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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

"Specific Intent" "Required to Establish Torture

In ***Oxygene v. Lynch***, 813 F.3d 541 (4th Cir. 2016) (*Motz*, King, Keenan), the Fourth Circuit deferred to the BIA's interpretation in *Matter of J-E-,* 23 I&N Dec. 291 (BIA 2002), that in order to constitute torture, the torturer must specifically intend to cause severe physical or mental pain or suffering.

The petitioner, Oxgene, a citizen of Haiti, entered the United States as a refugee with his mother and siblings and became a permanent resident in 1996. Five years later, a Virginia court convicted Oxygene of several state crimes and as a result he was placed in removal proceedings.

Oxygene conceded that he was removable due to his convictions for aggravated felonies and firearm offenses, but applied for deferral of removal under the CAT. Oxygene testified to his family's past persecution in Haiti and his fear that, if removed, he would face indefinite detention in Haitian prisons. Oxygene also expressed fear that, if detained in Haiti, he would not receive the medical care necessary to prevent his latent tuberculosis from becoming active.

Oxygene and his sister testified that they had no remaining family members in Haiti who could provide support in the form of food, medicine, or payment for release from detention. He also submitted documentary evidence from NGOs, country reports from the Department of State and news articles that paint a bleak picture of what criminal deportees can expect upon removal to Haiti.

The IJ concluded that despite the deplorable prison conditions in Haiti, and the fact that Oxgyene could be at higher risk given his diagnosis of latent tuberculosis, he had not

(Continued on page 2)

Eleventh Circuit Holds That House Arrest Constitutes a "Term of Imprisonment"

In ***Herrera v. Lynch***, __ F.3d __, 2016 WL 384604 (11th Cir. February 2, 2016) (Hull, Marcus, William Pryor), the Eleventh Circuit held that an alien who was convicted of burglary and sentenced to one year of house arrest had been convicted of an aggravated felony.

The petitioner, a citizen of Peru, entered the United States in 1995 as a legal permanent resident. In 2001, he was convicted in a Georgia court of burglary and sentenced to confinement for a period of five years which he was allowed to serve on probation provided he met all the terms and conditions of probation, including service of one year under house arrest. In July 2014, DHS charged Herrera as removable because he had been convicted of an aggravated felony, the burglary offense.

Petitioner then applied for cancellation of removal. He admitted to the prior conviction, but he argued that his burglary offense was not an aggravated felony because he was

(Continued on page 2)

Specific intent required to establish torture

demonstrated that he was more likely than not to suffer torture upon removal to Haiti. The IJ concluded that *Matter of J-E-,* foreclosed the argument that Haiti's detention policy and prison conditions necessarily constitute torture under the CAT, and that he had offered "no evidence that the [Haitian] authorities intentionally and deliberately detain deportees in order to inflict torture." On appeal the BIA affirmed the denial of CAT and also denied Oxygene's motion to reopen concluding that he had failed to show that the new evidence would change the result of the case.

The Fourth Circuit preliminarily determined that it lacked jurisdiction to review the BIA's denial of the motion to reopen because it challenged a factual determination, namely that given his mental health diagnosis he would be singled out for torture because of the stigma associated with mental health conditions in Haiti. The court determined, though, that it could consider Oxgene's challenge to the *Matter of J-E-* legal test for the intent necessary to establish torture under CAT because it was a question of law.

In considering the "intent" requirement under the CAT, the court examined the CAT and its implementing regulations. First, it noted that upon the signing of the CAT, the President proposed and the Senate adopted, a reservation or understanding, among others, that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." The court explained that "such an express understanding reflects the intent of the United States to influence how executive and judicial bodies later interpret the treaty on both the international and domestic level."

Second, the court noted that when Congress enacted the legislation to implement the CAT, it directed the heads of the appropriate agencies to prescribe regulations to implement the U.S. obligations subject to any reservations and understandings. The regulations provide in pertinent part that "[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5).

The court then examined *Matter of J-E-,* where the BIA articulated a five prong test in defining torture under the CAT including the requirement that an act amounting to torture had be "intentionally inflicted." The court also noted that in *Matter of J-E-,* the BIA specifically found that the Haitian government practice of indefinitely detaining criminal deportees under horrific conditions did not constitute torture because no evidence had been submitted showing that Haitian authorities were detaining deportees with "the specific intent to inflict severe physical or mental pain or suffering."

The court then concluded that it had to defer to the BIA's interpretation in *Matter of J-E-* because that interpretation "accords with the prevailing meaning of specific intent and reflects the likely wish of the President and Senate to incorporate that meaning into the CAT regulations." In particular, the court explained that "the requisite *mens rea* for specific intent crimes as akin to purpose or desire, rather than mere knowledge," and that Oxygene's argument that would require only a "general intent" would read "the explicit understanding of the President and Senate out of the regulation." Accordingly the court found no legal error and denied Oxygene application ofr deferral under CAT.

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House arrest constitutes "term of imprisonment"

(Continued from page 1)
not sentenced to a term of imprisonment. He based his argument on an order of clarification issued by the Georgia court on September 2014, stating that that court "did not nor does it now impose any confinement whatsoever."

The IJ and the BIA found that petitioner was ineligible for cancellation because his burglary offense was an aggravated felony in that it resulted in a sentence of one year of "confinement" which qualified as a "term of imprisonment."

