or" creates two different versions of the crime of larceny: one involving wrongful takings (theft), and one involving fraudulent takings (fraud). The court explained that "the use of the word 'or' in the definition of a crime does not automatically render the crime divisible . . . . a crime is divisible under *Descamps* only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime) . . . . Elements, as distinguished from means, are factual circumstances of the offense the jury must find 'unanimously and beyond a reasonable doubt.'"

The court cited favorably the Ninth Circuit's decision in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), where that court reached a similar conclusion in interpreting a statute written in the disjunctive. Under Virginia law, the court continued, "juries are not instructed to agree 'unanimously and beyond a reasonable doubt' on whether defendants charged with larceny took property 'wrongfully' or 'fraudulently.' Rather, [] it is enough for a larceny conviction that each juror agrees only that either a 'wrongful or fraudulent' taking occurred, without settling on which." Consequently, the court found that "larceny in Virginia law is indivisible as a matter of law[,]" the

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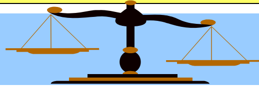

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modified categorical approach cannot be applied, and petitioner's conviction for grand larceny was, therefore, not a "theft offense" under the INA.

In a concurring opinion, Judge Niemeyer lamented the "ever blurring analysis and the increasingly blurred articulations of applicable standards" regarding when to apply the modified categorical approach, and said that *Descamps* was the "source of much of the confusion."

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SEVENTH CIRCUIT

Seventh Circuit Holds that BIA Properly Declined to Consider Social Group Formulation That Was Not Presented to the Immigration Judge

In *Duarte-Salagosa v. Holder*, __F.3d__, 2014 WL 7373525 (7th Cir. December 30, 2014) (*Manion*, Easterbrook, Sykes), the Seventh held that the BIA properly declined to consider a new social group proposed by the petitioner as a basis for withholding of removal because it had not been presented to the IJ.

The petitioner, a citizen of Mexico, claimed in his asylum application that he feared returning to Mexico because he had cooperated with the United States Drug Enforcement Agency (DEA) and feared retribution from the Zeta drug cartel. At his immigration hearing, petitioner denied that he had cooperated with the DEA or that he had been threatened by the Zeta cartel as a result of any purported association with law enforcement. Instead, he claimed that the conflict stemmed from a run-in he had with the cartel almost fifteen years earlier in Mexico, where the cartel kidnapped him for the purposes of ransom, but petitioner managed to escape. The IJ denied petitioner's application for asylum and withholding of removal.

In his appeal to the BIA, petitioner claimed persecution based on his "membership in the particular group of successful business [men] who have come under extortionate attacks by the ever-increasing influence of the Zeta drug cartels fighting for the heart and soul of Mexico's business and economic structure." The BIA rejected petitioner's proposed social group because he had not first raised this argument in his initial application or with the IJ. Nonetheless, the BIA considered petitioner's testimony about his kidnapping at the hands of cartel members and determined that the cartel detained him for the purposes of obtaining money rather than to persecute him for his race, religion, or any other grounds recognized by law. Accordingly, the BIA denied the withholding claim and denied the asylum claim for failure to timely file it within one year of his arrival in the United States.

> **"The possibility of private violence based on personal grudges, and the inability of a country to protect its citizens from this, is not a basis for asylum or withholding of removal."**

Before the Seventh Circuit, petitioner claimed that the BIA and IJ failed to consider his membership in a group consisting of "Mexican businessmen in an area known for widespread kidnappings and extortion, where the Mexican government is unwilling or unable to effectively intervene and where corruption makes it all but impossible to tell the good law enforcement from the bad." The court agreed with the BIA, however, that petitioner had to first exhaust this proposed social group before the IJ. Moreover, the court continued, and in any event, petitioner's "feared persecution emanates from a personal dispute rather than one of the protected grounds covered by the Immigration and Nationality Act. The possibility of private violence based on personal grudges, and the inability of a country to protect its citizens from this, is not a basis for asylum or withholding of removal." The Court likewise rejected petitioner's CAT claim, raised for the first time in his brief to the Court, for lack of exhaustion, and held it lacked jurisdiction to consider the agency's untimely asylum application finding.

