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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

State Conviction May Be Aggravated Felony Even Without "Interstate Commerce" Element Of Federal Crime

On May 19, 2016, the Supreme Court issued its decision in ***Torres v. Lynch***, __U.S.__, 136 S. Ct. 1619 (2016). At issue in the case was whether a state arson conviction categorically constitutes an "offense described in" 18 U.S.C. § 844(i), the federal arson statute, where the state statute lacks the interstate commerce element required for a federal conviction. If so, then a state arson conviction would constitute an aggravated felony under INA § 101(a)(43)(E)(i), 8 U.S.C. § 1101(a)(43)(E)(i). Agreeing with the government, a five Justice majority, with Justice Kagan writing, concluded that the state statute was a categorical match. The Court based this decision both on the text of the aggravated felony provision and the "settled practice" of distinguishing between jurisdictional elements, such as the interstate commerce element in Section 844(i), and the substantive elements that define the *actus reus* of the offense. Justice Sotomayor, joined by Justices Thomas and Breyer, dissented, and would have concluded that the omission of the commerce element in the state statute foreclosed a categorical match with the federal provision.

Torres, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, was convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 & 150.10. He was sentenced to one day of imprisonment and five years of probation. In 2006, after a trip abroad, Torres sought reentry to the United States. After a database query disclosed his conviction for at-

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Court of Appeals Adverse Credibility Project — Report for 2015

The Adverse Credibility Project was established 13 years ago as a means to track decisions issued by the courts of appeals that specifically make a ruling on the agency's adverse credibility determinations. The decisions include opinions, memorandum dispositions, and orders – that is, decisions that are unpublished and published, non-precedent and precedent. The "database" or source for obtaining these decisions are the paper copies of decisions that the clerks' offices send to OIL and electronic copies of decisions obtained by OIL paralegals, including the electronic copies of adverse decisions that the Adverse Support Team (headed by Angela Green) obtains.

The data compiled in the tables below reflect relevant decisions issued by the courts of appeals in 2015, the most recent year for which complete data are available. The tables tally all decisions in which – regardless of the ultimate outcome of the petition for review – the appellate court has either approved of, or

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Torres v. Lynch

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tempted arson, he was charged with being inadmissible. In the subsequent removal proceedings, IJs found that Torres's attempted-arson offense made him inadmissible and ineligible for cancellation of removal. First, an IJ determined that Torres had been convicted of attempted arson and that this conviction made him inadmissible as an alien convicted of a crime involving moral turpitude. Second, the IJ determined that he was ineligible for cancellation of removal, relying on a precedential Board decision that convictions for attempted third-degree arson in violation of New York law are aggravated felonies. *See Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), *vacated and remanded*, 744 F.3d 54 (3d Cir. 2014)).

The BIA dismissed Torres's appeal, rejecting his argument that his arson offense was not an aggravated felony because he was convicted under a state statute that "lacks the jurisdictional element in the applicable federal arson offense." The BIA found the question controlled by its decision in *Bautista*, because that decision had held that a conviction under the state arson statute under which Torres was convicted qualified as an aggravated felony when the sole difference between the state and federal arson statutes was the absence of "the jurisdictional element applicable in the federal arson offense." *See Matter of Bautista*, 25 I&N Dec. at 620-621. The Board also relied on *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), which had concluded that "state and foreign statutes need not contain a nexus to interstate commerce" in order for violations to qualify as aggravated felonies because they are offenses "'described in' 18 U.S.C. 922(g)(1)," the federal statute forbidding felons from possessing firearms.

The Second Circuit denied a petition for review, "defer[ring] to the [BIA's] reasonable determination that a state 'offense described in' 18 U.S.C. § 844(i) need not contain a federal jurisdictional element." The court of appeals took as its starting point the BIA's published decisions in *Bautista* and *Vasquez-Muniz*. There, the BIA had noted that the INA states that "the term 'aggravated felony' applies to 'an offense described in this paragraph whether in violation of Federal or State law' or 'the law of a foreign country.'" The BIA took that language to indicate that the definition of "aggravated felony" "expressed a congressional 'concern over substantive offenses rather than any concern about the jurisdiction in which they are prosecuted.'" *See Matter of Vasquez-Muniz*, 23 I&N Dec. at 210.

After recounting this and other reasoning by the BIA, the court of appeals concluded that the BIA's conclusion reflected a reasonable construction of an ambiguous term within the INA. After "[c]onsidering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as a whole," the court concluded that Congress had not spoken directly to "whether a state crime must contain a federal jurisdictional element in order to constitute an aggravated felony." It emphasized the contrasting language Congress used elsewhere in the INA's aggravated-felony definition, specifying that aggravated felonies include offenses "defined in" certain other provisions. This naturally suggested, the court noted, that Congress meant for the two terms to have different meanings. And the court wrote that "[i]t seems to us, as it did to the Fifth, Seventh, Eighth, and Ninth Circuits, that 'described in' is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have immigration consequences."

While the court stated that in its view the text did not unequivocally compel the BIA's statutory construction, it found "persuasive" the BIA's construction and stated that it "might well adopt" that construction if the case were not viewed through the lens of *Chevron*. At a minimum, the court concluded, the BIA's approach reflected a "'permissible construction' of section 1101(a)(43)(E)(i)." The court therefore declined to disturb the BIA's conclusion that Torres's state arson conviction was for an aggravated felony.

Torres's petition for certiorari was granted by the Supreme Court in June 2015. Before the Court, both parties relied primarily on the text and context of the aggravated felony provision, as well as the structure of the Immigration and Nationality Act, while secondarily arguing against deference to the BIA's interpretation of Section 1101(a)(43)(E)(i) (Torres), or in favor of deferring to the BIA's reasonable interpretation of the statute (the government).

An eight member Court issued its decision on May 19, 2016 (Justice Scalia had sat for argument, but passed away prior to issuance of the decision), with five Justices agreeing with the conclusion that the state statute need not reproduce a federal statute's jurisdictional element in order to be a categorical match under the INA's aggravated felony provision. Writing for the majority, Justice Kagan discounted reliance on a comparison between the phrases "defined in" and "described in," an assessment that had driven part of the reasoning of the Second Circuit as well as those other courts of appeals to have addressed the issue. Both terms, Justice Kagan reasoned, might have broad and narrow meanings given different circumstances, and thus did not resolve the question of whether the jurisdictional element was required to be reproduced in the state statute.

Rather, the majority's reasoning was based on two factors. First, the penultimate sentence of § 1101(a)(43) made clear that the discrete aggravated felony definitions of the statute apply "to an offense described in this paragraph whether in violation of Federal or State law," as

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reversed, the adverse credibility holding reached by the immigration judge or Board of Immigration Appeals.

Petitions for review in which the decision does not decide an adverse credibility issue are not counted, even though the immigration judge or Board made an adverse credibility determination. Cases in which the court upheld the agency's adverse credibility determination, although granting the petition for review on a different issue, would be included in the data. However, a petition denied because of, for example, a failure to demonstrate the requisite nexus, without addressing any credibility issues, would not.

This project's results were used to support the adoption of the REAL ID Act amendments. The project now monitors results in both pre- and post-REAL ID Act cases. The current purpose of the project is to determine the extent to which the courts of appeals are applying those amendments. The underlying assumption is that the courts' conscientious application of the amendments should be reflected in higher government win rates in post-REAL ID Act cases.

