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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Ninth Circuit En Banc Panel Holds California's Joyriding Statute Is Indivisible And Not a Categorical Match to a CIMT

Concurrence says "a better mousetrap is long overdue"

In *Almanza-Arenas v. Holder*, 809 F.3d 515 (9th Cir. 2015) (Chief Judge Thomas, N.R. Smith, Gould, Tallman, Rawlinson, Bybee, Callahan, Ikuta, Nguyen, Watford and Owens) (*en banc*), an eleven-judge *en banc* panel held that a conviction under California Vehicle Code § 10851(a), a statute criminalizing the unlawful driving or taking of a vehicle, is categorically not a CIMT because the statute is indivisible and the least of the acts criminalized – a temporary taking – is not a CIMT.

The statute punishes both automobile theft (a permanent taking), which is a CIMT, and joyriding (a temporary taking), which is not a CIMT. The court found that the statute is indivisible because the disjunctive phrase in the statute requiring intent to either permanently or temporarily deprive an owner of their vehicle merely sets forth means of committing the offense and not separate elements creating distinct crimes.

The petitioner, a citizen of Mexico, entered the United States unlawfully in October 2000. In February 2005, DHS placed him in removal proceedings because he had not been properly admitted to the United States. Petitioner admitted the allegation but sought cancellation of removal under INA § 240A. In his application for cancellation petitioner disclosed that on September 12, 2000, he pleaded guilty to a misdemeanor violation of California Vehicle Code § 10851(a).

(Continued on page 2)

Mandatory Detention Under INA § 236(c) Must Begin Upon the Alien's Release from Criminal Custody or Within a Reasonable Period of Time Thereafter

In *Castaneda v. Souza*, __F.3d __, 2015 WL 9319496 (1st Cir. December 23, 2015) (Howard, C.J., and Kayatta, Lynch, Barron, Torruella, and Thompson), the First Circuit *en banc* divided equally and therefore affirmed the judgments of the District Court for the District of Massachusetts finding that petitioners had a right to an individualized bond hearing because INA § 236(c) only requires mandatory detention immediately upon release from criminal custody or within a reasonable period of time thereafter.

The petitioners who filed these habeas petitions had been released from criminal custody years before their immigration custody started. Clayton Richard Gordon, an LPR, had been convicted of a drug offense in 2008 and released from custody a day after of his arrest. On June 20, 2013, while driving to work, Gordon was stopped by ICE agents, taken into ICE custody, and detained under the mandatory provisions of §236 (c). Leticia Castaneda, the other petitioner, was placed on probation

(Continued on page 11)

Joyriding Statute Indivisible

(Continued from page 1)

At the removal hearing, DHS argued that petitioner had been convicted of a CIMT and therefore was ineligible cancellation. DHS placed into evidence three state court documents: (1) a felony complaint charging (2) a copy of petitioner's September 12, 2000 plea of nolo contendere, and (3) a judgment showing that petitioner received a sentence of twenty-four days time served. Neither party placed into evidence the transcript of petitioner's plea colloquy for this conviction. The IJ found that petitioner had not met his burden of proof to show eligibility for cancellation of removal, because he had not shown that he was convicted of the lesser "temporary" offense in §10851(a).

The BIA affirmed the IJ's holding in a precedential decision, *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009). The BIA concluded that the conviction record before the IJ was ambiguous, and it was petitioner's duty to produce evidence (including the requested plea colloquy) that he did not commit a CIMT because he had the burden of proof. In particular, the BIA concluded petitioner did not meet his burden because he did not produce more specific evidence, as the IJ requested, to show that he did not intend to permanently deprive the owner of his or her vehicle. Petitioner timely sought judicial review. A Ninth Circuit panel initially granted the petition (785 F.3d 366) but subsequently the court ordered the case to be reheard *en banc*.

The *en banc* panel applied the three-step process set forth in *Descamps v. United States*, 133 S. Ct. 2276 (2013). First, under the so-called categorical approach, the court compared the three elements for the state offense to the elements of the generic offense. The court found that one element of § 10851 (a) criminalizes the driving or taking of a vehicle without consent regardless of whether the individual had the "intent to either permanently or temporarily deprive the owner" of his or her vehicle. The court then compared this to the generic definition of a CIMT to determine if the crime is "vile, base, or depraved" and "violates accepted moral standards." The court noted that although § 10851(a) is generally considered a theft offense, not all "theft" offenses are CIMTs. The BIA had held, for example, that a temporary taking (such as joyriding) is not a CIMT. Therefore, the court concluded that § 10851(a) is overbroad and is not a categorical match.

Judge Owens, joined by three judges, declared that the court "should no longer tinker with" the modified categorical method and called for the enactment of statutes that do not require the application of that method in the removal context.

Second, the court examined the statute to determine whether under the *Descamps*' methodology, it was divisible. Specifically, the court explained that its inquiry was whether § 10851(a)'s "'intent' element (to permanently or temporarily deprive) is divisible or indivisible." The court said it owed no deference to the BIA's interpretation that the statute was divisible. Looking at the text of the statute, the court determined that "the means or methods of committing the element of the offense do not make the statute divisible, because the trier of fact does not need to agree as to whether the deprivation was temporary or permanent (the length of time during which the deprivation occurred)." Therefore, the court concluded that § 10851(a) is an indivisible statute. The court confirmed its interpretation by examining the *Shepard* documents and finding that "because the indictment charged [petitioner] with having intent either to permanently deprive or temporarily deprive the owner, the indictment reveals that (under state law) the two forms of intent are alternative means of accomplishing the same crime instead of two separate crimes." The court also looked to the California law and found that the "jury instruction makes clear that California law treats the disjunctive phrases in the statute as means of committing the offense not separate elements creating new crimes." The court recognized that there is a circuit split as to whether, following *Descamps*, courts may look to state law to determine a statute's elements.

