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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Seventh Circuit Holds that Asylum Applicant Failed to Demonstrate a Nexus Between his Wife's Political Affiliation and his Fears of Future Harm

In *Ruiz-Cabrera v. Holder*, __ F. 3d __, 2014 WL 1362333 (7th Cir., April 8, 2014) (Easterbrook, Manion, *Hamilton*), the Seventh Circuit upheld the BIA's denial of petitioner's applications for withholding of removal and CAT protection.

The petitioner, a citizen of Mexico, entered the United States without in 2001. He came to the attention of immigration authorities in 2009 after an arrest. When placed in removal proceedings, he conceded removability, but applied for withholding of removal.

The petitioner claimed that he feared returning to Mexico because of threats and mistreatment by his wife, who holds a local office as a member of Party of the Democratic Revolution (PRD). Petitioner stated in his application that he feared his wife would "use her political influence to have people close to her cause me harm, including torture at the hands of Mexican law enforcement."

Petitioner sought withholding based on imputed political opinion (opposition to the PRD) and membership in a particular social group, which he defined as "individuals who face persecution by corrupt governmental and law enforcement authorities insti-

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Application of IIRIRA's Reinstatement Provision Not Impermissibly Retroactive Where Petitioner Failed to Seek Renewal of Denied Adjustment Application

In ***Ortega v. Holder***, __ F.3d __, 2014 WL 1273767 (9th Cir., March 31, 2014) (Farris, Smith, Watford), the Ninth Circuit held that IIRIRA bar on applications for relief by aliens subject to reinstatement of removal under INA § 241(a)(5), did not have an impermissibly retroactive effect on an alien whose application for adjustment of status was denied ten years prior to IIRIRA.

The petitioner, a citizen of Mexico, illegally entered the United States on August 14, 1984. On August 21, 1984, he was ordered deported to Mexico and returned there, but he reentered the United States on August 25, 1984. In December 1984, he fraudulently married a U.S. citizen so as to obtain immigration relief, and he applied to adjust his status to that of a lawful permanent resident after his spouse filed an I–130 petition. Before the application was acted on, the citizen-spouse withdrew her I–130 petition and admitted that the marriage was a fraud. Petitioner's application was accordingly denied in 1987. Petitioner continued to remain illegally in the U.S. until December 1, 2009, at which point his 1984 deportation order was reinstated.

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Asylum Applicant Failed To Establish Nexus

gated by a politically connected spouse ." He also applied for protection under the Convention Against Torture.

At his removal hearing, petitioner testified that throughout the 1990s, his wife would often become violent (throwing stones and other objects at him) and twice urged men to fight him, publicly asserting that he had abused her. In 1996 or 1997, someone fired two shots at him. Petitioner believed the shots were fired by the brother of a neighbor with whom his wife accused him of having an affair.

In 2002, when petitioner returned to Mexico for an eight-month period, he said that the police detained him based on his wife's false accusation that he had groped her. The police then had him stand naked for five minutes while they visually examined him. He was released later that day only after his wife dropped the charges.

Following a hearing, the IJ concluded that petitioner had not proposed a valid social group because he had not identified a shared characteristic aside from persecution and that he had not shown that he would be harmed based on his membership in that group. Rather, said the IJ, his wife targeted him in "a personal vendetta." The IJ also concluded that petitioner had not offered any evidence to show that an alleged persecutor would impute any political opinion to him. The BIA adopted and affirmed the IJ's order.

Before the Seventh Circuit petitioner contended that his proposed group is cognizable because its members — people who fear harm from politically connected spouses — share the characteristic of being married. He asserted that the identity of one's spouse (or in the case of divorce one's former spouse) was an immutable characteristic.

The court rejected that argument, explaining that the common characteristic shared by its members is that they face persecution. "Though a social group does not require complete independence of any relationship to the persecutor, the group must be linked by something more than persecution," said the court. The court explained that "marriage is his relationship to his alleged persecutor, not a characteristic shared by all members of the proposed group . . . A personal dispute, no matter how nasty, cannot support an alien's claim of asylum."

"Though a social group does not require complete independence of any relationship to the persecutor, the group must be linked by something more than persecution.

