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Immigration Litigation Bulletin

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SUPREME COURT DEADLOCKS ON DAPA
District Court Stays Sanctions Order

On June 23, in a much anticipated decision, the United States Supreme Court issued a *per curiam* one line opinion in ***United States v. Texas***, 136 S.Ct. 2271, affirming by an "equally divided court" the judgment of the Fifth Circuit Court of Appeals decision in *Texas v. United States*, 809 F.3 134 (5th Cir. 2016).

The Court's 4-4 deadlock, leaves in force a preliminary injunction enjoining DHS from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and the expansion of the Deferred Action for Childhood Arrivals (DACA) programs.

While the case was pending before the Supreme Court, the District Court on May 19, 2016, had issued an unprecedented order finding, *inter alia*, that the Department's attorneys had misrepresented facts in the case and that the misconduct was "intentional, serious and material." *State of Texas v. United States*, Civ. No. B-14-254 (S.D. Texas, May 19, 2016). As a remedy, the court ordered that any Department attorney "who appears, seek to appear in a court (state or federal) in any of the 26 Plaintiff States annually attend a legal ethic course."

The order also required the release of names and other confidential information of about 50,000 undocumented migrants who had benefitted prematurely under the DAPA / DACA programs.

The Department "strongly disagreed with the order" and filed a motion to stay it pending further review. The court granted the motion on June 7, 2016.

Supreme Court Reaffirms Categorical Approach And Reject Exception For Alternative Means

In ***Mathis v. United States***, 2016 WL 3434400 (U.S. April 26, 2016), the Supreme Court reaffirmed the use of the "categorical approach" to determining whether a prior conviction can qualify as a predicate for enhanced sentences under The Armed Career Criminal Act (ACCA). "For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition," said the Court. The Court declined to make an exception to that rule when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements.

The petitioner Richard Mathis, pleaded guilty to being a felon in possession of a firearm. Because of his five prior Iowa burglary convic-

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Mathis v. United States

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tions, the government requested an ACCA sentence enhancement. Under the generic offense, burglary requires unlawful entry into a "building or other structure." The Iowa statute, however, reaches "any building, structure, [or] land, water, or air vehicle." The District Court applied the modified categorical approach and found that that Mathis had burgled structures, and imposed an enhanced sentence. The Eighth Circuit affirmed. However, it acknowledge that the Iowa statute swept more broadly than the generic statute, but determined nonetheless, that, even if "structures" and "vehicles" were not separate elements but alternative means of fulfilling a single element, a sentencing court could still invoke the modified categorical approach.

"We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offenses."

Writing for the majority, Justice Kagan found that under the Court's precedents, the "undisputed disparity" between the elements of Mathis's crime of conviction (Iowa burglary), and the elements of the ACCA offense (generic burglary), resolved the case. "We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offenses," she said. Under the Court's precedents it doesn't matter how a given defendant perpetrated a crime. "Even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence," said the Court.

The only permitted use of the modified categorical approach, explained the Court, is "to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque . . . It is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense."

Therefore, when a court is faced with an alternatively phrased statute it must first determine whether its listed items are elements or means. "If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. [] But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution."

The Court found that the threshold inquiry—elements or means – was "easy" in petitioner's case "and it will be in many others." In petitioner's case the Iowa State Supreme Court previously held that the listed premises in Iowa's burglary law, are "alternative method[s]" of committing the single crime of burglary, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle." And, if the state law does not provide an answer, the Court said that federal judges can take a "peek" at the record documents for "the sole and limited purpose of determining whether [the listed items are] element [s] of the offense."

Finally, the Court noted that concerns have been raised about its line of decisions, and suggested to Congress that it reconsider how ACCA is written. "But whether for good or for ill, the elements-based approach remains the law. And we will not introduce inconsistency and arbitrariness into our ACCA decisions by here declining to follow its requirements. Everything this Court has ever said about ACCA runs counter to the Government's position. That alone is sufficient reason to reject it: Coherence has a claim on the law."

In a memorable dissenting opinion, Justice Alito recounted the real life story of a Belgian woman, Sabine Moreau, who was using her GPS to pick a friend at a train station about one hour away. The GPS instead took her through Germany, Austria, Slovenia, and then to Zagreb, Croatia, 900 hundred miles away. A trip that lasted two days. Only then, she told reporters, did she realize that she had gone off course, and she called home, where the police were investigating her disappearance. "Twenty-six years ago, in *Taylor v. United States*, 495 U.S. 575, 602, (1990), this Court set out on a journey like Ms. Moreau's. Our task in *Taylo*r, like Ms. Moreau's short trip to the train station, might not seem very difficult—determining when a conviction for burglary counts as a prior conviction for burglary under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). But things have not worked out that way," wrote Justice Alito.

Justice Breyer and Ginsburg, also dissented. They found the majority distinction between elements and means "a distinction without a difference" for sentencing purposes.

By Francesco Isgro, OIL

Contact: Jennifer Keeney, OIL
☎ 202-305-2129

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FURTHER REVIEW PENDING: Update on Cases & Issues

Citizenship – Equal Protection

On June 28, 2016, the Supreme Court granted the government petition for a writ of certiorari in ***Lynch v. Morales-Santana***, No. 15-1191, challenging the Second Circuit's 2015 opinion, 804 F.3d 520, which severed, as a violation of equal protection, a distinction between unwed mothers and unwed fathers in the physical presence requirements of the 1952 statute providing for citizenship at birth of a child born abroad where only one of the parents is a U.S. citizen. The court extended the requirements for unwed mothers to unwed fathers. The same equal protection issue deadlocked the Supreme Court in *Flores-Villar v. United States*, 564 U.S. 210 (2011) (with Justice Kagan recused). The petition for certiorari argued that the Second Circuit erred in both the equal protection ruling and the remedy. The government merits brief is due to the Supreme Court by August 12, 2016.