The court held that the BIA reasonably concluded that house arrest, as a punitive measure that involves a "serious restriction of liberty," constitutes confinement and is therefore a "term of imprisonment" under INA §101(a)(48)(B). The court explained that because "[w]ords in federal statutes reflect federal understandings. . . the statement of the Georgia court in its order of clarification that [petitioner] was not sentenced to 'any confinement' was due no weight in his immigration proceeding." Accordingly, the court ruled that the alien's aggravated felony conviction rendered him ineligible for cancellation of removal.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony

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

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Jurisdiction
Injunction Against Executive Action

On January 19, 2016, the Supreme Court granted the government's petition for a writ of certiorari in United States, in ***United States, et al. v. Texas, et al.*** (SCt No. 15-674), challenging the November 9, 2015 decision by the Fifth Circuit, 805 F.3d 653, affirming the injunction entered by a district court against the implementation of DHS's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and the expansion of Deferred Action for Childhood Arrivals (DACA) program. The court held that "[a]t least one state" - Texas - had Article III standing and a justiciable cause of action under the APA, and that respondents were substantially likely to establish that notice-and-comment rulemaking was required. The petition for certiorari (available at 2015 WL 7308179) argues, *inter alia*, that the court's merits rulings warrant review because they strip DHS of authority it has long exercised to provide deferred action, including work authorization, to categories of aliens. The parties' motion to exceed the word limitations was granted. The government merits brief was filed on March 1, 2016. The court will hear argument on April 18, 2016.

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Expedited Removal
Right to Counsel

On December 4, 2015, the Ninth Circuit *sua sponte* requested views from the government and amici on whether it should rehear *en banc* its September 28, 2015 published decision in ***Pena v. Lynch***, 804 F.3d 1258, which held that the court lacks jurisdiction to review the procedural due process claim of the alien who placed in expedited removal and ordered removed that he did not knowingly and voluntarily waived right to counsel. The panel held that the statute does not deprive the alien of any forum to challenge his expedited removal proceedings, and although the available avenues of review provide no relief for the alien in the administrative context, the fact remains that avenues of review exist. On December 18, 2015, the government and amici filed responses. The government recommended against rehearing en banc because the panel decision was correct and the case implicated no conflict with the precedent decisions of the circuit or any other circuits. On February 18, 2016, the panel amended its opinion to clarify that colorable constitutional claims may be raised but Pena had not raised any and that the statute retains some avenues of limited judicial review.

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Conviction
Inconclusive Record

On February 3, 2016, a First Circuit panel, over government opposition, granted panel rehearing and ordered that its original opinion in ***Sauceda v. Lynch***, formerly at 804 F.3d 101, no longer be cited. In its request for views on rehearing, the panel ordered the parties to address five questions: Are all available *Shepard* documents in the record? May the IJ consider non-*Shepard* documents to determine if the alien met the burden? Does the government have a burden of production? If the record is inconclusive, does the *Moncrieffe* presumption apply? Should the case be remanded for the BIA to decide the effect of *Descamps* and *Moncrieffe* on the alien's burden to prove eligibility for discretionary relief? Oral argument is set for April 5, 2016.

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Crime of Violence

On February 9, 2016, the First Circuit ordered a response by the alien to the government rehearing petition challenging the published opinion in ***Whyte v. Lynch***, 807 F.3d 463, which held that the alien's Connecticut conviction for third-degree assault was not "aggravated felony." The rehearing petition argued that the Connecticut assault statute for intentionally causing physical injury (impairment of physical condition or pain) is a categorical match to the element of use of physical force against the person of another 18 U.S.C. § 16(a) (crime of violence). The court ordered that the parties address at least whether intentionally withholding medicine would violate Conn. Gen. Stat. 53a-61(a)(1), and if so, whether such withholding is a use of "violent" force under *Johnson v. U.S.*, 559 U.S. 133. The court denied the rehearing petition on March 21, 2016.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds That Applicant Failed to Meet Burden of Showing that He Married in Good Faith and Sustains Denial of Waiver of Joint-Petition Requirement**

In ***Valdez v. Lynch,*** __ F.3d __, 2016 WL 521194 (1st Cir. February 10, 2016) (Torruella, Selya, *Thompson),* the First Circuit upheld the BIA's finding that petitioner had failed to show that he had married in good faith and therefore was ineligible for a waiver of the joint-petition requirement under INA § 216(c)(4).

The petitioner, a citizen of the Dominican Republic, obtained conditional resident status in 1996 after marrying an American citizen in Puerto Rico. Their marriage fell on hard times, and the couple separated in the early 2000s, with their divorce becoming final in 2008. At his removal proceeding, petitioner claimed that he had married in good faith but they separated in 2001 because his wife was unwilling to live in Rhode Island and she was having an affair. Petitioner submitted numerous federal and state tax returns as evidence of the couple's commingling of financial assets and liabilities, but did not produce any leases or other documents to back up his assertion that he and his wife lived together following their marriage. The IJ and on appeal the BIA, concluded that petitioner had not shown that he had married in good faith.

In upholding the BIA's denial, the court explained that petitioner's testimony was "clearly insufficient to carry his burden of showing that he married in good faith." "The record is similarly devoid of documentary evidence showing the couple lived together after they were married, and there are no birth certificates to consider," said the court.

Accordingly the court concluded "that the scant testimonial and documentary evidence in the record is far from sufficient to allow us to overturn the IJ's and BIA's well-founded conclusion that Valdez failed to meet his burden of showing that he married in good faith."

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■ **Change in Law Favorable to Alien Is Not Exceptional Circumstance Warranting Equitable Exception to Time and Number Bars on Motion to Reconsider**

Given the interest in finality, the BIA did not abuse its discretion in holding that its forward-looking re-interpretation of § 212(c) relief in *Abdelghany* "did not constitute the kind of extraordinary Circumstance" to warrant equitable tolling.

