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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Ninth Circuit Holds Habitual Drunkard Bar to Good Moral Character Unconstitutional Under the Equal Protection Clause

In *Ledezma-Cosino v. Lynch*, __ F.3d __, 2016 WL 1161260, (9th Cir. March 24, 2016) (*Reinhard*t, Du, Clifton (dissenting)), the Ninth Circuit held that a statutory provision designating a "habitual drunkard" as a person lacking good moral character for purpose of eligibility for immigration benefits, violated the Equal Protection Clause because Congress had no rational basis for such classification.

The petitioner, a Mexican citizen who entered the United States unlawfully in 1997, is a chronic alcoholic or a "habitual drunkard." His medical records state that he has a ten-year history of alcohol abuse, during which he drank an average of one liter of tequila each day. Examining doctors have diagnosed him with acute alcoholic hepatitis, decompensated cirrhosis of the liver, and alcoholism. His abuse of alcohol has led to at least one DUI conviction.

In 2008, DHS instituted removal proceedings against the petitioner. Over several hearings before an IJ, he conceded removability but sought cancellation of removal or voluntary departure. The IJ denied relief for several reasons, but the BIA affirmed solely on the ground that petitioner was ineligible because he lacked good moral character as a "habitual drunkard" under INA § 101(f)(1).

Following oral argument before the Ninth Circuit, that court ordered supplemental briefing on the question whether § 101(f)(1) violates due process or equal protection on the ground that chronic alcoholism is a medical condition not rationally relat-

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Former Members of Criminal Gang Do Not Constitute a Particular Social Group

In *Gonzalez v. U.S. Attorney General*, __ F.3d __, 2016 WL 1567121 (11th Cir. April 19, 2016) (Tjoflat, Pryor, Fay)(*per curiam*), the Eleventh Circuit affirmed the BIA's determination that former members of criminal gangs do not constitute a cognizable particular social group for asylum purposes.

The petitioner, a thirty-five-year-old native citizen of Honduras, came to the United States in 1997 when he was sixteen. On December 21, 2010, DHS charged petitioner with removability for being an alien in the United States without being admitted or paroled. Following petitioner's guilty plea of possession of cocaine with intent to sell and possession of drug paraphernalia, DHS lodged an additional charge of removability as an alien who committed a controlled substance violation. Petitioner conceded the charges but sought asylum, withholding, and CAT, claiming that he was likely to be tortured if he returned to Honduras based on his status as a former member of the Mara–18 gang. The IJ denied all

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Provision Labeling "Habitual Drunkards" as Lacking GMC Found Unconstitutional

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ed to the presence or absence of good moral character.

Initially the court agreed with the government's argument that petitioner could not challenge a denial of discretionary relief under the due process clause because he did "not have a protectable liberty interest in a privilege created by Congress." However, contrary to the government's assertion, the court found that petitioner could raise an equal protection claim, because it "does not require a liberty interest."

The court then explained that "a classification between noncitizens who are otherwise similarly situated violates equal protection unless it is rationally related to a legitimate government interest." The court then reasoned that in this case "the government interest is in excluding persons of bad moral character. The Government 'may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.' [] The absence of a rational relationship between a medical disease and bad moral character therefore renders any classification based on that relationship a violation of the Equal Protection Clause."

In particular, the court explained that here "Congress has created a classification dividing 'habitual drunkards'—i.e. persons with chronic alcoholism—from persons who do not suffer from the same disease and identifying the former as necessarily lacking good moral character." The classification is not rational, said the court, because Congress's disparate treatment of individuals with alcoholism is not 'rationally related to a legitimate state interest' in denying discretionary relief to individuals who lack good moral character . . . . Like any other medical condition, alcoholism is undeserving of punishment and should not be held morally offensive." The court found the government's view that people suffering from alcoholism are blameworthy because they simply lack the motivation to overcome their disease to be "deplorable, troubling, and wholly unacceptable implications." The court said instead that "animus was the impetus behind the law" singling out of chronic alcoholics and that "animus, of course, is not a legitimate state interest." Accordingly, the court found no rational basis for classifying persons afflicted by chronic alcoholism as persons who innately lack good moral character and held INA § 101 (f)(1) unconstitutional

The court remanded for further proceedings and, in a separate order, awarded costs to the petitioner.

In a dissenting opinion, Judge Clifton wrote that petitioner had not raised the equal protection argument but that the majority had created it by raising it at oral argument and then ordering supplemental briefing. "Perhaps that pride of authorship helps to explain why the majority finds the argument persuasive, despite its obvious and multiple flaws," said Judge Clifton. The dissent criticized the majority's "false factual premise", namely that "diagnosis of the condition of chronic alcoholism as 'medical' means that there can be no element of drunkenness that is subject to free will or susceptible to a moral evaluation. "Even if the issue were debatable, that does not provide a license for the majority to override Congress. '[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'"

The dissent also criticized the majority for engaging in false legal premises. In particular, Judge Clifton noted that the equal protection question was whether "there is any reasonably conceivable state of facts that could provide a rational basis for denying discretionary deportation benefits to habitual drunkards. The answer should be obvious. Congress has unquestionable power to exclude certain groups of aliens regardless of any moral culpability." Judge Clifton also criticized the majority for applying "heightened scrutiny standard by stealth." "The majority opinion is cast in the language of rational basis review, but it sidesteps the essential question, which is whether Congress had a rational basis for excluding habitual drunkards from discretionary deportation benefits." Finally, Judge Clifton said that the majority opinion was "an unwarranted intrusion on separation of powers, and it demands correction."

