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Immigration Litigation Bulletin

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Supreme Court Finds Visa Denial Was Facially Legitimate and Bonafide

In ***Kerry v. Din***, __ S.Ct. __, 2015 WL 2473334, (U.S. June 15, 2015), the Supreme Court, in a plurality opinion, vacated the Ninth Circuit's ruling that a U.S. citizen had a constitutional due process right, stemming from freedom of personal choice in matters of marriage, to judicial review of the denial of her spouse's visa application and that the denial in the absence of any allegations of proscribed conduct was not facially legitimate. The majority of the Court agreed that even assuming that the petitioner had a protected liberty interest, the government's reason for the visa denial, namely that her husband was inadmissible on the ground of "terrorist activity," was facially legitimate and bonafide.

The case concerned petitioner, Fauzia Din, a U.S. citizen, and her husband, Kanishka Berashk, a resident citizen of Afghanistan and former civil servant for the Taliban regime. Din petitioned for Berashk to be classified as an "immediate relative," so that he could receive priority immigration status. The petition was granted. Berashk was subsequently interviewed at the U.S. Embassy in Pakistan and was informed by a consular officer that his visa application was denied because he was inadmissible under INA § 1182(a)(3)(B) due to his participation in "terrorist activities." He was provided no further explanation for the denial.

Din then filed a suit in federal district court, seeking a writ of mandamus, as she was unable to receive more detail regarding Barashk's visa denial. The district court dismissed the suit. On appeal, the Ninth Circuit reversed the decision below finding that petitioner had a protected liberty interest in marriage that entitled her

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Supreme Court Holds That Courts of Appeals Have Jurisdiction to Review the BIA's Denial of an Untimely Motion to Reopen Even Where BIA Also Declines Sua Sponte Reopening

In ***Mata v. Lynch***, __ S.Ct. __, 2015 WL 2473335 (U.S. June 15, 2015), the Supreme Court held that the courts of appeals have jurisdiction to review the BIA's denial of an untimely motion to reopen seeking equitable tolling even where the BIA also declines to exercise *sua sponte* reopening authority.

The petitioner, Noel Reyes Mata, is a Mexican citizen who entered the United States unlawfully. In 2010, he was convicted of assault in a Texas court, and subsequently an IJ ordered him removed to Mexico. Mata's attorney filed a notice of appeal with the BIA but never filed a brief, and the appeal was dismissed. With the assistance of new counsel, Mata later filed a motion to reopen his removal proceedings. He

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Supreme Court Reviews Visa Denial Case

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to limited judicial review of the denial of her spouse's visa and that the government had deprived her of due process by not providing either her or her spouse a more detailed explanation for the visa denial.

Justice Scalia, writing the plurality opinion, joined by the Chief Justice and Justice Thomas, concluded that the government did not deprive Din of her constitutional right to due process, as no constitutional right to "live in the United States with [one's] spouse" exists. According to the plurality "it remains the case that no process is due if one is not deprived of 'life, liberty or property." The Court examined the historical intention of the "life, liberty or property" protection and determined that "Din cannot possibly claim that the denial of Berashk's visa application deprived her- or for that matter even Berashk- of life or property." Furthermore, looking at the historical definition of liberty as being, "the power of locomotion, [or] of changing situation…without imprisonment or restraint," "a claim that it deprived her of liberty is equally absurd," said the Court.

Even considering implied fundamental rights, the Court explained that Din's request was not a given right, which to exist must be, as was found in *Washington v. Glucksberg,* 521 U.S.702 (1997), "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed." The federal government had not forbidden Din's marriage and the cases that Din cited, the Court continued, are not sufficient to prove a "free-floating and categorical liberty interest in marriage." The plurality stressed that the relevant question is not whether the asserted interest "is consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice." To grant that Berashk's visa denial deprived Din of her rights would force the Court to answer a "policy question entrusted exclusively to the political branches of our Government," said the Court.

The Court concluded that, because the government has not refused to recognize Din's marriage and Din is free to live with her husband anywhere in the world where they are both permitted to reside, she was "not deprived of 'life, liberty, or property'" by Berashk's visa denial. Consequently, "there is no due process due to her under the Constitution. To the extent that she received any explanation for the Government's decision, this was more than the Due Process Clause requires," added the Court.

To the extent that she received any explanation for the Government's decision, this was more than the Due Process Clause requires."