RESULTS

Total number of credibility-related decisions fell by almost one-third

The chart shows that the number of relevant decisions fell in 2015, with the total number of credibility-related decisions at 200. By contrast, in both 2014 and 2013 the number was 291. As usual, the Ninth Circuit issued the highest number of decisions addressing the EOIR's credibility findings (66 in 2015, down from 122 in 2014). As in 2014, the second-place circuit in 2015 was the Second Circuit and the third-place circuit was the Sixth Circuit. The Second Circuit numbers fell in

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2015 Credibility Decisions

CIRCUITS	WIN (%)	WIN (#)	LOSS (%)	LOSS(#)	TOTAL WIN %
1st/pre REAL ID	0.0%	0	100.0%	2	
1st/post REAL ID	100.0%	1	0.0%	0	
1st/total	33.3%	1	66.7%	2	86.1%
2d/pre REAL ID	100.0%	1	0.0%	0	
2d/post REAL ID	96.1%	49	3.9%	2	
2d/total	96.2%	50	3.8%	2	93.1%
3d/pre REAL ID	0.0%	0	0.0%	0	
3d/post REAL ID	87.5%	7	12.5%	1	
3d/total	87.5%	7	12.5%	1	88.9%
4th/pre REAL ID	100.0%	2	0.0%	0	
4th/post REAL ID	100.0%	7	0.0%	0	
4th/total	100.0%	9	0.0%	0	93.7%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	13	0.0%	0	
5th/total	100.0%	13	0.0%	0	97.5%
6th/pre REAL ID	50.0%	1	50.0%	1	
6th/post REAL ID	94.7%	18	5.3%	1	
6th/total	90.5%	19	9.5%	2	93.1%
7th/pre REAL ID	100.0%	2	0.0%	0	
7th/post REAL ID	57.1%	4	42.9%	3	
7th/total	66.7%	6	33.3%	3	75.0%
8th/pre REAL ID	100.0%	1	0.0%	0	
8th/post REAL ID	100.0%	5	0.0%	0	
8th/total	100.0%	6	0.0%	0	95.7%
9th/pre REAL ID	60.0%	6	40.0%	4	
9th/post REAL ID	76.8%	43	23.2%	13	
9th/total	74.2%	49	25.8%	17	81.9%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	80.0%	4	20.0%	1	
10th/total	80.0%	4	20.0%	1	83.6%
11th/pre REAL ID	0.0%	0	0.0%	0	
11th/post REAL ID	75.0%	6	25.0%	2	
11th/total	75.0%	6	25.0%	2	91.5%
TOTAL	85.0%	170	15.0%	30	
Total/pre REAL ID	65.0%	13	35.0%	7	
Total/post REAL ID	87.2%	157	12.8%	23	

Win percentage in all asylum cases circuitwide -- 86.1%

Win percentage in all immigration cases circuitwide -- 86.9%

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2015 to 52 from 93 in 2014, and the Sixth Circuit dropped to 21 from 40 in 2014. The only other circuit with a number in double digits in 2015 was the Fifth with 13; in 2014 the only such circuit was the Eleventh with 10.

Overall win percentage remained almost identical from 2014 to 2015

The overall win percentage in adverse-credibility-related cases in 2015 was 85.0%; in 2014, it was 85.6%. In 2015, the win percentage in credibility-related cases was only slightly lower than the win percentage in all asylum cases (86.1%) and in all immigration cases (86.9%). In 2014, the win percentage in credibility-related cases (85.6%) was higher than for asylum cases generally (81.3%), but lower than for immigration cases generally (89.1%).

Adverse-credibility-related losses occurred in more circuits in 2015 than in 2014. During that period, the win percentage rose in three circuits, and declined in six.

Credibility losses were reported in 2015 in eight circuits: the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. We won all credibility cases only in the Fourth, Fifth, and Eighth Circuits. In contrast, in 2014, losses occurred in only six circuits: the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh.

The lowest win percentages were in the First Circuit, at 33.3% (of 3 cases), the Seventh Circuit, at 66.7% (of 9), the Ninth Circuit, at 74.2% (of 66), and the Eleventh Circuit, at 75.0% (of 8). Compared with the 2014 statistics, there were decreases in win percentages in the First Circuit (from 100% to 33.3% of 3 cases), Third Circuit (from 100% to 87.5% of 8 cases), Sixth Circuit (from 100% to 92.6% of 21 cases), Seventh Circuit (75.0% to 66.7% of 9 cases), Ninth Circuit (80.3% to 74.2% of 66 cases), and Eleventh Circuit (80.0% to 75.0% of 8 cases). In contrast, the win rates increased in the Second Circuit (88.2%

2014 Credibility Decisions

CIRCUITS	WIN (%)	WIN (#)	LOSS (%)	LOSS (#)	TOTAL WIN % (all immigr. cases)
1st/pre REAL ID	100.0%	2	0.0%	0	
1st/post REAL ID	100.0%	1	0.0%	0	
1st/total	100.0%	3	0.0%	0	89.5%
2d/pre REAL ID	100.0%	6	0.0%	1	
2d/post REAL ID	88.4%	76	11.6%	10	
2d/total	88.2%	82	11.8%	11	92.2%
3d/pre REAL ID	0.0%	0	0.0%	0	
3d/post REAL ID	100.0%	5	0.0%	0	
3d/total	100.0%	5	0.0%	0	91.5%
4th/pre REAL ID	0.0%	0	0.0%	0	
4th/post REAL ID	50.0%	3	50.0%	3	
4th/total	50.0%	3	50.0%	3	95.4%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	4	0.0%	0	
5th/total	100.0%	4	0.0%	0	98.1%
6th/pre REAL ID	100.0%	5	0.0%	0	
6th/post REAL ID	100.0%	35	0.0%	0	
6th/total	100.0%	40	0.0%	0	96.9%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	66.7%	2	33.3%	1	
7th/total	75.0%	3	25.0%	1	74.3%
8th/pre REAL ID	100.0%	1	0.0%	0	
8th/post REAL ID	100.0%	1	0.0%	0	
8th/total	100.0%	2	0.0%	0	93.8%
9th/pre REAL ID	69.8%	30	30.2%	13	
9th/post REAL ID	86.1%	68	13.9%	11	
9th/total	80.3%	98	19.7%	24	86.1%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	50.0%	1	100.0%	1	
10th/total	50.0%	1	50.0%	1	88.6%
11th/pre REAL ID	100.0%	2	0.0%	0	
11th/post REAL ID	75.0%	6	25.0%	2	
11th/total	80.0%	8	20.0%	2	83.7%
TOTAL	85.6%	249	14.4%	42	
Total/pre REAL ID	77.0%	47	23.0%	14	
Total/post REAL	87.8%	202	12.2%	28	

Win percentage in all asylum cases circuitwide -- 81.3%

Win percentage in all immigration cases circuitwide -- 89.1%

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to 96.2% of 52 cases), Fourth Circuit (50.0% to 100% of 13 cases), and Tenth Circuit (50.0% to 80.0% of 5 cases).

Percentage of credibility-related cases decided under the REAL ID Act increased, with win rates continuing to be higher in post-REAL ID Act than in pre-, but win rates declined in both post- and pre-REAL ID Act cases.

Decisions are categorized by whether they did or did not involve application of the changes introduced by the REAL ID Act. In 2015, 90.0% of the credibility-related decisions were decided under the REAL ID Act; in 2014, that percentage was 79.0%. The win percentage circuit-wide in 2015 was considerably higher for post-REAL ID Act determinations (87.2%) than for pre-REAL ID Act decisions (65.0%). The corresponding numbers in 2014 were 87.8% and 77.0%.

