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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Bipartisan Group of Senators Agree on Framework for Comprehensive Immigration Reform

On January 28, 2013, a group of four Democrats and four Republicans released an outline of a comprehensive immigration reform plan that would couple immigration reform with enhanced security efforts aimed at preventing illegal immigration and ensuring that those foreigners here temporarily return home when their visas expire.

The group of Senators "recognize that our immigration system is broken. And while border security has improved significantly over the last two Administrations, we still don't have a functioning immigration system. This has created a situation where up to 11 million undocumented immigrants are living in the shadows."

The group's proposal is anchored on four basic legislative pillars:

1. Create a tough but fair path to citizenship for unauthorized immigrants currently living in the United States that is contingent upon securing our borders and tracking whether legal immigrants have left the country when required;

2. Reform our legal immigration system to better recognize the importance of characteristics that will help build the American economy and strengthen American families;

3. Create an effective employment verification system that will prevent identity theft and end the hiring of future unauthorized workers; and,

4. Establish an improved process for admitting future workers to serve our nation's workforce needs, while simultaneously protecting all workers.

The Appellate Team's Role in Support of OIL-Appellate

In a recent SCOTUS blog post, an attorney formerly with the Civil Division's Appellate Staff described the important role played by the appellate staffs of the Department's litigating divisions in supporting the Office of the Solicitor General. No mention was made however, of OIL-Appellate's Appellate Team. That omission may be due to the fact that the Appellate Team was created after the author left Civil Appellate in 1988. Indeed, the velocity of immigration litigation has changed substantially since that time, such that OIL now accounts for the bulk of the Civil Division appellate caseload. This article fills that gap in the SCOTUS blog post, describing the appellate review process for OIL cases and the unique contributions of OIL-Appellate's Appellate Team.

As OIL's caseload has expanded dramatically, the number of adverse decisions has expanded as well. OIL has responded to the challenge of producing timely and high-quality adverse decision recommendations for the consideration of the Civil Division staff and the Office of the Solicitor General by dedicating a team of attorneys, managed by a Deputy Director,

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Role of OIL's Appellate Team

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to handle the process of reviewing these decisions and preparing recommendations regarding en banc rehearing or certiorari. This both relieved attorneys, who were becoming increasingly busy, of the need to prepare those recommendations, and ensured greater uniformity in the substance and form of recommendations.

Over time, this team of attorneys has established expertise in the appellate process, as well as those areas of the law that are the subject of recurring adverse decisions. In addition to fulfilling its original mission, the team serves the important function of sharing this expertise with other attorneys within OIL-Appellate, within the Department generally, and beyond. The team also performs other tasks in support of its special mission and the general mission of OIL. The Appellate Team's portfolio presently includes the following:

1. *Preparing further review recommendations for adverse decisions from the courts of appeals*. When OIL-Appellate receives an adverse decision from a court, it chooses among four courses of action: (1) to accept the result and not seek further review; (2) to request minor changes through a motion to amend; (3) to seek more substantial changes or challenge the judgment through a petition for rehearing, requesting that the court of appeals reconsider its decision and correct legal or factual errors; or (4) for decisions that OIL views as unusually important or conflicting with other circuits, to seek Supreme Court review. When OIL-Appellate determines that a rehearing en banc or Supreme Court review is warranted, it prepares a recommendation that the Civil Division ask the Solicitor General to authorize filing a petition for rehearing en banc or certiorari. Appellate Team attorneys are usually assigned responsibility for preparing such a recommendation and drafting the filings. A decision is made after receipt of recommendations from the attorney originally handling the case, from Appellate Team attorneys who routinely prepare supplemental recommendations, and the views of client agencies. These recommendations frequently incorporate or address the views of the affected government agencies (DOS, DHS, EOIR, ICE, USCIS, and other DOJ components), are reviewed by the OIL's Deputy Assistant Attorney General and the Civil Appellate staff, and approved by the Assistant Attorney General for the Civil Division. There may be meetings of Appellate Staff attorneys and others with the Solicitor General or members of his staff when the issues are especially complex or important, or where there is a difference of opinion among the various agency components.

On the rare occasion where acquiescence to a petition for certiorari is warranted, an Appellate Team attorney will draft a recommendation for the Civil Division.

2. *Rehearing Practice: Drafting and reviewing petitions for panel rehearing and petitions for rehearing en banc, responding to rehearing petitions, and presenting en banc arguments*. If the Management Team determines that a petition for panel rehearing shall be filed, an Appellate Team attorney is assigned to file the rehearing petition or to monitor the filing by the attorney originally assigned to handle the case. Where the Solicitor General authorizes rehearing en banc, the Appellate Team attorney who prepared the recommendation to the Solicitor General will ordinarily draft the appropriate petition, prepare any supplemental briefs, and present oral argument to the en banc panel. When a court requests a response to rehearing petitions, an Appellate Team attorney files the response or monitors the filing by the attorney originally assigned to handle the case. On the rare occasions where acquiescence to an en banc petition is warranted, an Appellate Team attorney will draft the recommendation and, with Solicitor General approval, communicate that acquiescence to the court.

3. *Supreme Court Practice: Drafting certiorari petitions, responses to petitions, and merits briefs for the Supreme Court*. If the Solicitor General decides that the government should seek Supreme Court review in a case handled by OIL-Appellate, the Appellate Team attorney who prepared the recommendation to the Solicitor General will ordinarily prepare a draft of a petition for a writ of certiorari. Appellate Team attorneys likewise prepare draft briefs in response to petitions by non-government parties. Petitions and responses are filed by the Solicitor General. If the Court grants certiorari, the Appellate Team attorneys will usually prepare a draft merits brief and assist the Solicitor General on the case. In cases where it is clear that no government response is required for the Supreme Court to determine that certiorari is unwarranted, Appellate Team attorneys prepare a memorandum for the Solicitor General recommending waiver of the opportunity to respond. On the rare occasion where acquiescence to a petition for certiorari is warranted, an Appellate Team attorney will draft a recommendation for the Civil Division.