Given its ruling that § 10851(a) is not divisible, the panel did not address petitioner's burden of proving that a conviction is not disqualifying, including the validity of *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*).

In a separate concurring opinion, Judge Owens, joined by three judges, declared that the court "should no longer tinker with" the modified categorical method and called for the enactment of statutes that do not require the application of that method in the removal context. "The bedeviling 'modified categorical approach' will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal judges reviewing thousands of criminal state laws and certain documents to determine if an offense is 'categorically a crime involving moral turpitude.' Almost every Term, the Supreme Court issues a 'new' decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again. A better mousetrap is long overdue."

Concurring in the judgment, Judge Watford agreed that a conviction under § 10851(a) is not a CIMT, but disagreed with the majority's conclusion that the statute is indivisible. Judge Watford wrote that he would overrule *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), because its divisibility analysis is inconsistent with *Descamps'* approach.

By Francesco Isgro, OIL

Contact: Patrick Glen, OIL
☎ 202- 305-7232

FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony

On November 3, 2015, the Supreme Court heard argument on certiorari in ***Torres v. Lynch***, 764 F.3d 152, where the Second Circuit held that a state arson conviction need not include an interstate commerce element in order to qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E). That provision defines aggravated felonies to include "an offense described in . . . 18 U.S.C. 844(i)," which is the federal arson statute and which includes an element not found in state arson crimes – mainly, that the object of the arson be "used in interstate or foreign commerce." The Second Circuit agreed with the Board of Immigration Appeals' decision in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), while the Third Circuit had previously rejected *Bautista* on direct review, 744 F.3d 54 (3d Cir. 2014).

Contact: Patrick Glen, OIL
☎ 202-305-7232

Crime of Violence

On November 18, 2015, the Department filed a petition for *en banc* rehearing of the judgment in ***Dimaya v. Lynch***, 803 F.3d 1110 (9th Cir. 2015), in which a divided panel ruled that the "crime of violence" definition in 18 U.S.C. § 16 (b), as incorporated into the aggravated-felony provision of the immigration laws, is unconstitutionally vague in view of Johnson *v. United States*, 135 S. Ct. 2521 (2015). The petition argues that ruling is incorrect, is already causing substantial disruption to the administration of the immigration and criminal laws in the Ninth Circuit, and will cause even greater disruption if extended to the more-than-a-dozen other federal statutes that use 18 U.S.C. § 16(b) or similar language. At the court's direction Dimaya has responded to the government's petition

Contact: Bryan Beier, OIL
☎ 202-514-4115

Jurisdiction
Injunction Against Executive Action

On January 19, 2016, the Supreme Court granted the government's petition for a writ of certiorari in United States, in ***United States, et al. v. Texas, et al.*** (SCt No. 15-674), challenging the November 9, 2015 decision by the Fifth Circuit, 805 F.3d 653, affirming the injunction entered by a district court against the implementation of DHS's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and the expansion of Deferred Action for Childhood Arrivals (DACA) program. The court held that "[a]t least one state" - Texas - had Article III standing and a justiciable cause of action under the APA, and that respondents were substantially likely to establish that notice-and-comment rulemaking was required. The petition for certiorari (available at 2015 WL 7308179) argues, *inter alia*, that the court's merits rulings warrant review because they strip DHS of authority it has long exercised to provide deferred action, including work authorization, to categories of aliens.

Civil Division Contact: Adam Jed, Counsel to the AAG

Expedited Removal
Right to Counsel

On December 4, 2015, the Ninth Circuit *sua sponte* requested views from the government and amici on whether it should rehear *en banc* its September 28, 2015 published decision in ***Pena v. Lynch***, 804 F.3d 1258, which held that the court lacks jurisdiction to review the procedural due process claim of the alien who placed in expedited removal and ordered removed that he did not knowingly and voluntarily waived right to counsel. The panel held that the statute does not deprive the alien of any forum to challenge his expedited removal proceedings, and although the available avenues of review provide no relief for the alien in the administrative context, the fact remains that avenues of review exist. On December 18, 2015, the government and amici filed responses. The government recommended against rehearing en banc because the panel decision was correct and the case implicated no conflict with the precedent decisions of the circuit or any other circuits.

OIL Contact: Papu Sandhu
☎ 202-616-9357

Updated by Andy MacLachlan, OIL
☎ 202-514-9718

USCIS Launches Virtual Assistant "Emma"

USCIS has launched a virtual assistant named "Emma" on uscis.gov, allowing customers to quickly find accurate information. She answers questions in plain English and navigates users to relevant USCIS web pages. She is named after Emma Lazarus, whose famous words are inscribed at the base of the Statue of Liberty.

Emma was developed in response to a growing interest in self-help tools and to enhance our customer service. USCIS call centers currently receive many questions concerning general information requests that can be provided through the Web. Now Emma will help provide that information.

Although Emma can currently answer many questions USCIS customers commonly ask, her knowledge base is still growing. As customers ask more questions, Emma gets smarter and can better assist future customers.

Soon, she'll be expanding to mobile devices, and her Spanish language capabilities will be arriving early next year.

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Alien Did Not Derive United States Citizenship Because His Father did Not Have Legal Custody Pursuant to a "Legal Separation" under Jamaican Law

In *Thompson v. Lynch*, __F.3d__, 2015 WL 9466573 (1st Cir. December 29, 2015) (Howard, *Torruella*, Lipez), the First Circuit held that a Jamaican national did not derive United States citizenship under former INA § 321(a)(3) based on his father's naturalization.

Former § 321(a) provides that a child derives citizenship from the naturalization of one parent if (1) the naturalized parent has "legal custody of the child when there has been a legal separation of the parents"; (2) the naturalization occurs before the child turns eighteen years old; and (3) the child is a lawful permanent resident either at the time of or after the naturalization.