In 2015, the Ninth, Second, and Sixth Circuits – the same circuits with the biggest numbers of all credibility decisions – had the largest numbers of post-REAL ID Act decisions. The Ninth Circuit had 56 (84.8% of all its credibility decisions), the Second had 51 (98.1%), and the Sixth 19 (90.5%). Seven circuits had higher win rates in post-REAL ID Act cases than in pre-, but in four of these seven circuits (the Third, Fifth, Tenth and Eleventh Circuits) there were no pre-REAL ID credibility cases at all. The other three were the First Circuit, with 100% of 1 case vs. 0% of 2 cases), Sixth Circuit (94.7% of 19 cases vs. 50.0% of 2 cases), and Ninth Circuit (76.8% of 56 cases vs. 60.0% of 10 cases).

The Ninth Circuit – declining numbers and win rates

The number of credibility-related decisions was 66, down from 122 in 2014. The win percentage was 74.2%, down from 80.3% in 2014.

Focusing on the impact of the REAL ID Act, the number of post-REAL ID

2013 Credibility Decisions

CIRCUITS	WIN (%)	WIN (#)	LOSS (%)	LOSS(#)	TOTAL WIN % (all immigr. cases)
1st/pre REAL ID	100.0%	1	0.0%	0	
1st/post REAL ID	100.0%	2	0.0%	0	
1st/total	100.0%	3	0.0%	0	89.5%
2d/pre REAL ID	100.0%	7	0.0%	0	
2d/post REAL ID	91.5%	43	8.5%	4	
2d/total	92.6%	50	7.4%	4	92.2%
3d/pre REAL ID	100.0%	3	0.0%	0	
3d/post REAL ID	100.0%	13	0.0%	0	
3d/total	100.0%	16	0.0%	0	91.5%
4th/pre REAL ID	100.0%	5	0.0%	0	
4th/post REAL ID	90.0%	9	10.0%	1	
4th/total	93.3%	14	6.7%	1	95.4%
5th/pre REAL ID	0.0%	0	0.0%	0	
5th/post REAL ID	100.0%	5	0.0%	0	
5th/total	100.0%	5	0.0%	0	98.1%
6th/pre REAL ID	100.0%	14	0.0%	0	
6th/post REAL ID	100.0%	48	0.0%	0	
6th/total	100.0%	62	0.0%	0	96.9%
7th/pre REAL ID	100.0%	1	0.0%	0	
7th/post REAL ID	100.0%	1	0.0%	0	
7th/total	100.0%	2	0.0%	0	74.3%
8th/pre REAL ID	50.0%	1	0.0%	1	
8th/post REAL ID	100.0%	1	0.0%	0	
8th/total	66.7%	2	33.3%	1	93.8%
9th/pre REAL ID	66.7%	26	33.3%	13	
9th/post REAL ID	76.1%	35	23.9%	11	
9th/total	71.8%	61	28.2%	24	86.1%
10th/pre REAL ID	0.0%	0	0.0%	0	
10th/post REAL ID	0.0%	0	100.0%	1	
10th/total	0.0%	0	100.0%	1	88.6%
11th/pre REAL ID	100.0%	4	0.0%	0	
11th/post REAL ID	85.7%	12	14.3%	2	
11th/total	88.9%	16	11.1%	2	83.7%
TOTAL	87.5%	231	12.5%	33	
Total/pre REAL ID	81.6%	62	18.4%	14	
Total/post REAL ID	89.9%	169	10.1%	19	

Win percentage in all asylum cases circuitwide: 87.5%

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well as to most foreign offenses. To read the statute as requiring reproduction of the jurisdictional element, however, would mean that many of the offenses listed in § 101(a)(43) would *never* result in removal if the convicting sovereign was a state or foreign government, since many of the referenced federal provisions do include a jurisdictional element. Moreover, the inclusion of state and foreign offenses would be irrational—many of the most serious offenses, such as selling a child for the production of child pornography, would not constitute aggravated felonies, while many less serious offenses, such as possessing a firearm without a serial number, would be included. This crazy-quilt exclusion of offenses is not what Congress would have intended by adding the penultimate sentence of § 101(a)(43).

Second, the majority relied on a consistent practice of distinguishing between jurisdictional elements and the substantive elements of the offense. Whereas the substantive elements of the offense define the evil Congress is attempting to prevent, the jurisdictional element simply "connects the law to one of Congress's enumerated powers, thus establishing legislative authority." In assessing the collateral consequences of convictions in other circumstances, such as the Assimilative Crimes Act and the federal "three-strikes" statute, the courts of appeals have uniformly disregarded the jurisdictional element in undertaking the relevant categorical analysis. The majority saw no reason to dispense with this approach in the context of the INA, especially where there was no indication that the seriousness of the offense or the nature of the "evil" Congress was seeking to eradicate was tied back to the bare exercise of its authority. Put differently, the jurisdictional element has no connection to the *actus reus*, and thus no relevance to the categorical analysis.

Given these points, the majority found the statute clear enough to uphold the Second Circuit's decision, disregarding the jurisdictional element in undertaking the categorical analysis. The Court did not reach any issue of deference, however, and yet was also silent on whether the text of the statute unambiguously compelled its holding.

Justice Sotomayor penned a dissent, joined by Justices Thomas and Breyer. The affirmative point of the dissent was that the plain language dictated that *every* element of the federal statute had to be considered in undertaking the categorical analysis of the state statute, and given the New York statute's lack of an interstate commerce element, Torres's arson conviction could not be an "offense described in" Section 844(i).

The dissent also took issue with the majority's two main points, arguing that: 1) even under Torres's reading of the statute many state and foreign convictions would fall within the aggravated felony definition, and there was nothing irrational about some offense falling outside the purview of § 101(a)(43); and 2) the jurisdictional element should not be ignored based only on practice in the criminal context, especially where Congress could have added specific language directing that the element should not be considered in assessing whether a state statute is a categorical match for immigration purposes.

By: Patrick Glen, OIL

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

Credibility Decisions

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Act cases in 2015 was 56, representing 84.8% of all credibility decisions in the Ninth Circuit. In 2014, there were 79 post-REAL ID Act decisions, representing 64.8% of all the credibility decisions in the Ninth Circuit. As time goes by, we expect to see further decline in the number of pre-REAL ID cases and thus rises in the percentage of credibility cases decided under the REAL ID Act.

The win rate in 2015 for post-REAL ID Act cases was 76.8%, compared to a win rate of 60.0% for pre-REAL ID Act cases. In 2014, these rates were 86.1% and 69.8%, respectively. Thus the win rates in post-REAL ID Act cases continue to surpass those in pre-REAL ID Act cases within the Ninth Circuit, mirroring the circuit-wide pattern. Yet the win rates for both post- and pre-REAL ID Act cases fell in the Ninth Circuit between 2014 and 2015. The drop in win rate for the post-REAL ID Act cases is particularly troubling. It may reflect the gradual accumulation of damaging precedent in the Ninth Circuit since the enactment of the REAL ID Act.

Contact: Alison R. Drucker, OIL
☎ 202) 616-4867

FURTHER REVIEW PENDING: Update on Cases & Issues

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 petition has been distributed for the Supreme Court's June 23, 2016 conference.