Contact: Andy MacLachlan, OIL
☎ 202-514-9718

Mandatory Detention

On June 20, 2016, the Supreme Court granted the government petition for a writ of certiorari in ***Jennings v. Rodriguez***, No. 15-1204, challenging the Ninth Circuit's 2015 opinion, 804 F.3d 1060, which held that all aliens detained pending completion of their removal proceedings, including criminals and terrorists, must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. Under that ruling, such bond hearings must be afforded automatically every six months, the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, and the length of the alien's detention must be weighed in favor of release. The government merits brief is presently due by August 4, 2016. The Court took no action on the government's petition for a writ of certiorari in the related case, *Shanahan v. Lora,* No. 15-1205, challenging the Second Circuit's 2015 opinion, 804 F.3d 601, presumably holding that petition for *Rodriguez*, but denied the Lora's conditional cross-petition for a writ of certiorari. The *Lora* petition may reach whether the mandatory detention provision applies at all to aliens who were not taken into detention for removal at the time they were released from their criminal incarceration.

Contact: Sarah Wilson, OIL-DCS
☎ 202-532-4700

Asylum —Unable or Unwilling to Control

On June 14, 2016, over government opposition, the Ninth Circuit granted rehearing *en banc* in ***Bringas-Rodriguez v. Lynch***. The panel decision, formerly published at 805 F.3d 1171, held that bare hearsay assertions were insufficient to contradict the substantial country-conditions evidence, and consequently, substantial evidence supported the Board of Immigration Appeals' determination that an alien who was sexually abused as a child failed to prove that his government would be unwilling or unable to control his abusers. A supplemental briefing schedule has been set, and *en banc* argument is calendared for the week of September 5, 2016.

Contact: Jesi Carlson, OIL
☎ 202-307-7037

Crime of Violence — Vagueness

On June 10, 2016, the government filed a petition for a writ of certiorari in ***Lynch v. Dimaya***, No. 15-1498, challenging the judgment of a divided Ninth Circuit panel (803 F.3d 1110) that the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the aggravated-felony provision of the immigration laws, is unconstitutional in view of *Johnson v. United States*, 135 S. Ct. 2521 (2015) (striking down the "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)). The government contends that review is warranted because that ruling is incorrect, strikes down a federal statute, conflicts with a decision of another court of appeals, and is already causing substantial disruption to the enforcement of the immigration laws and several criminal laws.

Contact: Bryan Beier
☎ 202-514-4115

Good Moral Character

On June 6, 2016, the government filed a petition for *rehearing en banc* in ***Ledezma-Cosino v. Lynch***, challenging the Ninth Circuit panel's decision, 819 F.3d 1070, holding that the "habitual drunkard" bar to good moral character is unconstitutional under the Equal Protection Clause. The panel majority concluded that the provision targeted an underlying medical condition, alcoholism, and held "that, under the Equal Protection Clause, a person's medical disability lacks any rational relation to his classification as a person with bad moral character[.]" Dissenting, Judge Clifton would have held that the provision is rationally related to compelling government interests, including public health and safety, and thus constitutional. In its petition for rehearing, the government argues: 1) there are not two similarly situated classes of aliens, and 2) even assuming such classes, the statutory provision is rationally related to Congress's intent to limit eligibility for relief and benefits to those who do not present risks to public health and safety.

Contact: Patrick J. Glen
☎ 202-305-7232

Updated by Andy MacLachlan, OIL
☎ 202-514-9718

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds It Lacks Jurisdiction over Petitioner's Challenge to Discretionary Denial of NACARA

In ***Lima v. Lynch***, __ F.3d __, 2016 WL 3409910 (1st Cir. June 21, 2016) (*Torruella,* Selya, Thompson), the First Circuit held that the court lacked jurisdiction to review a challenge to the agency's discretionary denial of relief under NACARA because petitioner failed to raise a colorable legal or constitutional claim. The court concluded that petitioner's claim the IJ should not have relied on police reports, and instead credited his testimony. was a challenge to the way in which the agency weighed the evidence and not a legal question.

Contact: Jennifer Khouri, OIL
☎ 202-532-4091

Second Circuit Holds That Asylum Applicants Failed to Establish that BIA Abused Its Discretion in Denying Motion to Reopen

In ***Chen v. Lynch***, __ F.3d __, 2016 WL 3207796 (1st Cir. June 9, 2016) (Howard, Lynch, *Selya*), the First Circuit held that the BIA did not abuse its discretion when it denied the petitioners' second untimely motion to reopen because they failed to show that circumstances had changed for pro-democracy activists returning to the People's Republic of China from the United States.

The court agreed with the BIA's conclusions that the petitioners' unauthenticated documents lacked probative value. In particular, the court noted that "the BIA has general discretion to deem a document's lack of authentication a telling factor weighing against its evidentiary value." The court also agreed that the evidence failed to establish any change in country conditions material to petitioners' claim between their last hearing in 2010 and their motion to reopen in 2014.