"The majority opinion is "an unwarranted intrusion on separation of powers, and it demands correction."

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USCIS Reaches FY 17 H-1B Cap

USCIS has reached the congressionally mandated H-1B cap for FY 2017. USCIS has also received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced degree exemption. USCIS will use a computer-generated process, also known as the lottery, to randomly select the petitions needed to meet the caps of 65,000 visas for the general category and 20,000 for the advanced degree exemption.

USCIS will first randomly select petitions for the advanced degree exemption. All unselected advanced degree petitions will become part of the random selection process for the 65,000 general cap. The agency will reject and return filing fees for all unselected cap-subject petitions that are not duplicate filings.

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).

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Citizenship – Equal Protection

On March 22, 2016, the government filed a petition for a writ of certiorari in ***Lynch v. Morales-Santana***, No. 15-1191, challenging the Second Circuit's 2015 opinion, 804 F.3d 520, which severed, as a violation of equal protection, a distinction between unwed mothers and unwed fathers in the physical presence requirements of the 1952 statute providing for citizenship at birth of a child born abroad where only one of the parents is a U.S. citizen. The court extended the requirements for unwed mothers to unwed fathers. The same equal protection issue deadlocked the Supreme Court in *Flores-Villar v. United States*, 564 U.S. 210 (2011) (with Justice Kagan recused). The petition for certiorari argues that the Second Circuit erred in both the equal protection ruling and the remedy. The brief in response is presently due May 23, 2016.

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Mandatory Detention

On March 25, 2016, the government filed a petition for a writ of certiorari in ***Jennings v. Rodriguez***, No. 15-1204, challenging the Ninth Circuit's 2015 opinion in ***Rodriguez v. Robbins***, 804 F.3d 1060, which held that all aliens detained pending completion of their removal proceedings, including criminals and terrorists, must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. Under that ruling, such bond hearings must be afforded automatically every six months, the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, and the length of the alien's detention must be weighed in favor of release. The opposition brief in was filed on May 10, 2016, and the government's reply is due by May 24, 2016. The government also filed a petition for a writ of certiorari (to hold for *Rodriguez*) in ***Shanahan v. Lora***, No. 15-1205, challenging the Second Circuit's 2015 opinion, 804 F.3d 601, that criminal and terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months, and that the criminal or terrorist alien is entitled to release unless the government demonstrates by clear and convincing evidence that he is a flight risk or a danger to the community. On May 4, 2016, Lora opposed certiorari, but has also filed a conditional cross-petition for certiorari, No. 15-1307, requesting that, if the government's petition for certiorari is granted, the Supreme Court also address whether the mandatory detention provision applies at all to aliens who were not taken into detention for removal at the time they were released from their criminal incarceration. The government response to the cross-petition is due by May 25, 2016.

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Jurisdiction
Injunction Against Executive Action

On April 18, 2016, the Supreme Court heard argument in ***United States, et al. v. Texas, et al.*** (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 government argued that the Fifth Circuit's merits rulings strip DHS of authority it has long exercised to provide deferred action, including work authorization, to categories of aliens.

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Crime of Violence – Vagueness

The Solicitor General has been granted until May 24, 2016, to determine whether to file a petition for a writ of certiorari (No. 15A1049) to the Ninth Circuit for its decision in ***Dimaya v. Lynch***, 803 F.3d 1110, which held that 18 U.S.C. § 16(b), as incorporated into 8 U.S.C. § 1101(a)(43)(F)'s definition of a "crime of violence," is unconstitutionally vague.

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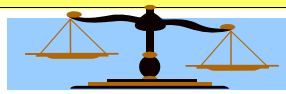

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds That IIRIRA's "Stop-Time" Rule Applies to All Orders to Show Cause

In *Santos-Quiroa v. Lynch*, __ F.3d __, 2016 WL 850954 (1st Cir. March 4, 2016) (Lynch, Lipez, *Thompson*), the First Circuit held that IIRIRA's "stop-time" rule under INA § 240A(d)(1) applies to all orders to show cause, regardless of the date of issuance and whether deportation proceedings were "pending" or "final."

The petitioner, a citizen of Guatemala, entered the United States in 1994 and was served with OSC one day after his entry. Petitioner was released on bond a little over a week later, having told immigration authorities he would be living at an address (his brother's) in Providence, Rhode Island. Notice of the deportation hearing was mailed to that Providence address but petitioner failed to show up. Consequently, on December 1, 1994, he was ordered deported in absentia. Subsequently petitioner got married, fathered two U.S.-citizen children, and in September 23, 2009, moved to reopen his deportation proceedings. Eventually the case was reopened and petitioner applied for applied for suspension of deportation. At a merits hearing on December 4, 2014, the IJ pretermitted petitioner's application, finding that IIRIRA's stop-time rule applied and cut off petitioner's accrual of continuous presence on the day he was served with an OSC in 1994.

On appeal the BIA agreed and held that the stop-time rule applies to an OSC regardless of the date of service. The BIA rejected petitioner's contention that, because he had been ordered deported in absentia pre-IIRIRA, this constituted a final pre-IIRIRA deportation precluding application of the stop-time rule.