Justice Kennedy, writing the concurring opinion, joined by Justice Alito, said that there was no need for the Court to decide whether Din had a liberty interest because due process was satisfied when the government notified Din's husband that his visa was denied under the INA's terrorism bar. The Court's holding in *Kleindienst v. Mandel,* 408 U.S. 753 (1972), was controlling here, because the government had provided a "facially legitimate and bona fide" reason when it deemed Berashk inadmissible on the grounds of his participation in the Taliban, a fact that was not contested by Din. Moreover, "even assuming [Din has a protected liberty interest] the notice she received regarding her husband's visa denial satisfied due process," said Justice Kennedy. Under the circumstance, "absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa – which Din has not plausibly alleged with sufficient particularity – *Mandel* instructs us not to 'look behind' the Government's exclusion of Berashk for additional factual details," said Justice Kennedy. Additionally, the relevant statute § 1182 (b)(3) "expressly refrains" from requiring the government to provide further detail on specific provisions pertaining to why the alien is inadmissible in cases of terrorism or national security and therefore granting Din's request would be contrary legislative intent.

Justice Breyer, writing the dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, argued that there is a "strong expectation that the government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure," citing *Turner v. Safley,* 482 U.S. 78 (1987). Justice Breyer said that Ms. Din "seeks procedural, not substantive, protection for" her "freedom to live together with her husband in the United States," and that because she satisfies the requirements necessary to receive procedural due process she was entitled to view the reasons behind her husband's visa denial. The dissent noted that the plurality opinion rested on the antiquated idea that there is a distinction between 'rights' and 'privileges.' The justices stated that some "kind of statement, permitting an individual to understand *why* the government acted as it did, is a fundamental element of due process."

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AILA Doc. No. 15100701. (Posted 10/07/15)

FURTHER REVIEW PENDING: Update on Cases & Issues

Standard of Review - Nationality Rulings

The Ninth Circuit granted *en banc* rehearing, over government opposition, and vacated its prior decision in ***Mondaca-Vega v. Holder,*** 718 F.3d 1075. That opinion held that prior case law requiring *de novo* review of nationality claims was effectively overruled, that the clear-and-convincing and clear, convincing, and unequivocal standards are functionally the same. On March 17, 2014, an *en banc* panel heard oral argument.

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Conviction – Divisibility - Inconclusive Record

On May 8, 2015, the Ninth Circuit ordered *en banc* rehearing of ***Almanza-Arenas v. Lynch***. The panel opinion (originally published at 771 F.3d 1184, now withdrawn) ruled that California's unlawful-taking-of-a vehicle statute is not divisible, but even assuming divisibility, the record of conviction discharged the alien's burden of proving eligibility for relief from removal and held the Board's precedent decision (*Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009)) to be erroneous. In response to the court's *sua sponte* call for *en banc* views, the government recommended *en banc* rehearing, arguing that the panel erred because: it failed to address the Board of Immigration Appeals' precedent ruling that the alien did not carry his burden of proving eligibility when he refused the immigration judge's request to provide the plea colloquy that was relevant to assessing whether his conviction involved moral turpitude; it held (without needing to address the question) that the alien is eligible if it cannot be determined from the criminal record whether or not the conviction was for a crime of turpitude or not; it declined to follow its own *en banc* precedent (*Young v. Holder*, 697 F.3d 976 (9th Cir. 2012)) that the alien is ineligible if it cannot be determined conclusively from the criminal record that the conviction was not for a crime of turpitude, because, it believed, the reasoning in a Supreme Court decision (*Moncrieffe v. Holder*, 133 S. Ct. 1630 (2013)) overruled the reasoning of *Young*.

Simultaneous supplemental briefs are due from the parties by July 31, 2015.

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Aggravated Felony

On June 29, 2015, over government opposition, the Supreme Court granted certiorari to review the Second Circuit's published opinion in ***Torres v. Lynch,*** 764 F.3d 152, holding that a state arson conviction need not include an interstate commerce element in order to qualify as an aggravated felony under 8 U.S.C. § 1101 (a)(43)(E). That provision defines aggravated felonies to include "an offense described in . . . 18 U.S.C. 844 (i)," which is the federal arson statute and which includes an element not found in state arson crimes – mainly, that the object of the arson be "used in interstate or foreign commerce."