Contact: Christina Greer, OIL
☎ 202-598-8770

SECOND CIRCUIT

Second Circuit Holds That New York Child Pornography Conviction Constitutes an Aggravated Felony Despite Lacking a Federal Jurisdictional Element

In ***Weiland v. Lynch***, __ F.3d __, 2016 WL 3548350 (2d Cir. June 29, 2016) (Parker, Lohier, Carney) (*per curiam*), the Second Circuit applied the Supreme Court's recent decision in *Torres v. Lynch*, 136 S. Ct. 1619 (2016), and held that an alien's conviction for possession of child pornography under New York Penal Law § 263.11 constituted an aggravated felony, despite the state law's lack of a federal jurisdictional element.

An alien's conviction for possession of child pornography under New York Penal Law § 263.11 constituted an aggravated felony, despite the state law's lack of a federal jurisdictional element

In particular, the court rejected petitioner's argument that this conviction did not qualify as an aggravated felony under because it lacks the interstate commerce element present in the analogous federal child pornography statute. The court noted that *Torres* the Supreme Court "expressed concern that requiring a state law to include a federal jurisdictional element in order to be an offense 'described in' one of the federal laws identified in § 101(a)(43) would exclude most state child pornography laws—an outcome that the Court characterized as 'perverse.'"

Contact: Nick Harling, OIL
☎ 202-305-7184

THIRD CIRCUIT

Third Circuit Holds DHS Did Not Err in Placing Petitioner in Administrative Removal Proceedings Because His Crime Was an Aggravated Felony

In ***Bedolla Avila v. Att'y Gen. of the U.S.,*** __ F.3d__, 2016 WL 3443112 (3d Cir. June 23, 2016) (McKee, *Smith*, Hardiman), the Third Circuit denied petitioner's appeal from the DHS's administrative removal order under INA § 238(b), finding that his conviction for illicit trafficking in a controlled substance was a conviction for an aggravated felony utilizing the "hypothetical federal felony route" of analysis.

Petitioner, a citizen of Mexico was placed in removal proceedings as an alien present in the United States without being admitted or paroled under INA § 212(a)(6)(A)(i). During the pendency of the hearing, petitioner pled guilty to a drug offense. In light of the drug conviction, DHS served petitioner with a Notice of Intent to Issue a Final Administrative Removal Order ("NOI") under § 238 (b). Petitioner, who at the time was serving a prison sentence, refused to acknowledge receipt of the NOI. On March 9, 2015, DHS issued the Final Administrative Removal Order ("FARO"). On March 17, 2015, at DHS's request, the IJ terminated the still-pending § 240 removal proceeding. DHS then re-issued the FARO on April 20, 2015, and served it upon petitioner in person in York, Pennsylvania on April 27, 2015. Petitioner did not petition for review of the April 20, 2015, FARO. Petitioner then expressed fear of returning to Mexico, but an IJ determined that he failed to demonstrate a reasonable possibility of persecution or torture.

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The Third Circuit determined that petitioner was convicted of possession with intent to deliver cocaine, and under the hypothetical federal felony route, petitioner was convicted of a crime analogous to the federal felony of possession with intent to distribute cocaine prohibited by § 841(a)(1) of the Controlled Substances Act.

The court also rejected petitioner's claim that DHS violated his due process rights and its own regulations by issuing its order before preexisting removal proceedings under INA § 240 were terminated, noting that the statute and regulations do not "prohibit the pendency of concurrent removal proceedings" where, as here, the proceedings were based upon independent reasons for effecting removal.

While a "formal judgment of guilt" requires a plea, finding, adjudication, and sentence, the sentence did not need to include a possible federal sentencing option.

Contact: Julia Tyler, OIL
☎ 202-353-1762

■ **Third Circuit Holds a Formal Judgment of Guilt Does Not Require Punishment to Qualify as a Conviction**

In ***Frias-Camilo v. Att'y Gen. of the U.S.***, __ F.3d __, 2016 WL 3443111 (3d Cir. June 23, 2016) (Ambro, *Jordan*, Greenberg), the Third Circuit held that an alien found guilty with no further punishment had a conviction within the meaning of the INA.

The petitioner, a Dominican national, pleaded guilty in the Court of Common Pleas for Lehigh County, Pennsylvania, to one count of conspiracy to possess a controlled substance, cocaine. He was originally sentenced to a twelve-month period of probation, but, sixteen months later, the court amended his sentence and imposed a sentence of "guilty without further penalty." The amended order vacated several earlier-imposed punitive aspects of petitioner's sentence, so he received no jail sentence, no term of probation, no community service, and owed no fines or fees. Nonetheless, the order indicated that the court "finds the defendant guilty."

The court held that while a "formal judgment of guilt" requires a plea, finding, adjudication, and sentence, the sentence did not need to include a possible federal sentencing option. Instead, the court concluded that "no further punishment" was the sentence imposed, and accordingly, petitioner had been convicted of a removable offense.

Contact: Aimee Carmichael, OIL
☎ 202-305-7203

■ **Third Circuit Upholds Adverse Credibility Finding Based on Inconsistent Testimony and Contradictory Evidence**

In ***Ordonez-Tevalan v. Att'y Gen. of the U.S.***, __ F.3d __, 2016 WL 3443895 (3d Cir. June 23, 2016) (Jordan, *Greenberg*, Scirica), the Third Circuit held that inconsistencies between the petitioner's testimony and documentary evidence supported the agency's adverse credibility determination. The court further concluded the petitioner failed to show membership in a particular social group because she was not married to her alleged abuser, and ruled the rider alien failed to show a nexus between his fear and any protected ground. The court also addressed a preliminary jurisdictional issue and denied the government's motion to dismiss, holding the BIA's grant of reopening to reissue prior decisions did not materially alter the initial decisions.

