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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

First Circuit Holds Gang Membership, Past or Present, Does Not Constitute Membership in a Particular Social Group

In *Claros-Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) (Lynch, *Howard,* Kayatta), the First Circuit accorded *Chevron* deference to the BIA's interpretation that Congress never intended to extend particular social group status to individuals facing mistreatment on the basis of past or present membership in violent street gangs.

The petitioner, a citizen and native of El Salvador, and an ex-member of a violent criminal street gang based in the United States, claimed that he would face persecution and torture on account of his former gang membership if repatriated. The petitioner testified that he joined the East Boston arm of the 18th Street gang when he was sixteen years old. The 18th Street gang is a prominent violent criminal gang that is active throughout the United States and Latin America. He received several tattoos identifying him as a member of the 18th Street gang, some of which are prominently displayed. Subsequently petitioner became afraid of the violent nature of gang life, experienced a religious conversion, and decided to leave the gang. Some members of his gang beat him as a result.

Petitioner feared reprisals from the Salvadoran branch of the 18th Street gang for his having renounced gang membership, as well as persecu-

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Immigration in Uniform
The Immigration Consequences of Military Service

PART I*

Immigration and military service have enjoyed a long and substantial relationship. Improving on the Athenian notion that military service was an obligation of citizenship, the Romans recognized such service as a path to citizenship, providing faithful legionnaires with a piece of land and a voting stake in the polity. *See Roman Citizenship*, available at http://en.wikipedia.or /wiki/Roman_citizenship (visited Nov. 12, 2013). Our laws similarly have offered United States citizenship for military service.

During the Civil War, Congress enacted legislation offering expedited naturalization to "any alien . . . who has enlisted or shall enlist in the armies of the United States." Act of July 17, 1862, ch. 200, § 21, 12 Stat. 597 (permitting naturalization upon shortened period of residency, and without a prior declaration of intent). The intersection of immigration and military service actually began at our founding. Our immigration laws have consistently rewarded honorable military service with special naturalization opportunities. *See, e.g.*, 8 U.S.C. §§ 1439-40.

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Military service can bar or forfeit citizenship as well. Avoiding the uniform, or donning that of another sovereign, may make an alien ineligible to naturalization or render a citizen an expatriate. Apart from citizenship, military service also impacts on immigration enforcement and benefits.

I. Aliens Who Serve In Our Armed Forces

Aliens Who <u>May</u> Serve (Recruitment and Enlistment). At one time, like Athens, we limited military service to our citizens. *See, e.g.*, Act of March 16, 1802, ch. 9, 2 Stat. 132 (limiting peacetime enlistment to "able-bodied citizens"); Act of August 1, 1894, ch. 179, 28 Stat. 215, § 2 (limiting peacetime enlistment to citizens, intending citizens, and Indians). Current law allows the enlistment of lawful permanent residents and citizens, but limits commissioned officers to United States citizens. 10 U.S.C. §§ 504(b)(1)(B), 532(a)(1); *see* 10 U.S.C. § 504(b)(1) (aliens from Micronesia, the Marshall Islands, and Palau also may enlist). *Cf*. 10 U.S.C. § 504 (a) (barring enlistment of persons who are insane, intoxicated, deserters, or felons). The Army and Air Force presently limit the amount of time a non-citizen can serve to eight years and one enlistment, respectively. *See* Hattiangadi, Quester, Lee, Lien & MacLeod, *Non-Citizens in Today's Military* (CNA 2013), available at www.cna.org. Neither the Navy nor the Marine Corps expressly limits alien reenlistment. *See* Lee & Wasem, *Expedited Citizenship Through Military Service* (CRS RL 31884, Sept. 30, 2003), pp. 14-15.

The constraints on alien military service can be waived. Any person may be enlisted and LPR's may be commissioned as officers when the Secretary of Defense deems it "vital to the national interest." 10 U.S.C. §§ 504(b)(2), 532(f). Similarly, the Secretary may temporarily enlist any person 18 years of age or older "during war or emergency." 10 U.S.C. § 519. *Cf*. Executive Order 13269, 67 Fed. Reg. 45287 (for naturalization pursuant to 8 U.S.C. § 1440(a), active duty service after September 11, 2001, is service during a period of "armed conflict with a hostile foreign force"). In 2008, the Secretary authorized the limited recruitment of non-immigrant aliens (and TPS beneficiaries) who possess critical health care or language and cultural skills (the Military Accessions Vital to the National Interest, MAVNI, program). Memorandum of Secretary Gates, November 25, 2008, referenced at www.usarec.army.mil.

Our willingness to accept aliens in the military ranks has fluctuated according to the demands on our Armed Forces.

Our willingness to accept aliens in the military ranks has fluctuated according to the demands on our Armed Forces. *See*, *e.g.*, Wong & Cho, *Jus Meritum, Citizenship for Service*, pp. 73-75, published in *Transforming Politics, Transforming America* (UVa Press 2012); Sohoni & Vafa, *The Fight To Be American: Military Naturalization and Asian Citizenship*, 17 Asian Am. L.J. 119, 125-32 (2010). Except for the brief period from 1802 to 1811, our early enlistment statutes spoke of "able-bodied men" not citizens. *See* 6 U.S. Op. Atty. Gen. 474, 484, *Enlistment of Aliens in the Army*, 1854 WL 2069 (May 30, 1854, Attorney General Cushing to Secretary of War Jefferson Davis). While the Act of August 1, 1894, required alien enlistees to declare their intent to become citizens and to speak, read, and write English, earlier statutes had not been so restrictive. *Id*. Congress repealed the language limitation in 1920, and suspended the declaration requirement in 1950. Act of June 14, 1920, ch. 286, 41 Stat. 1077; Act of June 30, 1950, ch. 443, 64 Stat. 316 (suspension extended to June 1957, Act of July 12, 1955, ch. 330, 69 Stat. 297). The Attorney General previously had found no legal preclusion to alien service.

> There is no principle of the law of nations, no rule of comity between them, which forbids one nation to employ in her military service the subjects or citizens of a foreign nation.
>
> [U]nder the law of the United States, the officers of the Army employed in the recruiting service, are not restricted to enlistments of citizens of the United States, but may lawfully enlist persons not naturalized as citizens of the United States.

Enlistment of Aliens in the Army, *supra*, 6 U.S. Op. Atty. Gen. at 476, 485. *Accord* 4 U.S. Op. Atty. Gen. 350, *Enlistment of Sailors and Marines*, 1844 WL 1816 (Nov. 20, 1844) (finding nothing "in the laws relating to the enlistment of sailors and marines . . . to prohibit the employment of aliens"). The Board has recognized there is no statutory bar to enlisting non-resident aliens in our Armed Forces. *See*, *e.g.*, *Matter of Park*, 14 I&N Dec. 734 (BIA 1974).

Our acceptance of aliens within our military ranks dates from the Revolution. We competed with King George for available mercenaries, and offered bounties to aliens who were willing to switch allegiance to the United States. *Cf*. Note, *"Jealousies of a Standing Army": the Use of Mercenaries In The American*

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Revolution And Its Implications For Congress's Role In Regulating Private Military Firms, 106 Nw. U. L. Rev. 317, 323-26 (Winter 2012) (noting our competition with the British for the service of Native American fighters and Hessian mercenaries). The Continental Congress invited foreigners "in the service of his Britannic Majesty" to leave, with the inducement of United States citizenship and a graduated scale of land bounties ranging from 100 acres for a non-commissioned officer (corporals and sergeants) to 1,000 acres for a colonel. Resolve No. 18, 1st Cong., 3d Sess., *Rewards To Deserters from the Enemy* (Aug. 27, 1776), 5 U.S. Cong. Documents and Debates, 1774-1875 (Library of Congress). Many Hessians accepted. *See Enlistment of Aliens in the Army*, *supra*, 6 U.S. Op. Atty. Gen. at 476; *Hessian Soldiers*, available at http://en.wikipedia.org (visited Nov. 11, 2013). We continued cash and citizenship enlistment bonuses during subsequent wars. *See*, *e.g.*, Act of May 6, 1812, ch. 77, 2 Stat. 729; Enrollment Act of March 3, 1863, ch. 75, 12 Stat. 736.

The evolution of alien military service is somewhat obscured by our reliance on militias before World War I, which left to the individual states much of our military recruitment. The Uniform Militia Act of 1792, called upon the states to enroll in their militia "each and every free able-bodied white male citizen." Act of May 8, 1792, ch. 33, 1 Stat. 271. The 1903 Militia Act declared the militias to consist of

> every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age . . . .

Act of January 21, 1903, ch. 196, 32 Stat. 775. The federal interest was principally one of numbers. *See*, *e.g.*, Act of May 9, 1794, ch. 27, 1 Stat. 367 (authorizing 80,000 militia and the President to require militias of the "executives of the several states," apportioned among the states from 1,256 to be mustered by Delaware to 11,885 from Massachusetts). Particularly before the Fourteenth Amendment settled the limits of state authority to make citizens, the variable state militia and naturalization practices resulted in many non-citizens in our militia-bottomed military ranks. *See* Wong & Cho, *Jus Meritum, Citizenship for Service*, *supra*, pp. 73-75. *See also* Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. Rev. 1521, 1547 (Nov. 2010); *Presser v. Illinois*, 116 U.S. 252 (1886) (sustaining military regulation under state military codes). Current militia provisions include all able-bodied males between 17 and 45 who are citizens or have declared their intent to become citizens (as well as female citizens who are members of the National Guard). 10 U.S.C. § 311.

Alien military service also has been impacted by the race, nationality, and gender restrictions in our laws. Our original militia provisions spoke of service by "free, able-bodied white male citizens."

There have been differences in alien enlistment between our several branches of service. *See* Lee & Wasem, *Expedited Citizenship Through Military Service*, *supra*, pp. 4-6, 14-15. *Cf.* 4 U.S. Op. Atty. Gen. 350, *Enlistment of Sailors and Marines*, *supra* (aliens can be enlisted in the Navy or Marine Corps, and are bound to the same enlistment terms as citizens). Thus, for example, the Act of July 17, 1862, *supra*, § 21, provided for the naturalization of aliens who enlisted and honorably served in the "armies of the United States," a provision the courts held did not embrace honorable alien service in the Navy or Marines (a deficiency cured by the Act of July 24, 1894, ch. 165, 28 Stat. 124). *See In re Byrne*, 26 F.2d 750 (W.D. Wash. 1928); *In re Bailey*, 2 F. Cas. 360 (D. Or. 1872). *Cf.* Enrollment Act of 1863, *supra*, § 34 (authorizing the President to assign citizens and aliens drafted during the Civil War to any branch of service). Navy enlistment statutes made no reference to citizenship and appeared to be more accepting. *See*, *e.g.*, Act of March 2, 1837, ch. 21, 5 Stat. 153 (authorizing enlistment, with parental consent, of "boys" not under 13 years of age; Act of August 5, 1861, ch. 50, 12 Stat. 315 (authorizing enlistment of "able seamen, ordinary seamen, and boys"). The Board has observed that in wartime the determination by a given branch of the Armed Forces whether to accept non-resident aliens "appears to be one of internal policy." *Matter of Park*, *supra*, 14 I&N Dec. at 735. As noted above, even now the branches of the Armed Services differ regarding alien service.