The Second Circuit agreed with the Board of Immigration Appeals' decision in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), while the Third Circuit had previously rejected *Bautista* on direct review, 744 F.3d 54 (3d Cir. 2014). The government merits brief is due by September 22, 2015.

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Continuance

On July 14, 2015, over government opposition, the Seventh Circuit granted en banc rehearing in ***Bouras v. Holder.*** In the now-vacated panel opinion, 779 F.3d 665, the panel majority, over a dissent by Judge Posner, held that an immigration judge did not abuse his discretion in denying the alien's request for a continuance to obtain his former spouse's testimony in support of his request for a waiver under 8 U.S.C. § 1186a (c)(4) of the joint-petition requirement for removing the conditions on a grant of permanent resident status. The continuance was requested at the close of the hearing and the immigration judge determined that the alien had failed to show either that the testimony would significantly favor him or that he had made a good-faith effort to secure that testimony. The government supplemental brief is due by September 22, 2015.

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NOTED

World Refugee Day was celebrated on June 20. This day is always special to employees of USCIS not only because the role that it plays in resettling refugees from around the globe, but also because this year marks the 10th anniversary of the establishment of the refugee corps.

Today the refugee corps includes 88 officers and 22 supervisors, who are based in Washington, D.C., but also travel around the world to interview refugee applicants. The men and women of the USCIS Refugee Corps provide resettlement opportunities to qualified refugees from around the globe while ensuring the integrity of the refugee program and our national security. Working in cooperation with the Department of State, the U.S. Refugee Admissions Program resettled 69,987 in the United States during fiscal year 2014.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Eighth Amendment Inapplicable to Immigration Cases

In ***Hinds v. Lynch***, __ F.3d __, 2015 WL 3876582 (1st Cir. June 24, 2015) (*Howard*, Thompson, Laplante), the First Circuit held that *Padilla v. Kentucky*, 559 U.S. 356 (2010), did not alter longstanding precedent that the Eighth Amendment does not apply to immigration proceedings. The court further rejected the alien's argument that the Fifth or Eighth Amendments required a proportionality review, holding that such a review would result in "dramatic separation of powers consequences."

Hinds, an LPR since 1975 and Panama native, was convicted of ten drug and firearm charges in 1994 and sentenced to twenty-five years imprisonment, of which he served eighteen. Upon his release DHS served him an NTA charging him with removability as an alien convicted of an "aggravated felony" drug trafficking crime. Hinds conceded the charges but denied removability on the sole ground that removal would violate his Fifth Amendment right to due process. To support his claim Hinds cited his four years of honorable service for the U.S. Marine Corps, the hardship his removal would cause to his citizen wife and four citizen children, and the fear of harm or death he would incur upon his return to Panama. The IJ concluded that he "lack [ed] authority to consider" Hinds' constitutional claims and, because he asserted no other substantive claim, Hinds was ordered removed. The BIA affirmed the IJ's decision.

Before the First Circuit Hinds argued that, because the court described deportation as a "penalty" in *Padilla v. Kentucky,* the court is required to consider whether his removal would constitute a violation of his right to be protected from cruel and unusual punishment, in the Eight Amendment, and his right to due process, in the Fifth Amendment. The First Circuit held that removal is a civil not a criminal procedure, asserting that "for more than a century federal courts have described orders of removal as non-punitive," therefore the Eighth Amendment protections against violation of rights in a criminal procedure do not apply for orders of removal.

The court found that *Padilla* does not affect the way immigration proceedings are considered under constitutional law, citing *Mellouli v. Lynch* 135 S.Ct. 1980 U.S. (2015), which refers to "removal merely as a 'consequence' of a conviction, not as a penalty." The court emphasized that its conclusion in *Padilla* did not affect the characterization of removal proceedings as being civil: "Even the fact that the Court or a legislative body believes that a consequence is significant enough that it requires some notice to the defendant, does not transform that consequence into a criminal punishment." The court stated "removal continues to operate simply as 'a refusal by the government to harbor persons whom it does not want,' not as a punishment within the meaning of the Constitution intended to acutely sanction a noncitizen for his underlying criminal conviction."

"Removal continues to operate simply as 'a refusal by the government to harbor persons whom it does not want,' not as a punishment within the meaning of the Constitution."

