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# Immigration Litigation Bulletin

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## LITIGATION HIGHLIGHTS



## Inside



## Ninth Circuit Grants CAT Protection To Transgender Applicant from Mexico

In ***Avendano-Hernandez v. Lynch***, 800 F.3d 1072 (9th Cir. 2015) (Pregerson, Parker (by designation), *Nguyen*), the Ninth Circuit held that the sexual assaults that petitioner suffered at the hands of Mexican police constituted torture by public officials, and no further showing of acquiescence was required. The court also concluded that it was likely the petitioner would be tortured in the future because current country conditions confirmed that violence against transgender individuals continues to occur in Mexico.

The court also held that the BIA acted within its discretion when it determined that petitioner conviction for DUI with bodily injury constituted a particularly serious crime.

The petitioner, Avendano–Hernandez , is a transgender woman who grew up in a rural town in Oaxaca, Mexico. She was born biologically male, but she knew from an early age that she was different. Her appearance and behavior were very feminine, and she liked to wear makeup, dress in her sister's clothes, and play with her sister and female cousins rather than boys her age. Because of her gender identity and perceived sexual orientation, as a child she suffered years of relentless abuse that included beatings, sexual assaults, and rape. The harassment and abuse continued into adulthood. In July 2000, Avendano–Hernandez unlawfully entered the United States and settled in Fresno, California. She began taking

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## Government Seeks Rehearing En Banc Of Second Circuit Citizenship Decision

On September 21, 2015, the government filed a petition for rehearing en banc challenging the Second Circuit's published decision in ***Morales-Santana v. Lynch***, 11-1252, 792 F.3d 256 (*Lohier*, Carney, Rakoff (by designation)), which held that a former version of INA § 309(a) & (c), violated the Fifth Amendment's Equal Protection Clause because it imposed different eligibility requirements on unwed fathers than unwed mothers to transmit United States citizenship at birth to a child born abroad where the other parent was not a U.S. citizen.

Under the statute between 1952 to 1986, an unwed, citizen mother only had to satisfy one year continuous physical presence in the U.S. before her child's birth to transmit citizenship, while an unwed father had to establish physical presence in the U.S. for ten years prior to the child's birth, five following his fourteenth birthday. The Second Circuit panel severed the scheme from the Act, and then interpreted the statute to confer citizenship at birth on all children born out of wedlock abroad to

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# Government Seeks Further Review in Citizenship Case

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a U.S. citizen and an alien where the citizen parent had been physically present in the U.S. for a continuous period of one year prior to the birth.

The government argues that rehearing *en banc* should be granted because the panel made a series of errors, and the case is one of extraordinary importance. The question of defining who is a citizen of the United States is extraordinarily important in itself, but the panel decision created a conflict among the circuits – establishing divergent rules of citizenship. The government claims that the panel did something no court had ever done – invalidate a citizenship statute written by Congress and rewrite the statutory provision at issue in a way that affirmatively grants United States citizenship to a class of individuals to which Congress did not.

On the merits, the government argues that the panel erred in its equal protection analysis in several ways. First, the panel erred when it failed to apply rational basis review to petitioner's constitutional challenge. Rather than determining whether "a facially legitimate and bona fide reason" supports the judgment of Congress, *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), the panel applied heightened scrutiny as it would for other types of discrimination claims. The petition points out that the plaintiffs in *Fiallo* included U.S. citizens, who unsuccessfully argued that rational basis review should not apply because the statutory provision at issue implicated constitutional interests of U.S. citizens and permanent residents, similar to Morales -Santana's claim.

Second, the panel erred in rejecting the government's argument that the statutory scheme is justified by the goal of ensuring a sufficient connection between the child and the United States. Congress carefully distinguished the circumstance in which the child had two legal parents, one of whom was a U.S. citizen and the other of whom was an alien, where the child would be subject to influences of the alien parent and would therefore be less closely connected to the United States. The 1952 scheme reflects awareness that, at the exact moment of birth, there is only one legal parent, the mother. In the absence of any competing parental influence, it was reasonable for Congress to treat that differently than it would treat a child born to a married couple consisting of one U.S. citizen and one alien. In doing so, the scheme ensures a connection between U.S. citizen children and the United States.