The court also rejected petitioner's contention that persons in Mexico would impute his wife's political opinion to him and target him for harm as a result. "It is not enough to show that a family member holds a political opinion. [Petitioner] also must show that an alleged persecutor would impute that opinion to him," said the court. The court also noted that the only evidence petitioner " supplied on this theory was general background evidence of drug violence and political corruption in Mexico. Nothing in the record indicates that traffickers or politicians are likely to connect him to his wife's politics or to target him for those reasons."

Finally, the court determined that substantial evidence supported the IJ's conclusion that petitioner had not shown that he "would likely suffer harm so barbaric that it met the definition of torture."

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Reinstatement Provision Was Not Impermissibly Retroactive As Applied To Applicant For Adjustment

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In rejecting petitioner's contention that the § 241(a)(5) was impermissibly retroactive the court explained that when, as here, Congress has not spoken explicitly with respect to a statute's temporal reach, the court analyze retroactivity claims by assessing whether the application would (1) create "new consequences [for] past acts" or (2) "cancel[ ] vested rights."

The court then determined, in light of the Supreme Court decision in *Fernandez–Vargas v. Gonzales*, 548 U.S. 30 (2006), that § 241(a)(5) did not create new consequences for past acts when applied to continuing violators of immigration laws, such as petitioners. Moreover, petitioner failed to take any action prior to IIRIRA to vest any right he may have initially had. Petitioner "did nothing to renew his application — for example, he did not re-marry another citizen or re-acquire an I–130 from his initial spouse, nor did he ever re-apply for adjustment of status," said the court.

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FURTHER REVIEW PENDING: Update on Cases & Issues

CSPA — Aging Out

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

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BIA Standard of Review

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

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Standard of Review Nationality Rulings

The Ninth Circuit 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. The court had granted *en banc* rehearing over government opposition, and vacated the published prior panel decision, 718 F.3d 1075.

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Retroactive Application of Board Decisions

On January 6, 2014, the Ninth Circuit ordered the government to respond to the rehearing petition challenging its September 19, 2013 unpublished decision in ***Diaz-Castaneda v. Holder***, 2013 WL 5274401. The petition contends that petitioners are eligible for adjustment of status because the balancing of the *Montgomery Ward* factors tilts against applying *Matter of Briones* retroactively to their case, and the case should be remanded to develop the record on their reliance and equitable interests relating to the *Montgomery Ward* balancing test. The government opposed rehearing on January 27, 2014, arguing that the panel appropriately determined the *Montgomery Ward* factors in the first instance and therefore the panel decision suffered no error of fact or law to support rehearing.

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Asylum – Internal Relocation

In ***Maldonado v. Holder***, No. 09-71491, the Ninth Circuit has ordered the parties to file supplemental briefs on whether case should be heard *en banc* in the first instance to consider: (1) whether there is a conflict in our case law between *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011), and *Hasan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004), regarding which party bears the burden of proof on internal relocation; and (2) whether *Hasan* and *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008), improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible." Simultaneous briefs by the parties are due June 16, 2014.

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Asylum – Credibility

The Ninth Circuit ordered the government to respond to the alien's petition for *en banc* rehearing in ***Li v. Holder***, 738 F3d 1160, on the question of whether the panel's use of "*falsus in uno, falsus in omnibus*" to uphold the adverse credibility finding inconsistent with the circuit's pre-REAL ID Act rulings requiring adverse credibility findings go to the heart of the claim. The government opposition to rehearing was filed March 21, 2014.

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Jurisdiction – Final Order

On May 7, 2014, the Ninth Circuit granted *en banc* rehearing, with government acquiescence, and vacated its published panel decision in ***Abdisalan v. Holder***, 728 F.3d 1122, which held that an unsuccessful asylum claim was necessarily final at time of remand of the successful withholding of removal claim to update her background checks, but ruled that it lacked jurisdiction to review the alien's challenge to the agency's ruling that the asylum application was untimely. The government response defended the judgment, but conceded that the court's precedents on finality are inconsistent and in need of correction *en banc*. Oral argument before an *en banc* panel is calendared for the week of June 16, 2014.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds BIA Afforded High Level of Deference When Deciding Motions to Reopen

In ***Marsadu v. Holder***, __ F.3d __, 2014 WL 1328306 (1st Cir., April 4, 2014) (*Torruella*, Lynch, Kayatta), the First Circuit held that it will only "meddle" in the BIAs' denial of a motion to reopen where it concludes that the BIA has abused its ample discretion, which the court recognized was an "exceedingly high bar" that the petitioner failed to overcome.