The First Circuit, reviewing the issue de novo but with deference, agreed with the BIA's plain reading of the statute that "Congress intended the stop-time rule to apply to all OSCs, regardless of whether they were issued on, before, or after April 1, 1997," the effective date of IIRIRA. The court also agreed with the BIA that whether or not petitioner's deportation proceedings were pending or final on April 1, 1997, has no effect on the stop-time rule.

"Congress intended the stop-time rule to apply to all OSCs, regardless of whether they were issued on, before, or after April 1, 1997,"

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First Circuit Upholds Agency's Adverse Credibility Finding and Concludes Petitioner Failed to Establish He Was Admitted or Paroled

In Acosta v. Lynch, __ F.3d __, 2016 WL 1612847 (1st Cir. April 22, 2016) (*Torruella*, Thompson, Barron), the First Circuit held that substantial evidence supported the agency's decision to discredit petitioner's testimony that he was admitted to the United States as a child, such that he might be eligible to adjust his status under INA § 245(a). The court agreed that substantial testimony and forensic reports from DHS officials suggested that petitioner's travel documents were falsified and that additional evidence in the record directly contradicted his claim that he was admitted to the United States.

The court was nevertheless sympathetic to petitioner's circumstances because he had entered the United States from Colombia when he was thirteen years old and could not explain how he was admitted using fake documents. Petitioner's uncle and father testified at the hearing that petitioner was not responsible for his travel documentation. The court suggested, in a footnote, that prosecutorial discretion may be warranted "to avoid the harsh result that [petitioner] now faces."

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Inconclusive but Complete Record of Conviction Is Sufficient to Establish the Absence of a Disqualifying Conviction

In *Peralta-Sauceda v. Lynch*, __ F.3d __, 2016 WL 1612848 (1st Cir. April 22, 2016) (Torruella, *Lynch*, Kayatta), the First Circuit held that because all the *Shepard* documents had been produced and created a complete record of conviction, and the modified categorical approach using such documents could not identify the prong of the divisible statute under which the alien was convicted, the unrebutted *Moncreiffe* presumption applies and requires that the least of the acts criminalized under this divisible statute must be presumed, and as a matter of law, the alien was not convicted of a "crime of domestic violence."

The court concluded that because the acts committed by the alien were not categorically a disqualifying offense, the alien had discharged his burden of proof and was not, contrary to the decision of the BIA, statutorily ineligible to apply for cancellation of removal based on his criminal conviction. The court also rejected the government's argument that records and evidence outside the approved *Shepard* documents may be considered in the assessment of the conviction. The court therefore vacated the agency's decision and remanded to the agency for further proceedings consistent with the court's opinion.

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SECOND CIRCUIT

Second Circuit Holds Court Lacks Jurisdiction to Review BIA's Discretionary Decision Not to Certify Untimely Appeal

In *Vela-Estrada v. Lynch*, 817 F.3d 69 (2d Cir. 2016) (Straub, Chin, Carney) (*per curiam*), the Second Circuit held that it lacked jurisdiction to review the BIA's decision not to certify an untimely appeal to itself, expressly aligning itself with the Eighth and Tenth Circuits.

The court deemed the decision not to certify to be an agency action committed to agency discretion by law, noting the absence of meaningful guidance in 8 C.F.R. § 1003.1(c). The court explained that the regulation commits the certification decision to BIA discretion and that the BIA has merely stated that it will exercise this power only in "exceptional circumstances." "The BIA, however, has not elaborated on what 'exceptional circumstances' would merit certification," said the court.

The court rejected petitioner's *Kucana* reviewability argument, noting its post-*Kucana* holding that regulatory *sua sponte* reopening decisions are unreviewable. The court, however, remanded the case for further consideration, noting it was unclear from the BIA's decision whether it considered petitioner's motion to reopen, which was attached as an exhibit.

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THIRD CIRCUIT

Service of an NTA Lacking Specific Date and Time Does Not Stop Accrual of Physical Presence for Cancellation of Removal

In *Orozco-Velasquez v. Att'y Gen. of the U.S.*, 817 F.3d 78 (3d Cir. 2016) (McKee, Ambro, *Roth*), the Third Circuit broke with the Second, Fourth, Sixth, Seventh, and Ninth Circuits in holding that the service of a Notice to Appear bars cancellation of removal under the stop-time provision only when "the combination of notices, properly served on the alien charged as removable, conveys the *complete* set of information prescribed by [8 U.S.C.] § 1229(a)(1) within the alien's first ten years of continuous residence."

The court declined to give *Chevron* deference to the BIA's precedent decision in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), finding the language of INA § 239 (a)(1) (setting forth the NTA requirements) and INA § 240A(d)(1) (the stop-time provision) to be clear. "Taken to its logical conclusion, the agency's approach might treat even a "notice to appear" containing no information whatsoever as a "stop-time" trigger, permitting the government to fill in the blanks (or not) at some unknown time in the future," explained the court.

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FOURTH CIRCUIT

Fourth Circuit Holds that Although "Common Sense" Says Embezzlement Is Theft, Receipt of Embezzled Goods Is Not an INA § 101 (a)(43)(G) Theft Offense

In *Mena v. Lynch*, __ F.3d __, 2016 WL 1660166 (Wilkinson, *Shedd*, Agee, JJ.) (4th Cir. April 27, 2016), the Fourth Circuit, although acknowledging that common sense suggests otherwise, ruled that, under its precedents, an 18 U.S.C. § 659 paragraph II conviction—for knowing purchase, receipt, or possession of embezzled or stolen property—is not an INA § 101(a)(43)(G) "theft offense."