4. *Tracking Supreme Court stay applications and drafting any necessary responses.* The Appellate Team tracks all stay applications filed in the Supreme Court in immigration cases, and provides the liaison between the Solicitor General and the relevant agencies. If the Supreme Court requests a response to the stay application, Appellate Team attorneys are assigned to draft the response. An Assistant to the Solicitor General completes and files the response.

5. *Managing the adverse decision process*. To ensure that the Solicitor

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony — Drug Trafficking

On October 6, 2012, the Supreme Court heard argument in ***Moncrieffe v. Holder*** on the question of whether, to establish a drug trafficking aggravated felony, the government must prove that marijuana distribution involved remuneration and more than a small amount of marijuana, as described in 21 U.S.C. § 841(b)(4). In a decision at 662 F.3d 387, the Fifth Circuit joined the First and Sixth Circuits in holding that the government need not. The Second and Third Circuits require that the government make these showings, because a defendant could make them in a federal criminal trial to avoid a felony sentence for marijuana distribution.

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Motion to Reopen - Deadline

On February 19, 2013, the government filed responses supporting petitions for en banc rehearing in ***Avila-Santoyo v. Att'y Gen.***, 11th Cir. No. 11-14941, and ***Ruiz-Turcios v. Att'y Gen.***, 700 F.3d 1270 (11th Cir. 2012). The government responses agreed with the petitioners that the agency filing deadline for a motion to reopen a removal proceeding is not "mandatory and jurisdictional," and the court should reconsider its precedents holding that equitable tolling is foreclosed by that jurisdictional deadline. The government argued that the question of the applicability of equitable exceptions to the deadline should then be remanded to the Board to determine in the first instance.

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Asylum – Particular Social Group

On September 27, 2012, the *en banc* Seventh Circuit heard argument on rehearing in ***Cece v. Holder***, 668 F.3d 510 (2012), which held an alien's proposed particular social group of young Albanian women in danger of being targeted for kidnapping to be trafficked for prostitution was insufficiently defined by the shared common characteristic of facing danger.

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Asylum — Corroboration

On December 11, 2012, an en banc panel of the Ninth Circuit heard argument on rehearing in ***Oshodi v. Holder***. The court granted a *sua sponte* call for en banc rehearing, and withdrew its prior published opinion, 671 F.3d 1002, which declined to follow, as dicta, the asylum corroboration rules in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011). The parties have filed en banc supplemental briefs.

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Convictions – Modified Categorical Approach

On January 7, 2013, the Supreme Court heard oral argument in ***Descamps v. United States***, a criminal sentencing case in which the question presented is whether the Ninth Circuit was correct in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), that a state conviction for burglary, where the statute is missing an element of the generic crime, may be subject to the modified categorical approach. Resolution of the case is expected to implicate the reasoning of *Aguila-Montes* and the "missing element" rule that it overruled. The government's brief was filed on December 3, 2012.

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Convictions – Modified Categorical Approach

On January 4, 2013, the government filed a petition for panel rehearing in ***Aguilar-Turcios v. Holder***, 691 F.3d 1025 (9th Cir. 2012), in which the Ninth Circuit applied *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), and held that the alien's convictions did not render him deportable. The rehearing petition argues that the court should grant rehearing and hold the case, and decide it when the Supreme Court rules in *Descamps v. United States*. The petition also argues that the court should permit the agency to address other grounds for removal on remand.

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Consular Nonreviewability

On July 25, 2012, the government filed a petition for rehearing en banc in ***Rivas v. Napolitano***, 677 F.3d 849 (9th Cir. 2012), which held that the district court had jurisdiction to review a consular officer's failure to act on the alien's request for reconsideration of the visa denial. The petition argues that the longstanding doctrine of consular nonreviewability recognizes that the power to exclude aliens is inherently political in nature and that consular decisions and actions are generally not, therefore, appropriately subject to judicial review. The court ordered the appointment of pro bono counsel to respond to the government petition by December 27, 2012.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Remands Asylum Claim To Consider Whether Police Officer Could Establish Persecution Based On Political Beliefs And Because The BIA Failed To Articulate Factors For Internal Relocation Analysis

In *Khattak v. Holder*, __F.3d__, 2013 WL 174421 (1st Cir. January 17, 2013) (*Lynch*, Lipez, Howard), the First Circuit remanded an asylum case because the agency erroneously relied on BIA precedent to determine that a police officer who expressed political beliefs could not demonstrate persecution.

On July 4, 2009, the petitioners, citizens of Pakistan, entered the United States on B-2 visitor visas and subsequently timely filed affirmative asylum applications. The primary petitioner claimed that he is an active member in the Awami National Party (ANP), which he described as an alternative to the Taliban. He had been a member of the NAP for 20 years, head of the local chapter for 15 years, and served as the mayor of a municipality of 20,000 people from 1980 to 1991. In 2008 petitioner began working with the Nowshera Peace Committee as a volunteer "special police officer." His task was to tell people that the fight the Taliban was fighting was not a fight for Islam. As a result of his activities he received numerous threatening phone calls against him and his family. In 2009, many NAP members across Pakistan were killed during interparty clashes.

The asylum officer did not grant the asylum applications and petitioners were placed in removal proceedings where they renewed their request. The IJ denied asylum finding that the primary petitioner's fear of persecution was not objectively reasonable, and that he had been targeted due to his work with the local peace committee, not due to his ANP activism. Individuals attacked solely because they were police officers are not attached on account of political opinion, the IJ explained. The BIA affirmed, finding among other reasons, that petitioner and his family had not shown he would be singled out for persecution.