The petitioners, husband and wife, and citizens of Indonesia entered the United States as visitors in 2001 and 2002 and never departed. Petitioners filed separate applications for asylum, withholding and CAT protection based on fears of being persecuted in Indonesia due to their Christian faith. Their cases were subsequently consolidated. The IJ denied all of petitioners' claims, and the BIA dismissed their appeal. On October 30, 2009, the First Circuit denied their petition for review.

On July 9, 2012, petitioners filed an untimely motion with the BIA to reopen removal proceedings, arguing that they were *prima facie* eligible for asylum due to recent changes in country conditions in Indonesia that put them at risk of persecution. Specifically, petitioners argued that there had been a recent rise in violence in Indonesia led by radical Islamists against Christian minority groups.

The BIA denied the motion concluding that petitioners' evidence in support of their motion was insufficient to show "a change in conditions or circumstances in Indonesia material to [their] asylum claim." In particular, the BIA noted that petitioners' evidence was not individualized to reflect dangers posed specifically to them or that there was pattern or practice of persecution of Christians in Indonesia.

In upholding the denial of the motion, the court explained that the BIA did not abuse its discretion when it concluded, notwithstanding a contrary report by petitioners' expert witness, that petitioners failed to show an "intensification or deterioration of country conditions." The court further found that even if petitioners had shown a material change in Indonesia's conditions, they had not established a *prima facie* case for asylum.

"The agency had the right to require that the petitioner proffer more than uncorroborated suppositions; it had the right to expect such corroboration, if reasonably available."

The court also determined that the BIA had "correctly found that petitioners provided no proof of an individualized risk of harm," and that "the evidence presented was also insufficient to establish a pattern of persecution against Christians in Indonesia."

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First Circuit Affirms Denial of Asylum Claim due to Applicant's Failure to Provide Corroborating Evidence

In ***Moreno v. Holder***, __ F.3d __, 2014 WL 1613680 (1st Cir., April 18, 2014) (*Selya*, Torruella, Howard), the First Circuit held that substantial evidence supported the agency's denial petitioner's application for asylum and related relief because she failed to corroborate her credible testimony or explain her failure to do so.

The petitioner, a Colombian national, entered the United States as a visitor in 1998, and overstayed her visa. When placed in removal proceedings she applied for asylum, withholding and CAT protection. She claimed that she had been persecuted, and would face future persecution, on account of, among other things, her status as the expatriate widow of a slain narco-trafficker. The IJ and the BIA denied the claims for failure to prove either past persecution or a well-founded fear of future persecution based on a statutorily protected ground.

The court determined that petitioner never substantiated either her suspicion that her first husband was involved with narco-traffickers or her suspicion that he was killed as a result of that involvement. "The agency had the right to require that the petitioner proffer more than uncorroborated suppositions; it had the right to expect such corroboration, if reasonably available," said the court. Moreover the court also found that petitioner "never tied her first husband's murder to her own persecution. An alien who claims that harm to a relative is evidence that she herself has been persecuted must present more than gossamer strands of speculation and surmise."

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First Circuit Holds Asylum Applicant Failed to Meet Burden of Establishing Materially Changed Country Conditions in Sri Lanka for Returning Asylum Seekers

In ***Perera v. Holder***, __ F.3d __, 2014 WL 1613670 (1st Cir., April 22, 2014) (Lynch, *Thompson*, Kayatta), the First Circuit held that the BIA did not abuse its discretion when it denied the petitioner's time and number-barred motion to reopen.

The petitioner sought asylum, withholding and CAT protection claim-

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ing persecution and fear of future persecution by Sri Lankan police officers who thought that she supported the Sri Lankan separatist group called the Liberation Tigers of Tamil Eelam ("LTTE"). The IJ denied the claims and the BIA dismissed her appeal in 2008. The First Circuit later denied her petition for review. *Perera v. Holder*, 471 F. App'x 4 (1st Cir. 2012) In 2010 petitioner moved to reopen her case, alleging changed circumstances in her homeland, *e.g.,* that the police were still looking high and low for her because of her support for LTTE. The BIA denied the motion finding that the evidence did not constitute "changed conditions or circumstances," and that she had not shown a *prima facie* eligibility for withholding, asylum, or CAT.