Thompson was born in 1982 to Jamaican parents in Jamaica. Sometime after his birth, Thompson's father moved to the United States and, in 1992, became a naturalized citizen. In 1997, Thompson's father petitioned for Thompson to immigrate to the United States. Later that year, at the age of fourteen, Thompson was admitted as an LPR and moved to the United States to live with his father. Thompson remained in the custody of his father until he reached adulthood.

In 2012, DHS commenced removal proceedings against Thompson on the basis that in 2001 he had pleaded guilty to a deportable offense. Thompson in turn submitted to USCIS an application for citizenship. USCIS denied the application, explaining that because Thompson's parents were never legally married, they could not have legally separated as required by § 321(a)(3). An IJ affirmed USCIS's reasoning fully and ordered Thompson removed to Jamaica. Thompson appealed to the BIA asserting that his parents "were common law spouses in Jamaica" who legally separated when they ceased cohabitation. The BIA rejected this argument on the grounds that Thompson had not proven that Jamaica recognized common-law marriage at the time of his birth and that the cessation of cohabitation did not qualify as a "legal separation."

"Thompson's failure to prove that Jamaica recognized common-law marriages while his parents were in a relationship is dispositive of his claim."

In denying the petition, the court explained that "Thompson's failure to prove that Jamaica recognized common-law marriages while his parents were in a relationship is dispositive of his claim," because without a legally recognized relationship, his parents could not have legally separated as required by section 321(a)(3).

Moreover, the court found that, even if the Thompsons's parents were in a common-law marriage, he had failed to adduce any factual or legal arguments that his parents had "legally separated."

Contact: Joseph Hardy, OIL
☎ 202-305-7972

First Circuit Holds that Connecticut Third-Degree Assault Conviction is Not Categorically a Crime of Violence Aggravated Felony

In *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015) (Torruella, Lynch, *Kayatta, JJ.),* the First Circuit held that third-degree assault under Conn. Gen. Stat. § 53a-61(a)(1) does not require proof of all the elements of a crime of violence under 18 U.S.C. § 16(a) and therefore is not an aggravated felony under INA § 237(a)(2)(A)(iii).

The court, looking at the text of the Connecticut statute, found that it was missing "any indication that the offense also requires the use, threatened use, or attempted use of 'violent force.'" Accordingly, the court concluded that "common sense" suggests that there is a reasonable possibility that Connecticut could punish conduct that results in "physical injury" which does not require the "use of physical force."

Contact: Anthony Norwood, OIL
☎ 202-616-4883

First Circuit Remands to Allow the BIA to Further Consider the Appropriate Standard for Aliens Convicted of Non-Aggravated Felony Particularly Serious Crimes

In *Velerio-Ramirez v. Lynch*, 808 F.3d 111 (1st Cir. 2015) (Torruella, *Lynch,* and Kayatta), the First Circuit granted the petition for review and remanded the alien's proceedings to the BIA, holding that the BIA did not adequately consider the intersection between former INA § 243(h) and AEDPA § 413(f) as applied to aliens convicted of non-aggravated felonies.

The petitioner, a citizen of Costa Rica, claimed that the BIA erred in upholding the IJ's determination that her conviction for aggravated identity theft was a "particularly serious crime" rendering her ineligible for withholding of removal under INA § 241(b).

The former INS placed Velerio in deportation proceedings in 1991. By the time the DHS took action in

(Continued on page 5)

Summaries Of Recent Federal Court Decisions

(Continued from page 4)

Velerio's case in 2011, Congress had replaced deportation proceedings with removal proceedings, a process governed by a different set of statutes. DHS mistakenly leveled removability charges against Velerio, and the IJ's decision mistakenly applied removal law in denying her application for protection. In particular, the IJ pretermitted Velerio's application for withholding on the basis that her crime was "particularly serious." On appeal, the BIA identified the error but found the law governing the two proceedings the same in the context of particularly serious crimes.

The First Circuit noted that although it generally defers to the BIA's interpretation of the immigration laws where reasonable, "the BIA's decision failed to acknowledge whether or how, if at all, AEDPA § 413(f) changes the 'particularly serious crime' determination for a non-aggravated felon like Velerio." Accordingly, it remanded "in an abundance of caution" to allow the BIA to consider the appropriate test for determining whether such a conviction constitutes a particularly serious crime.

Contact: Jem Sponzo, OIL
☎ 202-305-0186

FOURTH CIRCUIT

■ **Fourth Circuit Holds Possessing Cocaine with Intent to Distribute is Always a Felony Under the Controlled Substance Act and Therefore an Aggravated Felony**

In ***Hernandez-Nolasco v. Lynch***, 807 F.3d 95 (4th Cir. 2015) (Wilkinson, *Keenan*, Thacker), the Fourth Circuit held that possessing cocaine with the intent to distribute was always punishable as a felony under the Controlled Substances Act, and as such it constituted an aggravated felony drug trafficking crime under *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-86 (2013).

The petitioner, a citizen of Honduras, entered the United States without authorization in 2009, when he was 17 years of age. In 2012, petitioner was indicted by a grand jury in Fairfax County, Virginia, and charged with possession of cocaine with the intent to distribute in violation of Virginia Code § 18.2–248. Petitioner entered a guilty plea to the charge in the indictment and was convicted and sentenced to a five-year term of imprisonment, suspended.

The court held that since petitioner had received a five-year sentence for his crime, his crime was per se particularly serious and the exception in *Matter of Y-L-* , 23 I&N Dec. 270 (AG 2002), did not apply.

DHS later issued a Final Administrative Removal Order and petitioner sought withholding. The agency denied withholding because petitioner's conviction constituted a particularly serious crime and denied CAT protection on the merits.