The court also noted that should Hinds' definition of removal as a punishment reign true, due to double jeopardy, removal proceedings could not even exist for convicted criminals, preventing Congressional intent to become realized. In addition aliens removed for criminal convictions would be entitled to a case by case assessment under the Eight Amendment, more than that afforded to those being removed on non-criminal grounds. On the merits of Hinds' second claim, that the Fifth Amendment's due process clause requires that the immigration consequences of his conviction be proportionate to his criminal conduct, the court found that Hinds' claims rested on a "basic infirmity" that removal is a punishment, rather than a consequence as the court affirmed, of his criminal conduct. for review.

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First Circuit Holds Board Did Not Abuse Its Discretion in Denying Motion to Reopen to Reapply For § 212(h) Waiver and Withholding of Removal

In ***Mazariegos v. Lynch***, __ F.3d __, 2015 WL 3876681 (1st Cir. June 24, 2015) (Lynch, Selya, *Thompson*), the First Circuit held that the BIA properly denied a petitioner's motion to reopen to reapply for a waiver of inadmissibility under INA § 212(h) of the INA, based on petitioner's formerly estranged wife's affidavit attesting to hardship that would result from his removal and an admittedly skeletal asylum application.

Mazariegos, a native and citizen of Guatemala, entered the U.S. when he was two years old, with his family on visitors' visas. In 2008, at the age of 19, he married Lludelina Garcia, a U.S. citizen, becoming the stepfather to her daughter. On the basis of that marriage Mazariegos' I-130 immigrant visa petition was approved and he applied for adjustment of status. DHS denied his application due to a pending criminal case, stemming from a 2008 stolen property and fail-

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ing to stop for police arrest. In July 2009 DHS placed him in removal proceedings on the charge that he had remained in the U.S. longer than permitted. Mazariegos conceded removability and sought relief from removal by renewing his application of adjustment of status and applying for a § 212(h) waiver claiming hardship to his LPR parents and his citizen wife and step-daughter. Mazariegos' estranged wife did not testify, but his parents stressed the difficulty they would face should he be removed.

The IJ considered Mazariegos long criminal record, most of which took place during his juvenile years, and granted the waiver and adjustment of status applications. DHS appealed to the BIA, which ruled that the IJ erred in exercising favorable discretion. Mazariegos filed a motion to reopen with the BIA in light of two new pieces of evidence: an affidavit from his wife indicating his removal would cause her financial and emotional hardship, and an affidavit from his former lawyer who stated that he failed to advise Mazariegos that withholding of removal was an option. He included an I-589 application for withholding, asylum, and protection under CAT, citing the fact that a group of policemen had killed and threatened his family.

The BIA denied the motion finding that Mazariegos did not merit a waiver due to his record of criminal activity, that he had not proven ineffective assistance of counsel, and that he lacked evidence of country conditions for his petitions for asylum, withholding and CAT.

The First Circuit examined the new evidence Mazariego submitted to determine whether the BIA had committed an error of law. Regarding petitioner's wife's affidavit, the court affirmed that it did not change Mazariegos' entitlement to the waiver. The court found that "the BIA may deny an [MTR] where it determines that 'the movant would not be entitled to the discretionary grant of relief which he sought,' even assuming he had established a prima facie case for the relief and introduced previously unavailable material evidence."

"The BIA may deny an [MTR] where it determines that 'the movant would not be entitled to the discretion grant of relief which he sought."

The court next addressed the proffered I-589 application and found that Maziergos failed to prove that he would more likely than not be tortured if he returned to Guatemala, leading it to reject his CAT claim. The court explained that Maziergos failed to present any specific facts or country conditions to bolster his claims regarding withholding and asylum.

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■ **First Circuit Holds BIA Erred by Denying Motion to Reopen for Lack of Notice and Remands for Consideration of Evidence that Alien Complied with Address Requirements**

In ***Renaut v. Lynch***, __ F.3d __, 2015 WL 3486688 (1st Cir. June 3, 2015) (Howard, Barron, *Thompson*), the First Circuit held that the agency abused its discretion by denying a motion to reopen based on lack of notice. The BIA denied the motion on the basis that the alien, who did not receive his hearing notice, evaded delivery by relocating without updating his address. The court held that the BIA erred by stating that an alien must provide his physical address, rather than a valid mailing address, without providing any legal authority.