In upholding the BIA's denial, the court observed that she had "not shown why other evidence of Sri Lanka's 'history of torturing returned asylum seekers' -- again, words lifted from her reopen motion — was 'unavailable and undiscoverable' at the time of her removal proceedings." Accordingly, he motion was "barred by her failure to show a material adverse change in country conditions," said the court.

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■ **First Circuit Holds that Asylum Applicant Failed to Establish Past Persecution Based on a Single Beating**

In ***Thapaliya v. Holder***, __ F.3d __, 2014 WL 1624177 (1st Cir., April 24, 2014) (*Howard*, Stahl, Lipez), the First Circuit held that the petitioner failed to establish that he was a victim of past persecution in Nepal, even though he experienced a severe beating and a possible death threat due to his political affiliation.

The court explained that "the baseline rule is that past persecution requires more than mere discomfiture, unpleasantness, harassment, or unfair treatment," and that "isolated beatings have been commonly rejected as grounds for persecution." On the claim of future persecution, the court noted that a year passed after the incident before petitioner left Nepal, and neither he nor his family suffered harm during that time. "We have often echoed that the fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return," said the court.

"We have often echoed that the fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return."

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■ **First Circuit Holds that Petitioner's Failure to Challenge the Agency's Determination that He was Able to Relocate in India Resulted in Waiver**

In ***Singh v. Holder***, __F.3d __, 2014 WL 1688913(1st Cir. April 30, 2014) (*Howard*, Selya, Lipez), the First Circuit held that petitioner's failure to challenge the agency's finding that he lacked a well-founded fear of future persecution, given his ability to relocate in India, resulted in waiver and this unchallenged finding warranted denial of the petition.

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■ **First Circuit Holds that Agency Did Not Abuse Its Discretion in Denying Petitioner's Third Motion to Reopen as Untimely**

In ***Wang v. Holder***, __ F.3d __, 2014 WL 1688916 (Torruella, *Selya*, Lipez) (1st Cir. April 30, 2014), the First Circuit affirmed the agency's denial of petitioner's third motion to reopen as untimely.

The petitioner, a Chinese national, entered the United States unlawfully in 1993. He unsuccessfully applied for asylum on November 28, 1994. Petitioner renewed his asylum claim during his removal proceedings. However, when he failed to appear at a hearing on August 16, 1995, he was ordered removed *in absentia*. On November 12, 1998, petitioner moved to reopen the proceedings but conceded that he had known of the scheduled show-cause hearing. The IJ denied the motion as untimely. Petitioner then filed a second motion on February 12, 2009, eight years later, with the BIA, claiming changed country conditions. The BIA denied the motion. Petitioner then sought judicial review, but the First Circuit denied the petition finding no abuse of discretion.

Undaunted, petitioner filed a third motion on February 27, 2013, claiming *inter alia* that he had never received notice of the original deportation order. The BIA denied the motion as untimely.

In upholding the denial of the motion, the court agreed with the BIA that the petitioner's concession that he had received notice of his scheduled deportation hearing rendered him ineligible to take advantage of an exception to the time limit for moving to reopen and that tolling the deadline was unwarranted because petitioner had not shown that he exercised due diligence.

"Although a familiar bit of homespun philosophy tells us that hope springs eternal, litigation founded on hope alone, unsupported by persuasive legal or factual arguments,

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should not be allowed to persist eternally. Such is the lesson of this case," wrote the court.

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FIFTH CIRCUIT

■ Fifth Circuit Holds Alien Admitted on Fraudulent Travel Document Ineligible to Adjust Status

In ***Sattani v. Holder***, __ F.3d __, 2014 WL 1420288 (5th Cir., April 14, 2014) (Higginbotham, Davis, Haynes) (*per curiam*), the Fifth Circuit held that petitioner, who was admitted to the United States on fraudulent documents, was inadmissible and ineligible to adjust status under INA § 245(i).

The court explained that eligibility for visas and admissibility is governed by the plain language of INA § 212(a). Namely, that an applicant for adjustment of status under INA § 245(i) must establish that she is "not inadmissible under any of the various paragraphs of [§] 212(a) . . . or that [she is] eligible for a waiver of any applicable ground of inadmissibility."

The court rejected petitioner's contention that it should extend *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), to his circumstances. In *Briones* the BIA held that § 245(i) adjustment remains available to aliens inadmissible under § 212(a)(6)(A)(i) only because a contrary interpretation would render the language of section 245(i) so internally contradictory as to effectively vitiate the statute, an absurd result that Congress is presumed not to have intended. The court explained that "no absurdity or contradiction results from applying INA § 212(a)(6)(C)(i) as written: that an alien, like [petitioner], who is in unlawful status and seeks to adjust to lawful status through an employment visa is ineligible to do so if she is inadmissible for the use of fraudulent documents."