In ***Omar v. Lynch***, __ F.3d __, 2016 WL 759883 (1st Cir. February 25, 2016) (Lynch, Stahl, *Barron*), the First Circuit upheld the BIA's decision denying petitioner's second motion to reconsider as time- and number-barred.

The petitioner, a citizen of Pakistan, was placed in removal proceedings in 1998. An IJ denied his request for INA § 212(c) relief because he had been convicted after a trial and ordered him deported. The BIA summarily affirmed that decision on January 30, 2003. On February 27, 2003, petition filed a timely motion for reconsideration. The BIA denied the motion but petitioner did not seek further review. On August 7, 2014, petitioner filed a second motion to reconsider the BIA's January 2003 removal order. Petitioner claimed that he was now eligible for § 212(c) because in *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014), the BIA had extended eligibility to aliens who had been convicted after a trial. The BIA rejected petitioner's second motion to reconsider. The BIA did so on the grounds that his motion was time- and number-barred and that petitioner had failed to show that equitable tolling of the time and number bars was warranted. Specifically, the BIA held that a change in the law favorable to petitioner that "occurr[ed] long after the expiration of [petitioner's] filing deadline d[id] not constitute extraordinary circumstances justifying equitable tolling."

The First Circuit initially rejected petitioner's contention that it was inappropriate for the BIA to count his first motion since he had departed the U.S. and the departure bar applied. The court noted that the BIA had denied that motion on the merits, and moreover, it did not have jurisdiction to consider that claim because it had not been exhausted.

On the merits, the court stated that given the interest in finality, the BIA did not abuse its discretion in holding that its forward-looking re-interpretation of § 212(c) relief in *Abdelghany* "did not constitute the kind of extraordinary circumstance that would warrant allowing [petitioner]to file a motion to reconsider eleven years after the time for filing had passed."

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■ **First Circuit Holds Asylum Applicant Failed to Show either Past Persecution or Well-Founded Fear of Future Persecution**

In ***Chen v. Lynch***, __ F.3d __, 2016 WL 732546 (1st Cir. February 24, 2016) (Lynch, Lipez, *Thompson*), the First Circuit held that substantial evidence supported the BIA's determination that the asylum applicant's punishment by Chinese family-planning officials—a nine-day deten-

(Continued on page 5)

Summaries Of Recent Federal Court Decisions

(Continued from page 4)

tion accompanied by beatings that caused only bruising and did not require hospitalization—did not rise to the level of persecution.

The petitioner, Chen, entered the United States illegally in December 2009 and was detained shortly after entry. When placed in removal proceedings he conceded removability but sought asylum, withholding, and CAT protection. He claimed that he fled China to avoid persecution by the country's family planning officials and that he feared being subjected to forced sterilization if he were to return. He explained that while living in China he violated China's planning regulations because he was not legally married to his wife when she got pregnant. On July 18, 2009, local government officials came to his home looking for his wife, who, Chen claimed, would have been forced to undergo an abortion. Fortunately, his wife was not at home. Chen testified, however, that when he refused to tell the officials his wife's whereabouts he was beaten and subsequently taken to the police station where he was placed in custody, interrogated, further assaulted, and threatened with forced sterilization. Nine days later he was released from police custody when his father paid money "to the police station" and he promised to find his "girlfriend" and asks her to get an abortion. Instead Chen first left his home town and in October 2009 left China altogether.

The court explained that "a single detention, even one accompanied by beatings and threats ... does not necessarily rise to the level of persecution."

Petitioner also claimed that after his arrival in the United States — and after his removal proceedings had already begun — he joined the China Democracy Party ("CDP"), an "anti-government" organization, and wrote several article published on the CDP web site.

The IJ denied all relief. With respect to Chen's first claim, the IJ concluded that Chen had failed to carry his burden to show either past persecution or a well-founded fear of future persecution due to his violation of China's family planning regulations, noting that Chen had presented no concrete evidence that his wife even existed. The IJ also determined that, even assuming the truth of Chen's testimony, his treatment did not rise to the level of past persecution. Regarding Chen's second claim, the IJ determined that Chen had failed to demonstrate a well-founded fear of future persecution based on his membership in the CDP. According to the IJ, Chen had failed to offer any credible evidence that the Chinese government was aware, or was likely to become aware, of his involvement in the CDP

On appeal the BIA affirmed. In particular, the BIA concluded that Chen had not "shown that the punishment he received from Chinese authorities, even when viewed cumulatively, rose to the level of persecution."

In upholding the BIA's decision, the First Circuit, explained that "a single detention, even one accompanied by beatings and threats ... does not necessarily rise to the level of persecution." "Although Chen's ordeal included repeated beatings during his detention, his injuries did not exceed bruising and did not require hospitalization or conventional, allopathic medical care," said the court. Moreover, "Chen was released from custody, was able to travel freely in and around the country without being harassed, and was allowed to leave the country using his own passport," added the court.

The court also upheld the BIA's determination that the alien failed to show a well-founded fear of future persecution based on his political activities in the United States, given the lack of credible evidence that the Chinese government was or would become aware of those activities.

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■ **First Circuit Rejects Proposed Particular Social Group in El Salvador of "Women with Children Whose Husbands Live and Work in the U.S."**

In ***Granada-Rubio v. Lynch***, __ F.3d __, 2016 WL 732532 (1st Cir. February 24, 2016) (Howard, Stahl, Lynch) (*per curiam*), the First Circuit held that the asylum applicant had not shown her proposed group to be socially distinct.