The First Circuit rejected the IJ's conclusion that the lead petitioner could not be persecuted due to his status as a "police officer." The court explained that petitioner was not performing a traditional law-enforcement role when he was persuading people to spurn the Taliban. The court acknowledged that the BIA noted that petitioner's status as a special police officer was not necessarily a bar to his asylum claim, but faulted the BIA for not explaining its reasoning and giving instead a cursory conclusion that the petitioner had not met his burden.

The court faulted the BIA for not explaining its reasoning and giving instead a cursory conclusion that the petitioner had not met his burden.

The court also faulted the BIA for failing to meaningfully discuss factors to determine the reasonableness of petitioner's relocation and for overlooking petitioners' pattern-and-practice claim. The court declined to reach the merits of petitioner's asylum claim, remanding it instead to the BIA to provide a reasoned analysis of the evidence as a whole.

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First Circuit Holds BIA Did Not Abuse Its Discretion in Dismissing Alien's Ineffective Assistance of Counsel Claim for Lack of Due Diligence

In *Bead v. Holder*, 703 F.3d 591 (1st Cir. 2013) (Lynch, Boudin, *Stahl*), the First Circuit held that because the petitioner had failed to demonstrate what steps he took to discover and remedy his counsel's alleged ineffective assistance during a five-year period, he could not demonstrate the due diligence required to qualify for equitable tolling of the motion to reopen deadline, assuming equitable tolling was otherwise appropriate.

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First Circuit Holds Conviction for Larceny under Connecticut Law Is Not a Crime Involving Moral Turpitude under the Modified Categorical Approach

In *Patel v. Holder*, __F.3d__, 2013 WL 388046 (1st Cir. February 1, 2013) (Thompson, *Stahl*, Lipez), the First Circuit held that, under the modified categorical approach, petitioner's conviction for larceny in violation of Connecticut General Statute § 53a–119 was not a crime involving moral turpitude because it was not improbable that the petitioner was engaged in a foolish collegiate prank instead of acting with the intent to cause permanent deprivation.

The petitioner, a citizen of India, became a lawful permanent resident of the United States in 1998. During his freshman year at the University of Connecticut, petitioner and two acquaintances concocted a plan whereby they would knock on doors in the university's dorms; if the resident answered, they would say they were looking for someone else and leave. If not, they would enter the room (if the door was unlocked) and take things. They executed the plan, taking clothes, DVDs, and electronics, but residents soon noticed the missing items and called the police. University police officers found a car parked outside one of the dorms, in which they could plainly see many of the items that had been

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reported missing. Petitioner and his companions returned to the car, admitted their involvement, and were arrested. Subsequently, petitioner pled guilty to six counts of conspiracy, three to commit misdemeanor larceny in the fourth degree, id. § 53a–125, and three to commit misdemeanor criminal trespass, id. § 53a–108.

Because the Connecticut larceny statute reaches both permanent and temporary takings, the BIA applied the modified categorical approach and concluded that petitioner intended a permanent deprivation of the purloined items. Thus, in the BIA's view, his offenses were CIMTs.

The court held that the BIA erred by bridging the "gap between the 'offense' and the actual conduct involved, because there was not a statement in the alien's plea colloquy admitting an intent to commit a permanent taking." "This result may seem strange, but that is a not-uncommon side effect of the modified categorical approach. 'Sometimes th [is approach] hurts the alien. . . Other times, as in this case, the alien . . . comes out ahead. This is hardly the most jarring example,'" concluded the court.

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SECOND CIRCUIT

■ **Second Superseding Opinion Holds BIA's Precedent that Petitioner Is Inadmissible for Ten Years after Departure Applies Retroactively**

In ***Carrillo de Palacios v. Holder***, __F.3d__, 2013 WL 310387 (9th Cir. January 28, 2013) (Graber, *M.Smith*, Benitez), the Ninth Circuit denied the petitioner's second petition for rehearing *en banc*, but withdrew and again replaced its December 1, 2011 opinion, published at 662 F.3d 1128. The panel did not change its holding that petitioner was ineligible for the exception to inadmissibility described at INA § 212(a)(9)(C)(ii) because she failed to remain outside the country for more than ten years before returning. The added analysis applies the five retroactive application factors from *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982), as described in the court's intervening *en banc* decision in *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012), concluding that the BIA did not err in applying *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), retroactively in this case.

The court explained that not applying the modified categorical approach "would bring about dramatic — and constitutionally problematic — consequences."

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FOURTH CIRCUIT

■ **Fourth Circuit Upholds Application of the Modified Categorical Approach and IIRIRA Definition of Aggravated Felony to Preclude Alien from NACARA Relief**

In ***Mondragón v. Holder***, __F.3d__, 2013 WL 363611 (4th Cir. January 31, 2013) (*Niemeyer*, King, Agee), the Fourth Circuit held that the BIA properly applied the definition of aggravated felony set forth in Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") § 321 to determine that petitioner's pre-IIRIRA conviction for assault and battery was an crime of violence with a one-year imprisonment, and thus an aggravated felony. Additionally, the court rejected the petitioner's claim that the retroactive application of the IIRIRA's aggravated felony definition violated the Due Process Clause.