Contact: Lindsay Corliss, OIL
☎ 202-532-4214

■ **Third Circuit Rules that Regulation Preventing K-4 Visa Holders from Adjusting Status Without Qualifying Relationship to U.S. Citizen Stepparent Is Contrary to Statute**

Section 101(a)(15)(K)(iii) of the INA allows a child under the age of twenty-one whose alien parent has married a U.S. citizen abroad to obtain a temporary "K–4" visa to accompany her parent to the United States and, based on the parent's marriage, to apply to adjust her status to that of a lawful permanent resident. In *Matter of Akram*, 25 I&N Dec. 874 (BIA 2012), the BIA held that given the legislative history of K-visas and the implementing regulations at 8 C.F.R. § 245.1(i), only the U.S. citizen stepparent may file an I-130 petition for a K-4 visa holder.

In ***Cen v. Att'y Gen. of the U.S.***, __ F.3d __, 2016 WL 3166013 (3d Cir. June 6, 2016) (Schwartz, *Krause*, Greenberg), the Third Circuit joined the Seventh Circuit in declining to defer to the BIA's interpretation in *Matter of Akram*, and declared the applicable regulation invalid because it "departs from the plain language of the INA, contravenes congressional intent, and exceeds the permissible scope of the Attorney General's regulatory authority."

The petitioner Cen is a Chinese national who was nineteen when her mother married a U.S. citizen in China. After properly obtaining her K-4 visa and moving to the United States with her mother, Cen filed an application to adjust her status. Cen's U.S. stepfather filed an I-130 petition on her behalf, but that petition and hence Cen's application were denied because Cen was nineteen when her

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mother married and therefore could not be deemed her stepfather's "child" under INA § 101(b)(1)(B) for purposes of her stepfather's I-130 petition. The IJ and the BIA upheld the denials bound by the precedential decision in *Matter of Akram*. The BIA also noted that it did not itself have authority to declare regulations invalid.

In rejecting the BIA's interpretation in *Akram*, the court found 8 C.F.R. § 245.1(i) invalid under step two of *Chevron* and "read the statutory text to strongly indicate that Congress intended the opposite: that the marriage of the child's parent to the child's stepparent would itself render her eligible to apply for adjustment of status and that the only parent-child relationship of relevance to a K-4 child is the one between the child and her K-3 alien parent—not her U.S. stepparent."

A special-court martial constitutes a "court" as provided in the definition of a "conviction" at INA § 101(a)(48)(A).

Contact: Jeffrey Meyer, OIL
☎ 202-514-6054

■ **Third circuit Holds That Convictions in Special Courts-Martial Meet the Definition of Conviction at INA § 101(a)(48)(A)**

In ***Gourzong v. Att'y Gen. of the U.S.***, __ F.3d __, 2016 WL 3254900 (3d Cir. June 14, 2016) (Fisher, *Rendell*, Cowen (dissenting)), the Third Circuit held that convictions by special courts-martial qualify as convictions for immigration purposes.

The petitioner, a native of Jamaica, was found by an IJ to be removable as an alien "convicted of an aggravated felony," specifically, he had been convicted by a special court-martial of the United States military of having sexual intercourse with a person under the age of sixteen. The BIA affirmed.

Petitioner contended before the Third Circuit, that a special court-martial is not a "court" because there is a possibility that a special court-martial can convene without a legally trained judge presiding over it. The court agreed with the BIA that a special-court martial constitutes a "court" as provided in the definition of a "conviction" at INA § 101(a)(48)(A), notwithstanding the remote chance that a special court-martial may convene without a legally-trained military judge presiding over the proceedings.

Judge Cowen dissented from the majority opinion because he would have found that "a special court-martial does not constitute 'a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice.'"

Contact: Jesse Matthew Bless, OIL
☎ 202-305-2028

■ **Fourth Circuit Holds Court Lacks Jurisdiction to Review the BIA's Decision Denying Sua Sponte Reopening**

In ***Lawrence v. Lynch***, __ F.3d __, 2016 WL 3361592 (4th Cir. June 17, 2016) (*Agee*, Wilkinson, Davis), the Fourth Circuit held that the petitioner failed to demonstrate due diligence in pursuing his motion to reopen, based on *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), which was decided after his removal for a conviction of an aggravated felony distribution of marijuana. The court also held it lacked jurisdiction to review the BIA's decision declining to exercise its *sua sponte* authority to reopen, applying the court's precedent in *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009).

Contact: Matthew A. Spurlock, OIL
☎ 202-616-9632

■ **Fourth Circuit Upholds Office of Refugee Resettlement's Definition of Unaccompanied Alien Child and Affirms Its Custodianship Authority after Removal Proceedings End**

In ***D.B. v. Cardall***, __ F.3d __, 2016 WL 3387884 (4th Cir. June 20, 2016) (*King*, Agee, Floyd (dissenting)), the Fourth Circuit affirmed the Eastern District of Virginia's ruling that the Office of Refugee Resettlement (ORR) had correctly classified the appellant's son as an unaccompanied alien child and, therefore, was legally authorized to keep him in custody. The court further held that, under the terms of the statute, ORR's custody authority did not end when the child's removal proceedings were terminated. The court also held that while the child and the mother had fundamental rights to their familial relationship, ORR's custody does not violate those rights because its decision is based on the child's safety and welfare. Lastly, the court concluded that the district court did not properly analyze the appellant's procedural due process claim and remanded that issue.