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SEVENTH CIRCUIT

■ Seventh Circuit Holds It Lacks Jurisdiction to Review Government Decisions About Prosecutorial Discretion

In ***Patel v. Holder***, __ F.3d __, 2014 WL 1282291 (7th Cir., April 1, 2014) (Kanne, *Rovner*, Durkin), the Seventh Circuit held that the BIA did not abuse its discretion in denying petitioners' untimely motion to reopen because no exception applied to toll the untimeliness. The petitioners sought to reopen their removal proceedings for the purpose of allowing the government to consent to have those proceedings administratively closed.

"Government decisions about prosecutorial discretion in immigration enforcement are not subject to judicial review."

The court explained that the BIA "is not empowered to exercise prosecutorial discretion in agency enforcement of immigration laws," and that "government decisions about prosecutorial discretion in immigration enforcement are not subject to judicial review."

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EIGHTH CIRCUIT

■ Eighth Circuit Holds Asylum Applicant Did Not Receive Incompetent Translation Services

In ***Yang v. Holder***, __ F.3d __, 2014 WL 1356597 (8th Cir., April 4, 2014) (Wollman, Loken, Kelly) (*per curiam*), the Eighth Circuit held that petitioner's due process rights were not violated by minor translation errors and agreed with the BIA that the petitioner was "allowed to fully present her claim."

The petitioner, a citizen of China, entered the United States in 1999, and was ordered removed for violating INA §§ 2122(a)(5)(A)(i), (a)(6)(A)(i), (a)(7)(A)(i)(I). In response, petitioner applied for asylum, withholding of removal, and CAT protection claiming a well-founded fear of religious persecution if she were removed to China because she had recently converted to Christianity and had joined the St. Louis Chinese Baptist Church in August 2009.

The IJ found that petitioner's application for asylum was time-barred and denied withholding and CAT protection because petitioner had failed to demonstrate that she was a member of any Christian church or had converted to Christianity, and therefore could not demonstrate that she would be persecuted or tortured in China based on her religion. The BIA upheld the IJ's decision noting that the IJ "went to extraordinary lengths to assure the proper translations in this case," and that petitioner "was allowed to fully present her claim" because "all parties understood to what [she] was referring" in the instances of translation error alleged by [petitioner] on appeal."

In rejecting the due process challenge claim based on faulty translation, the court concluded that "after careful review of the transcript, we agree with the BIA that [petitioner] did not receive incompetent translation services at the hearing."

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NINTH CIRCUIT

■ **Ninth Circuit Holds Substantial Evidence Supports Adverse Credibility Finding Where Alien Lies to Immigration Officials and a District Court Judge**

In *Carrion Garcia v. Holder*, __ F.3d __, 2014 WL 1465699 (9th Cir., April 16, 2014) (Wallace, McKeown, *Gould*), the Ninth Circuit held that the record did not compel the conclusion that the petitioner was credible where she had lied multiple times about her identity and country of origin to immigration officials and a district court judge, and where she equivocated about her prior misrepresentations in her testimony before the IJ.

The petitioner, a native of the Dominican Republic, was caught trying to enter the United States four times. Each time she gave false identifying information to immigration officials. At the last apprehension at the border, following a "reasonable fear" interview, DHS referred petitioner's withholding of removal application to an IJ. The IJ found that petitioner was not credible, and denied her application for withholding and protection under the CAT. The BIA affirmed the denial of relief.

In upholding the adverse credibility findings, the court noted that the IJ based his determination mainly on two factors. The first was petitioner's various lies to U.S. officials and to the district court judge, especially about her identity and country of origin. The second was that she equivocated during her interview with the IJ. "These factors are generally sufficient to support an adverse credibility determination," said the court. The court further determined that the corroborating documents that petitioner presented were insufficient to rehabilitate her testimony or independently establish her eligibility for relief.

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■ **Ninth Circuit Applies Attorney General's *Matter of J-S-* to Alien Whose Removal Hearing Occurred Under Prior Rule of Spousal Eligibility**

Asylum applicant who was not present when his wife was taken for a forced abortion and sterilization did not resist a coercive family planning program and had not been persecuted.