"Like theft, embezzlement is also stealing. And 'distinctions between' different types of stealing 'serve no useful purpose in the criminal law but are useless handicaps from the standpoint of the administration of criminal justice.'"

The petitioner, a citizen of the Dominican Republic, was admitted to the United States as an LPR, and then ordered removed based on two convictions for crimes involving moral turpitude not arising out of the same criminal scheme. He applied for cancellation of removal, but was found ineligible as an alien convicted of an aggravated felony due to his 18 U.S.C. § 659 conviction.

The court, applying the categorical approach, concluded that the BIA erred in finding that petitioner was an aggravated felon ineligible for cancellation of removal. "The crime set forth in the second paragraph of § 659 'sweeps more broadly' than the generic § 101 (a)(43)(G) theft offense, and it is not an INA aggravated felony under the categorical approach," said the court.

Judge Wilkinson, dissenting, lamented that the majority "explicitly abjure[d] common sense." "Like theft, embezzlement is also stealing. And 'distinctions between' different types of stealing 'serve no useful purpose in the criminal law but are useless handicaps from the standpoint of the administration of criminal justice.'"

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FIFTH CIRCUIT

■ **Fifth Circuit, in Reinstatement Case, Exercises Jurisdiction to Review Only Legal Claims and Holds that "Former Informants" Do Not Constitute a Particular Social Group**

In *Hernandez-De La Cruz v. Lynch*, __ F.3d __, 2016 WL 1657962 (5th Cir. April 26, 2016) (*Higginson*, Wiener, Costa, JJ.), the Fifth Circuit held that it lacked jurisdiction under INA § 242(a)(2)(C) to review withholding of removal claims in a reinstatement case except to the extent they raise constitutional claims or questions of law. "We have no authority to consider petitioner's arguments that the IJ and the BIA erroneously found that he was mistreated by people driven by economic motives—not petitioner's political opinion as expressed through whistleblowing activity," explained the court.

The court, however, reviewed petitioner's challenge to the determination that "former informants" do not constitute a "particular social group," finding it to be a legal question. On the merits, the court concluded that having an antagonistic relationship with a gang does not amount to an immutable characteristic, and that the group is neither particular nor socially distinct." Accordingly the court held that there was "no indication that an incorrect legal standard was applied or that it was legally erroneous to conclude that former informants do not constitute a particular social group."

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that BIA Abused its Discretion in Granting DHS's Motion to Reopen Where Evidence Was Previously Available**

In *Sakhawati v. Lynch*, __ F.3d __, 2016 WL 946202 (6th Cir. March 14, 2016) (*Gilman*, White, Stranch), the Sixth Circuit vacated the BIA's order granting DHS's motion to reopen.

The petitioner, Sakhawati, a citizen of Bangladesh, was granted asylum and withholding of removal by an IJ in 2006 after testifying to being kidnapped, forced to marry, and targeted for promoting feminist political views inside Bangladesh. In 2007, DHS appealed the IJ's grant of asylum to the BIA and moved to reopen the proceedings, alleging that it had uncovered new information showing that Sakhawati's story was fraudulent. The BIA granted the motion. On remand, the IJ reversed his original ruling, denied Sakhawati's claims for relief, and ordered her removed to Bangladesh.

"The evidence relied on by DHS was already present in its records and because DHS was given notice that Sakhawati had used the alias Muhibun Nessa, the evidence was available and could have been discovered with due diligence."

The court concluded that Sakhawati had disclosed that she used an alias in a previous hearing, and DHS's results of a later investigation uncovering fraud and the long use of two identities did not qualify as previously unavailable evidence to permit reopening. "The evidence relied on by DHS was already present in its records and because DHS was given notice that Sakhawati had used the alias Muhibun Nessa, the evidence was available and could have been discovered with due diligence prior to Sakhawati's original hearing," explained the court.

The court also stated that the DHS "can seek to initiate a new proceeding against her based on the allegedly fraudulent application. . . .We have no need to decide whether any new proceedings would be barred by res judicata (as Sakhawati contended at oral argument) or on any other basis."

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■ **Sixth Circuit Upholds Adverse Credibility Determination Based In Part on Petitioner's Fraudulent Visa Applications**

In *Bi Qing Zheng v. Lynch,* __F.3d__, 2016 WL 1359265 (6th Cir. April 6, 2016) (*Clay,* Gibbons, Stranch), the Sixth Circuit upheld the agency's denial of asylum, withholding of removal, and CAT protection to an asylum applicant who claimed persecution in China as a Christian in light of her incredible testimony and suspect corroborating evidence. The court noted that petitioner "hardly knew anything about Christianity, even telling the asylum officer in her credible-fear interview that she "ha[d] no idea" why she was a Christian, [] and later testifying that she could not 'remember anything that was taught at [her] church in China.'" The court explained that "while the law does not require that an applicant possess the knowledge of a religious scholar to claim persecution based on religion, the IJ could certainly consider Zheng's lack of knowledge when evaluating her testimony about religious persecution."