Contact: Andy MacLachlan, OIL
☎ 202-514-9718

Mandatory Detention

On June 20, 2016, the Supreme Court granted the government petition for a writ of certiorari in ***Jennings v. Rodriguez***, No. 15-1204, challenging the Ninth Circuit's 2015 opinion, 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 government merits brief is presently due by August 4, 2016. The Court took no action on the government's petition for a writ of certiorari in the related case, *Shanahan v. Lora,* No. 15-1205, challenging the Second Circuit's 2015 opinion, 804 F.3d 601, presumably holding that petition for *Rodriguez*, but denied the Lora's conditional cross-petition for a writ of certiorari. The *Lora* petition may reach 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.

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

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.

Civil Division Contact: Adam Jed, Counsel to the AAG

Crime of Violence – Vagueness

On June 10, 2016, the government filed a petition for a writ of certiorari in ***Lynch v. Dimaya***, No. 15-1498, challenging the judgment of a divided Ninth Circuit panel (803 F.3d 1110) that the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the aggravated-felony provision of the immigration laws, is unconstitutional in view of Johnson v. United States, 135 S. Ct. 2521 (2015) (striking down the "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)). The government contends that review is warranted because that ruling is incorrect, strikes down a federal statute, conflicts with a decision of another court of appeals, and is already causing substantial disruption to the enforcement of the immigration laws and several criminal laws.

Contact: Bryan Beier
☎ 202-514-4115

Good Moral Character

On June 6, 2016, the government filed a petition for *rehearing en banc* in ***Ledezma-Cosino v. Lynch***, challenging the Ninth Circuit panel's decision, 819 F.3d 1070, holding that the "habitual drunkard" bar to good moral character is unconstitutional under the Equal Protection Clause. The panel majority concluded that the provision targeted an underlying medical condition, alcoholism, and held "that, under the Equal Protection Clause, a person's medical disability lacks any rational relation to his classification as a person with bad moral character[.]" Dissenting, Judge Clifton would have held that the provision is rationally related to compelling government interests, including public health and safety, and thus constitutional. In its petition for rehearing, the government argues: 1) there are not two similarly situated classes of aliens, and 2) even assuming such classes, the statutory provision is rationally related to Congress's intent to limit eligibility for relief and benefits to those who do not present risks to public health and safety.

Contact: Patrick J. Glen
☎ 202-305-7232

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Petitioner Failed to Establish that the BIA Abused its Discretion in Denying Motion to Reconsider

In *Garcia v. Lynch*, __ F.3d __, 2016 WL 2621180 (1st Cir. May 9, 2016) (Torruella, *Selya*, Thompson), the First Circuit held that it lacked jurisdiction to review petitioner's untimely petition for review of the BIA's denial of his second motion to reopen.

The petitioner, a citizen of the Dominican Republic, married a U.S. citizen in 1996 and became a conditional lawful permanent resident. In 1998, the couple filed a joint petition to remove the condition, but the USCIS denied it citing marriage fraud. Petitioner's conditional permanent residency was terminated and he was placed in removal proceedings. In 2009, when petitioner failed to appear for a scheduled hearing he was ordered removed in absentia. Petitioner then promptly sought to reopen the proceedings but the motion was denied. Petitioner appealed to the BIA, but withdrew his appeal and requested reinstatement of the removal order, professing a desire to return to his homeland. The BIA granted the request and, on July 10, 2009, the petitioner was removed to the Dominican Republic.

Sometime in December of 2012, the petitioner reentered the United States illegally. He was soon apprehended and charged criminally with unlawful reentry. On August 28, 2013, the petitioner again moved to reopen, alleging that he had received ineffective assistance of counsel during the 2009 removal proceedings. The IJ denied this second motion to reopen, because, inter alia, the motion was time and number barred and because the ineffective assistance of counsel claim did not comply with *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988). The BIA affirmed the IJ, adding that the petitioner had not demonstrated prima facie eligibility for any relief from removal. Petitioner filed a motion to reconsider but the BIA denied the motion. Petitioner a petition for review shortly thereafter.

BIA did not abuse its discretion in denying the petitioner's motion to reconsider for failure to comply with the requirements enumerated in Matter of Lozada.

The court held that because petitioner never filed a timely petition for judicial review of the BIA's denial of his second motion to reopen, it lacked jurisdiction to consider that challenge. Otherwise, the court held that the BIA did not abuse its discretion in denying the petitioner's motion to reconsider for failure to comply with the requirements enumerated in *Matter of Lozada*. The court further held that it lacked jurisdiction to review the petitioner's equitable tolling argument because he failed to exhaust his administrative remedies.

Contact: Nicole N. Murley, OIL-DCS
☎ 202-616-0473

First Circuit Remands, Seeking Reasoning for BIA's Finding that Battered Spouse Special-Rule Cancellation Requires Establishing a Good-Faith Marriage

In *Tillery v. Lynch*, __ F.3d __, 2016 WL 2731994 (1st Cir. May 11, 2016) (*Howard*, Selya, Lipez), the First Circuit held that the BIA failed to explain its interpretation that cancellation of removal for battered spouses under INA § 240A(b)(2) requires establishing a good-faith marriage.

Tillery, a native of St. Vincent and the Grenadines, entered the United States in February 2004 (then, as Sonia Peters) as a non-immigrant B–1 temporary visitor for business. She did not depart when her visa expired. Eventually she met and married Keial Tillery, a United States citizen. Shortly after the marriage, the husband was incarcerated and remained imprisoned for approximately a year. He was released in June 2009 and, according to Tillery, the couple resumed living together along with a third person, Annis Toney. Tillery claimed that her husband soon began verbally and physically abusing her, including forcing her to engage in sexual conduct against her will. At the same time, he pursued an I–130 spousal visa petition on her behalf, which the government denied after he failed to appear at the scheduled interview in August 2009. According to Tillery, her husband disappeared the day before the interview, and she has not heard from him since.

When Tillery was placed in removal proceedings for overstaying her original temporary visa, she conceded removability, but indicated her intent to apply for VAWA special rule cancellation of removal under § 240A (b)(2). The IJ expressed doubts about the validity of the marriage, but denied the VAWA application on the grounds that her testimony was not credible "with respect to her abuse." On appeal, the BIA declined to address whether Tilley had presented credible evidence that she was battered, but instead read the IJ decision as finding that she had failed to demonstrate that "she and [her husband] did not enter their marriage 'for the primary purpose of circumventing the immigration law," and affirmed on that basis.

Before the First Circuit, Tillery argued that the BIA erred in holding that a good faith marriage must be shown before an applicant may be eligible for VAWA special rule cancel-

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lation of removal. The government argued that such requirement was supported by both the plain meaning of the statute and by its legislative history. However, the court noted that although the government's argument was "not necessarily erroneous or unsupportable by law" the "agency's lawyers" cannot "serve to fill the gap that was left by the agency." The court said that its review of the issue had been "hindered by the BIA's failure to articulate a sufficient explanation of its interpretation of the VAWA relief provision that Tillery invoked." "The BIA's written decision does not adequately explain its conclusion that the operative statute requires an alien to prove a good faith marriage as an eligibility requirement for VAWA special rule cancellation of removal," said the court. Accordingly, it concluded that the "prudent course at this juncture is to vacate and remand. Further agency exposition will equip us to appropriately evaluate the decisional principles that potentially apply."

"The BIA's written decision does not adequately explain its conclusion that the operative statute requires an alien to prove a good faith marriage as an eligibility requirement for VAWA special rule cancellation."