In *He v. Holder*, __ F.3d __ 2014 WL 1491882 (9th Cir., April 17, 2014) (Reinhardt, *Clifton*, Dorsey), the Ninth Circuit held that a Chinese asylum applicant who was not present when his wife was taken for a forced abortion and sterilization did not resist a coercive family planning program and had not been persecuted. The court further held that petitioner did not establish persecution based on the economic deprivations that he has suffered. The court explained that petitioner had not shown any evidence of the effect of the fine imposed on him for violating China's one-child policy. "Apart from that he went into hiding to avoid paying it . . . he was able to borrow a much larger sum to travel to the United States," said the court.

The court also denied a request to remand for a new hearing under the rule stated in *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), because petitioner did not ask for such a remand in his brief to the BIA.

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■ **Ninth Circuit Holds Asylum applicant's Lies about his Addresses in the United States are Relevant in Assessing Credibility**

In *Jin v. Holder*, __ F.3d __ 2014 WL 1408636 (9th Cir., April 14, 2014) (Fisher, *Gould*, Christen), the Ninth Circuit held that the agency's dispositive adverse credibility finding, based in large part on petitioner's lies about where he lived in the United States in support of his efforts at forum shopping for his asylum claim, was supported by substantial evidence.

Petitioner, a Chinese citizen, entered the United States on April 2005 as a non-immigrant visitor authorized to stay for a month. He did not depart. In October 2005, petitioner filed an affirmative application for asylum. Subsequently he was placed in removal proceedings where he renewed his claims. The IJ and the BIA did not find petitioners' credible based on his non-responsive and evasive testimony, the lack of detail when testifying about his religious beliefs, and based on petitioner's admitted attempt to defraud the immigration courts by lying about his residence and place of worship.

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■ **Ninth Circuit Rejects Citizenship Claim, but Rules Alien Not Removable for Hawaii State Court Drug Conviction Which Did Not Constitute a Controlled Substance Offense**

In *Ragasa v. Holder*, __ F.3d __, 2014 WL 1661491 (9th Cir. April 28, 2014) (Hawkins, *McKeown*, Bea), the Ninth Circuit rejected an applicant's claim to United States citizenship through his adoptive parents because they had naturalized after the applicant's birth but before he had left his birth parents' custody in the Philippines. The court also held that the

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applicant was not removable based on his Hawaii state court conviction for attempted promoting of a dangerous drug. The court ruled that the statute of conviction was not a categorical removable offense because it criminalized at least two substances not proscribed by the Controlled Substances Act. The conviction record also did not disclose the substance involved, precluding removability under the modified categorical approach.

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DISTRICT COURTS

■ **California District Court Holds that an Entry-Level Public Relations Specialist Position is Not a "Specialty Occupation"**

In ***CareMax, Inc. v. Holder***, __ F.Supp. 2d __, 2014 WL 1493621 (N.D. Cal., April 16, 2014) (Breyer, J.), the District Court for the Northern District of California granted summary judgment in favor of USCIS, upholding its decision to deny an employer's H-1B visa petition. The court reasoned that an entry-level position paying entry-level wages could not be considered specialized or complex as to constitute a specialized occupation. The court also determined that the position was not specialized because neither the employer nor other employers in the industry required position applicants to hold a bachelor's degree in a specific academic subject.

Alternatively, the court concluded that even if the position qualifies as a "specialty occupation," the worker did not have the equivalent of a U.S. bachelor's degree in English. The court found it proper for the USCIS to give little weight to the credential evaluation from the European –American University, an institution located in the Commonwealth of Dominica which does not have U.S. accreditation.

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■ **Central District of California Upholds USCIS's Denial of Alien's EB-5 Immigrant Investor Visa Petition**

An entry-level position paying entry-level wages could not be considered specialized or complex as to constitute a specialized occupation eligible for an H-1B visa.

In ***Zhao v. Napolitano***, No. SACV 13-1185 (C.D. Cal., March 31, 2014) (Selna, J.), the District Court for the Central District of California granted summary judgment in favor of the government and held that USCIS denial of an alien's EB-5 immigrant investor visa petition was not arbitrary and capricious.

The court found that the administrative record supported USCIS's determination that the alien failed to demonstrate that his $1 million capital investment was fully "at risk" with the new commercial enterprise (NCE), and that his investment had created the required number of jobs for U.S. workers. The court also agreed with USCIS's determination that the alien failed to present a credible business plan demonstrating how the NCE would use his $1 million capital investment to conduct its business activities.