The petitioners, a mother and her two sons from El Salvador, were placed in removal proceedings, conceded removability, but applied for asylum, withholding, and CAT protection. The lead petitioner claimed that members of the MS–13 gang, who knew her husband was in the United States, demanded $500 a month "as rent." They threatened to kill her or her children if she did not comply. Petitioner claimed that on November 10, 2011, she left El Salvador with her children for the United States because "she was afraid for [her] life." She believes that if she returns to El Salvador, members of the MS–13 gang will torture or target her.

The IJ denied asylum and withholding finding that petitioner had failed to establish past persecution based on a protected ground and her "fear of victimization by gang members for economic reasons will not

(Continued on page 6)

Summaries Of Recent Federal Court Decisions

(Continued from page 5)

support a claim of persecution as members of a particular social group." The IJ denied the CAT request because petitioner had not shown a clear likelihood "that a public official in El Salvador would likely acquiesce in or exhibit willful blindness toward any torture inflicted by gang members." The BIA affirmed.

Before the First Circuit petitioner argued that she was "a member of a particular social group of women with children whose husband[s] live and work in the U.S. and it is known to society as a whole that the husbands live in the U.S." The court found that this proposed social group had not been proposed to the BIA and therefore petitioner had not exhausted her claim.

Applying *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), the court renewed its rejection in cases preceding those BIA decisions of "proposed social groups based solely on perceived wealth, even if signaling an increased vulnerability to crime, regardless of why one is perceived as wealthy." The court also held that evidence of violence and corruption in El Salvador did not support the alien's Convention Against Torture claim.

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SECOND CIRCUIT

■ **Second Circuit Holds that It Reviews De Novo Review Whether The BIA Has Exceeded Its Scope of Review and Remands Decision Overturning IJ's Credibility Finding**

In ***Lin v. Lynch***, 813 F.3d 122 (2d Cir. 2016) (*Newman*, Walker, Jacobs), the Second Circuit joined other circuits in holding that it reviews *de novo* whether the BIA exceeded the scope of the clear-error standard in reviewing the Immigration Judge's credibility finding. The court noted that although the BIA recognized its obligation to apply the "clear error" standard of review to the IJ's findings of fact, it erred in its application of that standard.

The court concluded that the BIA must provide "sufficient justification for its conclusion," and determined that it failed to do so in this case. Accordingly, the court remanded with instructions that the BIA must either accept the judge's positive credibility determination or provide a supportable basis for rejecting it.

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Relying on INA § 242(g), the panel stated that no court has jurisdiction to review ICE's DACA determinations.

THIRD CIRCUIT

■ **Courts Lack Jurisdiction to Review ICE's Denial of Deferred Action, Upholds District Court Decision Not to Hold ICE in Contempt for Removing Alien Moments Before His Stay Request Was Granted**

In ***Vasquez v. Aviles***, 2016 WL 732118 (3d Cir. February 24, 2016) (Chagares, *Rendell*, Barry), in an unpublished decision, the Third Circuit upheld the dismissal of an alien's habeas corpus petition that accused ICE of erroneously withholding relief under the Deferred Action for Childhood Arrivals (DACA) program. Relying on INA § 242(g), the panel stated that no court has jurisdiction to review ICE's DACA determinations. The court also upheld the district court's decision not to hold ICE in civil contempt for removing the alien after he had filed a stay request but several hours before the request was granted.

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■ **Third Circuit Rejects Petitioners' Appeal Concluding that No Petitioner Was Authorized Under Fed. R. Civ. P. 17(c)(1) to Proceed on the Minor K.G.'s Behalf**

In *United States ex rel. The Minor Child K.E.R.G. v. Sec. of HHS*, 2016 WL 457012 (3d Cir. February 5, 2016) (Fisher, Chagares, *Barry),* the Third Circuit, in an unpublished decision, affirmed a dismissal of the petitioners' attempts to reunite with K.G., a special-needs Mexican child for whom they cared some years earlier. When they attempted to bring K.G. to the United States, K.G. was detained, designated an unaccompanied alien child, and put in the care of the Office of Refugee Resettlement within the Department of Health and Human Services (HHS). The court ruled that no petitioner qualified to represent K.G.'s interests in federal court and upheld the district court finding that HHS' specific consent was required to provide a state court with jurisdiction to determine the child's custody status.

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FOURTH CIRCUIT

■ **BIA Abused Its Discretion by Disregarding Facially Valid Nunc Pro Tunc Adoption Decree and Denying Reopening**

In ***Ojo v. Lynch***, __ F.3d __, 2016 WL 611499 (4th Cir. February 16, 2016) (Motz, *King*, Keenan), the Fourth Circuit held that the BIA abused its discretion in denying the

(Continued on page 7)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)

motion to reopen the removal proceeding of a native of Nigeria who claimed that he had derived citizenship under INA § 320 as the adopted son of a United States citizen.

Ojo was born in Nigeria on August 28, 1983, and he lawfully entered the United States in August 1989. Two weeks later, on September 14, 1989, when Ojo was just six years old, his uncle—a United States citizen—became Ojo's legal guardian. More than ten years later, on June 19, 2000, when Ojo was sixteen, Ojo's uncle and the uncle's wife filed a petition to adopt Ojo. On January 24, 2001, after Ojo had turned seventeen, the Circuit Court for Montgomery County, Maryland (the "Maryland state court"), entered a judgment of adoption.

On May 6, 2013, the DHS charged him with removability from the United States under INA § 237(a)(2)(A)(iii) because he had been convicted of two drug-related offenses. The IJ determined that because Ojo turned sixteen on August 28, 1999, and was not adopted by his citizen uncle until he was already seventeen years old, he did not qualify as an adopted child under § 101(b)(1)(E). As a result, Ojo had not derived citizenship from his adoptive father (his biological uncle) pursuant to § 320. Accordingly he was ordered deportable as charged. The BIA agreed with the IJ that Ojo was removable, recognizing that Ojo had the burden of proving his citizenship claim and showing that his adoption occurred before his sixteenth birthday. Relying on the judgment of adoption of January 24, 2001, the BIA ruled that Ojo was seventeen when adopted.