**The government argues that Second Circuit panel erred when it reviewed a citizenship statute under the heightened scrutiny standard.**

Third, the petition argues that the panel erred in concluding that Congress did not enact the scheme for the purpose of avoiding statelessness. The panel inappropriately discounted the clearest statement of Congress's actual purpose in the 1952 amendment, which established the child's nationality as that of the [citizen] mother regardless of legitimation, to "insure[] that the child shall have a nationality at birth." The panel incorrectly reasoned that the prior scheme, enacted in 1940, contained a gender-based distinction. However, legitimation by the alien father – a relationship with two legal parents – placed the child in a circumstance comparable to that of child whose parents were married at the time of the birth. Under the 1940 scheme, the distinction therefore was not based on gender, but rather on the number of legal parents. However, the consequence of the scheme was expatriation of U.S. citizen children if their father later legitimated – another potential for statelessness. Congress corrected this problem in 1952, eliminating the adverse consequence from legitimation. Neither the 1940 Act nor the amendment in the 1952 Act was based on impermissible gender bias or stereotypes, as the panel concluded.

Fourth, the petition argues that the panel erred when it ruled that the disparate treatment of unmarried fathers and mothers did not bear a substantial relationship to the objective of preventing statelessness. The panel based this conclusion on its identification of a gender-neutral alternative, proposed in 1933. But the proposal's reference to "no other legal parent," was only facially gender-neutral – in practice, where the child was born out of wedlock and there was "no other legal parent," the one legal parent will be the mother. As the Supreme Court explained in Nguyen v. INS, 533 U.S. 53, 64 (2001), "[t]he issue is not the use of gender specific terms instead of neutral ones."

The government then argues that the panel's severability analysis is flawed in a number of fundamental ways, emphasizing two. First, the panel's severability analysis is ambiguous in ways that are likely to create confusion in its implementation. It is not clear whether the panel intends its rewritten version of the scheme to apply only to unmarried parents or also to married parents, as the literal text of its revision suggests, even though the statute as drafted by Congress is not unconstitutional as applied to parents married to aliens. Either approach would violate the 1952 Act's "Separability" provision, which states that if "any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder

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AILA Doc. No. 16071901. (Posted 7/19/16)

# FURTHER REVIEW PENDING: Update on Cases & Issues

## Aggravated Felony

On November 3, 2015, the Supreme Court will hear 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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## Conviction – Divisibility Inconclusive Record

On September 10, 2015, the *en banc* Ninth Circuit heard argument on rehearing of ***Almanza-Arenas v. Lynch***. The panel opinion, 771 F.3d 1184 (now vacated) ruled that California's unlawful-taking-of-a vehicle statute is not divisible, but even assuming divisibility, the record of conviction discharged the alien's burden of proving eligibility for relief from removal and held the Board's precedent decision (*Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009)) to be erroneous. The court *sua sponte* called for *en banc* views. The government argued that the panel failed to address the Board's precedent ruling that the alien did not carry his burden of proving eligibility when he refused the immigration judge's request to provide evidence relevant to assessing whether his conviction involved moral turpitude; did not need to address that the alien is eligible if it cannot be determined from the criminal record whether or not the conviction was for a crime of turpitude; and improperly failed to follow its own *en banc* precedent that the alien is ineligible if it cannot be determined conclusively from the criminal record that the conviction was not for a crime of turpitude.

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## Citizenship – Equal Protection

On September 21, 2015, the government filed a petition for rehearing *en banc* challenging the Second Circuit's published opinion in ***Morales-Santana v. Lynch***, 792 F.3d 256, which held that the former scheme for citizenship at birth abroad for children of one U.S. citizen and one alien violates equal protection because there is a different physical presence requirement for unwed mothers than unwed fathers. The *en banc* petition argues that the panel erred in its equal protection analysis and its rewrite of the scheme to expand citizenship, intruding on the prerogative of Congress, creating a circuit conflict and non-uniform rules for citizenship.

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## Standard of Review – Nationality Rulings

The Ninth Circuit granted *en banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder***, 718 F.3d 1075. That opinion 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. On March 17, 2014, an *en banc* panel heard oral argument.

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## Continuance – Waiver Standard

On July 14, 2015, over government opposition, the Seventh Circuit granted *en banc* rehearing in ***Bouras v. Lynch.*** The panel opinion, 779 F.3d 665 (now vacated), held that an immigration judge did not abuse his discretion in denying the alien's request for a continuance to obtain his former spouse's testimony in support of his request for a waiver under 8 U.S.C. § 1186a(c)(4) of the joint-petition requirement for removing the conditions on a grant of permanent resident status. Petitioner's supplemental brief to the *en banc* court relied on standard of proof for a good faith marriage waiver as described in the court's recent decision in *Hernandez-Lara v. Lynch*, 789 F.3d 800. The government supplemental brief, filed September 22, 2015, asks the *en banc* court to overrule *Hernandez-Lara*. *En banc* argument is calendared for December 1, 2015.