The court rejected petitioner's due process claims that evidence of her three admittedly fraudulent visa petitions should have been suppressed and that the Ninth Circuit's decision in *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010), required disclosure of her entire A-File.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds IJ Properly Determined Alien to Be Inadmissible Due to Marriage Fraud Based on USCIS's Visa Petition Denial and Incredible Testimony**

In *Zyapkov v. Lynch,*__ F.3d __, 2016 WL 1211415 (7th Cir. March 29, 2016) (*Manion,* Kanne, Williams), the Seventh Circuit upheld an IJ finding that petitioner's marriage to a United States citizen was fraudulent, rendering him ineligible for adjustment of status.

The petitioner, a Bulgarian citizen, entered the United States in 2002 with a six-month visitor's visa. His daughter and ex-wife had come to the United States two years earlier and both eventually obtained citizenship through the "diversity lottery." Three months after his arrival, petitioner married Juanita Gregory, a U.S. citizen. Subsequently Gregory and later his daughter (after becoming a citizen in February 2010) filed Form I–130 petitions on his behalf. While Gregory's I–130 petition was still pending in 2008, DHS initiated removal proceedings against petitioner for overstaying his visitor's visa and working as a long-haul truck driver without authorization. Soon after that, Gregory's I–130 petition was denied by USCIS because investigators concluded that Gregory's marriage to petitioner was a sham intended to gain him immigration benefits. USCIS's finding of marriage fraud relied heavily on its conclusion that Gregory was in a relationship and sharing an apartment with another woman while purportedly married to petitioner. The IJ ordered petitioner removed and, in August 2010, the BIA dismissed the appeal.

In September 2010, USCIS approved petitioner daughter's I–130 petition. Petitioner then asked the BIA to reopen the removal proceedings and also filed a Form I–485 seeking to adjust his status. In December 2010 the BIA granted the motion to reopen and remanded the case to the IJ. Following five hearings, and the testimony of petitioner and Gregory, the IJ agreed with USCIS's finding that Gregory's marriage to petitioner was a sham which, coupled with petitioner's false testimony, rendered him inadmissible under § 212 (a)(6)(C)(i) and therefore ineligible to adjust his status. Alternatively, the IJ held that petitioner did not merit a favorable exercise of discretion even if eligible. On appeal, the BIA assumed arguendo petitioner's eligibility but upheld the denial of the petitioner's applications for both adjustment of status and voluntary departure in the exercise of discretion.

"Due process protections do apply in all civil proceedings, including removal hearings, [] but we presume that any removal proceeding satisfies due process when it is conducted in accordance with INA § 240(b)(4).

The Seventh Circuit first found that substantial evidence supported the IJ's finding that petitioner had committed marriage fraud. The court noted that the IJ not only considered the result of the USCIS's investigation, but also considered the testimony of petitioner and Gregory who could not agree about where they had lived and whether they had separated. The court found no error in the BIA's discretionary denial of adjustment, noting that "there is no due process right to discretionary relief."

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■ **Seventh Circuit Upholds BIA's Recognition Of Post-Entry Adjustment As An "Admission" For Purposes Of The Aggravated Felony Removal Ground**

In *Estrada-Hernandez v. Lynch,* __ F.3d __, 2016 WL 1059415 (7th Cir. March 17, 2016) (*Wood,* Bauer, Kanne), the Seventh Circuit upheld the BIA's determination that petitioner was removable for having been "convicted of an aggravated felony at any time after admission."

The petitioner, Estrada–Hernandez, and his mother entered the United States unlawfully when he was a small child. They became LPRs in 1989, when Estrada–Hernandez was seven. His mother became a naturalized citizen when he was 16. Petitioner however did not automatically become a U.S. citizen. Over the next 15 years, Estrada–Hernandez was convicted of several state crimes, including three controlled-substance violations, two retail theft convictions, and one charge of felon-in-possession of a firearm. In 2015 DHS instituted removal proceedings and an IJ determined that he was removable as charged. Petitioner, who had been unrepresented, obtained counsel who argued on his appeal to the BIA to remand the case to the IJ so that petitioner could withdraw his admissions to the convictions. The BIA upheld the removal order and also rejected petitioner's contention that he was not removable under INA § 237(a)(2)(A)(iii) because he was never "admitted" at a border.

The court preliminarily rejected petitioner's contention that he had been denied his right to counsel before the IJ. "Due process protections do apply in all civil proceedings, including removal hearings, [] but we presume that any removal proceeding satisfies due process when it is conducted in accordance with INA § 240(b)(4). That statute requires only that a noncitizen be given an opportunity to hire a lawyer.

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[] The IJ made it clear to Estrada–Hernandez that he had this right," explained the court.

The court also held, reaffirming *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999), that Estrada–Hernandez's post-entry adjustment constituted an "admission" for the purpose § 237(a)(2)(A)(iii), and further held his offense was "described in" § 101(a)(43)(E)(ii), following its own precedent.

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■ **Eighth Circuit Upholds Determination that Petitioner Is Removable for Conviction of a CIMT Committed Within Five Years After His Admission**

In ***Ashraf v. Lynch***, __ F.3d __, 2016 WL 1612766 (8th Cir. April 22, 2016) (Colloton, Gruender, *Shepherd*), the Eighth Circuit held that petitioner's submission of a Petition to Remove the Conditions on Residence (Form I-751) constituted an overt act in furtherance of his conspiracy to commit marriage fraud, thereby extending his conspiracy crime to a date within five years of his admission to the United States.