Alien military service also has been impacted by the race, nationality, and gender restrictions in our laws. Our original militia provisions spoke of service by "free, able-bodied white male citizens." Act of May 8, 1792, *supra*. But the during the Civil War, Congress authorized the enlistment of "as many persons of African descent as [the President] may deem necessary and proper for the suppression of th[e] rebellion." Act of July 17, 1862, ch. 195, § 11, 12 Stat. 589, 592. *See* Shaw, *Selective Service: A Source of Military Manpow-*

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er, 13 Mil. L. Rev. 35, 42-46 (July 1961) (discussing Union and Confederate drafts). Almost 200,000 blacks served in the Union army and navy during the Civil War. See www.archives.gov/education/lessons/black (visited Nov. 12, 2013). See also Williams, *Black Confederates in the Civil War*, available at www.usgennet.org (visited Nov. 18, 2013) (estimating as many as 65,000 Southern blacks served in the Confederate ranks).

The immigration statutes affected alien enlistment both by limiting the admission of certain foreign nationals to the United States, and by restricting by nationality and race the persons eligible to citizenship.

The early enlistment statutes did not address service by non-whites other than blacks and Indians, but the enactment of exclusionary immigration laws at the turn of the previous century limited the opportunity for alien service. The 1882 Chinese Exclusion Act, the 1907 "Gentlemen's Agreement" with Japan, the 1917 Immigration Act's "Asiatic Barred Zone," and the 1924 National Origins Act imposed race and nationality constraints on the pool of available, potential alien recruits. See Act of May 6, 1882, ch. 126, 22 Stat. 58; *Gentlemen's Agreement* available at http://en.wikipedia.org/wiki/Gentlemen's_Agreement_of_190 (visited Nov. 12, 2013); Immigration Act of Feb. 5, 1917, Pub. L. No. 301, § 3, 39 Stat. 876-77; Immigration Act of 1924, Pub. L. No. 68-139, § 11, 43 Stat. 153. *But cf.* Act of May 11, 1898, ch. 294, § 2, 30 Stat. 405 (authorizing the organization of a "volunteer force of . . . enlisted men possessing immunity from diseases incident to tropical climates"). The immigration statutes affected alien enlistment both by limiting the admission of certain foreign nationals to the United States, and by restricting by nationality and race the persons eligible to citizenship (non-citizen enlistment typically being dependent upon an intent to naturalize). See Act of June 29, 1906, *as amended* March 30, 1918, ch. 36, 40 Stat. 500 (expanding authorized naturalization to include Filipinos and Puerto Ricans who honorably served in our Armed Forces).

Similarly, women were denied access to military service until World War I. See Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 Duke J. Gender L. & Pol'y 1061 (May 2007). In March 1917, the Navy authorized the enrollment of women in the Naval Reserve ("Yeomanettes"), and in August 1918 the Marines first recruited women ("Marinettes"). See *The Navy's First Enlisted Women*, available at www.navalhistory.org (visited Nov. 6, 2013); Anselmo, *A Woman's Place Is In The Ranks*, available at www.mca-marines.org/leatherneck (visited Nov. 6, 2013). Gender restrictions resumed with the 1925 Naval Reserve Act (authorizing enlistment of "male citizens", Pub. L. No. 68-512, 43 Stat. 1080), but the ranks again were open to women with the establishment of the Women's Reserve. Act of July 30, 1942, ch. 538, 56 Stat. 730. Female enlistment apparently was also limited by higher standards. See Women's Army Auxiliary Corps Act of May 14, 1942, Pub. L. No. 554, 56 Stat. 278 (limiting female recruitment to women of high moral character and technical competence, a constraint not imposed on the men).

The statutes that authorized female recruitment did not prohibit alien enlistment. See Act of June 12, 1948 (Women's Armed Services Integration Act), ch. 449, 62 Stat. 356. More than 35,000 women served in our Armed Forces in World War I and 350,000 in World War II, but little has been written about the extent to which such service was provided by non-citizens. It seems likely that the gender barriers to military service compounded the race and nationality obstacles to naturalization. See also *United States v. Schwimmer*, 279 U.S. 644 (1929) (woman pacifist denied naturalization for declining oath to bear arms, despite her age and gender ineligibility for military service), *overruled*, *Girouard v. United States*, 328 U.S. 61, 69 (1946). The current possibility of expedited naturalization may be attracting female alien recruits. See FlorCruz, *Chinese Women Enlist in United States Army to Expedite Citizenship Process*, Int. Business Times (July 29, 2013), available at www.ibtimes.com/Chinese_women_enlis (visited Nov. 12, 2013).

Alien military service also has been constrained by geographic limitations on recruitment and enlistment. Such limitations have reflected concerns regarding neutrality and sovereignty. International law generally finds sovereign offense in foreign recruitment. As the Attorney General explained,

> The undertaking of a belligerent to enlist troops of land or sea in a neutral state without the previous consent of the latter, is a hostile attack on its national sovereignty. The neutral state may, if it please, permit or grant to belligerents the liberty to raise troops within its territory; but for the neutral state to allow or concede this liberty to one belligerent and not to all would be an act of manifest belligerent partiality and a palpable breach of neutrality.

7 U.S. Op. Atty. Gen. 367, *Foreign*

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Enlistments in the United States, 1855 WL 2319 (Aug. 9, 1855) (supporting prosecutions for British recruitment in New York and Cincinnati). International law requires states affirmatively to prevent the use of their territory to levy foreign troops or launch military expeditions against other states. *See* Riesman, *Legislative Restrictions On Foreign Enlistment And Travel*, 40 Colum. L. Rev. 793, 799-809 (1940). Our criminal code has consistently reflected these principles. *See, e.g.*, Act of June 5, 1794, ch. 50, 1 Stat. 381, 383 (declaring foreign enlistment to be a "high misdemeanor"); 18 U.S.C. § 959 (penalizing foreign enlistment "within the United States").

Consequently, aliens ordinarily can enlist only when they are on United States territory. Current enlistment law requires lawful admission and presence. 10 U.S.C. § 504(b). *See* Mc-Intosh & Sayala, *Non-Citizens In The Enlisted U.S. Military* (CNA Nov. 2011), available at www.cna.org, pp. 19-22 (recruiting non-citizens). On occasion, we have engaged in offshore recruitment. For example, during the Cold War Congress enacted the Lodge-Philbin Act which authorized the enlistment of certain aliens (unmarried males without dependents) from among Europe's WW II displaced persons. Act of June 30, 1950, ch. 443, 64 Stat. 316. *See* INS Interp. Ltr. 329.2, *Foreign Enlistees*, 2001 WL 1333898. The recruitment was limited in number, excluded (in application) citizens of Marshall Plan or NATO countries, and lapsed in 1959. *See* Act of June 19, 1951, Pub. L. No. 51, § 21, 65 Stat. 89; *In re Todorvo*, 253 F. Supp. 977 (N.D. Ill. 1966) (Bulgarian enlisted in the Army at Heidelberg, Germany). *But cf. Garcia v. INS*, 783 F.2d 953 (9th Cir. 1986) (Act did not include service in Navy). Senator Lodge initially had called his proposal "America's Foreign Legion," to which Gen. Eisenhower observed critically, "When Rome hired mercenary soldiers, Rome fell." *Time Magazine*, April 2, 1951, available at http://www.time.co/time/magazine/article/0,1971,814485,00 (visited Sept. 30, 2013).

Aliens Who <u>Must</u> Serve (Conscription and Draft Registration). While only certain aliens may serve in our Armed Forces, some aliens must serve. We have consistently conscripted resident aliens into military service and have required them to register for the draft. The authority to register and conscript aliens arises from Congress's Article I, § 8, power to "raise and support Armies" and "provide and maintain a Navy." As discussed below, challenges to the alien draft have been unsuccessful.

The courts also have rejected the notion that conscription constitutes persecution within the meaning of our immigration laws.

Conscription has always had its critics. During the War of 1812, Rep. Daniel Webster railed against a proposal by President Madison and Secretary of War Monroe to enact a draft.

> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents, and parents from their children, and compel them to fight the battles of any war, in which the folly or the wickedness of government may engage it?

Daniel Webster, December 9, 1814, House of Representatives, available at www.constitution.org (visited Nov. 12, 2013). However, the courts have sustained the draft for citizen and alien alike. The Supreme Court had little difficulty rejecting a constitutional challenge to the World War I draft. *Arver v. United States (The Selective Draft Law Cases)*, 245 U.S. 366 (1918). The circuit courts have similarly concluded that the power of conscription is not limited to times of war or national emergency. *See, e.g.*, *United States v. Holmes*, 387 F.2d 781, 784 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968) (agreeing with the Ninth Circuit that peace-time draft does not violate the Thirteenth Amendment); *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959). *But see* Note, *Unwilling Warriors: An Examination Of The Power To Conscript In Peacetime*, 4 N.W. J. L. & Soc. Pol'y 400 (Fall 2009) (a Thirteenth Amendment argument against the draft). As the Court explained in *Butler v. Perry*, 240 U.S. 328, 333 (1916) (sustaining a Florida statute obligating every "able-bodied man within its jurisdiction" to provide conscripted, uncompensated labor on state roads), the constitutional bar to involuntary servitude "certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc."

The courts also have rejected the notion that conscription constitutes persecution within the meaning of our immigration laws. *See, e.g.*, *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988); *see also Arver v. United States*, *supra*, 245 U.S. at 378. Even those who press for a more inclusive interpretation of the Refugee Act have so acknowledged.

> The [UNHCR] Handbook's recommendation of refugee status for conscientious objectors constitutes an exception to the well-established principle that

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> sovereign nations have the right to raise and maintain armies, and therefore prosecution and punishment for the criminal offense of draft evasion or desertion does not constitute persecution within the meaning of the 1980 Refugee Act.

Musalo, *Swords Into Ploughshares: Why The United States Should Provide Refuge To Young Men Who Refuse To Bear Arms For Reasons Of Conscience*, 26 San Diego L. Rev. 849, 853-54 (Sept/Oct. 1989). The Board has unequivocally declared that "it is not persecution for a country to require military service of its citizens." *Matter of A– G–*, 19 I&N Dec. 502, 506 (BIA 1987); *see Matter of Vigil*, 19 I&N Dec. 572, 578 (BIA 1988).

Our statutes typically have limited alien conscription to persons who have declared their intention to become citizens or who have established residence in the United States.