Contact: Tim Ramnitz, OIL
☎ 202-616-2686

■ **First Circuit Holds BIA Acted Within Its Discretion in Denying Motion to Reopen Where Aliens Did Not Show Requisite Cancellation Hardship**

In ***Pandit v. Lynch***, __ F.3d. __, 2016 WL 3027596 (1st Cir. May 26, 2016)(Lynch, Thompson, *Barron*), the First Circuit upheld the denial of a motion seeking to reopen a previously denied application for cancellation for lack of exceptional and extremely unusual hardship.

The petitioners, husband and wife, are citizens of India who have lived in the United States for the past 21 years. They reside with their 19–year –old daughter, Pooja, who is a United States citizen. In 2009 DHS began removal proceedings against the petitioners on the grounds that they had arrived in the United States without a valid entry document and were present in the United States without being "admitted." Petitioners conceded removability but sought cancellation of removal. The IJ found that petitioners had failed to show that their removal would result in "exceptional and extremely unusual hardship" to their daughter Pooja. In the alternative, the IJ also determined that even if petitioners met the statutory eligibility requirements for cancellation petitioners would not "merit a favorable exercise of discretion" because they had "engaged in fraud repeatedly in order to gain immigration benefits."

On appeal the BIA agreed with the IJ that petitioners had not shown sufficient hardship to qualify for cancellation. Petitioners did not seek judicial review of the BIA's decision but instead filed a motion to reopen, proffering additional evidence relating to "chronic illnesses" suffered by Pooja. The BIA denied the motion finding that petitioners had not demonstrated the proffered evidence was "new or previously unavailable." Additionally, the BIA concluded that even if the evidence were considered, it did not prima facie establish that Pooja would experience exceptional and extremely unusual hardship if petitioners returned to India

The First Circuit reviewed the BIA's hardship finding and determined that the BIA's conclusions "were supportable by the record." In a footnote, the court rejected the government's contention that it lacked jurisdiction to review the denial of the motion because the underlying judgment denied an application for cancellation. The court cited its decision in *Mazariegos v. Lynch*, 790 F.3d 280, 285 (1st Cir. 2015), where it held that it had jurisdiction to determine whether the BIA had erred in not reopening a discretionary application for relief.

Contact: Katherine A. Smith, OIL
☎ 202-532-4524

FOURTH CIRCUIT

■ **Fourth Circuit Holds Written Warning on I-589 Satisfies Notice Requirement of INA § 208(d)(4)(A) for Purposes of Frivolous Asylum-Application Finding**

In ***Ndibu v. Lynch***, __ F.3d __, 2016 WL 2909681 (4th Cir. May 19, 2016) (*Traxler*, Thacker, Harris), the Fourth Circuit held that the written warning included on an asylum application satisfies the requirement under INA § 208(d)(4)(A) that an asylum seeker is warned of the consequences of filing a frivolous asylum application and that an additional oral warning from an IJ is not required.

The petitioner, a citizen of the Democratic Republic of the Congo, entered the United States in 2001 using a Canadian passport that did not belong to him. In 2004, he filed for asylum claiming that he feared persecution on account of his political opinion. That application was not granted and DHS placed petitioner in removal proceedings where he renewed his claim. The IJ denied asylum because the application had been untimely filed and denied petitioner's request for withholding due to lack of credibility. On appeal, the BIA affirmed the denial of asylum but remanded the case because the IJ

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had not adequately explained the reason for the adverse credibility finding, and also failed to explain why, if credible, petitioner's claim did not constitute persecution on account of political opinion. Petitioner failed to appear at the scheduled hearing, and the IJ ordered him removed in absentia. However, the IJ later granted a motion to reopen to permit petitioner to apply for adjustment of status based on his marriage to a U.S. citizen. Because of his admission of fraud, petitioner was ineligible for adjustment and thus sought to waive his inadmissibility by applying for a waiver under INA § 212(i). At the waiver hearing, he admitted that much of the information in his asylum application was false. The IJ then denied the waiver request and the adjustment application based on the finding that he had "knowingly made a frivolous application for asylum," INA § 208(d)(6) and therefore was "permanently ineligible for any benefits under [the INA]." The BIA affirmed the IJ's decision.

"Although an immigration judge is free to give an applicant additional warnings during the hearing, there is no statutory requirement that he do so."

The court first rejected petitioner's contention that he had not received adequate notice of the consequences of filing a frivolous asylum claim. The court found that "[t]he warning supplied by the I–589 form clearly satisfies these basic requirements by advising asylum applicants that they will be 'permanently ineligible for any benefits under the [INA]' if they knowingly file a frivolous application ... Although an immigration judge is free to give an applicant additional warnings during the hearing, there is no statutory requirement that he do so." The court also concluded that p was not prejudiced by his limited English ability, his initial assistance by an unlicensed individual, or his later assistance by an allegedly ineffective legal counsel.

Contact Jennifer Singer, OIL
☎ 202-532-4232

FIFTH CIRCUIT

■ **Fifth Circuit Holds that the BIA Applied the Incorrect Standard in Analyzing Whether Petitioner's Convictions Constitute CIMTs**

In ***Hernandez v. Lynch,*** __ F.3d __, 2016 WL 2586184 (5th Cir. May 4, 2016) (Higginbotham, Prado, Graves) (*per curiam*), the Fifth Circuit held that the BIA erred by applying the realistic probability approach in analyzing whether the alien's conviction for deadly conduct under Texas Penal Code § 22.05(a) was categorically a crime involving moral turpitude (CIMT). Relying on *Mercado Cardoso v. Lynch*, No. 14-60539 (5th Cir. May 4, 2016), the court remanded the case to the BIA for analysis under the minimum reading approach.

Contact: Stefanie Notarino Hennes, OIL
☎ 202-532-4175

■ **BIA Applied the Incorrect Standard in Analyzing Whether Petitioner's Convictions Constitute CIMTs**

In ***Mercado v. Lynch***, __ F.3d __, 2016 WL 2586169 (5th Cir May 4, 2016) (Higginbotham, Prado, Graves) (*per curiam*), the Fifth Circuit held that the BIA erred by applying the realistic probability approach in analyzing whether the alien's convictions under Texas law for indecent exposure and making terroristic threats constitute crimes involving moral turpitude (CIMTs). The court acknowledged that several other circuits have adopted the realistic probability approach in the context of analyzing whether convictions constitute CIMTs under INA, but found itself bound to follow its own precedents that "persistently applied the 'minimum reading, approach in this context."

The court found "unavailing" the government's argument that *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), is intervening law unequivocally indicating the Supreme Court's intention to extend that approach to CIMTs. The case was remanded for analysis under the minimum reading approach.

Contact: Julie Iverson, OIL
☎ 202- 616-9857

■ **Fifth Circuit Transfers Case to District Court for Resolution of Genuine Issue of Material Fact Relating to Alien's Derivative Citizenship Claim**

In ***Hernandez Rosales v. Lynch***, __ F.3d __, 2016 WL 2342974 (5th Cir. May 3, 2016) (King, Dennis, *Owen*), the Fifth Circuit rejected the alien's claim that he was entitled to citizenship under 8 U.S.C. § 1409(c) as a matter of Mexican law. The court instead transferred the case to a United States district court, holding that a genuine issue of material fact existed as to the alien's derivative citizenship claim, *i.e.,* on whether the alien's biological parents were married at the time of his birth.