The petitioner, a Pakistani national, pled guilty in 2007, to conspiring with at least four other Pakistanis in formulating a plan to enter into sham marriages with United States citizens for unlawful immigration purposes. In 2011 petitioner was placed in removal proceedings where he conceded that conspiracy to commit marriage fraud constituted a CIMT but argued that the crime was not committed within five years after his admission to the United States.

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■ **Eighth Circuit Holds Asylum Applicants Failed to Establish Government of Mexico Is Unable or Unwilling to Protect Family Members of Individuals Who Dated Gang Members**

In ***Saldana v. Lynch***, __ F.3d __, 2016 WL 1696701 (8th Cir. April 28, 2016) (Loken, Murphy, *Colloton*, JJ.), the Eighth Circuit held that, while it was unclear whether the BIA had rejected the petitioners' proposed social group of "family members"—as well as the proposed social group of "family members of individuals who dated gang members"—the petitioners nevertheless failed to establish that the government of Mexico was unable or unwilling to control the Matazetas gang or that relocation was unreasonable. In particular, the court noted that the BIA did not address whether a family constitutes a "particular social group" and "that is a matter that should be decided by the Board in the first instance."

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■ **Eighth Circuit Holds Iowa Domestic Abuse Assault, Third Or Subsequent Offense, Is Not Categorically a CIMT**

In ***Perez Alonzo v. Lynch***, __ F.3d __, 2016 WL 1612772 (8th Cir. April 22, 2016) (*Smith*, Bye, Benton), the Eighth Circuit held that the alien's convictions for domestic abuse assault, third or subsequent offense, in violation of Iowa Code § 708.2A(4), did not categorically constitute crimes involving moral turpitude. The court held that Iowa Code § 708.1, which defines assault, is a divisible statute and contains some portions which constitute crimes involving moral turpitude and others that do not. The court remanded for the BIA to determine whether the alien's convictions constitute crimes involving moral turpitude under the modified categorical approach.

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■ **Eighth Circuit Holds Asylum Applicant Failed To Establish Past Persecution Based On Threats and Harassment and a Nexus With a Cognizable Social Group**

In ***Cinto-Velasquez v. Lynch***, __ F.3d __, 2016 WL 1169079 (8th Cir. March 25, 2016) (*Loken*, Murphy, Colloton), the Eighth Circuit held that, absent physical harm, unfulfilled threats and incidents of harassment involving guerillas did not constitute past persecution and were not on account of alien's political beliefs.

Petitioner, a native of Guatemala, claimed that while in Guatemala in 1992, serving in the Civil Patrol, armed guerillas attempted to recruit him but he refused. He then fled to the United States. He returned to Guatemala in 2005, but then left again for the United States because he received a letter from "Mara 18" gang members demanding a "tax" of approximately $7,000 and he refused to pay. At his removal hearing he claimed asylum on the basis that members of violent Guatemalan gangs, who are former anti-government guerillas, will persecute him on account of his political opinion when he was a member of the Civil Patrol in 1992, and his present membership in a particular social group, namely, "Guatemalan repatri-

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ates who have lived and worked in the United States for many years and are perceived to be wealthy." The IJ and the BIA denied asylum, withholding, and CAT protection.

The court agreed that petitioner's encounters did not rise to the level of past persecution on account of a protected ground. The court also concluded that petitioner failed to show that the dated events provided an "objectively reasonable basis for a present fear." Lastly, the court found that the social group proposed by the petitioner, individuals who lived in the United States for many years and were perceived to be wealthy, was "too amorphous because it turns on whether an individual is *perceived* as being wealthy." The court further held that the BIA's finding that petitioner failed to prove he and his family would be unable to safely relocate within Guatemala was supported by substantial evidence.

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NINTH CIRCUIT

■ **Ninth Circuit, Applying the Substantial Evidence Standard, Upholds Negative Reasonable Fear Determination in Reinstated Removal Proceeding**

In ***Andrade-Garcia v. Lynch***, __F.3d__, 2016 WL 1719320 (Clifton, *Ikuta*, Block, JJ.) (9th Cir. April 29, 2016), the Ninth Circuit held that it reviews an IJ's reasonable fear determination under the INA § 242 substantial evidence standard, not the "facially legitimate and bona fide" standard espoused by the government. The court explained that the "facially legitimate" standard of review has been applied in other contexts not applicable here, because "Congress limited the Executive's discretion to impose a reinstated order of removal by authorizing aliens to seek relief under CAT" and withholding which, if applicant meets the relevant burden of proof "are mandatory forms of relief." The court further said that because it treats reinstatement orders as final orders of removal, reinstatement orders are subject to judicial review under § 242.

The court held that it reviews an IJ's reasonable fear determination under the INA § 242 substantial evidence standard, not the "facially legitimate and bona fide" standard.

The court nevertheless denied the petition for review, concluding that substantial evidence supported the determination that the petitioner failed to demonstrate that the Guatemalan government would acquiesce to his torture sufficient to establish a reasonable possibility of future torture under CAT.