Our statutes typically have limited alien conscription to persons who have declared their intention to become citizens or who have established residence in the United States. During the Civil War, both the Union and the Confederate militaries relied on drafts to support their armies, and both exempted non-residents from service. *See* Enrollment Act of 1863, *supra* (Union draft included citizens and alien males between 20 and 45 "who . . . have declared on oath their intention to become citizens"); White, *Recovering The Legal History Of The Confederacy*, 68 Wash. & Lee L. Rev. 467, 545-47 (Spring 2011). But the exclusion of non-resident aliens from draft registration and conscription is a matter of policy and dependent upon the legislative will. *See, e.g.,* Act of May 20, 1918, ch. 79, 40 Stat. 557 (registration required of "all male persons residing in the United States"); Selective Training and Service Act of Sept. 16, 1940, Pub. L. 76-783, § 2, 54 Stat. 885 (registration required of every citizen, and "every male alien residing in the United States"). The courts have deferred to such policies. *See, e.g.*, *United States v. Rumsa*, 212 F.2d 927, 936 (7th Cir.), *cert. denied*, 348 U.S. 838 (1954) (despite treaty, displaced Lithuanian LPR could not refuse induction under 1951 Universal Military Training & Service Act); *United States v. Lamothe*, 152 F.2d 340, 342 (2d Cir. 1945) (the power to raise military forces extends to non-citizens, and its use is a policy question for our political branches, not the courts). In denying the habeas petition of a German national drafted two months before the United States entered World War II, the court explained,

> The provision that an alien enemy should not be inducted for training and service is for the protection of the United States and not for the benefit of the alien enemy . . . [Aliens residing in the United States] share equally with our citizens the calamities which befall our country; and their services may be required for its defense and their lives may be periled for maintaining its rights and vindicating its honor.

Leonhard v. Eley, 151 F.2d 409, 410 (10th Cir. 1945). *See also Matter of Dunn*, 14 I&N Dec. 160 (BIA 1972) (alien's abandonment of LPR status did not relieve him of duty to comply with induction order).

The alien's obligation of military service has been subject to certain exceptions. For example, because of international commitments, enemy aliens cannot be compelled to take part in operations of war against their own country. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1952) (*citing* the 1907 Hague Convention Respecting the Laws and Customs of War on Land, § 2, c. 1, art. 23, 36 Stat. 2301-02). As discussed below, aliens also may be relieved of their military obligations by statute or treaty. *See generally* INS Interp. Ltr. 315.3, *Post-World War I Conscription Statutes*, 2001 WL 1333872 (Oct. 2001).

Concomitant with the obligation of military service, aliens have been required to register for the draft. Beginning with the 1863 Enrollment Act, aliens were required to identify themselves for possible conscription. During World War I, registration was required of all men 18 to 45 years of age including resident aliens (but divinity and medical students were exempted). *See* Act of May 18, 1917, ch. 15, 62 Stat. 604; Pub. Res. No. 30, ch. 79; Act of May 20, 1918, *supra*. During World War II, registration was required of all men 18 to 64 years of age. Act of Sept. 16, 1940, *supra*. After the war, registration initially was required of citizens and "every other male person now or hereafter in the United States," which provisions were amended in 1971 to include citizens and "every other male person residing in the United States" and to exclude lawful non-immigrants. Act of June 19, 1951, Pub. L. No. 51, § 3; Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(2). Current law requires men between the ages of 18 and 26 to register for the draft, including male aliens who are lawful permanent residents, non-H-2A seasonal agricultural workers, asylees or refugees, or illegally present in the United States. 50 U.S.C. App. § 453(a). The obligation to register attaches regardless of whether the alien may be exempt from actual military service. Lawful

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non-resident aliens such as students, visitors, and diplomats need not register, as long as they maintain their non-resident status. *See* Military Selective Service Act of Sept. 28, 1971, Pub. L. 92-129, 85 Stat. 348; Selective Service System, *Who Must Register*, available at http://www.sss.gov (visited Nov. 11, 2013).

II. Aliens Who Do Not Serve In Our Armed Forces

Aliens who are exempt from military obligations. An alien's obligation of draft registration and military service in the United States is defined by statute and, for foreigners of certain nationalities, by treaty. An alien's obligation of draft registration is independent of any duty of military service, so an exemption from service does not excuse an alien from registration. *See*, *e.g.*, 42 U.S. Op. Atty. Gen. 373, 380, *Exemption of Resident Aliens from Military Service Pursuant to Treaties*, *supra*. As noted above, current law requires registration by LPR's, illegals, and several other alien groups. *See* www.sss.gov (visited Nov. 12, 2013).

Beginning in the Nineteenth Century, we joined a number of countries in bilateral treaties that provide reciprocal military service immunity for our citizens and for their nationals. Fifteen such treaties are currently in force. *See* 8 C.F.R. § 315.4 (listing the countries, from Switzerland, effective 1850, to Ireland, effective 1950). The Attorney General has opined that such treaties are self-executing and the military service exemptions must be honored notwithstanding subsequent statutory enactments. 42 U.S. Op. Atty. Gen. 373, *Exemption of Resident Aliens From Military Service Pursuant to Treaties, supra* (noting that the treaties exclude military service, not draft registration, and that aliens who request service exemption would be naturalization ineligible). *See*, *e.g.*, INS Interp. Ltr. 315.5, *Treaty Aliens*, 2001 WL 1333874 (Oct. 2001). The provisions of such treaties are not uniform regarding military obligations, and typically provide little guidance on the treatment of dual nationals. *See* 8 C.F.R. § 315.4 (listing treaties). *See also Vaquez v. Attorney General*, 433 F.2d 516, 520-22 (D.C. Cir. 1970) (1853 treaty with Argentina exempted a dual citizen from induction). The immigration consequences for an alien who elects to assert his treaty exemption from military service are discussed below.

In case of war or armed hostilities, alien nationals of countries belligerent against the United States are exempt from fighting against their own countries.

In addition to the exemptions by statute and treaty, some aliens may be able to avoid military service by virtue of the international law constraints recognized in *Harisiades v. Shaughnessy*, *supra*. That is, in case of war or armed hostilities, alien nationals of countries belligerent against the United States are exempt from fighting against their own countries. *Id. But cf. Takeguma v. United States*, 156 F.2d 437 (9th Cir. 1946) (even if they became enemy aliens by their expatriation under 1940 Nationality Act, Japanese-Americans who renounced their citizenship were not exempt from military service with the United States if they were acceptable to military authorities). Some aliens may have more than one means of avoiding military service. For example, an alien may be protected from service by both statutory and treaty provisions, and may fall within one or more of the selective service categories protected against induction. The severe immigration consequences of asserting alienage-based service exemptions suggest that aliens who wish to avoid military service should rely first on their non-alienage options.

Aliens who assert their military exemption. Under our law, the avoidance of military obligations based on alienage is left largely to the individual. Aliens may elect to avoid induction or to be released from military service based on their non-citizenship. *See* INS Interp. Ltr. 315.3, *Post-World War I Conscription Statutes*, 2001 WL 1333872; MILPERSMAN 1910-127, *Separation By Reason of Convenience of the Government, Being An Alien* (July 2009). However, such an election has significant immigration consequences. INA section 315 provides:

> [A]ny alien who applies or has applied for exemption or discharge from training or service in the Armed Forces . . . on the ground that he is an alien, and is or was relieved or discharged on such ground, shall be permanently ineligible to become a citizen of the United States.

8 U.S.C. § 1426(a). *See* Goring, *In Service To America: Naturalization of Undocumented Alien Veterans*, 31 Seton Hall L. Rev. 400, 434 & n.140 (2000) (the permanent bar applies to undocumented aliens as well as LPR's). The citizenship bar attaches regardless of whether the alien executed an outdated exemption form, or the draft board failed to properly reclassify the alien's draft status. *See, e.g., Cernuda v. Neufeld*, 307 Fed. Appx. 427 (11th Cir. 2009) (outdated form); *Petition of Serano*, 651 F.2d 178 (3d Cir. 1981) (failed reclassification). Nor will subsequent peacetime military service lift the citizenship ineligibility of an alien who sought and obtained a wartime exemption. *See Matter of H–*, 9 I&N

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Dec. 106 (BIA 1960). However, the citizenship bar does not apply to aliens who seek a treaty-based exemption from our military after they have served in the armed forces of the countries of which they are nationals. 8 U.S.C. § 1426(c).

An alien ineligible to citizenship because of a military exemption is inadmissible and ineligible to receive visas to the United States. 8 U.S.C. § 1182(a)(8)(A). *Compare*, *e.g.*, *Matter of Guimaraes*, 10 I&N Dec. 529 (BIA 1964) (alien admitted as LPR in 1954 but in 1943 executed application for exemption from military service, was ineligible to citizenship and therefore inadmissible in 1960), *with Matter of Wolf*, 12 I&N Dec. 736 (BIA 1968) (granting a 212(c) waiver to an alien inadmissible because of the service exemption citizenship bar). Because they are inadmissible, such aliens also are ineligible for adjustment of status. *See* 8 U.S.C. §§ 1255(a). Under prior statutes, aliens who obtained a service exemption were ineligible for suspension of deportation. *See, e.g., Ceballos v. Shaughnessy*, 352 U.S. 599, 605 (1957). But an alien's unwillingness to serve in our Armed Forces will not provide a basis to refuse his admission. *See*, *e.g.*, 39 U.S. Op. Atty. Gen. 509, *Immigration – Admission of Pacifists*, 1940 WL 1422 (Nov. 22, 1940) (potential naturalization ineligibility no basis to deny immigrant visa).

An alien ineligible to citizenship because of a military exemption is inadmissible and ineligible to receive visas to the United States.

An alien's election to invoke his exemption from military service must be freely and intentionally made. *Compare*, *e.g.*, *Moser v. United States*, 341 U.S. 41, 45-46 (1951) (alien's application for treaty exemption did not bar naturalization where misleading circumstances precluded an intelligent election); *Petition of Rego*, 289 F.2d 174 (3d Cir. 1961) (no bar where alien was inducted notwithstanding exemption application); *with Torres v. INS*, 602 F.2d 190 (7th Cir. 1979) (bar applied where alien was erroneously classified and ordered to report, but was not inducted). *See also In re Monteiro*, 266 F. Supp. 492 (E.D. Pa. 1967) (bar applies to alien who completed and submitted an unsigned exemption application). However, infancy will not relieve an alien of the consequences of electing his military exemption. *See*, *e.g.*, *Gramaglia v. United States*, 766 F.2d 88 (2d Cir. 1985) (agreements between enlisted men and the military may not be disavowed under the infancy doctrine). *Cf. Valdez v. McGranery*, 114 F. Supp. 173 (S.D. Cal. 1953) (the statute did not include a minimum age for expatriation for service evasion, and the court declined to "amend the Act by judicial interpretation"). Aliens need not be expressly advised of the citizenship consequences of electing their military exemption. *See*, *e.g.*, *Ungo v. Beechie*, 311 F.2d 905 (9th Cir.), *cert. denied*, 373 U.S. 911 (1963); *United States v. Kenny*, 247 F.2d 139, 143 (2d Cir. 1957).