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## Jurisdiction – Criminal Alien Bar

On September 25, 2015, the government filed a petition for panel rehearing challenging the Ninth Circuit's panel opinion in ***Garcia v. Lynch***, 798 F.3d 876, which held that the criminal alien review bar (8 U.S.C. § 1252(a)(2)(C)) does not limit jurisdiction to review the denial of a continuance to an alien who is removable because of a controlled substance conviction, because the continuance was not denied by reason of the conviction.

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# Summaries Of Recent Federal Court Decisions

## FIRST CIRCUIT

**A Federal or State Conviction Can Constitute an Aggravated Felony Even if Alien Served No Incarcerative Sentence**

In ***Levesque v. Lynch***, __ F.3d__, 2015 WL 5474308 (1st Cir. September 18, 2015) (*Howard,* Lipez, Baron), the First Circuit held that a federal or state conviction can constitute an "aggravated felony" even if the petitioner served no incarcerative sentence for that crime.

The petitioner, Levesque, an LPR, pled guilty in 2011 to conspiracy to commit wire fraud, bank fraud, and identity fraud. See 18 U.S.C. § 371. The federal district court sentencing Levesque determined that the total amount of loss to the victims was $29,444.22, and thus required Levesque to pay restitution in that amount. The court then ordered a five-year term of probation, although it did not impose any incarcerative sentence.

Levesque conceded that the underlying conviction constituted an offense "involv[ing] fraud or deceit" under the definition of "aggravated felony," but argued that because she had not served a sentence her federal conviction therefore did not constitute an "aggravated felony." The court determined that the plain language of INA § 101(a)(43) indicates that the term aggravated felony "applies to an offense described in [§ 101(a)(43)] whether in violation of Federal or State law," even when it is not accompanied by a term of imprisonment, and distinctly "applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years."

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**First Circuit Holds that Agency Properly Denied the Motion to Reopen for Failure to Show Changed Country Conditions**

In ***Liu v. Lynch***, __F.3d__, 2015 WL 5306451 (1st Cir. September 11, 2015) (*Torruella*, Lipez, Barron), the First Circuit held that the IJ and the BIA did not abuse their discretion in denying an untimely motion to reopen because the petitioner failed to establish changed country conditions in China on the basis of his conversion to Christianity.

**Petitioner failed to establish that conditions for Christians in China materially worsened between 1998 and 2012.**

The petitioner, a Chinese citizen, was initially ordered removed in absentia in 1998. On January 13, 2012, almost fourteen years after he was ordered removed, petitioner filed a motion to rescind the in absentia removal order and a motion to reopen his removal proceedings to apply for asylum and related relief. In his motion, petitioner sought equitable tolling of the 180–day filing deadline to rescind a removal order on the basis of ineffective assistance of counsel and lack of notice, alleging that his prior counsel's misconduct had caused him to miss his removal hearing. Petitioner also sought to reopen his removal proceedings to apply for asylum and related relief due to his fear of religious persecution.

The IJ denied petitioner's motion as untimely and numerically barred. The IJ explained that petitioner did not qualify for the changed country conditions exception to the numerical and temporal limitations on motions to reopen because his motion was based solely on changed personal circumstances as a result of his conversion to Christianity. On appeal, the BIA agreed with the IJ that petitioner's conversion to Christianity was a change in personal circumstances, and also determined that his waiting for fourteen years to raise his claim of ineffective assistance of counsel did not amount to due diligence.

The court preliminary held that petitioner waived any challenge to the BIA's conclusion that he failed to exercise the requisite due diligence to warrant equitable tolling of the 180-day deadline for filing his motion to rescind an in absentia removal order, where he argued the due diligence issue for the first time in his reply brief.

On the merits, the court held that the IJ and the BIA acted within their discretion in determining that Liu failed to establish that conditions for Christians in China materially worsened between 1998 and 2012. "The evidence consistently represents a mere continuation of religious persecution, rather than an intensification," said the court. Accordingly, the court found that petitioner's motion did not qualify for the changed country conditions exception for filing motions to reopen.