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■ **District of Arizona Finds No Jurisdiction to Review APA and Mandamus Act Challenge to Multiple Denials of Spousal Visa Petitions and Adjustment Applications**

In ***Francois v. Johnson***, No.13-1964 (D.Ariz., April 22, 2014) (Rosenblatt, J.), the District Court of Arizona granted the government's motion to dismiss for lack of jurisdiction: (1) the alien's time-barred or non-final claim that USCIS failed to issue her a notice before denying two spousal visa petitions filed on her behalf (the court also determined that no relief could be granted for this claim because the agency was not required to issue such notice); (2) the alien's claim that USCIS erroneously denied her two adjustment applications; and (3) the alien's mandamus claim seeking a decision on her naturalization application.

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■ **Northern District of Illinois Grants Summary Judgment for the Government Upholding Determination that Plaintiffs Failed to Establish a Bona Fide Marriage**

In ***Cassell v. Napolitano***, No. 12-cv-09786 (N.D. Ill., March 31, 2014) (*Dow, R.*), the District Court for the Northern District of Illinois granted summary judgment in favor of the government, upholding USCIS'S denial of plaintiffs' Form I-130, Petition for Alien Relative, because plaintiffs failed to prove that their marriage was bona fide. In reaching its holding, the court noted the USCIS and the BIA based the denial on a reasonable and rational connection to the facts in the record. The court also held that a beneficiary of an I-130 petition has standing to challenge the denial of such petition in the district court.

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AILA Doc. No. 15092500. (Posted 09/25/15)

Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012

According to a recently released report from DHS, an estimated 11.4 million unauthorized immigrants were living in the United States in January 2012 compared to 11.5 million in January 2011. These results suggest little to no change in the unauthorized immigrant population from 2011 to 2012. Of all unauthorized immigrants living in the United States in 2012, 42 percent entered in 2000 or later. Entrants since 2005 accounted for 14 percent of the total. Fifty-nine percent of unauthorized immigrants in 2012 were from Mexico.

An estimated 8.9 million (78 percent) of the total 11.4 million unauthorized immigrants living in the United States in 2012 were from North America, including Canada, Mexico, the Caribbean, and Central America. The next leading regions of origin were Asia (1.3 million) and South America (0.7 million). Mexico continued to be the leading source country of unauthorized immigration to the United States. There were 6.7 million unauthorized immigrants from Mexico in 2012, representing 59 percent of the unauthorized population. The next leading source countries were El Salvador (690,000), Guatemala (560,000), Honduras (360,000), and Philippines (310,000). The ten leading countries of origin represented 85 percent of the unauthorized immigrant population in 2012.

California remained the leading state of residence of the unauthorized immigrant population in 2012, with 2.8 million. The next leading state was Texas with 1.8 million unauthorized residents, followed by Florida (730,000), New York (580,000), and Illinois (540,000).

For the full report visit: http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf

EOIR FY 2013 Statistics Yearbook

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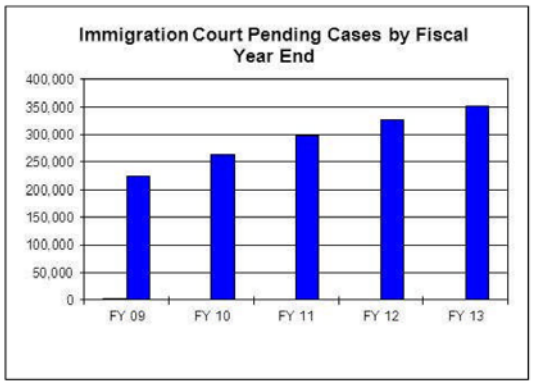
percent from FY 2009 to FY 2013, while receipts of appeals from DHS decisions increased by 30 percent. Completions of appeals from immigration judge decisions decreased by 11 percent from FY 2009 to FY 2013, while completions of appeals from DHS decisions increased by 46 percent for the same time period.

The number of pending cases in the immigration courts in FY 2013 rose to 350,330. In FY 2009, 223,707 cases were pending before the immigration courts. The Los Angeles immigration court had the highest number of pending cases, 49,462.