An alien's election to invoke his military exemption also must be effective. The bar to citizenship arises only where the alien gets the benefit of the bargain and is relieved from military training or duty because of his alienage. *See*, *e.g.*, *Astrup v. INS*, 402 U.S. 509 (1971) (no citizenship bar for Danish alien who was inducted despite exemption request, but then was found unfit for duty); *Matter of Mincheff*, 13 I&N Dec. 715 (BIA 1971) (no bar where alien requested exemption, but was classified I-A and ordered to report for induction). However, the bar may attach where the alien's election succeeds in delaying or deferring his military obligation. *See*, *e.g.*, *Gramaglia v. United States*, *supra*; *Columbo v. United States*, 531 F.2d 943 (9th Cir. 1975) (ineligible as receiving bargain, despite aging out of draft); *Assi v. United States*, 498 F.2d 1064 (5th Cir. 1974) (ineligible as receiving bargain, despite no longer neutral when native country Syria became co-belligerent). *See also Villamar v. United States*, 651 F.2d 116 (2d Cir. 1981) (alien exempted from service as citizen of neutral country, but reclassified 1-A when his country entered World War II was not barred from naturalization).

Aliens who evade or avoid their military obligations. An alien also may face immigration consequences when, without invoking a statutory or treaty exemption, he avoids his military obligation by leaving or remaining outside the United States. INA section 212(a)(8)(B) (entitled "draft evaders") provides

> Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or . . . national emergency is inadmissible ....

8 U.S.C. § 1182(a)(8)(B). The provision is inapplicable to aliens who departed and seek to return as non-immigrants. *Id.* But an alien's election to "convert" from immigrant to non-immigrant status will not necessarily avoid classification as a draft evader. *See*, *e.g.*, *Matter of Riva*, 13 I&N Dec. 268 (BIA 1969) (LPR who left after being ordered to report for induction was inadmissible under INA 212(a)(22), despite returning on a

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NIV student visa). *See also Matter of Martin-Arencibia*, 13 I&N Dec. 166 (BIA 1969), ("ineligible to citizenship" as defined in INA section 101(a)(19) means/is confined to aliens who are "draft evaders, avoiders, or deserters").

Avoidance of military service by elective exile once had consequences for citizens as well as aliens. Early cases found that native-born citizens could expatriate themselves by leaving or remaining outside the United States to avoid service. *See*, *e.g.*, *Valdez v. McGranery*, *supra* (under 1940 Nationality Act, native-born citizen whose parents took him to Mexico at age 5 and forbade him to register, was expatriated by remaining outside United States to avoid service). The Attorney General similarly concluded that youth does not preclude expatriation. *Matter of A– H–*, 2 I&N Dec. 390 (Atty. Gen. 1946) (under 1940 Nationality Act, a native-born citizen can forfeit his citizenship prior to his twenty-first birthday by departing the United States during war or emergency to evade or avoid military service). *See also Matter of Jolley*, 13 I&N Dec. 543 (BIA 1970), 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971) (native-born citizen who voluntarily renounced his citizenship abroad was excludable as a person who departed from or remained outside the United States to avoid his wartime military obligations).

Elective exile to avoid military service is no longer sufficient to expatriate. The INA still declares "any" draft evader to be inadmissible, but no longer includes among the grounds for expatriation the act of departing or remaining outside the United States to avoid service. *See* 8 U.S.C. §§ 1182(a)(8)(B), 1481(a); Pub. L. No. 94-412, § 501(a), 90 Stat. 1258 (1976) (striking this ground of expatriation). Both Congress and the courts have concluded that citizens cannot forfeit their nationality unless they commit the expatriating act with the intention of relinquishing their citizenship. *See* Pub. L. No. 99 -653, § 18(a), 100 Stat. 3658 (1986) (adding to 8 U.S.C. § 1481 (a), "voluntarily performing . . . acts with the intention of relinquishing United States nationality"); *Afroyim v. Rusk*, 387 U.S. 253 (1967) (under the Fourteenth Amendment Congress cannot expatriate a citizen without his or her consent and intent). *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (provisions of 1940 Nationality Act expatriating citizens who left or remained outside United States to avoid wartime military service violate due process guarantees of Fifth and Sixth Amendments).

Citizens and aliens alike have benefitted by the several presidential pardons of persons who left the United States to avoid military service.

Citizens and aliens alike have benefitted by the several presidential pardons of persons who left the United States to avoid military service. For example, President Carter pardoned everyone "who may have committed any offense between August 4, 1964, and March 28, 1973, in violation of the Military Selective Service Act." 13 Weekly Comp. Pres. Doc. 90 (January 21, 1977). While the pardon on its face did not extend to aliens who departed or remained outside the United States to avoid or evade military service (and thereby remove the sanction of inadmissibility), the Attorney General concluded that it should be given such an effect. 1 U.S. Op. Off. Legal Counsel 34, *Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service*, 1977 WL 18017 (March 24, 1977). *See*, *e.g.*, *Matter of Rahman*, 16 I&N Dec. 579 (BIA 1978). Similar pardons had been granted following both World Wars and the Korean War. *See*, *e.g.*, Proclamation 2068, *Christmas Amnesty Proclamation for Certain Wartime Offenders*, 48 Stat. 1725 (Roosevelt, Dec. 23, 1933); Proclamation 2762, *Granting Pardon to Certain Persons Convicted of Violating the Selective Training and Service Act*, 3 C.F.R. 1943-1948 Comp., p. 145 (Truman, Dec. 23, 1947). The differing terms of such acts of grace might suggest varying immigration consequences, but it seems likely that all persons within their terms would be forgiven their inadmissibility. *See* 1 U.S. Op. Off. Legal Counsel, *Effect of Presidential Pardon*, *supra* (applying the *Ex Parte Garland*, 71 U.S. 333 (1866), penalty-versus-qualification analysis).

Unsurprisingly, our law has been particularly harsh on deserters. *Cf.* Norton-Taylor, *Executed WWI Soldiers To Be Given Pardons* (306 British soldiers shot for desertion and cowardice), August 15, 2006, available at www.theguardian.com/uk/2006/Aug/1 (visited Nov. 12, 2013). The original INA expatriated citizens who were convicted by court-martial of "deserting the military, air, or naval forces of the United States in time of war." Act of June 27, 1952, ch. 477, § 349(a)(8), 66 Stat. 268. *See*, *e.g.*, *In re B– M–*, 6 I&N Dec. 756 (BIA 1955). Citizen deserters could redeem themselves through honorable service after restoration to active duty or reenlistment. INA sec. 349(a)(8), *supra*. *Cf.* Act of July 29, 1941, ch. 325, 55 Stat. 606 (deserters may be enlisted in Secretary's discretion). The Supreme Court invalidated the expatriation provision as punishment forbidden by the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86 (1958). *See* Act of Oct. 10, 1978, Pub. L. No. 95-432 (repealing former INA § 349

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(a)(8)). However, for alien deserters, the INA still declares them to be

> permanently ineligible to become a citizen of the United States and . . . forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

8 U.S.C. § 1425. *Accord* Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487. *Cf. Ex Parte Garland*, *supra*.

Alien deserters who are unconditionally pardoned by the President are relieved from the naturalization bar. *See, e.g.*, 31 U.S. Op. Atty. Gen. 225, *Naval Service - Desertion - Pardon*, 1918 WL 614 (Feb. 15, 1918). Such pardons may permit an alien to re-enter military service. *Id*. However, presidential forgiveness of evasion of military service does not expiate the sin of desertion. *See Matter of Muller*, 16 I&N Dec. 637 (BIA 1978) (President Carter's proclamation pardoning persons who violated the Selective Service Act did not relieve an alien convicted of desertion). *See also* Bettwy, *Assisting Soldiers in Immigration Matters*, 1992 Army Law 3, 10-11 (April 1992). However, the Board has concluded that neither desertion nor absence without leave is a crime involving moral turpitude. *Matter of Garza-Garcia*, 2007 WL 3301468 (BIA 2007). *Cf. In re A– and P–*, 2 I&N Dec. 293 (Atty. Gen. 1945) (alien deserters from Mexican Navy granted voluntary departure).

***Part II to be continued in the next issue of the Immigration Litigation Bulletin.**

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The views herein are purely personal, and the author does not speak for the Department of Justice or the Office of Immigration Litigation.

Gang membership not a particular social group for asylum purposes

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tion at the hands of rival gangs and police authorities.

The IJ and the BIA rejected petitioner's argument that as a former member of the gang, he was a member of a protected social group eligible for asylum or withholding of removal. The BIA relied on *Matter of E–A–G–*, 24 I&N Dec. 591 (BIA 2008), where it held that individuals erroneously perceived as gang members cannot constitute a "particular social group" under the INA because Congress could not have intended to offer refugee status based on an alien's membership in a violent criminal street gang in this country.

The First Circuit reviewed the BIA's decision *de novo* explaining that the BIA had rejected the proffered social group on legal grounds. The court then applied the two-step analysis under *Chevron* noting that the question implicated the agency's construction of a statute it administers.

The court first found that the INA does not define the term "particular social group" and that there was no guidance in the legislative history as to its meaning. The court also pointed out that the United States along with other countries "has had to struggle to give meaning to a term that has little pedigree of its own." *Quoting Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013. The court noted the BIA's evolving interpretation of the term, including the requirements of "social visibility," and particularity. However, the court rejected petitioner's contention that former gang members fell squarely within the BIA's definition because the BIA had rejected the proffered group on other grounds.

Second the court found that he BIA had "reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger." The court further explained that "[s]uch recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would moreover, offer an incentive for aliens to join gangs here as a path to legal status."

The court expressly rejected the Seventh Circuit's contrary interpretation in *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (holding that ex-gang member are a member of a protected social group), noting that "that approach would render largely superfluous the term 'social group' since, by its reasoning, anyone persecuted for any reason (other than perhaps a personal grudge) might be said to be in such a group." The court also noted that the Sixth Circuit in *Urbina-Mejia v. Holder*, 597 F.3 360 (6th Cir. 2010), although it had reversed the BIA on this issue, it had not addressed the BIA's reasoning that recognizing gang members as a particular social group would be inconsistent with the underlying statutory policies.

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FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

The Supreme Court heard argument On December 10, 2013, based on the government's petition for certiorari challenging the 2012 *en banc* 9th Circuit decision in ***Cuellar de Osorio v. Mayorka***s, 695 F.3d 1003, which held that the Child Status Protection Act extends priority date retention and automatic conversion benefits to aged-out derivative beneficiaries of all family visa petitions. The government argued that INA § 203(h)(3) does not unambiguously grant relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but "age out" of qualification by the time the visa becomes available, and that the BIA reasonably interpreted INA § 203(h)(3).

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Moral Turpitude – Assault with a Deadly Weapon

On December 10, 2013, an *en banc* panel of the Ninth Circuit heard argument on rehearing of its published decision in ***Ceron v. Holder***, 712 F.3d 426, which held that a California conviction for assault with deadly weapon was crime involving moral turpitude, and the alien's conviction was a felony. *En banc* rehearing will address whether assault with a deadly weapon, in violation of California Penal Code Section 245(a)(1), is a categorical crime involving moral turpitude, and whether a sentence of imprisonment for a California misdemeanor conviction can exceed six months.

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BIA Standard of Review

Oral argument on rehearing was heard before a panel of the Ninth Circuit on September 9, 2013, in ***Izquierdo v. Holder,*** 06-74629, addressing the question of whether the Board the engaged in impermissible fact-finding when it ruled that the alien witnessed a human rights crime and made no effort to prevent it.