Contact: Rebecca Hoffberg Phillips, OIL
☎ 202-305-7052

SIXTH CIRCUIT

■ **Sixth Circuit Holds Adverse Credibility Determination Is Supported by Similarity of Asylum Claim to Those of Aliens in Unrelated Immigration Proceedings**

In ***Wang v. Lynch,*** __ F.3d __, 2016 WL 3034680 (6th Cir. May 27, 2016) (Suhrheinrich, Daughtrey, *Rog-*

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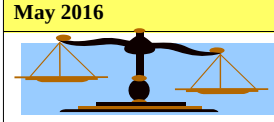

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ers), the Sixth Circuit held that an IJ may reasonably question the truthfulness of an asylum applicant whose claim is remarkably similar to those of other asylum applicants in unrelated immigration proceedings. The petitioner, a Chinese national, entered the United States as a nonimmigrant but did not depart when his visa expires. When placed in removal proceedings, he sought asylum, withholding and CAT protection claiming persecution on account of his practice of Christianity. The DHS argued, among other things, that petitioner's application was similar to several others. Nonetheless, the IJ found petitioner credible and granted asylum.

On appeal, the BIA remanded for fuller consideration of DHS's argument regarding the similarities between petitioner's application and the others. On remand, another IJ was assigned the case and the IJ determined that petitioner was not credible based on the inherent implausibility of elements of his story and the suspicious number of highly specific similarities between his application and two others submitted by DHS. On appeal, the BIA agreed with the IJ's findings and affirmed the removal order.

The Sixth Circuit rejected petitioner's contention that the previous, unrelated applications "should have no bearing on this case." The court found that petitioner had been afforded sufficient procedural safeguards throughout the proceedings, and that IJ had notified him of the similarities and given petitioner an opportunity to explain. Otherwise, the court explained the agency may properly consider identical formatting and substantive similarities in multiple aliens' asylum applications as evidence that an applicant is not telling the truth.

Contact: Kathryn McKinney, OIL
☎ 202-532-4099

SEVENTH CIRCUIT

■ **Seventh Circuit Holds Alien to His Concession that Conviction was a Crime Involving Moral Turpitude**

In ***Guzman-Rivadeneira v. Lynch,*** __ F.3d __, 2016 WL 2798678 (7th Cir. May 13, 2016) (Kanne, Sykes, *Hamilton*), the Seventh Circuit held that the petitioner was bound by his prior attorney's concession that his conviction for possession of counterfeit prescription blanks was a crime involving moral turpitude. The court held that it could not consider the alien's argument that he should be relieved of this concession due to "egregious circumstances" because the alien had not properly exhausted the argument before the BIA.

The petitioner was bound by his prior attorney's concession that his conviction for possession of counterfeit prescription blanks was a crime involving moral turpitude.

Contact: Annette Wietecha, OIL
☎ 202-353-3901

■ **Seventh Circuit Holds Asylum Applicant Not Required to Take Visible Steps to Renounce Gang Membership**

In ***Arrazabal v. Lynch***, __ F.3d __, 2016 WL 2641790 (7th Cir. May 4, 2016) (*Wood,* Posner, Rovner), the Seventh Circuit rejected the agency's requirement that a former gang member must exhibit visible outward signs that he has renounced his MS-13 gang membership before claiming persecution.

The petitioner, a citizen of El Salvador and a former LPR, was removed in 2001 for a drug offense violation. A decade later he attempted to reenter unlawfully and was prosecuted. DHS then reinstated the 2001 removal order and petitioner applied for withholding. The IJ denied the request finding no credible evidence that he would be harmed by MS–13, a rival gang, or the police. Even if the evidence supported such finding, the IJ continue, petitioner had not shown the necessary link between any such harm and a protected ground. Further, the IJ noted that petitioner could not show that his association with MS–13 was severed, because he had not taken any outward steps to renounce his membership in the gang. The IJ denied CAT protection for lack of credibility and lack of corroboration. The BIA upheld the IJ's finding.

Although the court upheld the agency's adverse credibility determination, it held that the agency had overlooked a letter that could potentially have rehabilitated petitioner's credibility. Moreover, the court found problematic the IJ's determination that even if petitioner had been harassed by MS–13 members in El Salvador, he could show a clear probability of persecution because he had not shown that his persecution was because of his membership in a particular social group. "If we accept that testimony as true (as the immigration judge implicitly did in this portion of his analysis), there is little more [petitioner] could have done to distance himself from the gang without putting himself at even more risk of reprisal."

Finally, the court also was concerned about the manner in which the IJ rejected petitioner's CAT claim "without elaboration that [petitioner] had not met his burden of showing that result was 'more likely than not.'" Accordingly, the

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court vacated the BIA's opinion and remanded the case.

Contact: John Stanton, OIL
☎ 202-616-7922

■ **Seventh Circuit Holds Burglary with Intent to Commit Theft Involves Moral Turpitude, Rejects Social Group Comprised of Deportees with Perceived Wealth**

In ***Dominguez-Pulido v. Lynch,*** __ F.3d__, 2016 WL 2641841 (7th Cir. May 5, 2016) (*Flaum*, Easterbrook, Sykes), the Seventh Circuit held that the alien's conviction for burglary with intent to commit theft under 720 Ill. Comp. Stat. 5/19-(1)(a) rendered him removable as an alien is a crime involving moral turpitude. The court concluded that the statutory phrase "crime involving moral turpitude" is not void for vagueness, citing *Jordan v. De George*, 341 U.S. 223, 230 (1951), where the court observed that "[n]o case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process." The court also agreed with the agency that the proposed social group, deportees with perceived wealth, is not cognizable.

Contact: Ashley Martin, OIL
☎ 202-514-0575

■ **Seventh Circuit Holds Alien Did Not Receive Statutory Procedural Due Process Where Government Failed to Make Reasonable Efforts to Procure Declarant of Statement**

In ***Karroumeh v. Lynch,*** __ F.3d __, 2016 WL 2641842 (7th Cir. April 29, 2016) (*Wood*, Manion, Rovner), the Seventh Circuit held that the alien was denied statutory and procedural due process when the IJ admitted the statement of his ex-wife, but the government did not present her to be cross-examined or make reasonable efforts to produce her. The court ruled that the admission of the ex-wife's statement, over petitioner's objection, was prejudicial because the government could not demonstrate marriage fraud without it.

Contact: Christina J. Martin, OIL
☎ 202-532-4602

NINTH CIRCUIT

■ **Ninth Circuit Grants Motion to Dismiss Petition Holding It Lacked Jurisdiction to Review Discretionary Denial of NACARA Special Rule Cancellation of Removal**

In ***Monroy v. Lynch***, __ F.3d __, 2016 WL 2731603 (9th Cir. May 11, 2016) (*Canby*, Leavy, Ikuta), the Ninth Circuit held that it lacked jurisdiction to review the BIA's discretionary denial of an application for special rule cancellation of removal under INA § 242(a)(2)(B)(i). The court, noting that a discretionary denial of special rule cancellation of removal under NACARA is subject to the same jurisdictional limit as a request for cancellation of removal under INA § 240A, granted the government's motion to dismiss.

A discretionary denial of special rule cancellation of removal under NACARA is subject to the same jurisdictional limit as a request for cancellation of removal under INA § 240A.