Contact: Kate Goettel, OIL-DCS
☎ 202-532-4115

FIFTH CIRCUIT

■ **Fifth Circuit Holds That Reinstated Removal Orders Are Not Final Until Reasonable Fear and Withholding of Removal Proceedings Are Complete**

In ***Ponce-Osorio v. Johnson***, __ F.3d __, 2016 WL 3063299 (5th Cir.

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May 27, 2016) (Higginbotham, Smith, Owen) (*per curiam*), the Fifth Circuit concluded that when an alien pursues reasonable fear and withholding of removal proceedings, a reinstated removal order does not become final for purposes of judicial review until the reasonable fear and withholding of removal proceedings are complete.

The petitioner, a citizen of El Salvador, was removed from the United States pursuant to a February 4, 2015, expedited order of removal. On March 16, 2015, she illegally reentered the United States. Three days later, DHS reinstated the order of removal, but, determining that she had a reasonable fear of persecution, referred the matter to an IJ for full consideration of the request for withholding of removal. Petitioner then sought asylum and withholding. The IJ granted withholding but determined that she was ineligible for asylum. On appeal the BIA affirmed the denial of asylum but remanded the case for the identity checks and the entry of an order as provided by 8 C.F.R. § 1003.47(h). Petitioner then sought judicial review.

In holding that it lacked jurisdiction, the court agreed with the reasoning in *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir.) and adopted its bright-line rule that, "when the BIA decides some issues but remands for background and security checks as to others, its decision is not final for purposes of judicial review."

Contact: Tiffany Walters, OIL
☎ 202-616-4857

■ **Fifth Circuit Holds the BIA Erred by Not Considering All Evidence Concerning Why Alien Did Not Appear at Immigration Court Hearing**

In ***Hernandez v. Lynch***, __ F.3d __, 2016 WL 3202492 (9th Cir. June 9, 2016) (*Wiener*, Prado, Owen), the Fifth Circuit concluded that the BIA erred in denying the petitioner's motion to reopen his *in absentia* removal order. The court reasoned that although the BIA had properly considered the credibility of the petitioner's claim that he did not receive notice, it failed to address other record evidence including his FOIA request and his change of address form. In particular, the court found it significant that petitioner had hired an attorney to file a FOIA request so as to learn about his immigration status. This fact, said the court " provides circumstantial evidence that Torres Hernandez did not receive the 2009 notice of hearing."

The court found the fact that petitioner had filed a FOIA request so as to learn about his immigration status to be "circumstantial evidence" that he had not received the notice of hearing.

Contact: Jason Wisecup, OIL
☎ 202-532-4317

■ **Fifth Circuit Holds That IIRIRA's Amended "Aggravated Felony" Definition Applies Retroactively**

In ***Lucas v. Lynch***, __ F.3d __, 2016 WL 3027351 (5th Cir. May 24, 2016) (Jolly, Benavides, Higginson) (*per curiam*), the Fifth Circuit held that the petitioner's alien-smuggling conviction under INA § 274(a)(1)(A), made him ineligible, as an aggravated felon, for a waiver under former INA § 212(c). Although the crime was not an aggravated felony at the time of his plea, the court found that it qualified as such under the amended definition enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Consequently, because aliens convicted of aggravated felonies were ineligible for § 212(c) relief at the time petitioner pleaded guilty, and because Congress intended the amended aggravated-felony definition to apply retroactively, petitioner was ineligible for a waiver.

Contact: Andrew Insenga, OIL
☎ 202-305-7816

SIXTH CIRCUIT

■ **Sixth Circuit Holds That It Lacks Jurisdiction to Review "Extraordinary Circumstances" Exception and 8 C.F.R. § 1208.16(e) Does Not Apply to Permit Reconsideration**

In ***Fisenko v. Lynch***, 2016 WL 1274573 (6th Cir. June 2, 2016) (Griffin, *Stranch*, Gwin (by designation)), the Sixth Circuit ordered publication of its April 1, 2016 decision that held it lacked jurisdiction to review the IJ's decision not to apply the "extraordinary circumstances" exception.

The petitioner, a citizen of Russia and ethnically Armenian, sought asylum, withholding, and CAT protection. The IJ denied the asylum application due to untimeliness and also refused to grant an exception for "extraordinary circumstances." The IJ denied the requests for withholding and CAT on the merits. On appeal, the BIA affirmed the denial of asylum but sustained the appeal of the withholding denial based on petitioner's Armenian ethnicity. On remand, the IJ granted withholding. Subsequently petitioner moved to reconsider the asylum denial but the IJ denied the motion. The BIA dismissed petitioner's appeal.

The court also held that the reconsideration regulation at 8 C.F.R. § 1208.16(e) did not apply to the IJ's refusal to consider petitioner's asylum application based on untimeliness and lack of extraordinary circumstances. The court explained that the regulation "refers instead to a specific type of denial of

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asylum—the 'discretionary denial of asylum' decisions made in the second step of the asylum inquiry under INA § 208(b) and 8 C.F.R. § 1208.4."