Lastly, the court determined that the BIA did not err by applying the modified categorical approach and not permitting the alien to submit additional evidence demonstrating his crime was not "violent," even though his conviction record was inconclusive on this issue. The court explained that not applying the modified categorical approach "would bring about dramatic – and constitutionally problematic – consequences. Earlier convictions such as [petitioner's] would be retried in immigration proceedings, putting to question the finality of earlier adjudications, and unfairness would inevitably result, as one party or the other would be unable to retrieve lost evidence, witnesses, or memories. Moreover, eligibility for relief from removal would no longer depend on the categorical fact that an alien had been convicted of a crime of violence, as provided for in NACARA, but rather on the retrial of the underlying facts for determination of whether the conduct constituted a crime of violence."

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FIFTH CIRCUIT

■ **Fifth Circuit Holds That A Conviction For Attempted Sexual Assault Is Not Categorically A Crime Of Violence**

In ***Rodriguez v. Holder***, __F.3d__, 2013 WL 173434 (5th Cir. January 16, 2013) (Dennis, Clement, *Owen*), the Fifth Circuit held both that the Texas offense of attempted sexual assault is not categorically a crime of violence and that petitioner's conviction for sexual assault was not an aggravated felony under the modified categorical approach.

In 2002, the petitioner pled guilty to attempted sexual assault and was placed in deferred adjudication. In 2006, petitioner pled guilty to violating the terms of that and was sentenced

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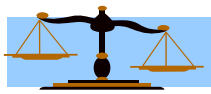

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to four years in prison. After DHS placed petitioner in removal proceedings, the IJ found that petitioner's conviction qualified as a crime of violence and ordered him removed to Mexico. The BIA dismissed petitioner's appeal.

The Fifth Circuit held that petitioner's conviction was not categorically a crime of violence because the statute encompassed crimes that could be committed without involving a substantial risk of intentional physical force. Specifically, the court identified subsections of the statute defining a crime based on the lack of legally effective consent and not based on the risk of force.

The Fifth Circuit held that petitioner's conviction was not categorically a crime of violence because the statute encompassed crimes that could be committed without involving a substantial risk of intentional physical force.

Judge Clement dissented and argued that petitioner's conviction was categorically a crime of violence, and rejected the majority's distinction between factual consent and legal consent in analyzing crimes of violence.

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SIXTH CIRCUIT

■ Sixth Circuit Rejects Petitioners' Claims Requesting Derivative Withholding of Removal

In ***Camara v. Holder***, __F.3d__, 2013 WL 149836 (6th Cir. January 15, 2013) (Batchelder, *Keith*, Martin), the Sixth Circuit upheld the BIA's determination that petitioner was derivatively ineligible for withholding of removal based on his claim that his wife had suffered female genital mutilation in Mali.

The petitioners, a married couple from Mali, overstayed their visitors' visas. Petitioner's wife, the lead petitioner, then filed an application for asylum, asserting that she was the victim of FGM. She listed her husband, as a derivative applicant. He did not submit a separate application or claim that he had suffered past persecution in Mali.

The IJ denied the lead petitioner's request for asylum because it was statutorily barred as untimely, but granted her request for withholding of removal. However, because withholding of removal is not available derivatively, the IJ ordered the husband removed to Mali. On appeal to the BIA, petitioners argued that the IJ should have considered the husband's independent claim for withholding of removal based on the risk of FGM to his wife. The BIA affirmed the IJ's decision finding that the husband had not filed an independent application for asylum and withholding and that he was precluded from raising the claim on appeal.

The court initially rejected petitioners' claim that the BIA and the IJ had violated their due process rights where petitioners never indicated that the husband wanted to advance a separate asylum claim, and the IJ had no duty to make them aware of application requirements when they were represented by counsel.

The court then determined that under *Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007), the BIA had properly interpreted the statute as not permitting derivative withholding. Because petitioner's did not argue that the *Matter of A-K-* interpretation was unreasonable, the court declined to reach the reasonableness of the BIA's interpretation.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds Emotional Distress Over Spouse's Forced Sterilization Does Not Amount to Persecution

In ***Chen v. Holder***, __F.3d__, 2013 WL 197835 (7th Cir. January 18, 2013) (*Manion*, Williams, Hamilton), the Seventh Circuit concluded that petitioner, whose wife was forcibly sterilized after he left China, could not establish persecution based solely on his grief over his wife's sterilization.

In 2006, the petitioner entered the United States illegally. Following petitioner's departure from China, his wife gave birth to their second child and was forcibly sterilized by Chinese authorities. Petitioner filed an affirmative asylum application and claimed that he suffered persecution as a result of his wife's sterilization. After being placed in removal proceedings, petitioner began practicing Falun Gong and added his fear of persecution on that basis to his pending asylum application. The IJ denied the asylum application and the BIA affirmed.

The Seventh Circuit deferred to the Attorney General's ruling in *Matter of J-S-*, 24 I&N Dec. 520, 534-35 (BIA 2008), that an applicant cannot establish that he was persecuted merely because his spouse was forcibly sterilized and he suffered emotional distress as a result. The court also upheld that agency's determination that petitioner failed to establish an objectively reasonable fear of future persecution in China based on his recent practice of Falun Gong ,because he failed to offer evidence that his practice would attract the attention of Chinese authorities.

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■ **Seventh Circuit Holds Pending Adjustment Application Did Not Toll Accrual of Days Without "Lawful Status" for Adjustment of Status Purposes**

In *Chaudhry v. Holder*, __F.3d__, 2013 WL 173970 (7th Cir. January 17, 2003) (Bauer, Kanne, *Wood*), the Seventh Circuit concluded that the BIA reasonably construed INA §§ 101(a)(15), 245(k), and 8 C.F.R. § 245.1, to hold that a pending adjustment application did not toll the accrual of days without "lawful status" for adjustment of status purposes.

The Seventh Circuit deferred to the BIA's interpretation of the term "lawful immigration status" to only include aliens whose initial period of admission has not expired.