The case concerned Renaut, a citizen of Brazil, who entered the United States, unlawfully without inspection, in 2003. He was detained upon entry and held for two months. During his detention he was personally served a NTA charging him with removability because he had not been admitted or paroled. On March 3, 2003, the petitioner filed a motion that was granted on March 14, to move the proceedings from Arizona to Boston. In the motion petitioner included the address of his friend's home in Massachusetts, where he intended to reside.

On January 28, 2004 the Boston Immigration Court mailed a notice to petitioner informing him of the date and time of his removal hearing. Petitioner claims that he had moved out of his friend's home, but continued to receive mail there. However, the hearing notice was returned to the court with a stamp on the envelope that read "ATTEMPTED NOT KNOWN." On March 2, 2004, an IJ ordered him removed *in absentia*.

Eight years later, in February 2012, Renaut married a U.S. citizen, who filed an I-130 on his behalf. In 2013 Renaut filed a MTR, arguing that he had never received the hearing notice. The IJ denied the MTR stating that petitioner had evaded removal proceedings by changing addresses without notifying the court and that the notice, returned as undeliverable, had been sent to his last known address. Renaut appealed to the BIA, which affirmed the IJ's denial.

The First Circuit found that the IJ and the BIA had abused their discretion in deciding that petitioner could not reopen his case because he failed to provide the government with his new residential address and as-

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sumed it amounted to an evasion of the hearing notice.

The court expressed concern at the BIA's implication that one must provide one's residential address rather than a valid mailing address, stating "the notice [to appear] mentions nothing of a residential or physical address requirement." The court stated that "the mere fact that an alien has changed his residential address neither categorically precludes that alien from moving to reopen his removal proceedings nor, once he does so, automatically compels a finding that he evaded notice." "While evasion is certainly a legitimate reason to deny a motion to reopen, 'evasion' by its nature entails some wrong doing," said the court. The court opined that whether or not Renaut evaded his notice should have been determined by making "an evidentiary evaluation," which both the IJ and BIA neglected to do. The court vacated the BIA's decision and remanded the case for further proceedings.

"The mere fact that an alien has changed his residential address neither categorically precludes that alien from moving to reopen his removal proceedings nor, once he does so, automatically compels a finding that he evaded notice."

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FOURTH CIRCUIT

■ Fourth Circuit Holds Agency Failed to Explain Why Failure to Prevent Child Abuse is Sexual Abuse of a Minor

In ***Amos v. Lynch***, __ F.3d __, 2015 WL 3606848 (4th Cir. June 10, 2015) (*Keenan*, Motz, Thacker), the Fourth Circuit held that the BIA erred by concluding that the alien's conviction for "causing abuse to a child" equates to the aggravated felony of "sexual abuse of a minor." The court ruled that the BIA, in both the petitioner's case and in *Matter of Rodriguez-Rodriquez*, 22 I&N Dec. 991 (BIA 1999), failed to explain the scope of the generic federal definition of sexual abuse of a minor. The court also ruled that the BIA did not explain why the failure to act to prevent sexual abuse, the least culpable conduct under the Maryland statute of conviction, is within the undefined scope of "sexual abuse of a minor."

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■ Fourth Circuit Affirms Denaturalization Because Mislabeling Infant Formula Constitutes Unlawful Acts that Adversely Reflect upon One's Moral Character

In ***United States v. Jammal***, __Fed. Appx. __, 2015 WL 3561249 (4th Cir. June 9, 2015) (Davis, Keenan, Harris) (*per curiam*), the Fourth Circuit, in an unpublished decision, upheld the District Court for the Southern District of West Virginia's grant of summary judgment in favor of the United States. The appellate court held there was no reversible error and affirmed the district court's reasoning that the appellant-defendant, a Lebanese citizen, unlawfully procured his naturalization because his actions in unlawfully repackaging, mislabeling, and re-selling infant formula constituted unlawful acts that adversely reflected upon his moral character.

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■ Fourth Circuit Adopts Totality of The Circumstances Approach for Determining Whether Agency Committed "Egregious Violations" of the Fourth Amendment

In ***Yanez-Marquez v. Holder***, __ F.3d __, 2015 WL 3719105 (4th Cir. June 15, 2015) (King, Floyd, Hamilton), the Fourth Circuit held that the exclusionary rule applies in removal proceedings to "egregious violations" of the Fourth Amendment. Significantly, in determining what constitutes an "egregious violation" of the Fourth Amendment, the court rejected the Ninth Circuit's view that all "bad faith" violations are "egregious," and adopted the Second, Third, and Eighth Circuits' totality of the circumstances approach.