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Standard of Review Nationality Rulings

The Ninth Circuit ordered the government to respond to the alien's petition for *en banc* rehearing challenging ***Mondaca-Vega v. Holder,*** 718 F.3d 1075, which held that prior case law requiring de novo review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same. The government response was filed August 13, 2013.

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Consular Nonreviewability

The government filed a petition for *en banc* rehearing challenging the 9th Circuit's decision in ***Din v. Kerry***, 718 F.3d 856, which reversed the district court's dismissal of the petition under the doctrine of consular reviewability, ruling that the government had not put forth a facially legitimate reason for the visa denial. The government rehearing petition argues that the panel majority's holdings constitute a significant violation of the separation of powers by encroaching on decisions entrusted solely to the political branches, and undermines the political branches' ability to protect sensitive national security information while excluding from admission aliens connected with terrorist activity.

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Convictions – Modified Categorical Approach

On September 10, 2013, the 9th Circuit withdrew its August 15, 2012 opinion in ***Aguilar-Turcios v. Holder***, 691 F.3d 1025, and stated that a new opinion would be forthcoming and the government's rehearing petition is moot. The prior decision 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 permit the agency to address other grounds for removal on remand. In a supplemental brief on July 11, 2013, the government argued that the Supreme Court's ruling in *Descamps v. United States* did not alter the need for remand to the BIA.

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Ordinary Remand Rule

On September 12, 2013, the 9th Circuit withdrew its March 22, 2013 opinion in ***Amponsah v. Holder***, 709 F.3d 1318, requested reports on the status of the BIA's present case reconsidering of the rule asserted in *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and stated that the government's rehearing petition is moot. The rehearing petition had argued that the panel violated the ordinary remand rule when it rejected as unreasonable under *Chevron* step-2 the BIA's blanket rule against recognizing state *nunc pro tunc* adoption decrees entered after the alien's 16th birthday.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

That Threats by a Family Member Resulting from Intra-Family Conflict Is Not Persecution on Account of a Protected Ground

In *Muyubisnay v. Holder*, 734 F.3d 66 (1st Cir. 2013)(Lynch, Torruella, Stearns (by designation)), the First Circuit held that the BIA correctly determined that threats from a family member resulting from an intra-family custody dispute did not constitute persecution on account of a protected ground.

The petitioner, a citizen of Ecuador, entered the United States illegally in 2001, and was placed in removal proceedings in November of 2008, following a routine traffic stop. Petitioner applied for withholding of removal and CAT protection claiming that he feared of returning to Ecuador because, as a member of an indigenous ethnic group, he has severely limited economic opportunities in his native country. The IJ, while finding that petitioner had shown instances of discrimination by Ecuadorian authorities against indigenous peoples, nevertheless found that his unfavorable financial prospects did not constitute "persecution" under the INA. The IJ further found that petitioner had not submitted credible evidence that he faced torture as defined by the CAT. On appeal, the BIA upheld the IJ's denial of relief and protection.

Subsequently, petitioner filed several motions with the BIA claiming, inter alia, ineffective assistance of counsel and also that his family circumstances and country conditions in Ecuador had worsened since his 2010 hearing. Specifically, petitioner claimed that his parents had become embroiled in a custody dispute with his brother-in-law who had recently been released from jail and was now issuing death threats against his family. According to petitioner, the Ecuadorian police, because of his family's indigenous ethnicity, refused to protect them from the brother-in-law.

The court a held that, even if the Ecuadoran government was unwilling to protect petitioner from the threats because of his indigenous ethnicity, he had not established persecution on account of a protected ground because the threats must be motivated by a protected basis. Lastly, the court concluded that petitioner's former counsel did not render ineffective assistance by failing to present expert testimony regarding discrimination against indigenous people because such testimony would not likely change the result in the case. A petitioner bringing an ineffective assistance claim "must establish both a deficient performance by counsel and 'a reasonable probability of prejudice resulting from [his] former representation,'" said the court.

A petitioner bringing an ineffective assistance claim "must establish both a deficient performance by counsel and 'a reasonable probability of prejudice resulting from [his] former representation.'"

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First Circuit Holds that Administrative Exhaustion is Satisfied When an Issue Is Addressed on Its Merits by the Agency, Even if Not Raised by the Alien

In *Mazariegos-Paiz v. Holder*, 734 F.3d 57 (1st Cir. 2013) (Torruella, *Selya*, Howard), the First Circuit held, as a matter of first impression, that an issue is exhausted when it receives "full-dress consideration on the merits" by the BIA, regardless of whether the issue was raised by the government, the alien, or the agency pursuant to its *sua sponte* authority.

In this case, the petitioner, a Guatemalan citizen, sought for asylum, withholding, and CAT protection based on both his political opinion and his membership in a particular social group. Petitioner's case was then consolidated with that of his cousin, Deny, who made similar claims. At the hearing, Deny took the lead and testified in support of his application. Deny's attorney sought a continuance to submit supporting documentation but the IJ denied the request and ultimately denied his claims for lack of credibility. In his brief to the BIA, the petitioner focused solely on the IJ's (allegedly erroneous) decision to consolidate the two cases. In contrast, Deny's brief challenged both the adverse credibility determination and the refusal to continue the hearing. The BIA consolidated the two appeals, adopted and affirmed the IJ's adverse credibility determination, and upheld the other disputed rulings. The BIA made no distinction as to who had raised which claims but, rather, proceeded as if each man had advanced every claim.

Before the First Circuit petitioner challenged the adverse credibility determination and the denial of a continuance. However, because petitioner had not raised these claims before the BIA, the government argued that petitioner had failed to exhaust his administrative remedies. The court disagreed. The court explained that ordinarily "an alien who neglects to present an issue to the BIA fails to exhaust his administrative remedies with respect to that issue and, thus, places it beyond our jurisdictional reach." However, "if the BIA deems an issue sufficiently presented to warrant full-dress consideration on the merits, a court should not second-guess that determination but, rather, should agree that such consideration exhausts the issue." Here, since the "undertook a developed discussion of the merits-related issues" raised by the petitioner the court found that it had jurisdiction to consider those issues.

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On the merits, the court upheld the adverse credibility determination because "the IJ made a series of specific factual findings that, taken together, cogently support her adverse credibility determination." The court also found that the IJ did not abuse discretion in denying a continuance because petitioner offered no convincing reason for his failure, over a period of more than a year, to procure corroborating evidence.

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■ **First Circuit Holds the REAL ID Act Permits Consideration of Alien's Unsigned Statement in Credibility Determination**

In ***Martinez v. Holder***, __ F.3d. __, 2013 WL 5878963 (1st Cir. November 4, 2013)(Howard, *Ripple* (by designation), Thompson), the First Circuit held that the BIA properly weighed the alien's unsigned Form I-877, Record of Sworn Statement, in reaching its adverse credibility determination where REAL ID Act permits a fact-finder to weigh even informal statements. The court ruled that the BIA's reliance on the Form I-877 was not excessive as the interview was conducted with the petitioner under oath and with the assistance of an interpreter, the immigration officer who conducted the interview signed the form, and the petitioner, who claimed eligibility for Convention Against Torture protection based on alleged gang threats in Guatemala, told a Border Patrol agent that he entered the United States to earn income and returned voluntarily to Guatemala in 2001.

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■ **First Circuit Holds that Accrual of Physical Presence Ends Upon Service of Notice to Appear**

In ***Soto v. Holder***, 736 F.3d 1009 (1st Cir. 2013) (Lynch, *Stahl*, Howard), the First Circuit held that the accrual of physical presence for purpose of cancellation of removal ends upon service of the Notice to Appear. The court rejected the claims that, notwithstanding service of the Notice to Appear, physical presence continues to accrue until the Notice is filed with the immigration court or that it accrues until the filing of the application for cancellation of removal. "Neither argument has any legal basis. The statute unambiguously cuts off the term of continuous presence for the purposes of § 240A at the date of the service of the NTA, regardless of when the removal proceedings actually begin," explained the court.

"The statute unambiguously cuts off the term of continuous presence for the purposes of § 240A at the date of the service of the NTA, regardless of when the removal proceedings actually begin."

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■ **First Circuit Holds that It Lacks Jurisdiction over Legal Claim Where BIA's Alternative Discretionary Finding Forecloses Relief**

In ***Ortega v. Holder***, 736 F.3d 637 (1st Cir. 2013) (Lynch, Selya, *Hillman* (by designation)), the First Circuit held that it lacked jurisdiction to consider whether the petitioner's conviction was an aggravated felony, where the BIA also denied cancellation of removal as a discretionary matter.

The petitioner, a citizen of the Dominican Republic, had been admitted to the United States as an LPR in 1969. In June of 2008, petitioner pleaded *nolo contendere* in a Rhode Island state court to possession of a controlled substance. In October of 2009, petitioner once more pleaded *nolo contendere* to possession of a controlled substance. When placed in removal proceedings for a controlled substance violation, petitioner conceded her removability as charged, but applied for cancellation of removal. The IJ initially granted cancellation, but ultimately the BIA, in a split opinion, found that petitioner's second state conviction for possession of a controlled substance could be seen to correspond to the federal offense of "recidivist possession" under 21 U.S.C. § 844(a), an aggravated felony rendering an applicant statutorily ineligible for cancellation of removal. Alternatively, the BIA also determined that petitioner did not merit relief in the exercise of its discretion.

The court held that the aggravated felony issue did not have independent legal significance because the petitioner was not found removable as an aggravated felon. Rather, the BIA concluded that the evidence indicated that a bar may apply and that the petitioner did not meet her burden of proving by a preponderance of the evidence that she was not an aggravated felon. "Because we cannot overturn the BIA's discretionary denial of relief regardless of our legal conclusions, any opinion we reach on [petitioner's] statutory or procedural claims would be purely advisory and beyond our authority under Article III," said the court.

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■ **First Circuit Holds It Lacks Jurisdiction to Review Denial of Motion to Reconsider Where Underlying Motion Sought *Sua Sponte* Reopening**

In ***Charuc v. Holder***, 737 F.3d 113 (1st Cir. 2013) (*Selya*, Lynch, Hillman (by designation)), the First Circuit held that it lacks jurisdiction to review the denial of a motion to reconsider where the only matter under reconsideration was the BIA's prior, unreviewable denial of *sua sponte* reopening. The court ruled that, absent special circumstances, "we think it virtually unarguable that when an appellate court lacks jurisdiction to review an

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agency's denial of particular relief, it must also lack jurisdiction to review the denial of a motion to reconsider the failure to grant that relief."