The court held that since petitioner had received a five-year sentence for his crime, his crime was *per se* particularly serious and the exception in *Matter of Y-L-*, 23 I&N Dec. 270 (AG 2002), did not apply. The court also reaffirmed that it lacks jurisdiction over factual issues, such as the Denial of CAT on the merits, under INA § 242(a)(2)(C).

Contact: Edward Wiggers, OIL
☎ 202-616-1247

■ **Fourth Circuit Holds Immigration Judge's Competency Assessment of Alien Proper, Request for Continuance Rightly Denied**

In ***Diop v. Lynch***, 807 F.3d 70 (4th Cir. 2015) (*Wilkinson*, Keenan, Thacker), the Fourth Circuit held that the IJ properly denied the petitioner's request for a continuance or administrative closure for a mental health evaluation. The court determined that there were no indicia of the petitioner's incompetency. The court emphasized that *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), advises IJs to employ an adaptable, case-by-case approach, in which the fact-finder is given a high degree of flexibility and discretion in assessing mental competency.

Here, the court found that the "IJ did what she deemed necessary to ascertain Diop's competency in full compliance with *M–A–M–*. This was not a case where the IJ sacrificed due process for expediency. Far from it. Diop received one continuance after another — to prepare his case, to consult with counsel, to request prosecutorial discretion, to receive a hearing on his mental competency."

Contact: Aaron Nelson, OIL
☎ 202-305-0691

■ **Fourth Circuit Holds It Has Jurisdiction to Consider Legal Challenges to Expedited Removal Proceedings in the First Instance**

In ***Etienne v. Lynch***, __F.3d__, 2015 WL 9487933 (4th Cir. December 30, 2015) (Traxler, Wilkinson, *Duncan*), the Fourth Circuit held that an alien in expedited or administrative removal proceedings has no prior opportunity to challenge the legal basis of his removal, and therefore the INA's administrative exhaustion requirement does not deprive the court of jurisdiction to consider such challenges in the first instance.

The petitioner, a citizen of Haiti, entered the United States unlawfully in 1984. In 1996, petitioner pleaded

(Continued on page 6)

Summaries Of Recent Federal Court Decisions

(Continued from page 5)

guilty to a drug offense. Following an earthquake in Haiti in 2010, petitioner applied for and was granted TPS. However, when petitioner sought a second renewal of his TPS in February of 2014, DHS rejected his application and shortly thereafter served him with a Notice of Intent to Issue a Final Administrative Removal Order under INA § 238. DHS alleged that petitioner was not an LPR and that his conviction for the drug offense constituted an "aggravated felony." Petitioner was given an opportunity to respond to the Notice and on March 20, 2014, DHS issued a Final Administrative Removal Order. Petitioner then sought withholding but an asylum officer, and subsequently an IJ, denied the request.

Before the Fourth Circuit petitioner argued for the first time that his 1996 conviction did not constitute an "aggravated felony" under the INA. The government argued that petitioner was obligated to raise any such challenge before DHS or forfeit that claim for failing to exhaust administrative remedies. The court, however, concluded that the INA and associated regulations indicate that "only factual challenges to an alien's removability may be raised in expedited removal proceedings." The court also determined that the administrative removal "Form I–851 offers no obvious opportunity to raise a legal challenge." Therefore, petitioner was not required to raise his legal challenge to removal in order to meet the exhaustion requirement of INA § 242(d)(1).

On the merits, the court determined that petitioner's conviction of conspiracy "to violate the controlled dangerous substances law of the State of Maryland" was an aggravated felony, and that a state-law conspiracy conviction need not require an overt act as an element for the conviction to qualify as an aggravated felony.

Contact: Jocelyn Lopez Wright, OIL
☎ 202-616-4868

SIXTH CIRCUIT

■ **Sixth Circuit Holds Applicant Failed to Establish Withholding of Removal Based on Purported Social Group**

In ***Sanchez-Robles v. Lynch***, 808 F.3d 688 (6th Cir. 2015) (Siler, *Gibbons*, Rogers), the Sixth Circuit held that Sanchez-Robles, a Mexican citizen, failed to show that she was eligible for withholding of removal.

The court found jurisdiction to review whether a particular social group is cognizable under the INA, because that was a question of law.

Sanchez-Robles claimed that she would be persecuted if returned to Mexico based on her membership in a particular social group — those perceived as wealthy because of their ties to the United States. An IJ determined that Sanchez-Robles was not eligible for withholding of removal, explaining that she had not established a "clear probability" of persecution on the basis of membership in a protected group. The BIA affirmed that decision noting that fear of general conditions of crime and violence in Mexico cannot support an application for withholding.

Preliminarily the court determined that, notwithstanding Sanchez-Robles's concession of removability under INA § 212(a)(2), it had jurisdiction to review whether a particular social group is cognizable under the INA, because that was a question of law. The court rejected the proposed social group explaining that it had "confronted the same argument and repeatedly rejected the position that individuals returning from the United States to their home countries comprise a particular social group." The court determined that it lacked jurisdiction to review Sanchez-Robles's contention that she had met her burden to show that she would be persecuted if she returns to Mexico, because that argument presented a factual challenge.

Contact: Ted Hirt, OIL
☎ 202-514-4785

SEVENTH CIRCUIT

■ **Seventh Circuit Rejects Statistical Analysis in Assessing the Likelihood of Torture, and Holds Petitioner Not Required to Show Acquiescence of More Senior Mexican Officials Following Torture by Local Police Officers**

In ***Rodriguez-Molinero v. Lynch***, 808 F.3d 1134 (7th Cir. 2015) (*Posner*, Manion, Sykes), the Seventh Circuit held that if petitioner were returned to Mexico, he would face a substantial risk of torture with the acquiescence of the Mexican government.