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## THIRD CIRCUIT

**Third Circuit Holds Aliens Ineligible for Naturalization Based on Deriving Lawful Permanent Resident Status from Father's Fraudulent Asylum Application**

In *Kadirov v. Secretary, DHS*, 2015 WL 5520222 (3rd Cir. September 22, 2015) (Fisher, *Chagares*, Jordan) (unpublished), the Third Circuit held that two brothers Temur and

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Khusan Kadirov, who derived their LPR status from their father's fraudulent asylum application, were ineligible for naturalization by failing to establish that they were lawfully admitted for permanent residence.

The Kadirovs' father, Akbar, obtained LPR status in 2004. The Kadirov brothers obtained their LPR status derivatively through their father in 2005. In 2008, Akbar was charged with fraudulently obtaining his asylum status, a crime to which he subsequently pled guilty. In 2011, an IJ sustained removal charges against Akbar, and he was removed that year. In 2009, ICE initiated removal proceedings against the Kadirov brothers on the ground that they were inadmissible at the time of their entry because the basis of their asylum status was their father's fraud. In 2012, DHS and the Kadirovs' counsel filed a joint motion to terminate the proceedings without prejudice against the Kadirovs in "the interest of justice."

**"An alien whose status has been adjusted to LPR — but who is subsequently determined to have obtained that status adjustment through fraud — has not been lawfully admitted for permanent residence ."**

The Kadirovs later applied for naturalization with USCIS, and their applications were denied mainly on the ground that they had failed to establish that they were lawfully admitted as LPRs. The Kadirovs filed a complaint in the district court challenging the USCIS's denial of their naturalization applications, but the district court granted the government's motion for summary judgement.

The Third Circuit upheld USCIS's denial. The court explained that under INA § 318, "no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter." "The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity.' As a result, 'an alien whose status has been adjusted to LPR—but who is subsequently determined to have obtained that status adjustment through fraud—has not been lawfully admitted for permanent residence because the alien is deemed, ab initio, never to have obtained [LPR] status,'" said the court.

The Kadirovs sought to distinguish their case on the basis that they had been through their Immigration Court removal proceedings and emerged with their LPR status not having changed. The court said that aslthough "the removal proceeding did not strip the Kadirovs of LPR status, neither did it cure the underlying deficiency with the basis of that status, their father's fraud."

The court also rejected the Kadirovs estoppel claims, that ICE's decision to join in a motion to terminate their removal proceedings precluded the USCIS from finding that the they have not been lawfully admitted for permanent residence.

Finally, the court observed that "although this outcome leaves the Kadirovs in the precarious position of being LPRs who are not currently the target of removal proceedings but who cannot pursue naturalization on the basis of their LPR status, this is the position they bargained for in agreeing to terminate the removal proceedings."

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## SIXTH CIRCUIT

■ **Sixth Circuit Holds that in Certain Cases Personal Service to Alien's Counsel Constitutes Personal Service on the Alien**

In ***Cruz-Gomez v. Lynch***, __ F.3d __, 2015 WL 5446898 (6th Cir. September 17, 2015)(*Boggs*, Batchelder, Huck), the Sixth Circuit held that INA § 240(a) requires personal service upon the alien wherever practicable, but acknowledged that in certain circumstances, such as on the facts of this case, "personal service to a represented alien's counsel may constitute personal service to the alien."

Petitioner Amoncio Cruz-Gomez, a native and citizen of Mexico, was charged with removability when he remained in the United States after his visa expired. When he failed to appear at a master calendar hearing in his removal proceedings, the IJ ordered him removed in absentia. Cruz-Gomez filed a motion to reopen his proceedings, arguing that he did not receive proper notice of the hearing.

The IJ denied the motion to reopen finding that he had specifically told Cruz-Gomez "about both hearing dates through a Spanish interpreter and that his counsel was provided with written notices of the two hearings." The IJ concluded that "notice to counsel constitutes notice to" Cruz-Gomez. On appeal, the BIA found no error in the IJ's denial and dismissed the appeal.

The court found that the record indicated that Cruz-Gomez's counsel was personally served with written notice of the hearing on the day that he appeared with Cruz-Gomez in immigration court. The court interpreted § 240 (a) "to require that personal service be made upon the alien

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whenever practicable and held that, in certain cases, personal service to a represented alien's counsel may constitute personal service to the alien." The court found that this is one of those cases.