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DISTRICT COURTS

District Court for Western District of Missouri Dismisses Class Action Lawsuit Challenging USCIS's Administration of the Adam Walsh Act

In *Bremer v. Johnson*, No. 13-cv-01226 (W.D. Mo.) (*Smith, J.),* A U.S. citizen plaintiff filed a class action lawsuit consisting of U.S. citizens with qualifying Adam Walsh Act convictions involving minors and who filed immigrant visa petitions to classify foreign national spouses as immediate relatives. Plaintiff challenged as substantively and procedurally defective USCIS's policy memorandum setting forth a standard for determining whether a petitioning citizen with qualifying convictions can show no risk to their intended beneficiaries. The district court dismissed the challenge for lack of subject matter jurisdiction because, by statute, USCIS's risk determinations are discretionary and under 8 U.S.C. § 1252(a)(2)(B)(ii) all such discretionary agency decisions are immune from judicial review. The district court also held that it lacked jurisdiction to review consti-

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USCIS Expands the Definition of "Mother" and "Parent" to Include Gestational Mothers Using Assisted Reproductive Technology (ART)

USCIS has issued a new policy (PA-2014-009) clarifying the definition of "mother" and "parent" under the Immigration and Nationality Act (INA) to include gestational mothers using assisted reproductive technology regardless of whether they are the genetic mothers. USCIS and the Department of State (DOS), who exercise authority over these issues, collaborated in the development of this policy. USCIS and DOS concluded that the term "mother" and "parent" under the INA includes any mother who: gave birth to the child, and was the child's legal mother at the time of birth under the law of the relevant jurisdiction.

Under this new policy, a mother who meets this definition but does not have a genetic relationship with her child (for example, she became pregnant through an egg donor) will be able to petition for her child based on their relationship, be eligible to have her child petition for her based on their relationship, be able to transmit U.S. citizenship to her child, if she is a U.S. citizen and all other pertinent citizenship requirements are met.

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tutional challenges to USCIS's risk determinations because such challenges may only be brought in a petition for review of a final order of removal.

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District of Arizona Revokes Naturalization of Former Border Patrol Agent

In *United States v. Arango*, No. 09-cv-178 (D. Ariz. December 17, 2014) (*Bury, J.*), the district court revoked and set aside the naturalization of a citizen who had obtained his lawful permanent resident status through a sham marriage. After he naturalized, the defendant became a Border Patrol agent and was convicted of intent to possess approximately 400 pounds of cocaine during an undercover operation at the Arizona border. The court held that the defendant illegally procured his citizenship as a result of his sham marriage, and that he procured his naturalization by willfully misrepresenting and concealing his marriage fraud during his naturalization process. The court rejected the defendant's argument that the INS had entered into an agreement with him in 1982 excusing his sham marriage. The court also held that, although the defendant naturalized in 1989, the doctrine of laches did not preclude the government's denaturalization action because the evidentiary value of the documentary evidence and the witnesses' testimony had not diminished, and the government did not lack diligence in initiating the proceedings.

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Aliens Who Obtained LPR as Derivatives on Fraudulent Asylum Application Are Ineligible for Naturalization

In *Kadirov v. Beers*, No. 13-cv-7390, (E.D. PA. December 4, 2014) (*McHugh, J.),* the court granted the government's summary judgment motion, holding that aliens who obtained LPR without being qualified for permanent residence are ineligible for naturalization. Two alien brothers filed suit after USCIS denied their naturalization applications, determining they were not lawfully admitted because they had obtained LPR status as derivatives on their father's fraudulent asylum application.

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Enforcement Efforts At and Between Ports of Entry

The following are excerpts from the CBP Border Security Report for Fiscal Year 2014.

The Nation's long-term investment in border security has produced significant and positive results in FY 2014. Illegal migration, as defined by total Border Patrol apprehensions, continues to reflect an overall decline compared to the peak in 2000.

Border Patrol apprehensions totaled 486,651 nationwide in FY 2014, compared to 420,789 in FY 2013. The uptick is largely due to the increase in unaccompanied children and family units who turned themselves in to Border Patrol agents in South Texas this summer. In FY 2013, the Border Patrol apprehended a total of 38,833 unaccompanied children and 15,056 family units nationwide. In FY 2014, those numbers were 68,631 and 68,684, respectively—a 76 percent increase in unaccompanied children and a 356 percent increase in family units over FY 2013. DHS responded aggressively to this spike, and by September the number of unaccompanied children and family units crossing into South Texas were at their lowest levels in almost two years.