Subsequently Ojo filed a motion to reopen his removal proceedings, supported by a *nunc pro tunc* order entered on October 29, 2014, by the Maryland state court. That order made Ojo's adoption effective on August 27, 1999, the day before he turned sixteen. The BIA denied Ojo's motion to reopen, observing that it "does not recognize *nunc pro tunc* adoption decrees after a child reaches the age limit for both the filing of the adoption petition and decree."

During the pending of the petition for review, the BIA held in *Matter of Huang*, 26 I&N Dec. 627 (BIA 2015), that it will recognize a *nunc pro tunc* order relating to an adoption "where the adoption petition was filed before the beneficiary's 16th birthday, the State in which the adoption was entered expressly permits an adoption decree to be dated retroactively, and the State court entered such a decree consistent with that authority.

An alien whose removal order has been reinstated is ineligible for asylum, even if the alien had been paroled into the United States.

The Fourth Circuit disagreed with the BIA's interpretation *in Matter of Huang*. The court found no ambiguity in the term "adoption." "An 'adoption,' as defined and commonly used, contemplates a formal judicial act. Furthermore, it is well understood that, in the United States, our various state courts exercise full authority over the judicial act of adoption," explained the court. Moreover, the court found "no indication from the text of § 101(b)(1)(E)(i)—or from any other aspect of the statutory scheme created in the INA—that Congress intended to alter or displace the plain meaning of 'adopted.'"

Accordingly, the court found that "it was contrary to law for the BIA not to recognize the *nunc pro tunc* order in Ojo's case. As a result, the BIA abused its discretion in denying Ojo's motion to reopen his removal proceedings."

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FIFTH CIRCUIT

■ Fifth Circuit Affirms Denaturalization of Defendant Arrested and Convicted of Forced Labor After Taking Oath of Allegiance

In ***United States v. Chang***, __ F.3d __, 2016 WL 454222) (5th Cir. February 4, 2016) (per curiam) (Elwood, Graves, Costa) (*per curiam*) , the Fifth Circuit, in an unpublished decision, affirmed the district court's decision revoking the defendant's citizenship for illegal procurement of his naturalization. At the time that the defendant applied for naturalization, he held between fifty and sixty women in his home under a condition of forced labor; after naturalizing he pleaded guilty to federal forced labor crimes. The court ruled that the defendant could not demonstrate the requisite good moral character during the statutory period.

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■ Fifth Circuit Denies Alien's Request for *En Banc* Rehearing of Ruling that Reinstatement of Removal Order Precludes Asylum

In ***Ramirez-Mejia v. Lynch***, 813 F.3d 240 (5th Cir. 2016) (Wiener, *Southwick*, Graves), the Fifth Circuit, in an order to be published, denied the alien's request for *en banc* rehearing of its earlier ruling (794 F.3d 485) that an alien whose removal order has been reinstated is ineligible for asylum, even if the alien had been paroled into the United States. In the order, the court reaffirmed its holding and added that such aliens

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)
may seek withholding of removal or protection under the Convention Against Torture, as the alien did in this case.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that It Lacks Jurisdiction over Alien's Untimely Review Petition**

In ***Hih v. Lynch***, 812 F.3d 551 (6th Cir. 2016) (Clay, *Rogers*, Thapar (E.D. Ky. by designation)), the Sixth Circuit held that a BIA decision that affirmed a denial of asylum and related relief but remanded the case for voluntary-departure advisals was a final order of removal for purposes of judicial review. Because the alien filed his petition for review more than 30 days after entry of that decision, the court ruled, it lacked jurisdiction to review it.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds that It Lacks Jurisdiction to Review Denial of Fraud Waiver**

In ***Jankovic v. Lynch***, 811 F.3d 265 (7th Cir. 2016) (Easterbrook, Hamilton, Pallmeyer (D.J.)), the Seventh Circuit dismissed, for lack of jurisdiction, a petition for review of the BIA's denial of his request for a waiver of inadmissibility under 8 U.S.C. § 1182(i). The waiver was denied because the alien failed to show his removal would cause extreme hardship to his U.S. citizen wife and in the exercise of discretion due to Jankovic's long history of lying to immigration officials about his wartime activities, including his service in a Bosnian Serb paramilitary unit that committed atrocities during the Bosnian war. The court ruled that it lacked jurisdiction under 8 U.S.C. §§ 1182(i)(2) and 1252(a)(2)(B)(i) to review either determination.

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■ **Seventh Circuit Holds that Substantial Evidence Supported Sham Marriage Finding**

In ***Sehgal v. Lynch***, __ F.3d __, 2016 WL 696565 (7th Cir. February 22, 2016) (Bauer, Posner, *Hamilton*),the Seventh Circuit held that substantial evidence, including an alien husband's own written confession of fraud, supported the agency's finding that his earlier marriage was fraudulent and, thus, the denial of the petition for immediate relative filed on his behalf was correct. The court held that the alien's allegations of coercion were too vague and inconsistent to undermine his confession and that the agency's procedural error, mistaking the alien's written confession as sworn, was harmless. The court expressed puzzlement as to the agency's failure to provide the alien with an actual copy of the derogatory information, but it nonetheless held that the summary provided was more than adequate.