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## NINTH CIRCUIT

■ **Ninth Circuit Holds that the BIA Erred in Finding that Alien's Conviction and Eleven-year Sentence for Voluntary Manslaughter Under California Penal Code Section 192(a) Constituted a Categorical Crime of Violence**

In ***Quijada-Aguilar v. Lynch***, 799 F.3d 1303 (9th Cir. 2015) (Pregerson, Fernandez, *Nguyen*), the Ninth Circuit disagreed with the agency that the alien's 1992 voluntary manslaughter conviction, under California Penal Code (CPC) § 192(a) was a categorical crime of violence.

The petitioner, who conceded his deportability, sought withholding of removal under the INA and CAT, and deferral of removal under CAT based on anticipated torture in El Salvador due to both his status as a criminal deportee and his affiliation with his family members who served in the Salvadoran military.

The court determined that "because a person may be convicted of voluntary manslaughter under § 192(a) for reckless conduct — conduct that falls outside the definition of a crime of violence set forth in 18 U.S.C. § 16 — § 192(a) is not categorically a crime of violence." As a result, the court found that petitioner was eligible for withholding of removal because he had not been convicted of a particularly serious crime.

The court also remanded the case for the BIA to evaluate petitioner's claim for deferral of removal under the CAT "by considering the aggregate risk of torture arising from Quijada–Aguilar's family affiliation together with the risk arising from his status as a criminal deportee."

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■ **Ninth Circuit Remands for Proper Application of "Clearly Erroneous" Standard, but Upholds Agency Determination that Grant of Amnesty by Philippines Does Not Eliminate Unlawfulness of Activity for Purposes of Terrorist Activity Bar to Admission to United States**

In ***Zumel v. Lynch***, __F.3d__, 2015 WL 5692524 (9th Cir. September 29, 2015) (*Ikuta*, O'Scannlain, Teilborg (by designation)), the Ninth Circuit held that the BIA failed to apply the "clearly erroneous" standard in reversing an IJ's finding that participants in an attempted coup against the Philippine government, including the petitioner, lacked intent to endanger the safety of others despite the fact that the participants were armed and there were 30-50 casualties.

The case was remanded for application of the proper standard by the BIA. The court upheld the BIA's decision in all other respects, including the conclusion that a grant of amnesty by the government of the Philippines to the petitioner and other coup participants did not eliminate the unlawfulness of their activity, and the determination that a conviction in the Philippines is not required for an activity to be "unlawful" within the meaning of the terrorist activity bar to admission to the United States.

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## DISTRICT COURTS

■ **District of New Jersey Grants Summary Judgment in Favor of Government in Naturalization Denial**

In ***Ijomah-Nwosu v. Holder***, No. 14-cv-2527 (D.N.J. August 31, 2015) (*Martini, J.*), the court granted summary judgment in favor of the government concluding that the Government properly denied the alien's naturalization application. The court held that because the alien was married prior to her entry as an unmarried child of a United States citizen, she was never lawfully admitted and therefore ineligible to naturalize under INA § 318. The court determined that the fact that she was admitted through no fraud of her own did not change the fact that she was substantively ineligible to be admitted, and therefore was not lawfully admitted for purposes of naturalization eligibility.

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■ **Denial of Adjustment Application Is Not Final Agency Action**

In ***Hosseini v. Beers***, No. 5:14-cv-404 (E.D. Ky. September 11, 2015) (*Hood, J.*), the Eastern District of Kentucky granted the government's motion to dismiss a challenge to USCIS' denial of an application to adjust status. The court held it had jurisdiction to hear the alien's complaint, despite the government's argument that INA § 242(a)(2)(B)(ii) precludes judicial review. However, the court ruled that the matter should still be dismissed. The alien had failed to state a claim because the agency rendered no final action. The court held that the denial of the application was "merely an intermediate step at this stage of the proceedings," noting that the government had not yet initiated removal proceedings against the alien.

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# Transgender Woman in Mexico Tortured

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female hormones in 2005, and lived openly as a woman for the first time. In 2006 petitioner was convicted of a felony for driving while having a .08 percent or higher blood alcohol level and causing bodily injury to another person, a violation of California Vehicle Code § 23153(b). Petitioner was sentenced to 364 days incarceration and three years of probation. After her release from custody, she was removed to Mexico in March 2007 under a stipulated order of removal.