The court determined here that although ICE agents had violated petitioner's constitutional rights when they executed the search warrant at 5:00 am instead of 6:00 am, the violation was not egregious given the totality of the circumstances of how the agents entered the premises and detained and questioned petitioner.

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FIFTH CIRCUIT

■ Fifth Circuit Holds that the Statutory Good Moral Character Bar Is Not Limited to Crimes Involving Moral Turpitude

In ***Rodriguez-Avalos v. Holder***, __ F.3d __, 2015 WL 3604664 (5th Cir. June 9, 2015) (Davis, Dennis, Costa) (*per curiam*), the Fifth Circuit held that a plain reading of INA § 101 (f)(7) indicates that jail time exceeding 180 days, regardless of whether or not it is being served for a CIMT, precludes an alien from fulfilling the good moral character requirement. The court also rejected petitioner's

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argument that the ten-year period for measuring good moral character is governed by the stop-time rule. The court deferred to *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), where the BIA interpreted the period for measuring good moral character as the ten years immediately preceding the final administrative decision by the agency.

The case concerned Rodriguez-Avalos, a citizen of Mexico, who entered the U.S. without admission or parole. In 2011 DHS discovered Rodriguez had been the subject of a complaint filed with the FTC for identity-theft. On May 18 he was indicted and charged, *inter alia*, with willful misrepresentation of his status as a U.S. citizen. On January 18, 2012, he was sentenced to fourteen months imprisonment, of which he affirms he served seven.

"Based on the unambiguous plain text of INA § 101(f)(7) a petitioner cannot establish good moral character if he has been incarcerated for 180 days or more."

On November 28, 2012, he was charged with removability as an alien present in the U.S. without admission or parole. Rodriguez conceded the charge of removability, but applied for cancellation claiming hardship to his three U.S. citizen children. The IJ denied petitioner's application for cancellation and ordered him removed to Mexico, deeming that the seven months imprisonment statutorily precluded Rodriguez from fulfilling the requirement for good moral character under INA § 101(f)(7). On appeal, in a single-judge opinion, the BIA affirmed the IJ's decision.

Before the Fifth Circuit petitioner contended that his conviction for falsely claiming to be U.S. citizen was not a CIMT and therefore his incarceration should not preclude him from cancellation. Petitioner also argued that the NTA as served to him May 3, 2011, and that, under the stop-time rule, the consideration of good moral character was halted at that time, and his jail time, served afterwards should not be impinge upon his consideration for cancellation.

The court held that "based on the unambiguous plain text of INA § 101(f)(7) a petitioner cannot establish good moral character if he has been incarcerated for 180 days or more, regardless of the nature of the underlying crime of conviction." The court determined that "to limit the application of [the statute] to confinements as a result of [CIMTs] would be inconsistent with Congressional intent." The court also accorded *Chevron* to *Ortega-Cabrera*, which held that the 10 year clock for establishing good moral character, stops upon the final decision regarding the petitioner's cancellation and that the stop-time rule applies only to continuous physical presence.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds Federal Law Does Not Require Aliens to Receive Advance Notice of the Evidence Necessary to Establish Eligibility for Relief**

In ***Gaye v. Lynch***, __ F.3d __, WL 3555937 (6th Cir. June 9, 2015) (*Batchelder,* Cox, White (dissenting)), the Sixth Circuit held that federal law does not entitle aliens to receive notice from the immigration court as to what sort of evidence must be produced to carry the burden for relief. The court rejected the contrary holding of the Ninth Circuit in *Ren v. Holder*, 648 F.3d 1079, 1091-92 (9th Cir. 2011).

Gaye, an ethnic Wolof and native of Mauritania, claimed that he entered the U.S. on October 17, 2000, at New York's JFK airport. He was served with an NTA by the INS in July 2001 and charged as removable under INA § 237(a)(1)(A). Gaye filed for asylum, withholding of removal, and protection under CAT.

Petitioner purported that he was a member of the Union for Democrats (UFD) political party which engaged in protests against the government. In 1993 he was captured by Moor soldiers and forced to cross into Senegal because, on account of his membership in UFD, the soldiers believed he did not belong in Mauritania, and threatened to kill them if he returned. Afterwards, Gaye claimed, he spent the next three to four years in a refugee camp where he obtained a false Senegalese passport.