Contact: Ann Welhaf, OIL
☎ 202-532-4090

SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Adverse Credibility Ruling was Erroneous and Based on Trivial or Immaterial Inconsistencies that were Easily Explained**

In *Yuan v. Lynch*, __ F.3d __, 2016 WL 3536667 (7th Cir. June 28, 2016) (*Kanne*, Sykes, Hamilton), the Seventh Circuit held the adverse credibility determination upheld by the BIA was flawed because the purported inconsistencies were easily explained, trivial, or immaterial.

The petitioner, a Chinese national, applied for asylum and withholding of removal based on his asserted opposition to China's coercive population-control policy. Central to his eligibility for relief was his testimony that employees of a government birth-control agency assaulted him because his girlfriend had failed to attend a medical examination. An IJ disbelieved much of petitioner's story, reasoning that his testimony was not credible because of four points of inconsistency and also lacked corroboration. On appeal, the BIA found no clear error in the adverse credibility determination but did not consider the IJ's alternative holding that the claim failed for lack of corroboration.

The Seventh Circuit reviewed each of the four inconsistencies identified by the IJ and upheld by the BIA, and determined that each were "either so easily explained or so trivial as to call into doubt the Board's decision." The court also found that the BIA and the IJ failed to grapple with potential explanations offered by the petitioner. Accordingly, the court granted the petition for review remanded the case to the BIA

Contact: Jeremy Bylund, OIL
☎ 202-514-9319

■ **Seventh Circuit Holds That Immigration Judge Properly Considered I-213 as Evidence of Alienage**

In *Aparicio-Brito v. Lynch*, __ F.3d __, 2016 WL 3068098 (7th Cir. May 31, 2016) (Posner, *Williams*, Pallmeyer (by designation)), the Seventh Circuit held that the I-213 was presumptively reliable and adequately informed the alien that his statements could be used against him, and the IJ properly considered the form as evidence of alienage. The court noted that petitioner had "failed to identify a single detail concerning the Form I–213 here that suggests error or foul play on the part of DHS." The court expressed concern, however, that 8 C.F.R. § 287.3(c) does not require receipt of a warning that statements may be used against an alien until after a Notice to Appear is issued.

"IJs are authorized to 'interrogate, examine, and cross-examine the alien and any witnesses' during removal proceedings... and an IJ can interrupt a witness's testimony to ask questions — even repeatedly."

The court also rejected petitioner's contention that the IJ had acted acted improperly by repeatedly asking him questions in a prosecutorial manner. "IJs are authorized to 'interrogate, examine, and cross-examine the alien and any witnesses' during removal proceedings... and an IJ can interrupt a witness's testimony to ask questions—even repeatedly—so long as the questions are relevant, non-confrontational, and clarifying in purpose," said the court.

Contact: Patricia Bruckner, OIL
☎ 202-532-4325

EIGHTH CIRCUIT

■ **Eighth Circuit Holds Witnesses to Criminal Activity of Mungiki and Resistance to Its Recruitment Efforts Are Not Cognizable Particular Social Groups**

In *Ngugi v. Lynch*, __ F.3d __, 2016 WL 3513994 (8th Cir. June 27, 2016) (Murphy, Beam, *Gruender*), the Eighth Circuit held that neither "witnesses to criminal activity of the Mungiki" nor "Kikuyus who resist recruitment by the Mungiki" constitutes a cognizable particular social group. The court also held that the asylum applicant from Kenya failed to establish persecution on account of religion or political opinion.

Contact: Walter Bocchini, OIL
☎ 202-514-0492

■ **Eighth Circuit Holds Collateral Estoppel and Law of the Case Did Not Apply on Remand after Reopening**

In *Estrada-Rodriguez v. Lynch*, __ F.3d __, 2016 WL 3148374 (8th Cir. June 6, 2016)(Murphy, *Smith*, and Benton), the Eighth Circuit held that the IJ was not barred from determining that petitioner's conviction for assault under Ark. Code Ann. § 5-13-205 was a CIMT.

The IJ had initially determined that petitioner's conviction was not a CIMT but denied his request for cancellation for failure to meet the ten years of continuous physical presence requirement. After the BIA reopened and remanded petitioner's case to the IJ, the IJ reconsidered the status of petitioner's conviction and determined that it constituted a

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CIMT. Accordingly the IJ pretermitted the cancellation application. The BIA dismissed the appeal, rejecting petitioner's contention that the IJ was precluded from reconsidering whether his conviction was a CIMT.

The court held that general principles of collateral estoppel and the law of the case did not preclude the IJ from reconsidering whether petitioner's conviction was a CIMT. The court explained that collateral estoppel did not apply here because the CIMT issue was not previously determined by a valid and final judgment in a prior action between petitioner and DHS. "Instead, the CIMT issue was determined at an earlier stage of the same action and was reconsidered pursuant to the reopening of the action," said the court.

The court also explained that the law of the case doctrine is a question of discretion and that it was not an abuse of discretion for the IJ to deem the CIMT issue appropriate for reconsideration. Finally, the court agreed with the BIA that a conviction under the Arkansas assault statute was categorically a CIMT because "the statute only applies to persons who recklessly disregard a serious risk of danger. Such an act is 'contrary to the accepted and customary rule of right and duty between man and man,'" said the court.