In 2003, the petitioners entered the United States as nonimmigrant visitors and, through a series of employment visas, maintained status until January 21, 2005. The lead petitioner submitted, and USCIS denied, two adjustment applications, the latter of which was denied on December 13, 2005. On May 25, 2006, the lead petitioner filed his third application for adjustment of status. USCIS, however, rejected petitioner's adjustment application because he had accrued more than 180 days without "lawful status" and was statutorily ineligible to adjust.

The Seventh Circuit deferred to the BIA's interpretation of the term "lawful immigration status" to only include aliens whose initial period of admission has not expired. The court noted that petitioners' interpretation would allow an alien to extend his or her lawful status by filing a series of adjustment applications, thus thwarting the statute's "basic aim" of creating a limited grace period for certain aliens whose status had lapsed. The court, however, left open the question of whether parolee status would toll the accrual of days without status pursuant to 8 C.F.R. § 245.1(d)(1)(iv).

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EIGHTH CIRCUIT

■ **Eighth Circuit Upholds Adverse Credibility Ruling and Rejects Asylum Applicant's Claim That Immigration Judge's Reliance upon a Small Amount of Evidence Denied Him Due Process**

In *Fofana v. Holder*, __F.3d__, 2013 WL 322619 (8th Cir. January 29, 2013) (Smith, *Beam*, Gruender), the Eighth Circuit concluded that the IJ considered all of the evidence presented by petitioner and that the adverse credibility ruling was supported by the record as a whole.

The petitioner, an asylum applicant from the Republic of Guinea, claimed that he had been beaten and abused by security officers because of his affiliation with a political group, the Rally of People in Guinea (RPG), and his Malinke ethnicity. He stated that he left Guinea in 2002 and traveled to the United States via a smuggler and a fraudulent passport. However, he was unable to produce corroborating evidence of his actual admission date or his manner of entry. The IJ also had serious concerns about some of the documents submitted by the petitioner. The Forensic Document Laboratory (FDL) examined the documents and found that none could be authenticated. The IJ did not find petitioner credible and denied the application for asylum. In his decision the IJ highlighted the inconsistencies and implausibities in petitioner's applications, testimony, and exhibits, and also remarked that petitioner's answers were evasive. The BIA dismissed petitioner's appeal.

The court also rejected petitioner's argument that the IJ denied him due process in basing his decision on a very small percentage of the evidence presented. The court explained that petitioner did not argue that the IJ did not consider evidence altogether, "the only meaningful violation of due process he could argue in this vein."

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NINTH CIRCUIT

■ **Ninth Circuit Remands For The BIA To Articulate Its Rationale For Categorizing Resisting Arrest As A "Particularly Serious Crime"**

In *Alphonsus v Holder*, __F.3d__, 2013 WL 208930 (9th Cir. January 18, 2013) (Pregerson, Graber, *Berzon*), the Ninth Circuit held that the BIA abused its discretion in concluding that petitioner's conviction for resisting arrest, in violation of Cal. Penal Code § 69, constituted a particularly serious crime because the BIA failed to adequately explain how the result fits within the statutory language or any current framework created by BIA precedent.

The petitioner, a native of Bangladesh, was admitted to the United States in 1988 and adjusted his status. Subsequently, petitioner was convicted of petty theft with priors and resisting arrest. After being placed in removal proceedings, petitioner applied for asylum claiming that he was persecuted in Bangladesh on account of his Christianity. The IJ found that the resisting arrest conviction was a particularly serious

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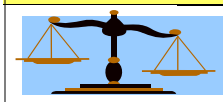

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crime under INA § 241(b)(3)(B)(ii), because it was "a crime against the officer" and "a crime against the orderly pursuit of justice," thus rendering petitioner ineligible for asylum and withholding of removal. The IJ also concluded that petitioner failed to demonstrate that the government would acquiesce to his torture and denied his application for CAT. The BIA affirmed.

Initially, the Ninth Circuit considered petitioner's argument that the particularly serious crime bar was unconstitutionally vague. Although the court acknowledged that § 241 (b)(3)(B)(ii) is not a criminal statute, it considered petitioner's vagueness challenge "because of the harsh consequences attached to a particularly serious crime determination and the attendant denial of withholding of removal." The court then rejected the argument, explaining that the statutory provision covers "an ascertainable core set of convictions, and the BIA's interpretive glosses have added some specificity as well."

On the merits, the Ninth Circuit concluded that it could not conduct a meaningful review of the BIA's determination because it did not clearly identify the rationale it used in finding a particular serious crime or show how it had arrived at that conclusion. "We cannot discern, from the BIA's ambiguous statement, the operative rationale of its particularly serious crime determination. The BIA may have determined that [petitioner's] conviction for resisting arrest constitutes a particularly serious crime because the offense interfered with the orderly pursuit of justice, or because the offense created a meaningful risk of harm, or because the offense both interfered with the orderly pursuit of justice and created a meaningful risk of harm." The court further noted that, as a result of the lack of adequate explanation, it was unclear how the BIA's decision could be reconciled with the statutory language and earlier BIA precedent.

The court, however, upheld the agency's denial of petitioner's claim for protection under the CAT, noting that the Department of State Country Reports indicates that freedom of religion is protected, and that the Bangladeshi government is taking steps "to promote understanding and peaceful coexistence among different communities."

"We cannot discern, from the BIA's ambiguous statement, the operative rationale of its particularly serious crime determination."

In an opinion concurring in part and dissenting, Judge Graber would have concluded that "the BIA's 'meaningful risk of harm' rationale applies legal principles that are neither new nor erroneous, and because it is premised on factual considerations that, under 8 U.S.C. § 1252(a)(2)(C), we lack jurisdiction to review."