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

■ **Ninth Circuit Holds that the IJ's Credibility Analysis was Insufficient to Support a Finding that Petitioner was Inadmissible for Alien Smuggling**

In ***Perez-Arceo v. Lynch***, __ F.3d __, 2016 WL 2754547 (9th Cir. May 12, 2016) (Noonan, *Gould*, Friedland), the Ninth Circuit concluded that the BIA failed to address the IJ's seemingly inconsistent credibility findings. The court noted a "fundamental contradiction" in the IJ's reliance on the wife's testimony—in which she claimed sole responsibility for the smuggling attempt—to find her inadmissible, while apparently discrediting her testimony to find her husband inadmissible. The court remanded on an open record for further proceedings.

Contact: Ashley Martin, OIL
☎ 202-514-0575

■ **On Panel Rehearing, Ninth Circuit Holds the BIA May Not Apply Maxim "False In One Thing, False In Everything" To Discredit Alien's Evidence in Motion to Reopen**

In ***Yang v. Lynch,*** __ F.3d __, 2016 WL 2909236 (9th Cir. May 19, 2016) (Friedland, *Chhabria* (by designation), Schroeder (dissenting)), the Ninth Circuit withdrew its prior opinion at 815 F.3d 1173, and issued a superseding one. The court held that the BIA erred when it applied the maxim *falsus in uno, falsus in omnibus* – "false in one thing, false in everything" – to reject as not credible a Chinese alien's new asylum claim submitted in a motion to reopen, relying on a prior adverse credibility determination in underlying removal proceedings.

Contact: Jonathan Robbins, OIL-DCS
☎ 202-305-8275

■ **Ninth Circuit Finds District Courts Have Jurisdiction Under 8 U.S.C. § 1451(i) to Address Actions to Amend Pre-1991 Naturalization Certificates**

In ***Collins v. USCIS***, __F.3d__, 2016 WL 2342357 (Kleinfeld,

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McKeown, Ikuta) (9th Cir. May 4, 2016), the Ninth Circuit reversed the decision of a district judge that dismissed for lack of jurisdiction an action to amend a Certificate of Naturalization issued before the enactment of the Immigration Act of 1990. The Act transferred authority to naturalize persons as citizens from district courts to the Executive Branch. The panel held that the "previously existing right to petition for modification is governed by the provisions of the pre-1990 Immigration Act," and it concluded that the "broad savings clause" contained in the Act permits federal courts to continue to exercise jurisdiction over actions to modify court-issued certificates of naturalization. The court distinguished its concurrently filed opinion in *Yu-Ling Teng v. District Director, U.S. Citizenship & Immigration Servs.*, No. 14-55558, __F.3d__, 2016 WL 2343351 (9th Cir. May 4, 2016), in which it found that it lacked jurisdiction to amend an administratively-issued, post-1991 certificate.

Contact: Max Weintraub, OIL-DCS
☎ 202-305-7551

■ **A Car's Mechanical Failure Does Not Alone Compel Granting a Motion to Reopen Based on "Exceptional Circumstances"**

In ***Arredondo v. Lynch***, __ F.3d __, 2016 WL 3034658 (9th Cir. May 27, 2016)(Farris, Bea, *Smith*, JJ.), the Ninth Circuit held that "a car's mechanical failure does not alone compel granting a motion to reopen based on 'exceptional circumstances.'"

The petitioner, who was seeking to reopen her case, argued in her motion to reopen that her failure to appear at the IJ hearing was due to a mechanical failure with her car. The IJ did not find her story credible and denied the motion. On appeal, the BIA affirmed the IJ finding that petitioner had not corroborated her story, but in the alternative also held that even if true, petitioner's claims would not demonstrate "exceptional circumstances."

The court initially determined that petitioner's story about her car troubles was not "inherently unbelievable" or "incredible," and rejected the IJ's and BIA's contrary findings. However, the court held that "traffic and trouble finding parking, standing alone, do not constitute exceptional circumstances justifying a motion to reopen." The court noted that petitioner left home only a short time before her hearing, chose an unnecessarily long driving route, used her cash to pre-pay for car repairs instead of paying for alternate transportation, and failed to inform her lawyer or the immigration court of her car problems. "We agree with the BIA, and hold that mechanical failure, coupled with decisions to leave insufficient time to account for routine delays and to pay for car repairs instead of transportation to court, does not constitute exceptional circumstances," said the court.

"Mechanical failure, coupled with decisions to leave insufficient time to account for routine delays and to pay for car repairs instead of transportation to court, does not constitute exceptional circumstances."

Contact: Jeremy Bylund, OIL
☎ 202-514-9319

■ **Court Lacks Jurisdiction to Amend an Administratively Issued Naturalization Certificate**

In ***Yu-Ling Teng v. District Director, USCIS***, 820 F.3d 1106 (9th Cir. 2016) (Kleinfeld, *McKeown*, Ikuta), the Ninth Circuit affirmed the district court's decision dismissing an alien's lawsuit in which the alien sought to amend her naturalization certificate. Because the naturalization certificate was issued in 2001 by INS, an administrative agency, and because the court held that federal courts lack subject matter jurisdiction under the Immigration Act of 1990 to modify certificates of naturalization issued by an administrative agency, the Ninth Circuit affirmed the dismissal while acknowledging the "bureaucratic mess of Gogolian proportions." It distinguished its concurrently filed opinion in *Collins v. U.S. Citizenship & Immigration Servs.*, __ F.3d __, 2016 WL 3554380 (9th Cir. May 4, 2016), in which it found jurisdiction to amend a court-issued, pre-1991 certificate.

Contact: Robert Lester, AUSA

ELEVENTH CIRCUIT

■ **Reinstated Removal Order Does Not Become Final Order of Removal Until Reasonable Fear Proceedings Are Completed**

In ***Jimenez-Morales v. U.S. Attorney General***, __ F.3d __, 2016 WL 1732663 (11th Cir. May 2, 2016) (*Jordan*, Marcus, Walker), the Eleventh Circuit held that, where an asylum applicant pursues a reasonable fear proceeding following reinstatement of a prior order of removal, the reinstated removal order does not become final, and thus subject to judicial review, until reasonable fear proceedings are completed. The court further held that (1) if a petition for review of the reinstated order is premature when filed, it ripens (and jurisdiction vests) if still pending upon completion of reasonable fear proceedings; and (2) an alien subject to a reinstated removal order is ineligible for asylum.

Contact: Juria Jones, OIL
☎ 202-353-2999

OIL 2016 SUMMER INTERNS

Sarai Aldana is a rising 3L at Florida State University. She is a member of the FSU Journal of Land Use & Environmental Law, Executive Editor of "From the Legal Field" sports law blog and has recently been selected as a Florida Gubernatorial Fellow for her 3L year. This summer, Sarai is serving as an OIL intern for the Blakeley Team.

Cassidy Cloninger is from Raleigh, NC and graduated from East Carolina University in 2012 with a major in Communication (PR), a minor in Hispanic Studies, and a certificate in Global Understanding. She is a rising 3L at Campbell University School of Law and a new OIL summer intern on the Payne Team.

Cody Combs is a rising 2L at the University of Texas School of Law. Cody is a member of the board of directors of Texas Law Fellowships. This summer, Cody is serving as an OIL intern for the Blakeley Team.

Amy Grenier is a rising 2L at Northeastern University School of Law in Boston. Amy is a Public Interest Law Scholar and founding co-editor of *The Migrationist*, an international collaborative blog on immigration. She also has an MA in Migration Studies from the University of Sussex. This summer, Amy is serving as an OIL intern for the Radford Team.