Contact: Annette Wietecha, OIL
☎ 202-353-3901

■ **Eighth Circuit Holds Applicants Failed to Establish Persecution by Gang Members on Account of Their Family Relationship**

In *Garcia-Milia v. Lynch*, __F.3d __, 2016 WL 3361474 (8th Cir. June 17, 2016) (Riley, *Murphy,* Shepherd), the Eighth Circuit held petitioner and her minor sons did not establish past persecution because they did not establish the gang persecuted them on the basis of their membership in a particular social group where they testified the sole reason their family was targeted was to extort money. The court also held that the petitioners did not show a well-founded fear of particularized persecution directed at them personally. Finally, the court held that the petitioners did not present a case of willful non-intervention by law enforcement in Guatemala, sufficient to meet the requirements for CAT protection.

Petitioners did not present a case of willful non-intervention by law enforcement in Guatemala, sufficient to meet the requirements for CAT.

Contact: Lindsay M. Corliss, OIL
☎ 202-532-4214

■ **Salvadoran Asylum Applicant Did Not Demonstrate Nexus between Harm and Asserted Social Groups for Withholding of Removal**

In *Aguinada-Lopez v. Lynch*, __ F.3d __, 2016 WL 3176422 (8th Cir. June 7, 2016) (Murphy, *Benton*, Kelly), the Eighth Circuit denied the asylum applicant's petition for rehearing from its February 23, 2016 published decision, but vacated that decision and issued a replacement decision. The court held that the BIA did not err when it determined that the petitioner failed to demonstrate that the harm upon which he based his application for withholding of removal was on account of his membership in various asserted social groups in El Salvador, even assuming those groups were cognizable as particular social groups under the INA. The court also held that the BIA did not err in denying protection from torture because the alien did not demonstrate that the government would acquiesce to torture.

Contact: Monica Antoun, OIL
☎ 202-305-2066

■ **Eighth Circuit Holds That Mere Statement of Non-Receipt Does Not Overcome Presumption of Delivery Sent by Regular Mail**

In *Diaz v. Lynch,* __ F.3d __, 2016 WL 3082109 (8th Cir. June 1, 2016) (Wollman, Loken, Benton) (*per curiam*), the Eighth Circuit held that the petitioner's affidavit claiming non-receipt of a Notice of Hearing did not overcome the presumption of delivery sent via regular mail where he admitted receiving the Notice to Appear sent one week earlier to the same address. Moreover, petitioner had not filed for any type of relief, had never appeared at an immigration hearing, and had no incentive to attend the removal hearing because his removability was not in doubt.

Contact: Jesse Matthew Bless, OIL
☎ 202-305-2028

NINTH CIRCUIT

■ **Ninth Circuit Holds That Intervening Prosecutorial Discretion Memos Are Not a Change in Law Requiring Remand and that Reinstatement Order Was Not Issued Prematurely**

In *Morales de Soto v. Lynch*, __ F.3d ___, 2016 WL 3065304 (9th Cir. May 31, 2016) (*Clifton*, Ikuta, Block (by designation)), the Ninth Circuit declined the petitioner's request for remand to permit ICE to reconsider the exercise of its discretion in light of prosecutorial discretion memos released after petitioner's reinstatement order was issued in 2009.

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Prepared by Gregory Parker, OIL Summer Intern

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The court distinguished the "unusual" circumstances of *Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013), and reasoned that petitioner had not pointed to any change in her circumstances or evidence that ICE failed to consider factors relevant to its discretionary decision to reinstate her prior order. The court further emphasized that it generally lacked jurisdiction to review the government's reasons for exercising prosecutorial discretion. "This reflects the understanding that 'an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion' and is not amenable to judicial review," said the court.

Finally, the court rejected the petitioner's argument that ICE abused its discretion by reinstating her removal order before the time for her to appeal the denial of her I-212 waiver application had expired. The court held that "there is no legal requirement for the government to wait until all other administrative appeals have been exhausted before reinstating removal."

Contact: Lindsay Murphy, OIL
☎ 202-616-4018

■ **Applying the Supreme Court's Decision in *Kerry v. Din*, the Ninth Circuit Affirms District Court's Dismissal of Consular Visa Denial Challenge**

In ***Cardenas v. Lynch***, __F.3d __, 2016 WL 3408047 (9th Cir. June 21, 2016) (Tallman, *Hurwitz*, Battaglia), the Ninth Circuit affirmed the District of Idaho's dismissal of a consular visa denial challenge, applying the Supreme Court's recent decision in *Kerry v. Din*, 135 S. Ct. 2128 (2015).

A consular officer denied the visa application of Rolando Mora-Huerta, a Mexican national, on the ground that he was a "gang associate" who intended to enter the United States to engage in unlawful conduct. INA § 212(a)(3)(A)(ii). This suit, by Mora's wife, Madeline Cardenas, a United States citizen, challenged the consular officer's decision. The district court dismissed the complaint, finding that the consular officer's determination "facially legitimate and bona fide" because he had reason to believe that Mora had "ties" to a gang.

On appeal, the Ninth Circuit first agreed with the government's position that Justice Kennedy concurrence in *Din* should apply to review petitioner's visa denial because in deciding that case no single rationale commanded a majority of the Court. "The Kennedy con-

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EOIR Swears in 15 Immigration Judges

The Attorneys General has appointed 15 new Immigration Judges who were sworn in on June 27 at a ceremony held at the U.S. Court of Appeals for the Armed Forces in Washington, D.C.