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■ **Ninth Circuit Holds That Applicant for Adjustment of Status Failed to Satisfy Burden of Proving Eligibility Due to Inconclusive Record Of Conviction**

In ***Lopez-Vasquez v. Holder***, __F.3d__, 2013 WL 387903 (9th Cir. February 1, 2013) (*Ikuta*, Graber, Bright (by designation), the Ninth Circuit, held that the BIA correctly concluded that petitioner was ineligible for adjustment of status on account of his conviction for possession of marijuana for sale in violation of California Health & Safety Code § 11359.

The court noted that the burden was upon petitioner to establish "clearly and beyond doubt" that he was entitled to be admitted and was not inadmissible under INA § 212. "An alien cannot carry this burden by merely establishing that the relevant record of conviction is inconclusive as to whether the conviction was for an offense that would make the alien inadmissible," said the court.

The court held that petitioner failed to carry his burden of proving that he was entitled to relief under the Federal First Offender Act, observing that the record was inconclusive as to whether the state court had reduced the conviction to misdemeanor simple possession of marijuana.

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■ **Ninth Circuit Holds False Imprisonment for Purposes of Avoiding Arrest under California Law Is a Crime of Violence under 18 U.S.C. § 16(b)**

In ***Barragan-Lopez v. Holder***, __F.3d__, 2013 WL 323241 (9th Cir. January 29, 2013) (Clifton, *W. Fletcher*, Ikuta), the Ninth Circuit concluded that false imprisonment under California Penal Code § 210.5 is categorically a crime of violence under 18 U.S.C. § 16(b), and thus, an aggravated felony under INA § 101(a)(43)(F), because the crime involves a "substantial risk that physical force against the person or property of another may be used."

The petitioner, a citizen of Mexico, became a conditional legal permanent resident on August 21, 1998. In 2004, petitioner was charged with false imprisonment against his daughter "for purposes of protection from arrest, which substantially increased the risk of harm to victim and for the purpose of using victim as a shield," a felony under California Penal Code § 210.5. He pleaded guilty to the charge and was subsequently sentenced to three years' imprisonment.

The court had previously determined that that under California law,

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This Month's Topical Parentheticals

ADJUSTMENT

■ *Chaudhry v.Holder*, __F.3d__, 2013 WL 173970 (7th Cir. January 17, 2013)(holding that pending adjustment application did not toll accrual of days without "lawful status" for adjustment of status purposes)

■ *Jin Qing Wu v. Holder*, __F.3d__, 2013 WL 15876) (1st Cir. January 2, 2013) (holding that petitioner failed to properly file an application for labor certification on or before April 30, 2001, and therefore was not a "grandfathered alien" for purpose of adjustment under § 245(i))

ASYLUM

■ *Chen v. Holder*, __F.3d__, 2013 WL__ (7th Cir. Jan. 18, 2013) (deferring to BIA's ruling that Chinese asylum applicant did not establish past persecution because his spouse was forcibly sterilized, finding no compelling evidence that applicant's practice of Falun Gong would create a reasonable possibility of persecution)

■ *Zhou Hua Zhu v. Holder*, __F.3d__, 2013 WL 42998) (11th Cir. January 4, 2013) (holding that agency engaged in improper fact-finding when it found alien would not be sterilized upon return to China)

■ *Tegegn v. Holder*, __F.3d__, 2013 WL 133714 (6th Cir. Jan. 11, 2013) (affirming IJ and BIA's conclusion that Ethiopian man failed to establish past political "persecution" by government based on hit-and-run accident, where there is no compelling evidence this was an intentional assault, or by the government, and the applicant remained unharmed for several years; remanding claim of well-founded fear of future persecution based on alleged pattern or practice of government persecution of opposition political leaders, where agency made no findings on this claim)

■ *Khattak v. Holder*, __F.3d__, 2013 WL 174421 (1st Cir. January 17, 2013)(remanding case where BIA failed to articulate with sufficient particularity denial of asylum to applicant from Pakistan who claimed persecution by Taliban due to his activities as police officer, among others, and failure to articulate factors as to reasonableness of internal relocation)

■ *Camara v Holder*, __F.3d__, 2013 WL 149836 (6th Cir. Jan. 15, 2013) (upholding finding that derivative withholding is not available and finding no due process violation where IJ did not advise applicant on the need to file separate claim for withholding)

CAT

■ *Wanjiru v Holder*, __F.3d__, 2013 WL 135712 (7th Cir. Jan. 11, 2013) (reversing IJ and BIA's denial of CAT deferral of removal for Kenyan man, where the evidence supports the conclusion that the criminal Mungiki gang will probably murder him as a defector with the acquiescence, if not assistance, of the Kenyan government, and where the BIA was silent about, and failed to address, three points made by the evidence tending to show that future murder of the applicant by the Mungiki is more likely than not).

CITIZENSHIP

■ *Patel v. Napolitano,* __ F. 3d __, 2013 WL 285711 (4th Cir. Jan. 25, 2013) (affirming dismissal of petitioner's nationality claim based on his application for citizenship, registration for the Selective Service, and declaration of permanent allegiance to various United States officials; deferring to the BIA's interpretation of 8 U.S.C. § 1101(a)(22) (defining "national of the United States")) (Judge Davis dissented)

CRIMES

■ *Barragan-Lopez v. Holder,* __ F. 3d __, 2013 WL __ (9th Cir. Jan. 29, 2013) (holding that petitioner's conviction for false imprisonment under California Penal Code § 210.5 categorically qualifies as a crime of violence and reasoning that the crime of false imprisonment for purposes of protection from arrest or using the victim as a shield "by its nature[] involves a substantial risk that physical force . . . may be used in the course of committing the offense")