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EIGHTH CIRCUIT

■ **Eighth Circuit Rejects Alien's Claim that Failure to Advise Him of Eligibility for Relief from Removal Denied Due Process When Eligibility Was Not Apparent**

In ***Alva-Arellano v. Lynch***, 811 F.3d 1064 (8th Cir. 2016) (Colloton, *Gruender*, Shepherd), the Eighth Circuit ruled that the immigration judge did not commit a fundamental error by not advising the alien that he could apply for asylum or withholding of removal when the alien neither stated that he feared persecution if returned to Mexico nor submitted evidence disclosing apparent eligibility for asylum or other forms of relief. The court also held that the BIA's properly denied the alien's request for a remand as the purportedly new evidence presented by the alien was not new and could have been discovered earlier.

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■ **Eighth Circuit Holds Salvadoran Asylum Applicant Did Not Demonstrate Cognizability of Family-Based Social Groups in Context of Gang Violence**

In ***Aguinada-Lopez v. Lynch***, __ F.3d __, 2016 WL 711438 (8th Cir. February 23, 2016) (Murphy, *Benton*, Kelly), the Eighth Circuit held that the BIA did not err by rejecting two proposed social groups that were based on the petitioner's family relationship to a murdered gang member.

The petitioner, a citizen of El Salvador sought asylum, withholding, and CAT protection, on account of his relationship to his cousin, Oscar, who belonged to the MS-13 gang. According to his testimony, members of a rival gang, the Dieciocho, beat him on a couple of occasions, once when he was leaving National Industrial Technical Institute and wearing his school uniform. In another incident a man knocked him off his bicycle and pulled a gun, and said "You're that rat Oscar's cousin." In the last incident, two men dressed in black shot at him. Petitioner went into hiding, but members of the Dieciocho threatened his mother. After leaving El Salvador, members of the Dieciocho gang killed Oscar in front of petitioner's house as "threat for [him] not to return."

Petitioner claimed persecution on account of his membership in two family-based social groups: (1) male, gang-aged family members of mur-

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

dered gang members, and (2) male, gang-aged family members of his cousin Oscar. He also claimed persecution because of his membership in a third social group "male, gang-aged members of the Institute."

The IJ found petitioner credible, determined that petitioner's second social group constituted a particular social group under the INA, but denied but denied all claims. On appeal, the BIA disagreed, concluding that both proposed family-based social groups are not cognizable. "[A]n alien's membership in 'a family that experienced gang violence' lack[s] 'the visibility and particularity required to constitute a social group' under the statute."

The Eight Circuit upheld the BIA's denial based on the family's relationship. With respect to a third proposed group of "male, gang-aged members" of the school the petitioner attended, the court agreed with the BIA that the petitioner did not prove nexus.

Finally, the court affirmed the denial of CAT protection because petitioner did not demonstrate government acquiescence to gang violence.

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■ **Eighth Circuit Holds Alien Ineligible for Cancellation of Removal Based on Vacated Conviction for Crime Involving Moral Turpitude and Regardless of Admission Status**

In ***Andrade-Zamora v. Lynch***, __ F.3d __, 2016 WL 761197 (8th Cir. February 26, 2016) (*Bye,* Loken, Wollman), the Eighth Circuit upheld the BIA's denial of cancellation of removal where the applicant failed to carry his burden of proving that his erstwhile conviction for a CIMT had been vacated for a substantive or procedural defect and not for immigration purposes.

Andrade–Zamora was placed in removal proceedings because he was present in the United States without having been admitted or paroled. At a hearing in May 2014, he admitted the factual allegations, conceded removability, but indicated he would seek cancellation of removal. Three months later, Andrade–Zamora pled guilty in Iowa state court to one count of theft two counts of falsifying a driver's license. The state court sentenced him to one year of probation and ordered him to pay a fine. As a result of these convictions, on November 7, 2014, DHS filed a second notice charging Andrade–Zamora with being a removable alien, this time for committing a CIMT.

An alien convicted of an offense under INA § 237(a)(2), is precluded from applying for cancellation of removal even if he was never admitted to the United States.

The court also deferred to the BIA's interpretation of INA § 240A(b)(1)(C), as articulated in *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010), that an alien convicted of an offense under INA § 1237(a)(2), is precluded from applying for cancellation of removal even if he was never admitted to the United States.

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NINTH CIRCUIT

■ **Ninth Circuit Upholds Denial of Adjustment of Status under Regulation Limiting Grandfathered Alien Status For Substituted Beneficiary of Labor Certification Application**

In ***Valencia v. Lynch***, 811 F.3d 1211 (9th Cir. 2016) (Rawlinson, *Nguyen*, Posner), the Ninth Circuit held that the AG's interpretation of INA § 245(i) in the regulation at 8 C.F.R. § 1245.10(j), is entitled to *Chevron* deference. Under INA § 245(i), an alien beneficiary of a labor certification application filed on or before April 30, 2001, may apply for adjustment of status. Regulations permit, under certain circumstances, for another alien beneficiary to be substituted for the original beneficiary. However, 8 C.F.R. § 1245.10(j) provides that "[a]n alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien."

Valencia entered the United States on June 2006 on a B–2 tourist visa that expired later that year. About five years earlier, on April 26, 2001, Lawrence Equipment, Inc., a California corporation, had filed an application for labor certification, which was approved by DOL. This application, however, did not name Valencia as a beneficiary. At some point after April 30, 2001, Lawrence Equipment obtained approval from the DOL to substitute Valencia as the beneficiary of its approved labor certification. In January 2007, shortly after Valencia's tourist visa expired, Lawrence Equipment filed with USCIS an "Immigrant Petition for Alien Worker" naming Valencia as the beneficiary. USCIS approved this petition in April 2008, and assigned it a priority date of April 26, 2001, corresponding to the date that Lawrence Equipment had originally filed the application for labor certification. Valencia then filed an application with USCIS to adjust his status under § 245(i). USCIS determined that Valencia did not qualify. DHS then placed Valencia in removal

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)
proceedings where he renewed his application for adjustment. The IJ and later the BIA held that Valencia did not qualify because 8 C.F.R. § 1245.10(j) was controlling.