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■ **Ninth Circuit Holds Proposed Social Group of "Imputed Wealthy Americans" Lacks Required Particularity**

In ***Ramirez-Munoz v. Lynch***, 816 F.3d 1226 (9th Cir. 2016) (Wallace, Silverman, Christen), the Ninth Circuit held that the asylum applicants, a Mexican married couple and their children, failed to demonstrate that their proposed social group, "imputed wealthy Americans," had the required particularity. Specifically, petitioners claimed that because they are light-skinned, fit, and have American mannerisms or accents, their family will be perceived as wealthy Americans in Mexico, and thus will become targets for kidnapping or torture.

The court agreed with the BIA that the petitioners had not established that they are part of a narrowly defined or cognizable particular social group, and held that the proposed group of "imputed wealthy Americans" is not a discrete class of persons recognized by society as a particular social group. The court also held that "nor is the proposed group sufficiently particular that it can be described with passable distinction that the group would be recognized as a discrete class of persons." The court noted that there was no evidence that actual Americans or imputed Americans were targeted in greater numbers than native Mexicans.

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■ **Ninth Circuit Holds Agency's Definition of an Aggravated Felony "Relating To Obstruction of Justice" Raises Constitutional Vagueness Concerns**

In ***Valenzuela Gallardo v. Lynch***, __ F.3d __, 2016 WL 1253877 (9th Cir. March 31, 2016) (Thomas, *Christen*, Seabright), the Ninth Circuit held that *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012), in defining an aggravated felony offense "relating to obstruction of justice" under INA § 101(a)(43)(S) to require only "the affirmative and intentional attempt, with specific intent, to interfere with the process of justice," posed constitutional vagueness concerns by departing from a statutory construction requiring a nexus to an ongoing investigation or proceeding. The court remanded for the BIA to apply its prior interpretation or offer a new construction.

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Ninth Circuit Holds that California Identity Theft Convictions Were not Categorical CIMTs

In ***Linares-Gonzalez v. Lynch***, __ F.3d __, 2016 WL 1084735 (9th Cir. March 21, 2016) (Pregerson, *Callahan,* Bastian (by designation)), the Ninth Circuit held that neither a Mexican alien's conviction under California Penal Code § 530.5(a), which prohibits knowingly obtaining personal identifying information and using that information for any unlawful purpose, nor a Guatemalan alien's conviction under California Penal Code § 530.5(d)(2), which prohibits transferring that information to someone else, knowing that the transferee will use it for an unlawful purpose, was categorically a crime involving moral turpitude. The court remanded to the BIA's to determine whether the aliens met the statutory requirements for discretionary relief.

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■ **Alien's Conviction for Written Perjury under California Penal Code § 118 is Not a CIMT**

In ***Rivera v. Lynch,*** 816 F.3d 1064 (9th Cir. 2016) (Fletcher, *Paez*, Berzon), the Ninth Circuit determined that the state statute at issue was not categorically a CIMT and was, instead, divisible into two distinct offenses, written and oral perjury. Applying the modified categorical approach, the court concluded that written perjury under California Penal Code § 118 is not a CIMT because it involves neither fraud nor grave acts of baseness and depravity. The court declined to give any *Chevron* deference to *Matter of Martinez–Recinos*, 23 I&N Dec. 175 (BIA 2001), the decision cited by the BIA, because it "provided no reasoned explanation for its conclusion" that a conviction under § 118 was a CIMT. Finally the court noted that it took "no position on California's other, context-specific perjury statutes."

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■ **Ninth Circuit Affirms Denaturalization Based on 1994 Robbery Conviction**

The court found "very troubling" the nearly 20–year delay between petitioner's conviction and the complaint to revoke his naturalization.

In ***United States v. Zhou***, 815 F.3d 639 (9th Cir. 2016) (Berzon, Davis, *Owens*), the Ninth Circuit affirmed the Central District of California's decision to grant judgment on the pleadings and denaturalize an alien who in 1994, committed robbery two weeks before he naturalized but was not arrested and convicted for the crime until after he naturalized. The panel affirmed the district court's denaturalization judgment under the "catch-all" provision in INA § 101(f), on the ground that defendant's robbery conviction prevented him from establishing good moral character during the statutory period. The panel held that (1) robbery was an unlawful act reflecting adversely on defendant's moral character, (2) defendant was collaterally estopped by the conviction from contesting his culpability, and (3) defendant could not show extenuating circumstances to palliate his guilt.

Nonetheless, the court found "very troubling" the nearly 20–year delay between petitioner's conviction and the complaint to revoke his naturalization.

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TENTH CIRCUIT

■ **Generic Offense of Aggravated Felony "Sexual Abuse of a Minor" Contains a Mens Rea Element of Knowledge**

In ***Rangel-Perez v. Lynch*,** 816 F.3d 591 (10th Cir. 2016) (Kelly, *Ebel*, Lucero), the Tenth Circuit held that the generic offense for the aggravated felony "sexual abuse of a minor" includes a *mens rea* of at least "knowing" and determined that the BIA's decision in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), did not warrant deference because that decision did not address whether the generic offense included a *mens rea* element. Concluding that the generic offense requires *mens rea*, the court held that the Utah statute of conviction was a strict liability offense and therefore not an aggravated felony under *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The court did not decide whether the INA's generic "sexual abuse of a minor" offense also requires proof of a four-year age differential.