■ *Rodriguez v. Holder*, __F.3d__, 2013 WL 173434 (5th Cir. January 16, 2013) (holding that the Texas offense of sexual assault is not categorically a crime of violence and that under the modified categorical approach, petitioner was not convicted of an aggravated felony)

■ *Castrijon-Garcia v. Holder*, __F.3d__, 2013 WL 85971 (9th Cir. January 9, 2013)(CPC § 207(a) does not constitute a categorical crime involving moral turpitude because it does not require an intent to injure, actual injury, or a special class of victims)

■ *Alphonsus v Holder*, __F.3d__, 2013 WL 208930 (9th Cir. Jan. 18, 2013) (holding that BIA abused its discretion in concluding that petitioner's conviction for resisting arrest, in violation of Cal. Penal Code § 69, constituted a particularly serious crime, because the BIA failed to adequately explain how the result in this case fits within the statutory language or any current framework created by BIA precedent)

DUE PROCESS – FAIR HEARING

■ *US v. Vidal-Mendoza*, (9th Cir. Jan. 14, 2013)(because the defendant lacked apparent eligibility for relief under the applicable law at the time of his removal hearing and potentially became eligible for such relief only through a post-removal "change in law" precipitated by *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*), the IJ correctly informed the defendant that he was not apparently eligible for voluntary departure at the time of his

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This Month's Topical Parentheticals

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2004 removal hearing, and therefore the removal proceedings did not violate the defendant's due process rights and his waiver of appeal rights was considered and intelligent)

■ *Carrillo de Palacios v. Holder,* __ F. 3d __, 2013 WL 310387 (9th Cir. Jan. 28, 2013) (denying alien's second rehearing petition en banc and reissuing an amended decision in light of intervening decision in *Garfias-Rodriguez*; the panel applied the five retroactive application factors as set out in *Garfias-Rodriguez*, and concluded that the BIA did not err in applying *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), retroactively in this case)

■ *In re Payne,* __ F. 3d __, 2013 WL 297728 (2d Cir. Jan. 25, 2013) (reprimanding immigration attorney based on defaulting on scheduling orders, filing late stipulations to withdraw appeals, "intentional prejudice to clients," defective briefing, and failure to timely respond to orders of the court")

JURISDICTION

■ *Shabaj v. Holder*, __F.3d__, 2013 WL 149903 (2d Cir. January 15, 2013)(upholding district court's dismissal for lack jurisdiction of challenge to USCIS's determination that plaintiff failed to show extreme hardship and therefore was ineligible for 212(i) waiver of inadmissibility)

MOTION TO REOPEN

■ *Martinez-Lopez v. Holder*, __F.3d__, 2013 WL 49826 (1st Cir. January 4, 2013) (upholding BIA's denial of motion to reconsider where the previously available claims had not been raised below)

■ *Bead v.Holder*, __F.3d__, 2013 WL 68571 (1st Cir. January 7, 2013) (holding that BIA did not abuse its discretion in denying motion to reopen based on ineffective assistance of counsel because petitioner did not show due diligence in pursuing his rights)

Summaries Of Recent Federal Court Decisions

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the crimes of resisting arrest and kidnapping are categorical crimes of violence. See *Estrada–Rodriguez v. Mukasey*, 512 F.3d 517 (9th Cir. 2007) (holding that resisting arrest is a crime of violence); *Delgado–Hernandez v. Holder*, 697 F.3d 1125, 1128 (9th Cir. 2012) (holding that kidnapping is a crime of violence). The court determined that false imprisonment under § 210.5 is similar to both evading arrest and kidnapping in that "by its nature" it carries "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Therefore, explained the court, even if the perpetrator does not use force to imprison the victim, a substantial risk of force inheres in the likelihood that the incident might escalate.

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■ **Ninth Circuit Holds Kidnapping Is Not Categorically a Crime Involving Moral Turpitude**

In *Castrijon-Garcia v. Holder*, __F.3d__, 2013 WL 85971 (9th Cir., January 9, 2013) (*Reinhardt,* Clifton, N. Randy Smith), the Ninth Circuit, ruled that "simple kidnapping" under California Penal Code § 207(a) is not categorically a crime involving moral turpitude, based on its conclusion that such kidnappings did not involve an intent to harm someone, the actual infliction of harm upon someone, or an action that "affects a protected class of victim." The court also found that California courts have applied the statute to conduct that is not morally turpitudinous. Thus, the court opined that, it "seemed unlikely" the agency could conclude that the alien's crime was a crime involving moral turpitude.

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DISTRICT COURTS

Central District of California Finds No Jurisdiction Over Suit to Amend Pre-1990 Naturalization Certificate

In *Collins v. U.S. Citizenship & Immigration Service*, No. 11-cv-9909 (C.D. Cal. January 30, 2013)(Walter, J.), the District Court for the Central District of California granted the government's motion to dismiss a suit to amend the birthdate on a naturalization certificate issued before 1990 because the court lacked subject-matter jurisdiction. The court found that neither 8 C.F.R. § 334.16 nor 8 U.S.C. § 1331 conferred subject-matter jurisdiction over the petitioner's claims.

Moreover, the court held that 8 U.S.C. § 1451(I) grants a court the "inherent authority to set aside judgments for any reason cognizable under Federal Rule of Civil Procedure 60." In dismissing the petition with prejudice, the court held that the petitioner – who waited nearly two decades between discovering his "true" birthdate and seeking to amend – failed to meet the timeliness requirements of Federal Rule of Civil Procedure 60.

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Regulatory Update

Final Rule for New Provisional Waiver of Inadmissibility

DHS has published a rule will allow certain immediate relatives of U.S. citizens, who entered the country without permission or overstayed their visas to remain in the country during part of the process to obtain their Lawful Permanent Resident status. 78 *Fed. Reg.* 536 (January 3, 2013). The rule becomes effective on March 4, 2013.