The petitioner, a Mexican citizen and an LPR, was involved in the methamphetamine trade and this led to his conviction for federal drug crimes and a prison sentence. DHS sought petitioner's removal as alien an convicted of an aggravated felony and he in turn sought CAT deferral of removal under 8 C.F.R. § 1208.17. Petitioner claimed that if returned to Mexico he is highly likely to be tortured by the Zetas, a violent Mexican drug cartel. He testified that during several trips to Mexico he bought meth for resale in the United States and in one of those trips Mexican police entered his hotel room beat him, and stabbed him with an ice

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

pick. This was done at the behest of a member of the cartel known to the petitioner only as Jose, and was intended to test his loyalty to the cartel. When petitioner returned to the United States after his last trip, he owed Jose $30,000. However, petitioner was arrested upon his return and reported his experience with the Zetas to the FBI and DEA. A witness for the petitioner, who is an expert on Mexico's drug wars, testified that given petitioner's actions he was "marked for death." Petitioner also stated that after he returned to the United States, members of the Zetas cartel kidnapped and murdered his great-uncle after visiting the great-uncle's house several times asking for information about his whereabouts.

"Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."

An IJ determined that petitioner's beatings by the Mexican police at the hotel room amounted to torture but concluded that he "'did not demonstrate that Jose or the Zetas are likely to torture him if he returns to Mexico' and even if he would be tortured upon his return he 'did not demonstrate that the Mexican government will inflict or acquiesce in torture of the [petitioner] by Jose and/or the Zetas, a group of private actors.'" The BIA dismissed the appeal, noting that petitioner had traveled to Mexico several times and now he was "afraid of returning to his homeland because he owes money to the gang or drug cartel known as the Zetas and because he gave information to United States law enforcement authorities about this organization."

Preliminarily, the Seventh Circuit held that the "more likely than not" standard in the regulations contradicts the internal CAT language requiring only "substantial grounds for believing" that a removed alien "would be in danger of being" tortured. The court rejected using percentages to assess the likelihood of torture, explaining that "[a]ll that can be said responsibly on the basis of actually obtainable information is that there is, or is not, a substantial risk that a given alien will be tortured if removed from the United States."

The court then found that the IJ erred when he said that the infliction, instigation, consent, or acquiescence in torture must be by the Mexican government rather than just by Mexican police officers or other government employees. "The alien need not show that multiple government officials are complicit in order to be entitled to relief. 'Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.'" Nor is the issue, said the court "whether the police were rogue (in the sense of not serving the interests of the Mexican government) or not. The petitioner did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers."

The court also said that whether the Mexican government was making efforts to prevent violence by drug cartels and would not acquiesce to torture of the petitioner, was irrelevant to the case because here public officials at the local levels acquiesced in the torture and that satisfies the CAT's acquiescence requirement. Finally, the court noted that the attorneys for the government had not presented any evidence regarding the Mexican's government's ability to protect petitioner from the Zetas if returned to Mexico.

Contact: Tony Pottinger, OIL
☎ 202-532-4595

■ **Seventh Circuit Grants the Government's Contested Motion to Remand for Reconsideration of the Acquiescence Standard**

In ***Mendoza-Sanchez v. Lynch***, 808 F.3d 1182 (7th Cir. 2015) (Wood, *Posner*, Hamilton), the Seventh Circuit granted the Government's contested motion to remand for reconsideration of the Mexican alien's request for deferral of removal. The court concluded that the BIA should reconsider the Convention Against Torture acquiescence standard in light of the court's recent opinion in *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134 (7th Cir. 2015).

Contact: Jesse M. Bless, OIL
☎ 202-305-2028

EIGHTH CIRCUIT

■ **Eighth Circuit Finds Statutory Limit to the Department of Labor's Authority to Investigate Employer's H-1B Program Compliance**

In ***Greater Missouri Medical Providers v. Perez***, __F.3d __, 2015 WL 8591614 (8th Cir. December 11, 2015) (*Riley*, C.J., Bye, Gruender), the Eighth Circuit reversed an order by the District Court for the Western District of Missouri affirming the DOL order requiring an employer to pay more than $100,000 for violations of the H-1B non-immigrant program. The court determined that DOL exceeded its statutory authority by investigating the entirety of employer's compliance with the program for the year preceding a timely complaint by an aggrieved employee. The court held

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

that the investigation should have been limited to the employer's treatment of the complainant and was not properly expanded to include the employer's program compliance with respect to other H-1B workers.

Contact: Sarah Wilson, OIL – DCS
☎ 202-532-4700

■ **Eighth Circuit Finds Substantial Evidence Supported Adverse Credibility Finding**

In *Rodriguez-Mercado v. Holder*, __ F.3d __, 2015 WL 9310265 (8th Cir. December 23, 2015) (Benton, *Loken,* Shepherd), the Eighth Circuit held that the IJ supported his adverse credibility finding with specific and cogent reasons based on the record. The court reasoned that the alien's testimony and asylum application lacked detail and contained multiple material omissions regarding the extent and duration of her alleged persecution, whether the persecution was on account of her membership in a particular social group, and whether the Honduran police were unable or unwilling to control the purported persecution.

Contact: Sabatino F. Leo, OIL
☎ 202-514-8599

■ **Eighth Circuit Rules that a South Carolina Firearm Offense is a Crime of Violence**

In *Reyes-Soto v. Lynch*, 808 F.3d 369 (8th Cir. 2015) (Loken, Beam, *Shepherd*), the Eighth Circuit upheld USCIS's denial of naturalization under 8 U.S.C. § 1421(c) for an alien who pleaded guilty to pointing or presenting a firearm in South Carolina. The district court had upheld USCIS's denial on the ground that the firearm offense constituted a crime of violence under 18 U.S.C. § 16(b). The Eighth Circuit expressly avoided the question of whether, pursuant to the intervening decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), § 16(b) was unconstitutional. Instead, the court upheld USCIS's denial on § 16(a) grounds.