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■ **Tenth Circuit Affirms Discretionary Denial of Asylum**

In ***Htun v. Lynch***, __ F.3d __, 2016 WL 1397612 (10th Cir. April 8, 2016) (Hartz, Baldock, *McHugh*), the Tenth Circuit held that an IJ who had initially granted an asylum application, properly denied that application as a matter of discretion.

The petitioner, a citizen of Burma, entered the United States on a student visa in January 2002, but never attended school. In January 2003 he affirmatively applied for asylum claiming persecution on account of political opinion but that application was not granted because

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of credibility concerns. Petitioner was referred to removal proceedings where he renewed his request for asylum, withholding, and CAT protection. On March 2006, while removal proceedings were pending, petitioner married a United States citizen who filed an I-130, and he filed an application for adjustment.

Petitioner's asylum testimony centered on his anti-government activities as a student and his fear that some student protesters had disappeared and some had been imprisoned. Mr. Oo, a witness for petitioner, testified that during his visits to Burma (during a stay in Singapore) petitioner stayed with Mr. Oo to avoid detection from the government. The IJ granted asylum explaining that petitioner had a 10% chance of being in danger if he was sent back to Burma. On January 26, 2010, DHS moved to reopen petitioner's case based on new material information, namely, that petitioner's witness was actually his employee, and that petitioner had been married to a U.S. citizen.

At the reopened hearing petitioner admitted that he had married the U.S. citizen to obtain an immigration benefit, knowing that the marriage was not valid. Mr. Oo also confirmed that he was employed by petitioner when he had testified at the prior hearing. On May 10, 2013, the IJ issued a written decision finding that petitioner lacked credibility, and denying asylum as a matter of discretion. The IJ denied the request for withholding on the basis of changed country conditions and that petitioner had not met his burden. On appeal the BIA also concluded that petitioner lacked credibility and, after considering the relevant discretionary factors, the BIA agreed with the IJ that petitioner did not merit the favorable exercise of discretion.

The Tenth Circuit upheld the adverse credibility determination and upheld the discretionary denial of because IJ and the BIA had considered the totality of the circumstances. The court also upheld the denial of withholding and CAT protection, noting that petitioner, following his political activity, "had entered and exited Burma at will."

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Former Gang Members not a PSG

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requests concluding that petitioner's claim to asylum was time-barred, he was ineligible for withholding because he had committed serious nonpolitical crimes in Honduras, and he did not show that he was a member of a "particular social group." He also concluded that petitioner presented insufficient evidence to merit protection under the CAT.

On appeal, the BIA agreed that petitioner did not qualify for withholding because "former Mara–18 gang-members" could not be a "particular social group" under the INA. It concluded this for two reasons: first, the proposed group did not meet the "particularity requirement" for "particular social groups," and second, membership in a criminal organization cannot be the basis for protection under the INA given the Act's humanitarian purpose. The BIA also affirmed the CAT denial.

The Eleventh Circuit preliminarily explained that the BIA's interpretation of the phrase "particular social group" is entitled to Chevron deference because the INA does not define the phrase and it is ambiguous. The court then noted the BIA had relied on two precedential BIA decisions to determine that petitioner was not a member of a particular social group: *Matter of E–A–G–*, 24 I&N Dec. 591 (BIA 2008), and *Matter of W–G–R–*, 26 I&N Dec. 208 (BIA 2014). The court held that the BIA's determinations on both counts, namely that recognizing such a group would be inconsistent with the asylum statute's humanitarian objectives and that the proposed group lacked particularity, were entitled to Chevron deference. "We do not think either conclusion, either of which is sufficient to deny the relief sought by [petitioner], is an unreasonable interpretation of 'particular social group,'" said the court.

The court further held that the criminal alien bar at INA § 242(a)(2)(C) precluded it from reviewing the BIA's fact-based denial of CAT protection.

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INSIDE OIL

OIL Appellate Attorney **John F. Stanton** received national media attention on April 19, when he sponsored a dozen deaf colleagues, members of the Deaf and Hard of Hearing Bar Association (DHHBA), to be admitted to the Supreme Court Bar.

As reported by the *Wall Street Journal*, "for the first time, Chief Justice John Roberts [] used a language other than English in the formal ceremony admitting attorneys to the Supreme Court Bar: American Sign Language." The *SCOTUSblog* reported that "once Stanton finished presenting the deaf or hard of hearing lawyers for the bar, Chief Justice John G. Roberts, Jr., moved his arm broadly into a stamping gesture, in American Sign Language, as he also proclaimed that Stanton's motion was granted and the lawyers would be admitted. The Court's public information office said Roberts had learned the sign specifically for the ceremony."

Until the last two decades, according to Stanton's research, only a handful of deaf lawyers were in active practice, because of numerous obstacles at law schools and workplaces alike.

Even now, Stanton believes there are fewer than 250 deaf lawyers nationwide, holding jobs ranging from litigators to prosecutors to judges.

Stanton is the author of "Breaking the Sound Barriers: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed."

Justice Department Celebrates College Signing Day!

On April 26, 2016, the Department of Justice celebrated National College Signing Day -- a tradition to celebrate students going to college the same way we celebrate athletes and celebrities. OIL's University of Virginia team was featured on the DOJ public website as the representative of the Civil Division.

Pictured above: Anthony Payne, Alexander Lutz, Keith McManus, Jennifer Bowen, Dawn Conrad, Sarah Bayram, and David McConnell.

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.

Office of Immigration Litigation

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