Under current provisions of the INA, a non-citizen seeking to adjust his status to LPR must either be admitted or paroled into the country. If the non-citizen entered unlawfully, he would have to leave the country for processing of his application at a U.S. Embassy or Consulate. However, departure from the U.S. would trigger a 3-10 year bar to re-enter the country, in which the applicant would have file separate waivers to the U.S. Embassy or Consulate, and to USCIS in order to overcome the inadmissibility bar before they can proceed with their application.

The new rule will grant immediate relatives of U.S. Citizens a provisional unlawful presence waiver to non-citizens who are inadmissible only on account of their unlawful presence, and who are able to demonstrate that the denial of the waiver would result in "Extreme Hardship" to their U.S. citizen relative. Although the non-citizen would still have to leave the country for a short period of time to obtain their visa once it has been approved, the new rule is expected to greatly reduce the time that U.S. citizens are separated from their relatives, and allow much of the filing to be streamlined and completed from within the country.

By Miguel Willis, OIL

INDEX TO CASES SUMMARIZED IN THIS ISSUE

Role Appellate Team

(Continued from page 2)

General remains properly informed and timely receives recommendations requiring approval, the Appellate Team administers a comprehensive system for tracking and reporting adverse decisions. Unpublished adverse decisions where OIL-Appellate recommends no further review are reported by grouping several such decisions together in a single memorandum. This is the "Bulk SG memo." For published adverse decisions where neither OIL-Appellate, nor any other component of the Department nor any client agency, recommends further review, a "Short Form SG memo" is prepared that summarizes the decision and the reasons for the recommendation. And finally, when a recommendation is made for seeking review for which the Solicitor General's approval is required, a more detailed "Standard Form SG memo" is prepared. The Appellate/Adverse team of attorneys and staff are responsible for managing the system by which the memoranda are prepared and forwarded through the offices of the Civil Division Appellate staff and the Assistant Attorney General, to the Solicitor General.

6. *Providing litigation guidance and acting as Point of Contact for client agencies and other Departmental Appellate Staffs*. The Appellate Team coordinates with OIL-Appellate management and client agencies to formulate office-wide guidance on select issues to maintain a uniform response that best positions the office to seek further review. The Appellate Team also monitors and tracks developments for select issues in the courts of appeals and operates as the point of contact for client agencies and other Departmental Appellate Staffs.

7. *Preparing and distributing periodic reports*. The Appellate Team manages the preparation and distribution of periodic internal reports detailing recent courts of appeals decisions, and any office responses to those decisions.

8. *Performing routine duties as Senior Litigation Counsels.* All attorneys on the Appellate Team have been promoted to Senior Litigation Counsel (SLC). As SLCs, they may perform tasks which are similar or identical to those performed by SLCs on other teams, including briefing and arguing cases in the courts of appeals, acting as judges for moot courts, reviewing pleadings, and consulting with other attorneys on a wide range of issues.

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NOTED

USCIS to Welcome More Than 19,000 New Citizens

USCIS will recognize Presidents Day, welcoming more than 19,000 people as U.S. citizens during 135 naturalization ceremonies across the country Feb. 15 through Feb. 22. "Throughout our nation's history, the words and deeds of U.S. presidents have inspired Americans to uphold the ideals of freedom and equality enshrined in the Declaration of Independence and the Constitution of the United States," said USCIS Director Alejandro Mayorkas. "For Presidents Day, we welcome 19,000 new citizens who share these same ideals."

USCIS Report to Congress on The American Competitiveness and Workforce Improvement Act of 1998

According to the FY 2011 report by USCIS concerning the countries of origin and occupations of, educational levels attained by, and compensation paid to, aliens who were issued visas or otherwise provided nonimmigrant status under INA §101(a)(15)(H)(i)(b),

- The number of H-1B petitions filed increased eight percent from 247,617 in FY 2010 to 267,654 in FY 2011.
- The number of H-1B petitions approved increased almost 40 percent from 192,990 in FY 2010 to 269,653 in FY 2011.
- Approximately 58 percent of all H-1B petitions approved in FY 2011 were for workers born in India.
- Over two-thirds of H-1B petitions approved in FY 2011 were for workers between the ages of 25 and 34.
- Forty-one percent of H-1B petitions approved in FY 2011 were for workers with a bachelor's degree, forty-two percent had a master's degree, eleven percent had a doctorate, and 5 percent were for workers with a professional degree.
- About 51 percent of H-1B petitions approved in FY 2011 were for workers in computer-related occupations.
- The median salary of beneficiaries of approved petitions increased to $70,000 in FY 2011, $2,000 more than in FY 2010.

DACA Update from USCIS

As of January 17, USCIS had received 407,899 requests for deferred action (an average of 80,000 per month since the program began); 394,533 had been accepted and 154,404 approved. USCIS received an average of less than 1,500 requests per day in January, down from a high of more than 5,700 per day in October shortly after the program began accepting applications. The majority of DACA recipients continue to hail from Mexico and reside in California.

FY 2012 A Record Year for Asylum Cases

According to TRAC, the odds of an asylum claim being denied in Immigration Court reached an historic low in FY 2012, with only 44.5 percent being turned down. Ten years ago, almost two out of three (62.6%) individuals seeking asylum lost their cases in similar actions. Twenty years ago fewer than one out of four (24.0%) asylum applicants won their cases, while three out of four (76.0%) lost. Overall, the data indicate that a total of 11,939 individuals were awarded asylum last year, the highest number receiving asylum in Immigration Court proceedings since FY 2007. TRAC obtained the data from EOIR under a FOIA request.

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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