The Ninth Circuit court held that § 245(i) is ambiguous as to whether it applies to "substitute beneficiaries." The court then determined that "it was permissible for the Attorney General to interpret the statute to preclude beneficiaries substituted after the sunset date from obtaining grandfathered status." "The inclusion of the sunset provision suggests that Congress intended to impose a temporal constraint on eligibility for grandfathered status," explained the court.

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■ **Ninth Circuit Holds the BIA May Not Apply the Maxim "False in One Thing, False in Everything" to Discredit an Alien's Evidence in a Motion to Reopen**

In ***Yang v. Lynch***, __ F.3d __, 2016 WL 760626) (9th Cir. February 26, 2016), (Friedland, *Chhabria* (by designation), Schroeder (dissenting)), the Ninth Circuit held that the BIA erred when it applied the maxim *falsus in uno, falsus in omnibus*—"false in one thing, false in everything"—to reject as not credible a Chinese applicant's new claim for asylum relief, based on a prior adverse credibility determination in underlying removal proceedings.

Yang entered the United States on a nonimmigrant visa in January 2005 and overstayed. He subsequently applied for asylum, withholding of removal, and CAT protection. The asylum officer did not grant the application and referred him for removal proceedings. Yang renewed his requests. He claimed that local Chinese officials arrested and beat him because he had mobilized his co-workers to complain about corruption in the government-affiliated hotel where they worked. But the IJ found that Yang's testimony was not credible, and denied his applications for relief. The BIA dismissed Yang's appeal, holding that the IJ's credibility determination was not clearly erroneous.

Yang then filed a timely motion to reopen, asserting a new factual basis for relief. According to Yang, after he was ordered removed, he joined a Christian church whose members were persecuted in China. Yang submitted an affidavit that detailed his purported religious conversion. The affidavit further alleged that, after Yang tried to mail religious literature to his wife in China, Chinese authorities threatened to send her to a forced labor camp. The BIA denied the motion, finding that the new affidavit that Yang submitted with his motion to reopen was also not credible. Specifically, the BIA held that Yang had not shown why it "should now accept the statements offered in support of the motion as reliable where his prior testimony has been found to lack credibility."

The Ninth Circuit held that petitioner's "two counts of drug possession amounted to a single "offense" under the FFOA because they arose out of a single event, composed a single criminal case, and triggered a single, undivided sentence."

The Ninth circuit preliminarily noted that it had previously held that an IJ may apply the *falsus* maxim to find that a witness who testified falsely about one thing is also not credible about other things. The court further noted that the Second Circuit in *Qin Wen Zheng v. Gonzales*, 500 F.3d 143 (2d Cir. 2007), held that BIA may also apply the *falsus* maxim, relying on an IJ's prior adverse credibility determination to make its own finding that evidence supporting a motion to reopen is not credible an immigration judge, the BIA may not make findings of fact. The court however declined to follow the Second circuit, explaining that unlike an IJ, the BIA may not make findings of fact and therefore "credibility determinations on motions to reopen are inappropriate." The court explained that "the idea that the BIA could apply the *falsus* maxim to deny a motion to reopen is in tension with the BIA's limited and deferential role in reviewing immigration judges' credibility determinations in the first place." Accordingly the court held that the BIA had abused its discretion and remanded the case for further proceedings.

In a dissenting opinion, Judge Schroeder, agreed with the majority that the BIA should not deny motions to reopen by making adverse credibility determinations, but would have found that the BIA had not done so in this case.

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■ **Ninth Circuit Holds that Expunged Convictions for Two Counts of Drug Possession Involving a Single Event, Case, and Sentence Qualify for Federal First Offender Act Treatment**

In ***Villavicencios v. Lynch***, 811 F.3d 1216 (9th Cir. 2016)(Gould, Berzon, *Zouhary*, by designation), the Ninth Circuit held that a Guatemalan alien's expunged convictions for two counts of drug possession did not bar him from first-offender treatment under the Federal First Offender Act (FFOA).

The petitioner, a Guatemalan citizen, entered the United States illegally in 1992, and subsequently married a U.S. citizen. In October

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

2008, DHS charged petitioner with being present in the United States without admission or parole. Petitioner conceded removability but sought cancellation of removal and adjustment of status based on his marriage. Two months later, Villavicencio pled guilty to possession under California law. The charges stemmed from a single event on the same day and formed two counts of one criminal case. In January 2009, a state judge sentenced petitioner to a total of 180 days in jail for both counts. After his release, petitioner successfully petitioned the court to expunge his convictions under Cal. Penal Code §§ 1203.3–1203

At his removal hearing petitioner argued that his two convictions were excused under the FFOA, because they stemmed from a single event and were packaged and sentenced together by the state court. The IJ disagreed, finding that the FFOA applies only to a defendant found guilty of a single possession count involving a single drug. The IJ also determined that despite the expungement, the two convictions retained their immigration consequences and barred petitioner from cancellation of removal or adjustment of status. The BIA affirmed without opinion.