In Mexico, petitioner again faced harassment from her family and members of the local community because of her gender identity and perceived sexual orientation. One evening, when Avendano–Hernandez was on her way to visit family in Oaxaca's capital city, armed uniformed police officers stationed at a roadside checkpoint assaulted and raped her. Following this incident she fled Mexico but while attempting to cross the border with a group of migrants. A few days later, Avendano–Hernandez encountered a group of uniformed Mexican military officers who separated her from the rest of her group and one of the officers forced her to perform oral sex. Avendano-Hernandez successfully reentered the United States in May 2008 and returned to Fresno. Three years later, she was arrested for violating the terms of probation imposed in her 2006 felony offense for failing to report to her probation officer.

When placed in removal proceedings, the IJ and subsequently the BIA determined that this conviction constituted a particularly serious crime, rendering Avendano–Hernandez ineligible for withholding of removal. The BIA also denied Avendano–Hernandez's CAT request on the ground that she failed to "demonstrate[ ] that a member of the Mexican government acting in an official capacity will more likely than not 'consent' to or 'acquiesce' in her torture; that is, come to have advance knowledge of any plan to torture or kill her and thereafter breach her legal responsibility to intervene to prevent such activity."

The court first found that the BIA had applied the proper legal standard in concluding that Avendano–Hernandez's conviction was a particularly serious crime. "While 'driving under the influence is not statutorily defined as an aggravated felony,' [ ] the BIA may determine that this offense constitutes a particularly serious crime on a case-by-case basis," said the court.

Second the court found that the BIA had "wrongly concluded that no evidence showed 'that any Mexican public official has consented to or acquiesced in prior acts of torture committed against homosexuals or members of the transgender community.'" The court explained that Avendano-Hernandez "provided credible testimony that she was severely assaulted by Mexican officials on two separate occasions: first, by uniformed, on-duty police officers, who are the 'prototypical state actor[s] for asylum purposes [ ] and second, by uniformed, on-duty members of the military. Such police and military officers are 'public officials' for the purposes of CAT."

The court also found that the BIA had "erred by requiring Avendano–Hernandez to also show the 'acquiescence' of the government when her torture was inflicted by public officials themselves, as a plain reading of the regulation demonstrates." The court rejected the government's suggestion that these police and military officers could have been merely rogue or corrupt officials.

**The court also found that the BIA had "erred by requiring Avendano–Hernandez to also show the 'acquiescence' of the government when her torture was inflicted by public officials themselves, as a plain reading of the regulation demonstrates."**

The court then determined that absent changed circumstances, "if an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering." Moreover, the court said that "the agency must evaluate all other evidence relevant to the claim, including proof of 'gross, flagrant, or mass violations of human rights' in the home country and other country conditions evidence." Here, the court found flawed the BIA reliance on Mexico's passage of laws purporting to protect the gay and lesbian community because "it mistakenly assumed that these laws would also benefit Avendano–Hernandez, who faces unique challenges as a transgender woman . . . While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct."

Accordingly, the court concluded that "in light of Avendano–Hernandez's past torture, and unrebutted country conditions evidence showing that such violence continues to plague transgender women in Mexico, 'no questions remain—she was tortured and there is a substantial danger that she will be, if returned." Therefore, the court remanded the case to the BIA to grant CAT protection.

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# Former CEO of Bay Area University Sentenced in Visa Fraud Scheme

A former chief executive officer (CEO) of Herguan University in Sunnyvale, California, has been sentenced to 12 months in prison for his role in a student visa fraud scheme uncovered by the Document and Benefit Fraud Task Force (DBFTF) spearheaded by U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI). Jerry Wang, 34, appeared Monday before U.S. District Judge Edward J. Davila. Wang was ordered to surrender and begin serving his sentence by Nov. 3. In addition to the prison term, Judge Davila ordered the defendant to forfeit $700,000 in proceeds derived from the scheme.

**Wang admitted participating in the scheme to commit visa fraud involving more than 100 immigration-related documents known as "Forms I-20."**

In April, Wang pleaded guilty to submitting false documents to the Department of Homeland Security (DHS) Student and Exchange Visitor Program (SEVP). As part of his plea, he also admitted participating in the scheme to commit visa fraud involving more than 100 immigration-related documents known as "Forms I-20," as well as aiding and abetting the unauthorized access of a DHS computer database.

The ex-Herguan CEO was originally indicted in 2012 on 15 charges in connection with a visa fraud scheme tied to the school. A superseding indictment filed in October 2014 alleged that, starting in July 2007, Wang and others caused Herguan to submit fraudulent documents to the SEVP in support of petitions to admit foreign students. Wang was charged with conspiracy to commit visa fraud; aiding and abetting visa fraud; aiding and abetting unauthorized access of a government computer; use of false documents; and aggravated identity theft.