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SECOND CIRCUIT

■ Petitioner's Continuous Physical Presence Claim Was Supported by Substantial Evidence

In ***Hernandez v. Holder***, 736 F.3d 234 (2d Cir. 2013) (Katzmann, Kearse, *Gleeson* (by designation)), the Second Circuit held that the BIA's erred by determining that substantial evidence did not support the BIA's finding that petitioner failed to establish continuous physical presence in the United States for ten years for purpose of cancellation. The court determined that the applicant's testimony that he entered United States in July of 1996 in combination with the March 1998 birth certificate of his United States citizen child, constituted strong circumstantial evidence that applicant for cancellation of removal was present in the country about nine months prior to March 1998, *i.e.*, in June of 1997. Accordingly, the court remanded the case to the BIA to permit petitioner to present the new evidence of hardship in an attempt to reopen his case.

The motion to reopen regulation "does not mandate that any affidavit be submitted, let alone require one specifically from the petitioner."

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■ Second Circuit Holds BIA Abused Its Discretion In Denying Motion to Reopen

In ***Indradjaja v. Holder***, __ F.3d __, 2013 WL 6410991 (*Katzmann*, Jacobs, Carney) (2d Cir. December 9, 2013), the Second Circuit held that the BIA abused its discretion by denying an Indonesian asylum applicant's motion to reopen seeking to provide "new and previously unavailable evidence" of "dramatically increased levels of violence and persecution against the Chinese Christians in Indonesia."

The BIA had rejected petitioner's evidentiary submissions because she had not submitted a sworn statement in support of her motion and because her expert witness had not provided copies of the sources on which he relied. The court concluded that the BIA acted arbitrarily and capriciously in attaching consequences to these previously unarticulated requirements. The court explained that the pertinent regulation "requires only that '[a] motion to reopen . . . be supported by affidavits *or other evidentiary material*.' 8 C.F.R. § 1003.2(c)(1) (emphasis added). It does not mandate that any affidavit be submitted, let alone require one specifically from the petitioner."

The court also faulted the BIA for requiring that petitioner's expert provide copies of the primary sources on which he relied. The court explained that the BIA's treatment of the expert's affidavit was "inconsistent with the way that expert testimony is generally treated. *See* Fed. R. Evid. 703 (permitting an expert opinion to be based on facts or data that experts in the field would 'reasonably rely on . . . in forming an opinion on the subject' without regard to the admissibility of the underlying material and without requiring that the material be submitted)." Accordingly, the court remanded the case to the BIA,

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FOURTH CIRCUIT

■ Fourth Circuit Holds the *Fleuti* Doctrine Superseded by IIRIRA

In ***Othi v. Holder***, 734 F.3d 259 (4th Cir. 2013) (Niemeyer, *Agee*, Hamilton), the Fourth Circuit held that, by its plain language, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the INA, codified at INA §§ 101(a)(13)(A) and (C), superseded the *Fleuti* doctrine such that a lawful permanent resident who has committed an offense referenced at § 101(a)(13)(C)(v) is deemed to be seeking admission into the United States regardless of the innocence, casualness, or brevity of his or her trip abroad.

The petitioner, a native and citizen of India, gained LPR status when he entered the United States in 1983. In 1995, petitioner was arrested and convicted of theft. Two years later, he was arrested and convicted of possession of cannabis. And in 1999, petitioner was found guilty of second-degree murder, receiving a 12–year prison sentence. Petitioner travelled to India in early 2011 to get married, and returned to India in December 2011 to visit his new wife. On January 11, 2012, after 17 days outside the country, petitioner returned to the United States. Upon inspection at the airport of entry, a border agent referred petitioner for secondary inspection when his name appeared on a watch list. Border agents obtained his criminal record during that secondary inspection, and petitioner admitted his prior arrests and convictions.

On January 17, 2012, DHS initiated removal proceedings against petitioner on the basis of his prior conviction for a CIMT, his prior conviction under a law relating to controlled substances, and his prior convictions of two or more crimes having

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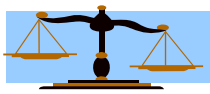

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aggregate sentences of five years or more. Petitioner argued that he was not an arriving alien because he never intended his trip abroad to meaningfully interrupt his permanent residence, relying on *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). The IJ, and on appeal the BIA, determined that petitioner was removable as an arriving alien and rejected his *Fleuti*-based argument.

The government's evidence was sufficient to trigger petitioner's burden "to show by a preponderance of the evidence that the persecutor bar does not apply."

In finding the *Fleuti* doctrine did not survive IIRIRA's enactment, the court explained that "Congress has spoken clearly and without reservation" when it enacted §101(a)(13)(C), and therefore no further analysis was required. "The plain meaning of the statute settles the issue at controversy," said the court. Moreover, the court said that it would have reached the same result even if it "did not find the statute's text to be plain, as principles of administrative deference under *Chevron,"* require the court to defer to the BIA's conclusion, see in *Matter of Collado–Munoz,* 21 I &N Dec. 1061 (BIA 1998), that *Fleuti* had been superseded.

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■ **Applicant for Cancellation Failed to Rebut Evidence Indicating Persecutor Bar Applied with Credible Testimony or Other Evidence**

In ***Pastora v. Holder***, __ F.3d __, 2013 WL 6487378 (Niemeyer, *Wynn*, Floyd) (4th Cir. On December 11, 2013), the Fourth Circuit held that the evidence in the record was sufficient to indicate that the persecutor bar applied to the petitioner's cancellation application under NACARA, and triggered the petitioner's burden to show by a preponderance of evidence that the bar should not apply.

The petitioner, a citizen of El Salvador, had indicated in his asylum application that he had "served in the Civil Patrol unit" as commandant in his hometown. The BIA determined that petitioner's admitted participation in the civil patrol, coupled with the government's evidence of human rights violations that occurred during the time and in the place that petitioner patrolled, was sufficient to trigger petitioner's burden "to show by a preponderance of the evidence that the persecutor bar does not apply." The BIA also noted that petitioner had not rebutted the application of the persecutor bar with credible testimony.

The court upheld the BIA's finding, explaining that the "totality of the specific evidence in this case was sufficient to indicate that the persecutor bar applied, requiring [petitioner] to prove by a preponderance of the evidence that he did not assist or otherwise participate in persecution." The court also held that the petitioner's multiple inconsistencies were sufficient to support an adverse credibility determination and that he, therefore, did not meet his burden of showing the persecutor bar did not apply.

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■ **Adverse Credibility Determination Against Asylum Applicant Supported by Substantial Evidence**

In ***Lin v. Holder,*** 736 F.3d 343 (4th Cir. 2013) (*Gregory*, Thacker, Hamilton), the Fourth Circuit held that, under the facts and circumstances of the case, petitioner's inconsistencies and omissions between her Border Patrol interview and her later testimony before the IJ were sufficient to support the BIA's adverse credibility determination.

However, the court expressed reluctance toward relying extensively on statements in the Border Patrol interviews, suggesting that reliance on such interviews would not be appropriate in all cases. "Most so-called 'airport interviews' are brief affairs given in the hours immediately following long and often dangerous journeys into the United States. These circumstances caution against basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of statements made in such environments," noted the court.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds that Administrative Removal under INA § 238(b) Applies to All Aliens Convicted of an Aggravated Felony Who Are Not Admitted for Permanent Residence**

In ***Valdiviez v. Holder***, __ F.3d __, 2013 WL 6230973 (5th Cir. December 2, 2013) (Jolly, DeMoss, Southwick) (*per curiam*) (Jolly, special concurrence), the Fifth Circuit granted the petitioner's petition for rehearing and held: (1) that the exhaustion requirement did not preclude judicial review of the petitioner's argument that administrative removal should not apply to persons, like him, who unlawfully entered the United States; and (2) that all qualifying aliens may be subject to administrative removal even if they were never admitted or paroled into this country. The court also denied the petitioner's motion for sanctions because there was no evidence of government misconduct

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or abuse in connection with his removal to Mexico.

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■ Fifth Circuit Holds that Criminal Conviction Is Not Required for Alien to Be Removable as Drug Trafficker

In ***Cuevas v. Holder***, __ F.3d __, 2013 WL 6503359 (5th Cir. December 10, 2013) (*Jolly*, Smith, Clement), the Fifth Circuit held that based on the plain reading of the statute, an alien can be found inadmissible as a drug trafficker under INA § 212(a)(2)(C) even when not convicted of a drug trafficking crime.

The petitioner, a citizen of Mexico and a lawful permanent resident of the United States, was denied admission while seeking to reenter the United States from Mexico in 2005 because when his car was searched, nearly 24 kilograms of cocaine were found concealed in the car's rear panel. Based on this finding, DHS charged Cuevas with removability under INA § 212(a)(2)(C) on the basis that there was reason to believe that petitioner was a drug trafficker. The IJ found petitioner inadmissible, and therefore removable as charged. Following petitioner's appeal, the BIA remanded the case, instructing the IJ to determine whether the DHS had proven by clear, unequivocal, and convincing evidence that there exists reason to believe that petitioner was a drug trafficker. On remand, the IJ concluded that DHS had shown sufficiently that there was reason to believe petitioner was engaged in illicit drug trafficking. On the second appeal, the BIA concluded that DHS had met its burden of proving a reason to believe that Cuevas was a drug trafficker and dismissed the appeal.

Deciding an issue of first impression, the Fifth Circuit concluded that a conviction is not required for DHS to have a reason to believe that an alien is a drug trafficker and therefore inadmissible under § 212(a)(2)(C). The court then noted that "reason to believe necessarily evokes a lower standard than the beyond a reasonable doubt required to obtain a criminal conviction." However, the courts that have addressed this issue have applied two different standards. The First Circuit and the BIA have intimated that this standard is equivalent to the probable cause standard. The Ninth Circuit has required a showing greater than mere probable cause. *See Alarcon–Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000) (holding that a reason to believe must be based on reasonable, substantial, and probative evidence).

The Fifth Circuit concluded that a conviction is not required for DHS to have a reason to believe that an alien is a drug trafficker.

The court declined to adopt an evidentiary standard, finding instead that because the evidence in petitioner's case satisfied the "reasonable, substantial, and probative evidence" standard - the more stringent of the two potential standards - it found it unnecessary to decide whether a probable cause standard would support the DHS's reason to believe an alien is a drug trafficker.

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SIXTH CIRCUIT

■ Sixth Circuit Affirms Qualified Immunity Dismissal of *Bivens* Suit Stemming from Issuance of ICE Detainer

In ***Ortega v. U.S. Immigration and Customs Enforcement***, 737 F.3d 435 (6th Cir. 2013) (*Sutton,* Black, Keith), the Sixth Circuit denied the appeal of a U.S. citizen challenging the dismissal of his suit against two officers of the Louisville, Kentucky, Metro Department of Corrections and against an individual Immigration and Customs Enforcement ("ICE") agent. The suit asserted jurisdiction against the ICE agent under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). According to the complaint, the corrections officers unlawfully transferred the citizen from home confinement to incarceration based on an immigration detainer the ICE agent issued. The district court had found that the doctrine of qualified immunity protected the defendants from litigation. The Sixth Circuit did not address the ultimate question of whether a home confinee should be considered a prisoner without a liberty interest in avoiding a transfer to prison or a probationer/parolee with such a liberty interest. Instead, the court determined that – even if such a liberty interest existed – such a right was not "clearly established." Accordingly, it found, the district court did not err in dismissing the claims under Federal Rule of Civil Procedure 12(b)(6) based on the doctrine of qualified immunity.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds that It Lacks Jurisdiction to Review Alien's Request for *Sua Sponte* Reopening

In ***Shah v. Holder***, 736 F.3d 1125 (7th Cir. 2013) (Bauer, Posner, *Easterbrook*), the Seventh Circuit reaffirmed that it has no jurisdiction to review the BIA's refusal to reopen an alien's proceedings *sua sponte* in the absence of a legal or constitu-

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tional challenge to the decision. "If the Board said something like: 'We would have reopened this proceeding, except that the alien wrote an oped piece that critiques immigration policy, so we have decided not to help him', that violation of the First Amendment could be reviewed under the proviso for pure questions of law," said the court.