While Border Patrol apprehensions of Mexican nationals in FY 2014 decreased by 14 percent when compared to FY 2013, apprehensions of individuals from countries other than Mexico—predominately individuals from Central America—increased by 68 percent. Of the 486,651 apprehensions nationwide, 468,407 of those apprehensions were of individuals from Mexico, El Salvador, Guatemala and Honduras, and nearly all apprehensions were along the southwest border. In FY 2014, CBP apprehended 66,638 nationals from El Salvador, 81,116 nationals from Guatemala, 91,475 nationals from Honduras, and 229,178 nationals from Mexico.

ICE Enforcement and Removal Operations Report

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tral America. CBP apprehensions in the RGV—a sector containing just 320 miles of our 2,000 mile border with Mexico—accounted for 72.8 percent of the unaccompanied children and 76.2 percent of the family units apprehended in FY 2014. In FY 2013, the Border Patrol apprehended a total of 21,553 unaccompanied children and 7,265 family units in the RGV. In 2014 those numbers were 49,959 and 52,326, respectively. In June alone, at the height of the surge, the Border Patrol apprehended 8,730 unaccompanied children and 13,370 family units in the RGV, which placed significant strain on a number of DHS resources and operations, including ICE.

FY 2014 Top 10 Countries of ICE Removal by Citizenship	
Citizenship	**Total**
Mexico	176,968
Guatemala	54,423
Honduras	40,695
El Salvador	27,180
Dominican Republic	2,130
Ecuador	1,565
Nicaragua	1,266
Colombia	1,181
Jamaica	938
Brazil	850
Total	**307,196**

As part of DHS's response to this unprecedented migration, and to stem the tide, in FY 2014, ICE devoted significant resources, both transportation assets and ICE Enforcement and Removal Operations (ERO) officers, to transfer 56,029 unaccompanied children apprehended at the southwest border to the Department of Health and Human Services (HHS), as the law requires. While these unaccompanied children did not occupy ICE detention space, they required ICE to reallocate resources, including officer time, to support DHS's response to this urgent humanitarian situation. For example, approximately 800 ERO officers and support personnel (over 10 percent of ERO's entire workforce) were detailed to support southwest border operations.

The significant increase in illegal migration of unaccompanied children and family units also contributed to operational challenges for ICE. ICE does not detain unaccompanied children. Under the law, ICE is required to transfer unaccompanied children to HHS, generally within 72 hours. HHS then becomes responsible for their care and is required by law to place unaccompanied minors in the least restrictive setting that is in the best interest of the child, which generally results in placement with a family member. Unlike adults apprehended at the border who are placed into expedited removal, the law requires that unaccompanied children be placed in removal proceedings before an immigration judge (as opposed to expedited removal). These cases are placed on the non-detained immigration court docket, and due to a number of factors, generally take significantly longer to be adjudicated than those of adults.

Like single adults, family units apprehended at the border may be placed into expedited removal proceedings and detained. However, this process requires ICE to maintain an increased level of family detention space, which historically has been limited to fewer than 100 beds nationwide. ICE cannot detain family units, including children, in adult detention facilities. As a result, in the summer ICE sought substantial resources and authority to build additional detention capacity to detain and remove family units, and since then ICE has opened three additional facilities for this purpose. All of these efforts required ERO officer time, support personnel, and significant funding.

At the height of the surge, in order to sustain ICE and CBP response efforts, the President submitted an emergency supplemental funding request to Congress to help address these unique and urgent challenges, including significantly increased ICE detention capacity for family units and ICE transportation resources for unaccompanied children. That request was not acted upon, and as a result DHS was required to reprogram funds from other key homeland security priorities. In doing so, and coupled with a broader public messaging campaign and sustained foreign counterpart engagement, DHS efforts helped contribute to dramatically reducing migration in the RGV, down to 1,491 unaccompanied children and 1,704 family units apprehended in September, the last month of the fiscal year. However, ICE and DHS components remain vigilant and will continue to work with Congress and our interagency and foreign counterparts to sustain our progress.

The Spike of Central Americans

In addition to the surge of unaccompanied children and family units, between FY 2013 and FY 2014, ICE experienced another key demographic shift in the population of the individuals it detained and removed. Specifically, ICE removals of Mexican nationals decreased from 66 to 56 percent of total ICE removals during this period. At the same time, the number of aliens removed to El Salvador, Guatemala, and Honduras increased by 15 percent due to the increased share of apprehensions involving such nationals at the border. Removals of individuals at the border from countries other than Mexico increased 26 percent.