Contact: Genevieve Kelly, OIL-DCS
☎ 202-532-4705

■ **Eighth Circuit Holds that Applicant for Cancellation Failed to Establish Continuous Physical Presence When His Application Listed Absences Over 180 Days in the Aggregate, and His Testimony, Although Credible, Was Unclear**

In *Torres-Balderas v. Lynch*, 806 F.3d 1157 (8th Cir. 2015) (Murphy, *Melloy*, Smith), the Eighth Circuit held that substantial evidence supported the IJ's determination that petitioner was ineligible for cancellation of removal because he failed to establish the continuous physical presence requirement.

A positive credibility assessment did not elevate imprecise or unclear testimony to the level where a judge must accept it as defeating more clear and more specific prior sworn statements.

The court concluded that a positive credibility assessment did not elevate imprecise or unclear testimony to the level where a judge must accept it as defeating more clear and more specific prior sworn statements from the alien's relief application.

Contact: Lisa Damiano, OIL
202-616-4213

■ **Eighth Circuit Upholds USCIS's Discretionary Authority to Revoke I-140 Alien Worker Petition as Unreviewable**

In *Rajasekaran v. Hazuda,* 806 F.3d 1142 (8th Cir. 2015) (Loken, *Benton*, Shepherd), the Eighth Circuit affirmed the district court's decision dismissing a challenge to USCIS's revocation of a company's I-140 petition for alien worker for lack of subject matter jurisdiction. The court upheld USCIS's discretionary authority to revoke the petition under 8 U.S.C. § 1155 as unreviewable under 8 U.S.C. § 1252(a)(2)(B)(ii), and held that any alleged regulatory violation by USCIS did not constitute a predicate legal question amounting to a nondiscretionary determination.

The court also held that the alien could not "port" his I-140 petition under 8 U.S.C. § 1154(j) because USCIS's fraud investigation revealed numerous deficiencies, making the alien statutorily ineligible for adjustment of status.

Contact: Glenn M. Girdharry, OIL-DCS
☎ 202-532-4807

■ **Eighth Circuit Holds Immigration Judge Acted Within Discretion in Denying Waiver of Inadmissibility**

In ***Njie v. Lynch*,** 808 F.3d 380 (8th Cir. 2015) (*Wollman*, Colloton, Kelly), the Eighth Circuit upheld an Immigration Judge's discretionary denial of the aliens' applications for waivers of inadmissibility under 8 U.S.C. § 1227(a)(1)(H). The court also concluded that the BIA did not abuse its discretion in affording little weight to the evidence submitted in support of the aliens' motion to remand to apply for asylum, in light of their extensive fraudulent scheme to obtain immigration benefits.

Contact: Brendan Hogan, OIL
☎ 202-305-2036

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

NINTH CIRCUIT

■ **Ninth Circuit Holds North Korean Human Rights Act of 2004 Does Not Preclude a Finding that a North Korean "Firmly Resettled" in South Korea Under the Firm-Resettlement Bar**

In *Sung Kil Jang v. Lynch*, __ F.3d __, 2015 WL 9286697 (9th Cir. December 22, 2015) (*Graber*, Gould, Daniel (by designation)), the Ninth Circuit held that section 302 of the North Korean Human Rights Act of 2004, 22 U.S.C. § 7842, did not preclude a finding that a North Korean had "firmly resettled" in South Korea under the firm-resettlement bar to asylum, 8 U.S.C. § 1158(b)(2)(A)(vi). The court determined that section 302 of the Act had no effect on the analysis of whether a North Korean has "firmly resettled" in South Korea, and instead simply eliminated a potential dual-nationality barrier to asylum.

Contact: Alexander Lutz, OIL
☎ 202-305-7109

■ **Ninth Circuit Holds It Lacks Jurisdiction to Review a Nationality Claim under INA § 242(b)(5) Absent a Final Order of Removal**

In *Viloria v. Lynch*, __ F.3d __, 2015 WL 9267552 (9th Cir. December 21, 2015) (Wardlaw, *Berzon*, Owens), the Ninth Circuit held that it lacked jurisdiction to resolve the alien's citizenship claim on appeal of the BIA's decision vacating the Immigration Judge's order terminating removal proceedings because there was no final order of removal, and the statutory provision for review of nationality claims, INA § 242(b)(5), did not create an exception to the court's limitation to the review of final orders of removal.

Contact: Timothy Hayes, OIL
☎ 202-532-4335

■ **Ninth Circuit Holds that Continued Unlawful Presence Is Not a Legitimate Reliance Interest for Retroactivity Purposes, but Incurred Legal Expenses Could Be**

In *Correo-Ruiz v. Lynch*, __F.3d__, 2015 WL 9487890 (9th Cir. December 30, 2015) (Kozinski, Berzon, *Watford*), the Ninth Circuit remanded the case for the BIA to apply *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012), and determine whether the bar on INA § 245(i) relief described in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), applies retroactively.

The court held that continued unlawful presence is not a legitimate reliance interest, but that incurring legal expenses during the 21-month period between the court's now-overruled decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and the BIA's decision in *Briones* could be.

The court found that family is the "quintessential social group."

Contact: Anh-Thu Mai Windle, OIL
☎ 202-353-7835

■ **Ninth Circuit Holds Family Is a Particular Social Group and Remands to Address that Claim**

In *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015) (Thomas, Hawkins, *McKeown*), the Ninth Circuit held that substantial evidence supported the BIA's determination that there was little likelihood the petitioner, a native of Guatemala, would be persecuted on account of his Evangelical Christian faith. However, the court found that the BIA had not addressed petitioner's claim that he also faced persecution because of a gang vendetta targeting his family. The court then found that family is the "quintessential social group" and remanded to the BIA to address the family aspect of petitioner's social group claim.