The IJ denied petitioner's application for asylum, finding that he did not meet his burden for showing that he had filed within one year of arriving in the U.S. The IJ also denied all three applications because he found petitioner's testimony incredible and inconsistent with country conditions. Gaye appealed to the BIA, which determined that the IJ's finding of inconsistency in Gaye's testimony was not supported by the record and remanded back to the IJ who recused himself. The case was reassigned to another IJ, who did not hold an evidentiary hearing and made a decision based on the record as it then stood, finding that petitioner was not credible due to inconsistencies that appeared to be an attempt to bolster his claims. Petitioner appealed a second time to the BIA but the BIA dismissed the appeal.

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The Sixth Circuit found that it did not have jurisdiction to determine whether or not petitioner's asylum application was timely filed. The court also stated that it lacked jurisdiction to consider petitioner's claim that his due-process was violated when the second IJ did not hold a new evidentiary hearing. It found that petitioner did not exhaust his administrative remedies in regards to this claim because he did not argue "to the BIA that the IJ's decisional method on this issue violated the Due Process Clause." The court denied Gaye's claim that he was not given sufficient notice of what evidence was required to fulfill his burden, finding "that federal law does not entitle illegal aliens to notice from the Immigration Court as to what sort of evidence the alien must produce to carry his burden," agreeing with the Seventh and disagreeing with the Ninth Circuit.

The court also concluded that even if aliens were entitled to such forewarning it would not affect Gaye's claims, as the first IJ provided him with ample opportunity to provide supporting evidence by continuing proceedings several times. The court lastly denied petitioner's claim of ineffective assistance for lack of prejudice, determining that Gaye did not prove that there was additional evidence his attorney failed to present.

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■ **Sixth Circuit Holds That BIA Did Not Abuse Its Discretion In Denying Motion To Rescind an In Absentia Removal Order, Where the Alien Signed a Notice To Appear Containing Incorrect Address**

In ***Thompson v. Lynch***, __ F.3d __, 2015 WL 3634473 (6th Cir. June 12, 2015) (*Gilman*, Rogers, Sutton (concurring in part)), the Sixth Circuit held that petitioner did not adequately rebut the presumption that he had received a notice of hearing. It affirmed the BIA's ruling that petitioner did not meet his burden to alert the court of any changes in address when he signed an NTA, which allegedly contained an incorrect address, and made no effort to correct it.

Thompson, a Jamaican native, entered the U.S. at an unknown date and location and was personally served a NTA in March 1999 while detained for a marijuana trafficking charge. The Cleveland immigration court mailed him a notice of hearing soon thereafter. Thompson failed to attend the hearing and was ordered removed *in absentia*. Fourteen years later, Thompson filed a MTR on the grounds that he did not receive a notice for the 1999 hearing. He claimed the INS officer noted petitioner's actual address but petitioner nonetheless signed the NTA listing a different address to which the court mailed his notice. The IJ denied his motion and on appeal the BIA upheld the IJ's decision.

"Federal law does not entitle illegal aliens to notice from the Immigration Court as to what sort of evidence the alien must produce to carry his burden."

The Sixth Circuit held that the BIA did not abuse its discretion in finding that Thompson did not adequately rebut the presumption that he received the notice of hearing. The court explained that to show non-receipt petitioner must prove that he provided a correct address and that he never received the notice.

In reviewing petitioner's claim that the address listed on the NTA was not the "last address he provided" to the INS officer, the court disagreed with the Ninth Circuit's holding in *Velasquez-Escovar v. Holder,* 768 F.3d 1000 (9th Cir. 2014). In that case, the Ninth Circuit found that the BIA abused its discretion by rejecting an alien's assertion that she provided her address, but the INS officer had not written the correct one. The Sixth Circuit found that the BIA did not abuse its discretion, as the NTA clearly informs the recipient that it is his/her burden to provide the court with the correct address as well as any change of address thereto and that it warns of the consequences of providing a wrong address. The court explained that Thompson did not meet his burden when he signed an NTA with an incorrect address and did not make any effort to correct it. "We are left to wonder how Thompson expected the government to contact him regarding his pending removal hearing when the form he signed listed an incorrect address," said the court. The court opined that Thompson's signature established "a strong presumption" that he was aware of "its contents and assent[ed] to them." The court went on to say that "ignorance of the law is no defense" and that Thompson cannot therefore "argue that the warning on the [NTA] was too vague to fully apprise of his obligation."