Rebecca Hughes is a rising 2L at the University of Michigan Law School, where she is a board member for the Women Law Students Association and Student Funded Fellowships. Rebecca graduated from the College of Charleston with a B.A. in International Studies. This summer, Rebecca is serving as an OIL intern for the McIntyre Team.

Alanna Kennedy is a rising 3L at American University Washington College of Law, here in the District. Alanna serves as an Articles Editor on the American University Law Review, and is the President of the WCL Moot Court Honor Society. This summer, Alanna is serving as an OIL intern for the Keener Team.

Abigail Leach is a rising 3L at Catholic University of America, Columbus School of Law in Washington, D.C. Abby is the Managing Editor for the CUA Journal of Law and Technology, a member of the Delta Theta Phi law fraternity and a member of Students for Public Interest Law. This summer, Abby is participating in the Summer Law Internship Program as a SLIP on the Payne Team.

Michael Mahaffey is a rising 2L at the Georgetown University Law Center in DC. Before law school, Michael worked for the U.S. Senate Health, Education, Labor and Pensions Committee and for U.S. Rep. Tom Rooney. This summer, Michael is serving as an OIL intern for the Wernery Team.

Andressa Marques is a rising 3L at the University of Richmond School of Law in Richmond, VA. Andressa is a transfer student from Charlotte School of Law to Richmond Law. Andressa is a volunteer at the Virginia Hispanic Chamber of Commerce, and interned last Summer and 2L year at a commercial immigration firm in Richmond. This Summer, Andressa is serving as an OIL intern for the Flynn team.

Christin Mitchell recently graduated, *magna cum laude,* from American University, Washington College of Law. She was president of the Mock Trial Honor Society, and worked full time for her law school's immigration clinic. She is currently studying for the VA bar exam while she works as an OIL intern two days a week for the Radford team.

Sarah Martin is a rising 3L at American University Washington College of Law in Washington, D.C. Sarah is a staffer on the *Administrative Law Review* and a member of the Women and the Law Clinic. This summer, Sarah is serving as an OIL intern for the Scadron Team.

Lisa Mathews is a rising 3L at George Mason University School of Law. Lisa is an Articles Editor for George Mason Law Review. Last summer she worked for the Senate Judiciary Committee, Office of Senator Hatch. This summer, she is an OIL intern for the O'Connor team.

Carlos Medina is a rising 3L at the University of Maine School of Law. Carlos is a 2L student bar representative and the Vice-President of the Multicultural Law Society. This summer, Carlos is serving as an OIL intern for the Hogan Team.

Greg Parker is a rising sophomore at Dickinson College where he studies history. This summer, Greg is serving as an OIL intern for the Radford Team.

Zohar Peleg is a rising 2L at American University Washington College of Law in Washington, D.C. Zohar is an Integrated Curriculum Dean's Fellow, a member of the Alternative Dispute Resolution Honor Society, and a staff writer on the Health Law and Policy Brief. This summer, Zohar is serving as an OIL intern for the Ginsburg Team.

Tatiana Pino is a rising 3L at The George Washington University Law School. Tatiana is a recipient of a 2016 GW Law Public Interest Award, an editorial staff member of *The American Intellectual Property Law Association Quarterly Journal*, and she is an active member of the Hispanic Bar Association of the District of Columbia. Last summer, Tatiana interned for The Honorable Jimmie V. Reyna of the U.S. Court of Appeals for the Federal Circuit. This summer, Tatiana is serving as an OIL intern for the Nicastro Team.

Maybeline Saharig is a 3L at Seton Hall University School of Law in New

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Filipino World War II Veterans Parole Program

USCIS has announced that beginning June 8, 2016, certain Filipino World War II veteran family members who are beneficiaries of approved family-based immigrant visa petitions will have an opportunity to receive a discretionary grant of parole on a case-by-case basis, so that they may come to the United States as they wait for their immigrant visa to become available. *See* 81 *Fed. Reg.* 28097 (May 9, 2016).

This parole policy was announced in the White House report, *Modernizing and Streamlining Our Legal Immigration System for the 21st Century*, issued in July 2015. An estimated 2,000 to 6,000 Filipino-American World War II veterans are living in the United States today. Among other things, this policy will enable many eligible individuals to provide support and care to their aging veteran family members who are U.S. citizens or lawful permanent residents.

Under the policy, certain family members of Filipino World War II veterans may be eligible to receive a discretionary grant of parole to come to the United States before their visa becomes available. In limited cases, certain eligible relatives will be able to seek parole on their own behalf when their Filipino World War II veteran and his or her spouse are both deceased.

Under the Filipino World War II Veterans Parole Program, USCIS will review each case individually to determine whether authorizing parole is appropriate. When each individual arrives at a U.S. port of entry, U.S. Customs and Border Protection will also review each case to determine whether to parole the individual.

Legal authority for this parole policy comes from the Immigration and Nationality Act, which authorizes the Secretary of Homeland Security to parole into the United States certain individuals, on a case-by-case basis, for urgent humanitarian reasons or significant public benefit.

USCIS strongly encourages eligible individuals interested in requesting parole under the FWVP Program do so within 5 years from June 8, 2016.

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OIL SUMMER INTERNS

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Jersey. Maybeline previously externed at the Newark Immigration Court in New Jersey and served as a summer clerk in the Chambers of the Honorable Frank Maas in the U.S. District Court for the Southern District of New York. Maybeline is a member of the Seton Hall Public Interest Network. Maybeline is part of the Blakeley Team, and her mentor is Enitan Tayo Otunla.

Nelle Seymour is in the third year of her JD/MPH program with Northeastern University School of Law and Tufts University School of Medicine. Nelle is an active member of LSRJ and will graduate with a concentration in Health Law and Policy. This is Nelle's second internship with OIL-Appellate, and she is very grateful for the opportunity to return as a SLIP.

Lilah Thompson is a rising third year law student at Temple University James E. Beasley School of Law in Philadelphia. Lilah is a Law & Public Policy Scholar, serves on the International Criminal Court Moot Court, and is the creator of the Between Borders Refugee Simulation Experience, which is a participatory workshop that simulates the life of a refugee throughout all stages of the refugee process. Lilah served this past year as the President and Auction Chair of the Student Public Interest Network and the Co-President of the National Lawyer's Guild Temple Law Chapter. This summer, Lilah is serving as a SLIP intern on the Payne Team.

OIL TRAINING CALENDAR

August 23-25, 2016
Fall Intern Training

October 3 -7, 2016
New OIL Attorney Training

October 31-November 4, 2016
Immigration Litigation Seminar
National Advocacy Center
Columbia, SC

December 5-December 9, 2016
22nd Annual Immigration Law Seminar
Washington, DC

For additional information contact:
training.oil@usdoj.gov

OIL WELCOMES SUMMER INTERNS

1st Row L to R: Cody Combs, Cassidy Cloninger, Sarah Martin, Andressa Marques, Jamie Fraser-Bingham (EOIR), Lilah Thompson; 2nd Row L to R: Joshua Zimberg (EOIR), Christin Mitchell, Carlos Medina, Tatiana Pino, Abby Leach, Amy Grenier, Maybelline Saharig, Sarai Aldana, Zohar Peleg, Alanna Kennedy, Rebecca Hughes, Lisa Mathews; Third Row L to R Donald Keener (Deputy Director), Dave McConnell (Director), Ernie Molina (Deputy Director), Michelle Latour (Deputy Director), Gregory Parker, Michael Mahaffey; not pictured Nelle Seymour.

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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