The new IJs are ***Nathan N. Aina***, a former Assistant Chief Counsel with ICE; ***John B. Carle***, a former Assistant Chief Counsel with ICE; ***Barbara Cigarroa***, a former Senior Attorney with ICE; ***John G. Crews***, a former AUSA for the Southern District of New Mexico; ***John P. Ellington***, a former Trial Counsel with ICE; ***Justin W. Howard***, a former Assistant Chief Counsel with ICE; ***James L. Left***, a former Senior Attorney with ICE; ***Clay N. Martin***, a former senior attorney with the ICE Office of Chief Counsel; ***Donald C. O'Hare***, a senior attorney with the ICE Office of Chief Counsel; ***Jeanette L. Park***, a former Assistant Chief Counsel with ICE; ***Ana L. Partida,*** a former Assistant Chief Counsel with ICE; ***Georgina M. Picos***, a former Assistant Chief Counsel with ICE; ***Jayme Salinardi***, a former Deputy Chief Counsel for ICE; and ***Sandra J. Santos-Garcia***; a former senior attorney with the ICE Office of Chief Counsel.

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currence's narrower position is that, even assuming a citizen spouse can bring such a challenge, the challenge fails as long as the consular officer has cited a valid statute of inadmissibility which implies a bona fide factual basis behind the denial," said the court.

Here, the court found that "the consular officer gave a facially legitimate reason to deny Mora's visa because he cited a valid statute of inadmissibility" and that the officer "also provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility: the belief that Mora was a 'gang associate'" with ties to a particular gang.

The court also concluded that appellants failed to state a plausible claim that the consular officer acted with bad faith.

Contact: Kate Goettel, OIL-DCS
☎ 202-532-4115

ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds that Georgia Code § 16-8-2 Is Not Categorically a Theft Offense Because It Punishes Taking by Fraud**

In ***Vassell v. U.S. Att'y Gen.***, __ F.3d __, 2016 WL 3240221 (11th Cir. June 13, 2016) (Wilson, *Martin*, Rodgers (by designation)), the Eleventh Circuit held that Georgia theft by taking under Georgia Code § 16-8-2, did not meet the federal generic definition of theft because it did not require property to be taken without consent and thus theft by taking was not a theft offense aggravated felony.

Therefore, the court vacated the BIA's decision which had held that petitioner's conviction for theft under the Georgia Code qualified as an aggravated felony theft. The court also noted that the BIA had conflicting rulings in several unpublished decisions regarding this same provision.

Contact: Tony Norwood, OIL
☎ 202-616-4883

OIL TRAINING CALENDAR

August 23-25, 2016
Fall Intern Training

October 3 -7, 2016
New OIL Attorney Training

October 31-November 4, 2016
Immigration Litigation Seminar
National Advocacy Center
Columbia, SC

December 5-December 9, 2016
22nd Annual Immigration Law Seminar
Washington, DC

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

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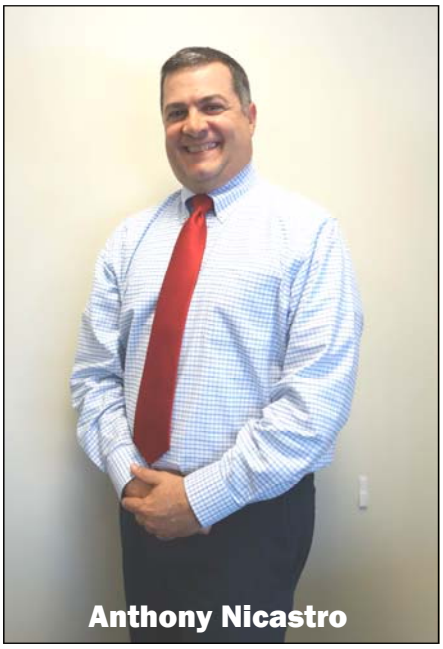
INSIDE OIL

Congratulations to new Assistant Directors ***Anthony Nicastro*** and ***Keith McManus.***

After serving as a summer intern, Mr. McManus joined OIL through the Attorney General's Honors Program in 2003. He has served in a wide range of positions at OIL, from being a line attorney on the Radford Team, to a member of OIL's Appellate Team, to a Senior Litigation Counsel on the Latour/Ferrier Team. He has also mentored new OIL attorneys and interns, and provided immigration training at the National Advocacy Center and at OIL. In 2013, Mr. McManus was selected for a temporary detail assignment with the Civil Division's Appellate Staff. For his work at OIL, Mr. McManus has twice been awarded a Special Commendation for Outstanding Service in the Civil Division. Mr. McManus earned his undergraduate degree from the University of Virginia and his J.D. from the University at Buffalo School of Law.

Mr. Anthony Nicastro arrived at OIL in June, 2001 after serving over 13 years active duty in the U.S. Army as an attorney. During his tenure at OIL, Mr. Nicastro was a trial attorney on David Bernal's team. In 2008, Mr. Nicastro was promoted to Senior Litigation Counsel and assigned to Ernie Molina's team. In Nov. 2015, Mr. McConnell, Director, OIL, announced that Mr. Nicastro would serve as Acting Assistant Director for Team 14. On May 24, 2016, Mr. McConnell promoted Mr. Nicastro to Assistant Director of Team 14. Mr. Nicastro is a graduate of St. John's University and Vermont Law School. He also earned an LLM in Military Law from The Judge Advocate General's School, U.S. Army, in Charlottesville, VA.



Congratulations to the following OIL Trial Attorneys who have been promoted to Senior Litigation Counsel : **Janette Allen, Jeff Leist, Zoe Heller, Andrew O'Malley, and Jessica Dawgert.**

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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