Contact: Robbin K. Blaya, OIL
☎ 202-514-3709

■ **En Banc Ninth Circuit Holds that Government Bears Burden to Rebut Citizenship Claim by Clear and Convincing Evidence, and that District Court's Fact-Finding that Government Met this Burden was not Clearly Erroneous**

In *Mondaca-Vega v. Lynch*, 808 F.3d 413 (9th Cir. 2015) (Thomas, Pregerson, Kozinski, Silverman, Fletcher, Rawlinson, Bybee, N. R. Smith, Murguia, Nguyen, *Hurwitz*, JJ.), an *en banc* panel of the Ninth Circuit denied the petition for review of a Mexican citizen who claimed that he was a United States citizen. The court held that the "clear error" standard of Federal Rule of Civil Procedure 52(a) applies to review of the district court's fact-finding, following a transfer under 8 U.S.C. § 1252(b)(5), and rejected the argument that that *de novo* review was appropriate.

Further, the Ninth Circuit held that when a petitioner presents substantial, credible evidence of United States citizenship, the government must present clear and convincing evidence to the contrary, rather than proof beyond a reasonable doubt. Applying that standard, the court of appeals ruled that the district court did not clearly err when it found that the government had carried its burden and proved that petitioner was not a citizen.

Contact: Kate Goettel OIL-DCS
☎ 202-532-4115

The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015

The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 (the "Act"), signed into law on December 18, 2015, establishes new eligibility requirements for travel under the VWP, to include travel restrictions. These restrictions do not bar travel to the United States, but they do require a traveler covered by the restrictions in the law to obtain a U.S. visa, which generally includes an in-person interview with a U.S. consular officer.

The Act also requires all VWP travelers to have an electronic passport for travel to the United States by April 1, 2016. And finally, the Act codifies many of the enhanced security measures announced by DHS in August 2015.

Under the Act, travelers in the following categories are no longer eligible to travel or be admitted to the United States under the VWP:

- Nationals of VWP countries who have traveled to or been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011 (with limited exceptions).
- Nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria.

According to the CBP website, these restrictions do not apply to VWP travelers whose presence in Iraq, Syria, Iran, or Sudan was to perform military service in the armed forces of a program country, or in order to carry out official duties as a full-time employee of the government of a program country. These military and official government services exceptions, however, do not apply to the dual national restriction.

Travelers who are known to fall into the dual national category noted above will receive notice via email on or about January 21, 2016 that their current ESTA is no longer valid.

The Act also requires all VWP travelers to have an electronic passport for travel to the United States by April 1, 2016.

The Act also requires that all VWP travelers use an electronic passport for travel to the United States by April 1, 2016. Finally, the Act includes other changes to the VWP to promote enhanced information sharing of terrorism and criminal data, and use of INTERPOL databases and notices for border screening purposes.

Source: CBP

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

■ **Tenth Circuit Holds Possession of Stolen Vehicle is a CIMT**

In ***Obregon De Leon v. Lynch***, 808 F.3d 1224 (10th Cir. 2015) (Holmes, Matheson, McHugh), the Tenth Circuit held that a conviction under Oklahoma's possession-of-stolen-vehicle statute categorically constitutes a crime involving moral turpitude because it requires a mens rea of knowing the vehicle is stolen.

The court also held, based on recent controlling precedent and the BIA's decision in *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015), that the BIA erred in finding the alien statutorily ineligible to apply for a waiver under INA § 212(h).

Contact: Wendy Benner-León, OIL
☎ 202-305-7719

DISTRICT COURTS

■ **Eastern District of New York Rules Asylum Applicants Barred from Challenging Delays in Scheduling Interviews or Completing Adjudications**

In ***L.M. v. Johnson,*** No. 1:14-cv-03833 (E.D.N.Y. December 8, 2015) (*Garaufis, J.*), the Eastern District of New York granted most of the government's motion to dismiss a putative class action claiming unlawful delays in processing asylum applications. In dismissing the complaint for failure to state a claim, the court accepted the government's argument that 8 U.S.C. § 1158(d)(7) bars actions to enforce asylum timelines. The complaint included mandamus, Administrative Procedure Act, due process, and equal protection claims. The court dismissed the action except for a "notice and comment" claim regarding the Controlled Applicant Review and Resolution Program (CARRP).

Contact: Max Weintraub, OIL-DCS
☎ 202-3057551

Mandatory Detention Limited

(Continued from page 1)

on October 6, 2008, for drug possession. ICE took Castaneda into custody on March 18, 2013, and charged her with inadmissibility for a drug offense. An IJ denied Castaneda an individualized bond hearing, ruling that she was subject to mandatory detention under § 236 (c). Two district courts determined that Gordon and Castaneda were both entitled to an individualized bond hearing. A First Circuit panel consolidated the cases and subsequently affirmed the district courts' decisions. *Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014).

On rehearing *en banc*, the panel evenly divided on the interpretation of § 236(c). Judge Barron, joined by Judges Torruella and Thompson, agreed with the lower court's rulings that aliens who are not immediately detained following criminal custody can seek release on bond under the discretionary release authority of § 236(a). Preliminarily, Judge Barron considered whether the court owed deference to the BIA's interpretation in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). In *Rojas*, the BIA held that a criminal alien who is released from criminal custody is subject to mandatory detention pursuant to section § 236(c) even if the alien is not immediately taken into custody by the INS [now ICE] when released from incarceration.

Judge Barron, declined to give deference to the BIA's interpretation because he determined by looking at the structure of the INA and the legislative history, that "Congress plainly intended for the 'when . . . released' clause in [236](c)(1) to apply to (c)(2) as well." Judge Baron then interpreted the "when . . .released" clause to mean, "absent an authoritative agency construction," that "aliens who have committed certain offenses be taken into immigration custody in a timely matter following their release from criminal custody. Because here the petitioners were released years before they were first placed in immigration custody, they were entitled to individualized bond hearings.