"Jerry Wang has admitted submitting over one hundred fraudulent documents to the government in an effort to circumvent the rules applying to international students," said Acting U.S. Attorney Brian J. Stretch. "In doing so, he has imperiled the programs that allow international students to visit the United States in order to engage in valuable educational exchanges."

Assistant U.S. Attorneys Hartley M. K. West and Maia T. Perez are prosecuting the case with the assistance of Helen Yee, Natachiana Williams, Rosario Calderon, and Trina Khadoo.

The DBFTF is a multi-agency task force that coordinates investigations related to fraud schemes involving immigration documents and benefits.

# DHS Announces Temporary Protected Status Designation for Yemen

DHS has designated Yemen for Temporary Protected Status (TPS) for 18 months due to the ongoing armed conflict within the country. Yemen is experiencing widespread conflict and a resulting severe humanitarian emergency, and requiring Yemeni nationals in the United States to return to Yemen would pose a serious threat to their personal safety. 80 *Fed. Reg.* 53319 (September 3, 2015)

As a result of Yemen's designation for TPS, eligible nationals of Yemen residing in the United States may apply for TPS with U.S. Citizenship and Immigration Services (USCIS).

The TPS designation for Yemen is effective September 3, 2015, and will be in effect through March 3, 2017. The designation means that, during the designated period, eligible nationals of Yemen (and people without nationality who last habitually resided in Yemen) who are approved for TPS will not be removed from the United States and may receive an Employment Authorization Document (EAD). The 180-day TPS registration period begins today and runs through March 1, 2016.

To be eligible for TPS, applicants must demonstrate that they satisfy all eligibility criteria, including that they have been both "continuously physically present" and "continuously residing" in the United States since September 3, 2015. Applicants also undergo thorough security checks. Individuals with certain criminal records or who pose a threat to national security are not eligible for TPS. The eligibility requirements are fully described in the Federal Register notices and on the TPS Web page at www.uscis.gov/tps.

Applicants may request that USCIS waive any or all TPS-related fees based on inability to pay by filing Form I-912, Request for Fee Waiver, or by submitting a written request. Fee-waiver requests must be accompanied by supporting documentation. USCIS will reject any TPS application that does not include the required filing fee or a properly documented fee-waiver request.



AILA Doc. No. 16071901. (Posted 7/19/16)

## Prof. Wadhia Shoba on Prosecutorial Discretion

comment administrative rulemaking process would suffice.

Perhaps most controversially to her audience of Government attorneys, Wadhia also proposed "exploring" judicial review of negative PD decisions — a prospect she suggested might nevertheless be possible even under *Heckler v. Chaney*, 470 U.S. 821 (1985) (limiting judicial review of agency decisions not to seek enforcement) and similar cases.

Returning to her theme of humanitarian compassion, Wadhia also suggested that a criminal background should not necessarily be a reason to deny PD. "Having a criminal history has not been fatal to a request for prosecutorial discretion historically," she noted.

Wadhia elaborated: based on her research, the Department of Homeland Security, United States Immigration and Customs Enforcement—as well as its predecessor agency, the former Immigration and Naturalization Service—"has a long history of protecting imperfect people" by granting PD.

Wadhia thus urged immigration authorities to "look at the whole person" when making PD decisions. Wadhia acknowledged that under DHS guidance, PD determinations are made on a case-by-case basis.

At Penn State Law, Wadhia teaches doctrinal courses in immigration and asylum and refugee law. She is also the founder/director of Penn State's Center for Immigrants' Rights Clinic.

Asked how she first became interested in immigration, Wadhia candidly revealed that she simply enjoys the Immigration and Nationality Act. "I fell in love with the statute and its cross-sections," she confided.

## Rehearing Sought in Citizenship Case

*(Continued from page 2)*

of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." 8 U.S.C. § 1101 note (1958). In addition, the panel's analysis fails to appreciate the important difference between the "physical presence" requirement in the part of the scheme the panel jettisoned, and the "continuous" physical presence requirement in the part of the scheme that the panel expanded. It is conceivable that some U.S. citizen parents are capable of satisfying the longer requirement but not the shorter continuous requirement. The panel's revision therefore arguably deprives at least some individuals of the U.S. citizenship to which they were entitled under the scheme enacted by Congress.