Further, the court recognized that the BIA may consider an alien's departure from the United States as a discretionary factor in deciding whether to reopen proceedings. Finally, the court determined that the BIA is not required to reopen proceedings to apply a new decision retroactively to a closed case.

"[W]e cannot write a party's brief, pronounce ourselves convinced by it, and so rule in the party's favor. That's not how an adversarial system of adjudication works."

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■ **Seventh Circuit Holds Alien Not Prejudiced by IJ's Failure to Advise in Detail about Hardship Requirement, and BIA Properly Considered Only New Hardship Evidence with Motion to Reopen**

In ***Reyes-Cornejo v. Holder***, 734 F.3d 636 (7th Cir. 2013) (*Ripple*, Rovner, Williams), the Seventh Circuit held that petitioner, who was *pro se* at the time of the removal hearing, did not establish that the IJ improperly failed to adequately advise him of the "extreme hardship" requirement under INA § 212(h) waiver of inadmissibility and that, regardless, the petitioner suffered no prejudice where the IJ would not have favorably exercised her discretion because of the petitioner's extensive criminal record. The court also held that the BIA did not abuse its discretion in denying the petitioner's motion to reopen where it "simply needed to determine if the new evidence supplied by" the petitioner changed its original hardship analysis, and it was not required to consider again all the factors listed in *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999).

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■ **Seventh Circuit Holds that Asylum Applicant Failed to Establish Well-Founded Fear of Persecution Based on Violation of China's Family Planning Policy**

In ***Chen v. Holder***, __ F.3d __, 2013 WL 6482542 (7th Cir. December 11, 2013) (Bauer, *Posner*, Easterbrook), the Seventh Circuit held that the petitioner failed to meet her burden of proving a well-founded fear of forced sterilization where she did not present evidence regarding her and her husband's financial situation, particularly their ability to avoid the consequences of not registering a child as a permanent resident or to pay the social compensation fee associated with the child's birth.

The court chided petitioner's counsel for the inadequacy of the appeal brief, noting that it consisted "almost entirely of verbatim quotations either from the administrative record or from previous decisions of this court." "[W]e cannot write a party's brief, pronounce ourselves convinced by it, and so rule in the party's favor. That's not how an adversarial system of adjudication works. Unlike the inquisitorial systems of Continental Europe, Japan, and elsewhere, our system is heavily dependent on the parties' lawyers for evidence, research, and analysis," said the court. On the other hand, the court found the government's brief to be "refreshingly candid in acknowledging deficiencies in the agency's analysis of China's one-child policy."

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Harassment and Brief Abduction of Ethnic-Chinese Christian in Indonesia Did Not Constitute Persecution**

In ***Supangat v. Holder***, 735 F.3d 792 (8th Cir. 2013) (Riley, Bright, Bye) (*per curiam*), the Eighth Circuit upheld the BIA's findings that the petitioner's treatment in Indonesia, where he was harassed due to his Chinese ethnicity and his Christianity, and once abducted and threatened with a knife, did not rise to the level of persecution, citing "other cases of this nature, including cases involving captivity." *See Wijono v. Gonzales,* 439 F.3d 868, 872 (8th Cir. 2006) (holding that "low-level intimidation and harassment alone do not rise to the level of persecution, nor does harm arising from general conditions such as anarchy, civil war, or mob violence ordinarily support a claim of persecution.")

The court further held that the petitioner did not demonstrate a well-founded fear of persecution given evidence that the Indonesian government now promotes racial and ethnic tolerance and such related violence has declined.

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■ **Eighth Circuit Holds that Warrantless Entry into Home is Not Necessarily an Egregious Fourth Amendment Violation**

In ***Lopez-Fernandez v. Holder***, 735 F.3d 1043 (8th Cir. 2013) (*Shepherd*, Murphy, Melloy), the Eighth Circuit held that a petitioner's

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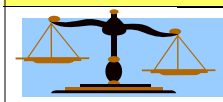

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bare allegations that Immigration and Customs Enforcement agents entered her home at 7:00 a.m., without a search warrant or consent, were insufficient to establish a *prima facie* case that the she had suffered an "egregious" violation of her Fourth Amendment rights. The court specifically noted that it was not necessary to decide "whether to join other circuits in holding that an egregious Fourth Amendment violation affirmatively compels exclusion in a removal proceeding."

Therefore, the court held that the immigration judge had properly declined to conduct an evidentiary hearing to determine whether the evidence obtained during that search should have been suppressed.

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■ Eighth Circuit Holds Substantial Evidence Did Not Support BIA's Adverse Credibility Determination

In ***Zhang v. Holder***, 737 F.3d 501 (8th Cir. 2013) (Murphy, Melloy, *Shepherd*), the Eighth Circuit held that the BIA erred by adopting the IJ's adverse credibility determination, concluding that the determination was not supported by the record, and that the IJ ignored relevant evidence and engaged in impermissible speculation.

The petitioner had testified that after she bore a son in 1991, China's family-planning officials forced her to have an intrauterine device (IUD) implanted to prevent further pregnancy. Petitioner eventually had the device removed and discontinued the required IUD check-ups. She testified that she became pregnant in February of 1993 and that her husband, Lin, fled from China on April 3, 1993 for fear that the state would compel his sterilization. On the night of April 15, 1993, government family-planning officials removed petitioner from her home, arrested her for violating the one-child policy, and forced her to undergo an abortion at the Jin Feng Hospital in Fujian Province. Petitioner testified that after the procedure, she requested evidence of the forced abortion and a nurse provided her with a photograph of the aborted fetus.

The court found "unsupported by the record and completely speculative" the IJ's finding that it was implausible petitioner would request a photograph of the aborted fetus.

The IJ did not find petitioner credible, questioning among other evidence, the photograph of the aborted fetus submitted by the petitioner. The IJ also noted that petitioner submitted an original letter allegedly written by her sister to the IJ dated November 18, 2009, that did not show fold lines to be expected if it was indeed mailed in the accompanying envelope. The BIA affirmed the IJ's adverse credibility determination and agreed that petitioner failed to prove past persecution.

The court found that the IJ's adverse credibility determination was inadequately explained and unsupported by the record. In particular, the court found "unsupported by the record and completely speculative" the IJ's finding that it was implausible petitioner would request a photograph of the aborted fetus. The court also noted that the unfolded letter did not undermine petitioner's testimony because the letter made no reference to the forced abortion. Accordingly, the court found that the BIA erred in affirming the IJ's decision that petitioner did not establish past persecution and remanded the case to the BIA for further proceedings.

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■ Eighth Circuit Holds that Petitioner's Conviction for Conspiracy to Commit Racketeering Render Him Inadmissible Because Predicate Crime Was Controlled Substance Offense

In *Garcia-Gonzalez v. Holder*, __ F.3d __, 2013 WL 6405042 (8th Cir. December 9, 2013) (Loken, *Gruender*, Shepherd), the Eighth Circuit held that substantial evidence supported the finding that the petitioner admitted to committing acts which constitute the essential elements of a violation of a law of the United States relating to controlled substances.

The petitioner, a Mexican citizen, first entered the United States in 1976. On January 22, 1991, he was granted adjustment of status to that of lawful permanent resident. In September 2005 he pled guilty pursuant to one count of conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d) (the "racketeering conviction") and was sentenced to 30 months' imprisonment. In his written plea agreement, petitioner "acknowledge[d] . . . that if this case were to proceed to trial, the government would be able to prove the following facts beyond a reasonable doubt."

In December 2011, petitioner was placed in removal proceedings. The IJ concluded that petitioner's racketeering conviction constituted a conviction for an aggravated felony, rendering him removable under INA § 237(a)(2)(A)(iii). Petitioner sought to adjust his status, but the IJ concluded that he was inadmissible under INA § 212(a) on two grounds: first, he had admitted to committing acts which constitute the essential elements of a violation of federal law relating to a controlled substance; and second, his racketeering conviction constituted a conviction for a crime involving moral turpitude. The BIA affirmed the IJ's decision and dismissed the appeal.

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The court held that, by agreeing that the government could have proved the factual basis for his racketeering conviction beyond a reasonable doubt, the petitioner had admitted to each of the elements of the offense. Consequently, the court upheld the BIA's finding that the petitioner was inadmissible and ineligible for adjustment of status

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NINTH CIRCUIT

■ **Divided Ninth Circuit Holds that Board Erred by Terminating Asylum Based on Asylee's Sworn Statement that Claim Was Fabricated**

In *Sumaira Urooj v. Holder*, __ F.3d __, 2013 WL 5928264 (9th Cir. November 6, 2013) (Berzon, *Marshall* (C.D. Cal., by designation), Bybee (dissenting)), the Ninth Circuit held that the BIA's erred by holding that ICE had carried its burden of proving that asylum should be terminated based on the asylee's written sworn statement that his claim was fabricated and his refusal to answer questions when the IJ had admitted the statement as "impeachment" evidence. The court explained that ICE did not comply with court rules regarding notice of evidence and witnesses for submission of substantive evidence, rejecting the use of "impeachment" evidence to meet DHS's burden of proof.

Dissenting, Judge Bybee disagreed with the majority that the decision was contrary to *Matter of Guevera,* 20 I&N Dec. 268 (BIA 1990), and stated that, even if it were, he would remand for a further agency explanation.

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■ **Ninth Circuit Holds that Petitioner's Due Process Rights Were Violated When IJ Refused to Continue Proceedings so Alien Could Investigate Government's Forensic Report**

In *Bondarenko v. Holder*, 733 F.3d 899 (9th Cir. October 25, 2013) (*W. Fletcher*, Pregerson, Nguyen), the Ninth Circuit held that the IJ violated due process by allowing the government to introduce, without prior notice, a forensic report concerning the petitioner's medical document, and by refusing the petitioner's request for a continuance to conduct his own investigation of the report.

The IJ violated due process by allowing the government to introduce, without prior notice, a forensic report concerning the petitioner's medical document.

The court further held that the petitioner was prejudiced by the IJ's decision because the IJ's other grounds for finding petitioner not credible were not supported by substantial evidence, and that the evidence established petitioner suffered past persecution in Russia on account of his anti-war activities.