Removal of nationals to non-contiguous countries are far more costly, take significantly more time, and require added officer resources as compared to removals of Mexican nationals. Instead of quickly returning Mexican nationals apprehended at the border, ICE must take custody of Central Americans and other individuals from non-contiguous countries, detain them, obtain travel documents from the host country, and expend transportation and flight resources.

Inside OIL

Congratulations to *Anthony Payne*, *John Hogan*, and *John Blakeley,* who have been promoted to OIL's Assistant Directors.

Mr. Payne is a graduate of the University of Virginia and the Georgetown University Law Center. He joined the Department in 1995 through the Attorney General's Honors Program. Prior to joining OIL in 1999 as a Trial Attorney, Mr. Payne served as Attorney Advisor with the Board of Immigration Appeals. In 2006, he became a Senior Litigation Counsel, assisting in the management of one of OIL's litigation team. Mr. Payne has been serving as Acting Assistant Director since July 2014.

Anthony Payne

Mr. Blakeley is a graduate of the U.S. Naval Academy and Notre Dame Law School, where he also earned an LL.M. in international human rights law, Mr. Blakeley joined the Department in 2006. Prior to joining OIL, Mr. Blakeley spent more than thirteen years in government service, first with the U.S. Navy and later with the U.S. Commission on Civil Rights. He also operated his own immigration practice in South Bend, Indiana. In 2008, he became a Senior Litigation Counsel, serving most of that time on the Appellate team, where he handled rehearing petitions in the courts of appeals and immigration cases in the Supreme Court. Mr. Blakeley has been serving as acting Assistant Director since September 2014.

John Blakeley

Mr. Hogan is a graduate of Lafayette College and Penn State University School of Law. Mr. Hogan joined OIL in 1999 after having served eight years in the United States Marine Corps. In the Marines, Mr. Hogan served as a military liaison in Bucharest, Romania, as a SAUSA in the Southern District of California, and traveled to over 30 countries as part of the International Military Education and Training program. Mr. Hogan served as a Senior Litigation Counsel on one of OIL's largest litigating teams until August 2014, at which time he was promoted to Acting Assistant Director.

John Hogan

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OIL TRAINING CALENDAR

February 2-6, 2015. OIL New Attorney Training. LSB LL-100.

February 9, 2015. OIL Brown Bag Lunch & Learn with Ron Rosenberg, Chief, Administrative Appeals Office (AAO), USCIS. Noon-1:00 pm LSB-5421.

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If you would like to learn more about INTERPOL Washington mission or read the latest INTERPOL Washington news on your mobile device, download the free INTERPOL Washington mobile app today in the Apple App Store. The app features news and media information about INTERPOL Washington; photographs of various law enforcement personnel in action, including U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI); a list of INTERPOL liaison locations within the U.S. and U.S. territories; as well as an explanation of the Notices issued by INTERPOL Washington pursuant to U.S. law enforcement agency requests. At this time, the INTERPOL Washington app is available only for the iPhone.

INSIDE OIL

Congratulations to OIL Director **David McConnell,** who received the Assistant Attorney General's Career Service Award for his outstanding support of the Civil Division's overall litigation mission. The award was presented by Joyce R. Branda, the Acting Assistant Attorney General for the Civil Division at the Annual Civil Division Award Ceremony held on December 4, 2015, in the Great Hall. James Comey, the Director of the Federal Bureau of Investigation gave the Keynote Address.

Congratulations to the following OIL employees who also received awards:

- Frank Fraser: *Dedicated Service Award*;
- Genevieve Kelly: *John W. Douglass Award for Pro Bono Service*;
- Tonya Alexander and Paula Richardson: *Award for Excellence in Paralegal Support*;
- Kenyetta Briggs: *Award for Excellence in Administrative Support*;
- John Hogan, Betty Stevens, Chris Fuller, and Ethan Kanter: *Special Commendation Award*;
- Tonya Alexander, LaTia Bing, Valarie Dickson, Karen Drummond, Wanda Evans, Janell Fletcher-Green, Jackquelyn Foster, Angela Green, Tracey Harris, Leijla Huric, Caroll Lanham, Tenecia Mahoney, Clynnetta Neely, Karen Riggleman, Krystal Samuels, Laroi Scrivner, and Tyrone Sojourner: *Training and Professional Development Award*.

Tenecia Mahoney, Tracey Harris, David McConnell, Clynetta Neeely, Karen Riggleman, Carol Lanham, Chris Fuller

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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