Judge Torruella wrote a concurring opinion to highlight his "constitutional concerns" that "the indefinite detention without access to bond or bail of *any* person in the United States violates due process."

Judge Kayatta, joined by Judges Howard and Lynch, would have held that the language, structure, and legislative history of § 236(c) support the BIA's decision in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), that criminal and terrorist aliens are not exempt from mandatory detention simply because their immigration custody did not begin immediately following release from other custody. In particular, Judge Kayatta read the legislative history as showing that Congress was concerned that IJs were not able to predict which criminal aliens would fail to appear for their removal hearings. "To now say that the executive, merely by failing to detain a criminal alien promptly, can revive the immigration judge's ability to pick and choose who gets released on bail would be a result directly at odds with what Congress plainly sought to achieve," explained the court.

Judge Kayatta would also have reached the constitutional argument finding that petitioners had not shown that the BIA's interpretation in *Rojas*, would subject them to "systemic delays or otherwise prolong the length of their detention prior to a hearing."

By Francesco Isgro

Contact: Elianis N. Perez, OIL-DCS
☎ 202-616-9124

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

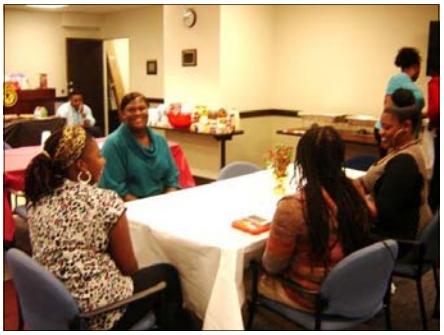
February 4, 2016. Rescheduled Lunch & Learn Brown Bag with Mathew E. Price, author of *"Rethinking Asylum: History, Purpose, and Limits."*

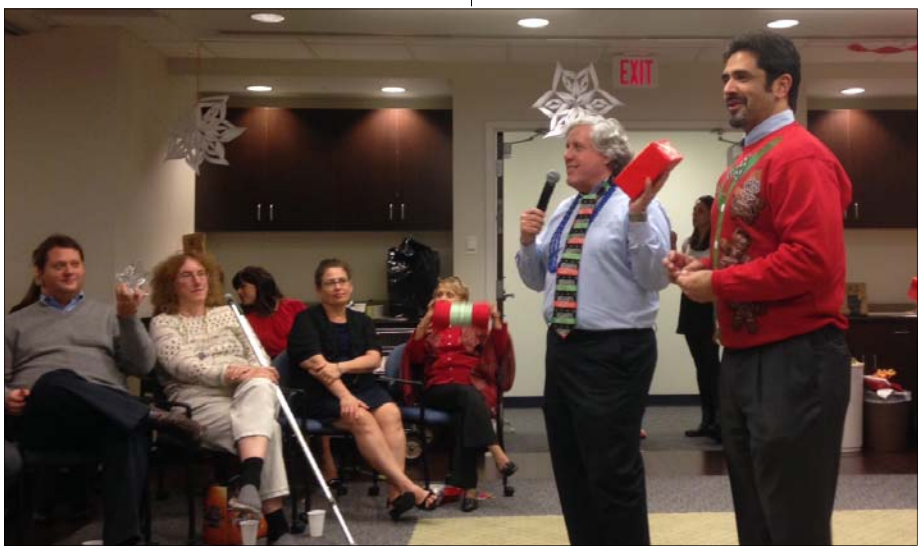
OIL Holiday party

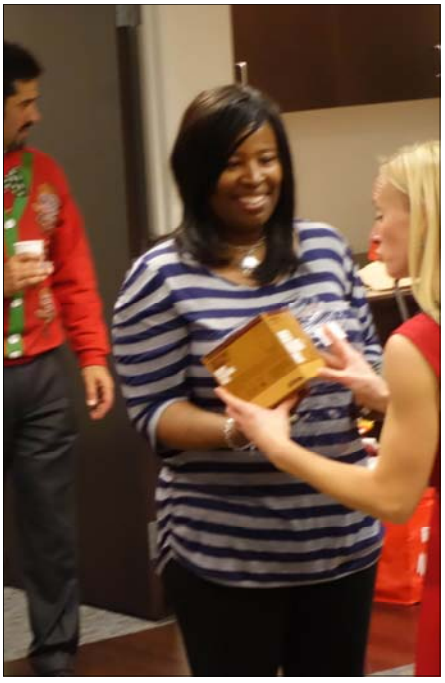
INSIDE OIL

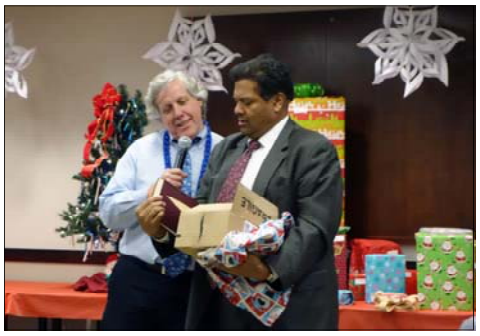
Dave's Annual White Elephant Game

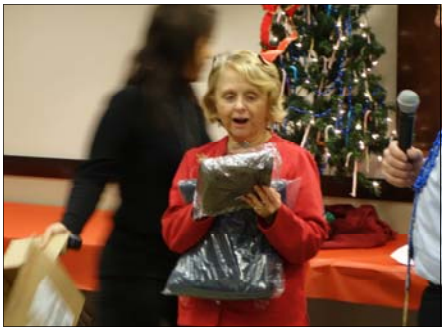
OIL held its Annual White Elephant Game and Holiday Party on December 17. Attorneys and support staff exchanged gifts valued under $10 and enjoyed the Holiday spirit.











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.

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linda.purvin@usdoj.gov