Total BIA Cases		
	Receipts	Completions
FY 09	38,013	38,890
FY 10	40,228	38,089
FY 11	39,450	39,256
FY 12	34,087	39,597
FY 13	34,790	36,690



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We encourage contributions to the Immigration Litigation Bulletin

OIL TRAINING CALENDAR

TBA September 2014. Brown Bag Lunch & Learn with **Alvaro Vargas Llosa**, author of *Global Crossings: Immigration, Civilization, and America* (Independent Institute, 2013).

November 3-7, 2014. OIL 20th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington DC. Attorneys from our client agencies and Assistant United States Attorneys are invited to attend.

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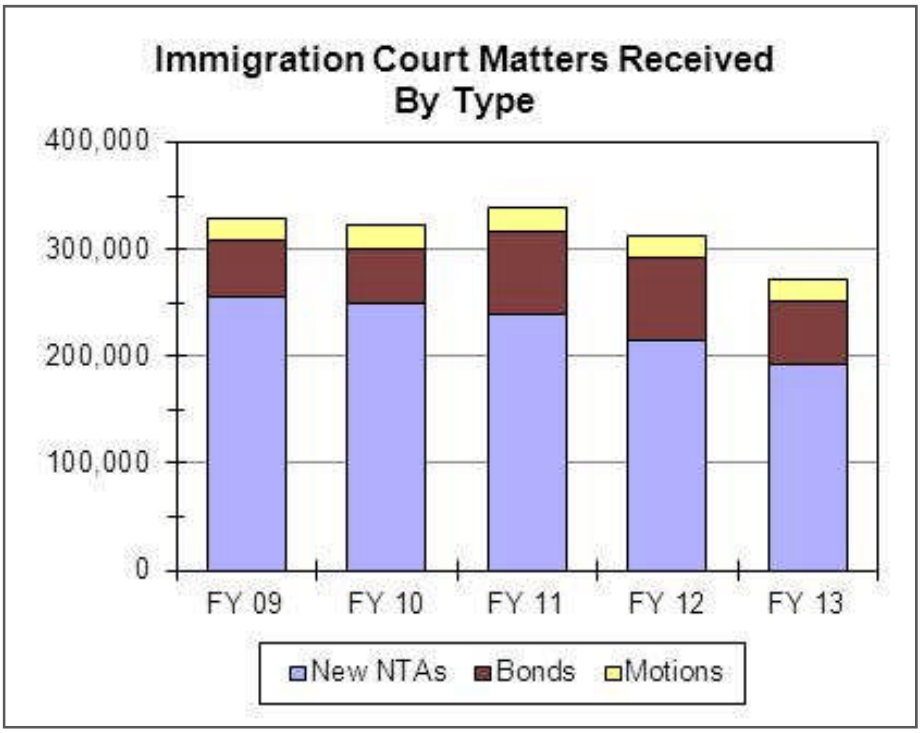
AILA Doc. No. 15092500. (Posted 09/25/15)

The Executive Office for Immigration Review Releases FY 2013 Statistics Yearbook

EOIR has released its FY 2013 Statistcs Yearbook. EOIR Director Juan P. Osuna said that the new statistical methodology revises the manner in which matters received and completed at EOIR are counted so that that the number of new receipts and initial case completions will provide as close an approximation as possible to the number of new individuals coming into EOIR immigration courts, and the number of motions and bonds will show additional work in existing cases.

EOIR has defined the term "immigration court matters" to include cases (deportation, exclusion, removal, credible fear review, reasonable fear review, claimed status review, asylum only, rescission, continued detention review, Nicaraguan Adjustment and Central American Relief Act, and withholding only); bond redeterminations; and motions to reopen, reconsider, or recalendar. Immigration court receipts are defined as the total number of charging documents; bond redeterminations; and motions to reopen, reconsider, or recalendar that the immigration courts received during the reporting period. Immigration court completions include immigration judge decisions and other completions (such as administrative closings) on cases, bond redeterminations, and motions that immigration judges did not grant.



The report indicates that the number of the immigration court matters received decreased by 17 percent between Fiscal Year (FY) 2009 and FY 2013. The number of matters the immigration courts completed decreased by 15 percent from FY 2009 to FY 2013. In FY 2009 a total of 328,619 matters were received and 298,025 were completed. In FY 2013 271, 279 were received and 253,942 were completed.

Appeals to the BIA from immigration judge decisions decreased by 13

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

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

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

Office of Immigration Litigation

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

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