Second, the petition argues that the panel's decision to rewrite the scheme also violates 8 U.S.C. § 1421 (d) (1958). That provision states that "[a] person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the 1952 Act], and not otherwise." In *Nguyen*, 533 U.S. at 72, the Supreme Court made clear that transmission of citizenship under Section 1409(a) constitutes a "naturalization" for purposes of Section 1421(d), at least where the statutory conditions set forth in that provision are satisfied after the child is born. Here, the panel decision allows children of unmarried citizen-fathers to acquire citizenship under conditions contrary to those prescribed by statute.

*Ed. Note: At the time of this writing, the Second Circuit has not yet acted on the government's petition for rehearing en banc in Morales-Santana v. Lynch.*

### INDEX TO CASES SUMMARIZED IN THIS ISSUE



### OIL TRAINING CALENDAR

**November 2-6, 2015.** 21st Annual Immigration Law Seminar. This is an intermediate immigration law training. Attorneys from OIL's client agencies and AUSAs are invited to attend. Contact Jennifer Lightbody at Jennifer.Lightbody@usdoj.gov.

**November 19, 2015.** Brown Bag Lunch & Learn with ***Mary Giovagnoli***, Deputy Assistant Secretary for Immigration Policy, DHS.

**DON'T FORGET TO COMPLETE THE ANNUAL MANDATORY TRAINING!**

# Professor Emphasizes PD's Human Impact

*by Benjamin Mark Moss, OIL*

On September 28, 2015, Penn State University School of Law Professor Shoba Sivaprasad Wadhia visited OIL-Appellate for the latest installment of OIL-Appellate's popular brown bag lunch & learn series.

Professor Wadhia discussed her 2015 book, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*.

Described on her Penn State faculty webpage as "one of the nation's leading scholars on the role of prosecutorial discretion in immigration law," Wadhia hewed closely to this theme, focusing on prosecutorial discretion's human impact.

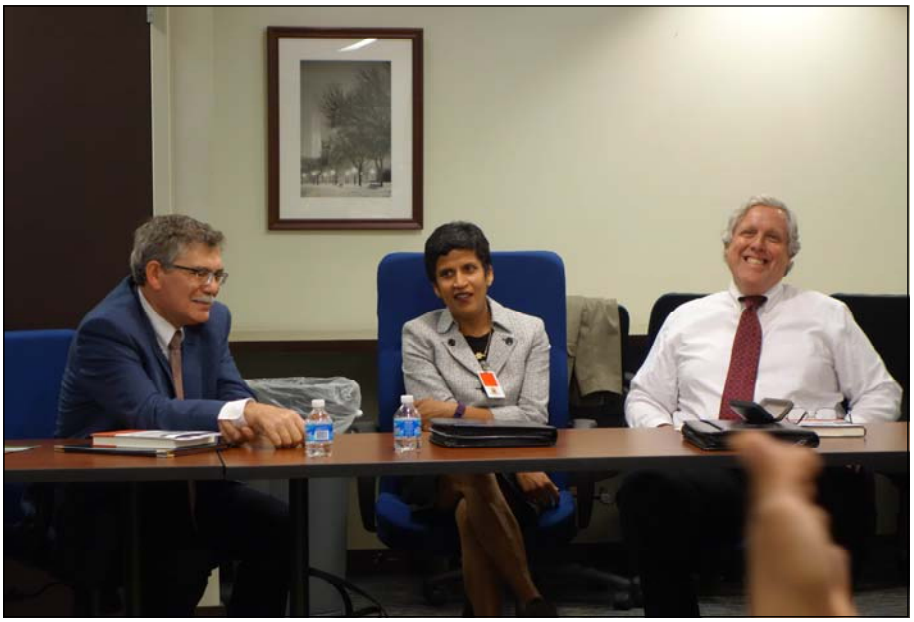
"Prosecutorial discretion is a powerful sword," she said, "because it empowers the government to decide the fate of thousands of people and their families." According to Wadhia, prosecutorial discretion, or PD as it is commonly called, "injects compassion into an otherwise complex and broken immigration system."

Wadhia recounted that her book follows the history of PD in immigration, including the case of iconic Beatles legend John Lennon, which resulted in the first notable public discussion of the requirements for deferred action.

As to the current system, Wadhia proposed reforms, including codifying deferred action as an immigration benefit with a standardized application and a transparent, quantifiable adjudication process.

Legislation from Congress would not be necessary, Wadhia opined; rather, she said, a notice-and-

*(Continued on page 9)*



***Francesco Isgrò, Shoba Wadhia, David M. McConnell, OIL Director***

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

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

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

Office of Immigration Litigation

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