The Ninth Circuit held that petitioner's "two counts of drug possession amounted to a single "offense" under the FFOA because they arose out of a single event, composed a single criminal case, and triggered a single, undivided sentence." The court explained that petitioner had committed no prior controlled substance violation and the FFOA was intended to apply to first-time offenders to avoid "mak[ing] felons of our young men and women who come into contact with drugs on a first occasion."

In a concurring opinion Judge Berzon explained that the FFOA can, "in narrow circumstances, apply to more than one offense, whether committed at the same time or different times, as long as both conditions in the remainder of the statutory provision are met."

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DISTRICT COURTS

■ **USCIS's Denial of O-1 Extraordinary Ability Petition for Ducati Motorcycle Mechanic Upheld**

In ***Pellizzari v. Zuchowski,*** No. 2:15-cv-2527 (D.N.J. February 9, 2016) (Chesler, J.), the district court affirmed USCIS's decision denying a nonimmigrant petition filed by a motorcycle dealership seeking to classify a temporary alien worker as an O-1 alien of extraordinary ability. The court granted summary judgment in the government's favor, concluding that the motorcycle dealership failed to demonstrate that the alien worker, whom the motorcycle dealership sought to hire as a Ducati motorcycle mechanic, had achieved "sustained national or international acclaim." In so finding, the court held that evidence merely establishing the regulatory criteria was not sufficient; rather, the court held that such evidence must also demonstrate "sustained national or international acclaim."

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■ **Northern District of Ohio Finds Border Patrol Did Not Maintain Policy or Practice of Racial Profiling**

In ***Muniz v. U.S. Border Patrol***, No. 09-cv-2865 (N.D. Ohio February 24, 2016) (*Zouhary, J.*), the court held that plaintiffs had not shown that the Border Patrol had a policy or practice of racially profiling Hispanics in violation of their Fourth and Fifth Amendment rights. The court heard testimony from twenty witnesses concerning Border Patrol procedures and practices and from two experts concerning Border Patrol arrest data. The court concluded that plaintiffs' expert was not reliable. The court also held that the evidence concerning the eight representative encounters failed to demonstrate racial profiling or any constitutional violations.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

April 21 -22 & 25, 2016
Criminal Alien Training

May 24-26, 2016
Summer Intern Training

August 23-25, 2016
Fall Intern Training

October 3 -7, 2016
New OIL Attorney Training

October 31-November 4, 2016
22nd Annual Immigration Law Seminar

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

Inside EOIR

Attorney General Lynch recently appointed Molly Kendall Clark, Ellen Liebowitz, and Blair T. O'Connor as board members to the BIA.

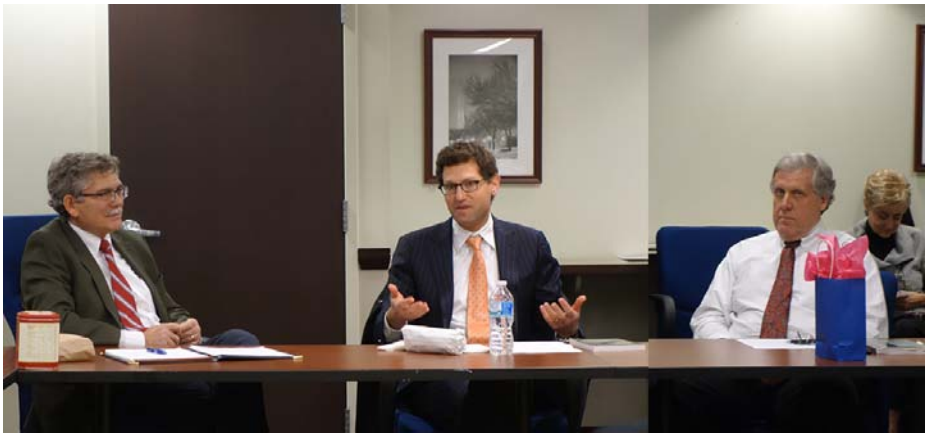
Board Member **Molly Kendall Clark** received a BA degree in 1974 from Colorado College and a JD in 1978 from Suffolk University. Prior to her appointment she was a senior legal advisor to the BIA chairman. From 1983 to 1991, and previously from 1978 to 1981, she was an attorney advisor for the BIA. From 1981 to 1982, she worked in the General Counsel's Office of the former INS.

Board Member **Ellen Liebowitz** received a BA in 1987 from the University of Delaware and a JD in 1990 from the University of Maryland. Prior to her appointment she was a senior legal advisor to the BIA chairman. From 2007 to 2008, she was a senior counsel to the BIA chairman and from 1991 to 2007, an attorney advisor for the BIA.

Board Member **Blair T. O'Connor** received a Bachelor of Business Administration degree in 1992 from the University of Notre Dame and a JD in 1995 from the Valparaiso University School of Law. Prior to his appointment he served as an assistant director, senior litigation counsel, and trial attorney at the Office of Immigration Litigation, Civil Division, Department of Justice. From 1996 to 2002, he served on active duty in various capacities in the Army's Judge Advocate General Corps including as legal assistance and claims attorney, prosecutor, and appellate defense attorney.

"Rethinking Asylum" Author, Matthew Price at OIL

Mathew Price, a former Bristow Fellow in the Office of the Solicitor General and author of "Rethinking Asylum: History, Purpose, and Limits," joined OIL on February 4, for the latest Brown Bag Lunch & Learn series. In his book Price argues for retaining asylum's focus on persecution - even as other types of refugee aid are expanded - and offers a framework for deciding what constitutes persecution. In particular, the book is critical of the efforts to widen the reach of asylum to protect others exposed to serious harm. Price admitted, however, that he would not necessarily follow his book's advice when litigating asylum cases for clients.



Francesco Isgro, Matthew Price. David McConnell

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

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