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■ **Lewd and Lascivious Acts upon a 14- or 15-Year-Old Child Constitutes a Crime of Violence and Therefore an Aggravated Felony**

In *Rodriguez-Castellon v. Holder*, __ F.3d __, 2013 WL 5716356, (9th Cir. October 22, 2013) (O'Scannlain, Paez, *Ikuta*), the Ninth Circuit held that the alien's conviction under California Penal Code § 288(c)(1) for lewd and lascivious acts upon a 14- or 15-year-old child, categorically constituted an aggravated felony under INA § 101(a)(43)(F). The panel concluded that, in the ordinary case, a violation of California Penal Code § 288(c)(1) posed a substantial risk of the use of physical force and was therefore a crime of violence under 8 U.S.C. § 16(b).

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■ **Agency Did Not Violate Due Process by Accepting and Relying on Consular Letter**

In *Angov v. Holder*, __ F.3d __, 2013 WL 6246282 (9th Cir. December 4, 2013) (*Kozinski*, Trott, Thomas), the Ninth Circuit held that the immigration judge acted within his discretion in admitting a letter memorializing a consular investigation in Bulgaria and relying on it to find the alien not credible. The Ninth Circuit broke from five other circuits in holding that the admission of the letter did not violate due process, and stated that the proper venue for determining the reliability of a consular letter is the adversarial process itself, rather than requiring the judge to act as a gatekeeper for such evidence.

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■ **Conviction under Arizona's Divisible Racketeering Statute Constitutes Aggravated Felony**

In *Murillo-Prado v. Holder*, __ F.3d __, 2013 WL 6084401 (9th Cir. November 20, 2013) (Farris, Black (by designation), Ikuta) (*per curiam*), the Ninth Circuit held that an alien's conviction under Arizona's divisible racketeering statute constituted an aggravated felony rendering him removable under 8 U.S.C. § 1101(a)(43)(J), despite racketeering being a "generic" federal crime. Applying the modified categorical approach and

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citing *Descamps v. United States*, 133 S. Ct. 2276 (2013), the court held that the detailed conviction record reliably established that the alien engaged in racketeering as defined under federal law, and dismissed the petition for review for lack of jurisdiction.

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■ **Abuse of Discretion Review Applies to Finding that Petitioner Abandoned Her Applications for Relief and Protection**

In ***Taggar v. Holder***, __ F.3d __, 2013 WL 6224282 (9th Cir. December 2, 2013) (*Wallace*, M. Smith, Ikuta), the Ninth Circuit held that abuse of discretion review applies to the finding that an alien waived her applications for relief and protection by failing to file them by the established deadline under 8 C.F.R. § 1003.31(c). The court ruled that an application for protection under the United Nations Convention Against Torture ("CAT") can be abandoned under 8 C.F.R. § 1003.31(c). The court further held that an alien removable under 8 U.S.C. § 1227(a)(3)(B)(iii) (conviction for fraud or misuse of a visa) is not eligible for a fraud waiver under 8 U.S.C. § 1227(a)(1)(H).

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TENTH CIRCUIT

■ **Tenth Circuit Holds Alien Granted Suspension of Deportation Is Ineligible for Cancellation of Removal**

In ***Velasco v. Holder***, __ F.3d __, 2013 WL 5789116 (10th Cir. October 29, 2013) (*Hartz*, Baldock, Gorsuch), the Tenth Circuit held that an alien who was previously granted suspension of deportation under former INA § 244(a), is ineligible for discretionary cancellation of removal for permanent residents under INA § 240A(a). The court reasoned that Congress stated unequivocally that once an alien has obtained relief under one of the three provisions referenced in INA § 240A (c)(6), the alien has had his "bite of the apple" and can no longer seek cancellation of removal.

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■ **BIA Remand for Voluntary Departure Advisals Remains a Final Order of Removal and Denies Petition for Review as Untimely**

In ***Batubara v. Holder***, __ F.3d __, 2013 WL 5779037 (10th Cir. October 28, 2013) (*Briscoe*, Holloway, Tymkovich), the Tenth Circuit held that a decision by the BIA's, dismissing the alien's appeal from an immigration judge's denial of relief from removal, and remanding for voluntary departure advisals, constituted a final order of removal. Consequently, the court concluded that the alien's petition for review of the Board's decision, filed after the immigration judge's decision denying voluntary departure upon remand, was untimely filed.

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ELEVENTH CIRCUIT

■ **Persecution of Alien's Family does Not Constitute Persecution of Alien Herself When She was Not Directly Threatened**

In ***Rodriguez v. U.S. Att'y Gen.***, __ F.3d __, 2013 WL 6068465 (11th Cir. November 19, 2013) (Hull, Hill, Motz (sitting by designation)) (*per curiam*), the Eleventh Circuit held that persecution of an asylum applicant's family does not constitute persecution of the applicant herself, unless the applicant was also directly threatened. The court determined that the petitioner, whose family owned a large farm in Mexico, could not establish past persecution from a drug cartel murdering her father and cousin and kidnapping an uncle, because the acts did not directly threaten the alien. The court also concluded that the petitioner failed to establish that she would be harmed in Mexico because of her purported social group memberships - farm owners in Mexico and members of a family targeted by drug cartels.

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■ **Eleventh Circuit Rules that Possessing Cannabis with Intent to Sell or Deliver under Florida Law Does Not Constitute a "Drug Trafficking Crime"**

In ***Donawa v. U.S. Att'y Gen.***, __ F.3d __, 2013 WL 5944045 (11th Cir. November 7, 2013) (*Martin*, Jordan, Suhrheinrich (6th Cir., by designation)), the Eleventh Circuit ruled that possessing cannabis with intent to sell or deliver under Fla. Stat. § 893.13(1)(a)(2) is not a "drug trafficking crime" aggravated felony. The court reasoned that the crime does not include a *mens rea* element that would make it correspond to a felony under the Controlled Substances Act because knowledge of the illicit nature of cannabis is not an element of the offense, and rejected the government's argument that the crime is an aggravated felony because the lack of that knowledge is an affirmative defense. The court remanded for the agency to consider whether the offense is an "illicit trafficking" aggravated felony.

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D.C. CIRCUIT

■ **District of Columbia Upholds Denial of I-130 Based on Prior Marriage Fraud**

In ***Zemeka v. Holder,*** No. 1:12-cv-01619-JEB (D.D.C. November 20, 2013) (*Boasberg*, J.), the United

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States District Court for the District of Columbia granted summary judgment to the government, ruling that the denial of plaintiffs' I-130 petition by the USCIS based on a prior fraudulent petition was rational. Under 8 U.S.C. § 1154(c), a prior fraudulent petition results in a lifetime bar to any subsequent petition. Plaintiffs challenged the denial of the petition under the Administrative Procedure Act, contending that the beneficiary plaintiff was unaware that his prior I-130 was fraudulent at the time it was submitted. The district court held that the agency's denial of the I-130 petition was based on probative and substantial evidence in the record, and was not arbitrary, capricious or an abuse of discretion under the APA.

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■ **District Court for District of Columbia Upholds Denial of a Petition Seeking Classification as Alien of Extraordinary Ability**

In *Visinscaia v. USCIS*, No. 13-cv-223 (D.D.C. December 16, 2013) (Boasberg, J.), the District Court for the District of Columbia upheld USCIS's denial of the plaintiff's petition for classification as a first preference alien of extraordinary ability based on her achievements as a professional ballroom dancer. Plaintiff sought judicial review of the denial under the APA, alleging that the agency ignored the evidence in the record establishing her extraordinary achievements. The court granted the government's motion for summary judgment because the agency weighed the evidence in the record and provided a reasoned basis for finding that the evidence did not warrant classifying plaintiff under the extremely selective first preference category.

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■ **Eastern District of Missouri Rules that Engaging in a Conspiracy to Avoid Financial Reporting Requirements Demonstrates Lack of Good Moral Character**

In *Hamed v. Napolitano*, No. 13-cv-00516 (E.D. Mo. November 20, 2013) (*Autrey, J.*), the Eastern District of Missouri granted the government's Rule 12(b)(6) motion to dismiss a suit seeking naturalization under 8 U.S.C. § 1421(c). The court concluded that the alien's guilty plea and conviction for conspiracy to structure in order to avoid reporting requirements, reflecting a scheme in which the alien and others engaged in acts to export monetary instruments without reporting the transactions, adversely reflected upon his moral character and rendered him ineligible to naturalize.

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■ **Eastern District of Pennsylvania Upholds Denials of U Visa Applications Based on Inadmissibility**

In *Shukhrat v. Napolitano*, No. 12-cv-04137 (E.D. Pa. November 27, 2013) (*Goldberg*, J.), the United States District Court for the Eastern District of Pennsylvania granted summary judgment to the government and dismissed a challenge to USCIS's denials of two U visa applications. The court ruled that USCIS appropriately determined that Plaintiffs were ineligible for U visas because they failed to seek a waiver of inadmissibility after allowing their native passports to expire. The court also concluded that it lacked jurisdiction to review USCIS's discretionary denials of plaintiffs' late-filed waiver applications.

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OIL held its 19th Annual Immigration Law Seminar on December 9-16, 2013. More than 60 attorneys, from OIL and client agencies attended the seminar.

INSIDE OIL

Congratulations to ***Luis Perez*** who has been selected as OIL's newest Assistant Director. Luis joined the OIL through the Attorney General's Honor Program in September

of 2002, and was appointed Senior Litigation Counsel in August of 2008. He received a B.A. degree in Social Sciences, *magna cum laude*, from the University of Puerto Rico at Mayaguez in 1996. He received a Juris Doctor, *magna cum laude*, from the University of Puerto Rico School of Law in 2000, where he served on the University of Puerto Rico Law Review. Following law school, Mr. Perez clerked for the Hon. Jay A. Garcia-Gregory of the U.S. District Court for the District of Puerto Rico.

Congratulations to ***Tiffany Maynard***, secretary OIL, who received the Award for Excellence in Administrative Support; ***Benjamin Moss***, Trial Attorney, OIL, who received Rookie of the Year Award; and ***Bryan Beier,*** Senior Litigation Counsel received a Special Commendation Award. The late Senior Litigation Counsel ***James Hunolt***, who passed away earlier this year, received posthumously the Dedicated Service Award.

These awards were presented by Assistant Attorney General Stuart F. Delery, at the Annual Civil Division Awards Ceremony held in the Great Hall. Attorney General Eric Holder gave the keynote address, while OIL's Trial Attorney, ***Virginia Lum*** played of America the Beautiful.

OIL Director David McConnel recently presented Service Awards to the following OILers: ***Mary C. Coates*** 40-years of Service Award; ***Wanda Evans***, ***Karen Y. Stewart***, and ***Mark C. Walters*** , 35-years Service; ***Nannette Anderson, Harold Cubert, Tracey Harris, John B. Holt, Anthony Nicastro, Manuel P. Palau, Margaret Perry***, 25-years of Service. Congratulations to all of them!

Congratulations to Trial Attorney ***Thankful Vanderstar*** for being recognized by the Washingtonian Magazine as a local hero, one of 12 "2013 Washingtonians of the Year." The magazine noted among other contributions, that Thankful before and after work spends two hours or more manning the "Rape, Abuse & Incest National Network's online sexual-assault hotline from her home."

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

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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