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■ **Sixth Circuit Declines to Follow Ninth Circuit or Seventh Circuit View on Jurisdictional Bar for CAT Claims**

In ***Ventura-Reyes v. Lynch***, __ F.3d __, WL 3485909 (6th Cir. May 26, 2015) (*Donald*, Merritt, Stranch), the Sixth Circuit declined to follow the reasoning of either the Ninth Circuit in *Pechenkov v. Holder*, 705 F.3d 444 (9th Cir. 2012), or the Seventh Circuit in *Issaq v. Holder*, 617 F.3d 962 (7th Cir. 2010), and agreed with the government's view that the jurisdictional bar in INA § 242(a)(2)(C) prevented the court

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from reviewing the merits of a criminal alien's claim for protection under the CAT.

Concluding that petitioner, a citizen of the Dominican Republic, raised no meritorious constitutional claims or questions of law, the court denied the petition in part and dismissed the remainder for lack of jurisdiction.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds Alien Who Was Assumed Credible Necessarily Met His Burden of Proof Under Preponderance Standard Where Government Offered No Opposing Evidence

In ***Lara v. Lynch***, __ F.3d __, 2015 WL 3775285 (7th Cir. June 18, 2015) (Flaum, Kanne, *Williams*), The Seventh Circuit held that the BIA erred in its application of the preponderance of the evidence standard to an application for a good-faith marriage waiver. The court ruled that, if the alien testifies credibly that he married for love not immigration benefits then his testimony alone is enough to prove that the marriage is bona fide under the preponderance standard.

Gerardo Hernandez Lara, a Mexican citizen, married a U.S. citizen in 1988 and obtained conditional permanent residence based on his marriage. In 1990 Lara and his wife, Diana Winger, filed a joint petition to make his status permanent. However, Winger did not appear for the interview. At Lara's request, the interview was rescheduled for November 1992, but this time neither spouse showed. Ten years after divorcing his wife, in 2008, Lara filed a Form I-751 with the USCIS requesting a discretionary waiver of the joint-petition requirement, claiming he had entered his failed marriage in good faith. He submitted several pieces of evidence to prove his marriage was bona fide, including joint tax returns, testimony from friends, and letters from his wife. In 2009 the USCIS denied his request for a waiver on the grounds that he "failed to establish or provide documentation," that he entered his marriage in good faith. USCIS terminated his status as a conditional permanent resident and he was served with an NTA charging him with removability. At his 2010 hearing, Lara conceded to removability and renewed his request for a discretionary waiver of the joint-petition requirements. Lara testified to the validity of his marriage and submitted additional evidence, while the government submitted none. The IJ found his marriage was not bona fide, without making a credibility finding, and ordered him removed. On appeal the BIA assumed that Lara's testimony regarding his marriage being in good faith was credible, yet it found that he did not prove by a preponderance of the evidence that his marriage was bona fide.

If the alien testifies credibly that he married for love not immigration benefits then his testimony alone is enough to prove that the marriage is bona fide under the preponderance standard.

Before the Seventh Circuit Lara claimed that the BIA held him to a burden of proof more onerous than the preponderance of the evidence standard that must be met to demonstrate a failed marriage was bona fide. The court agreed with Lara, finding that the "Board's analysis misapprehends the preponderance standard." The court held that once the BIA found that Lara had testified truthfully "his testimony alone [was] enough to prove that his marriage to Winger was more likely than not bona fide," citing *Lopez-Esparza v. Holder*, 770 F.3d 606, 608-09 (7th Cir. 2014).

The court also rejected the government's argument that Lara never claimed the BIA failed to correctly apply the burden of proof, affirming that Lara did make this assertion multiple times and that "[t]he Board's failure to reach [the] conclusion [that Lara met his burden of proof] is a legal error." The court also found that the government had violated the Chenery doctrine in arguing that Lara's petition should be denied on the basis of the REAL ID Act, as "neither the IJ's nor the Board's ruling rest[ed] on a determination that [Lara] had failed to provide available corroborating evidence."

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■ Seventh Circuit Holds that Alien's Inconsistent Testimony Was Not "Independently Sufficient" to Support Agency's Adverse Credibility Finding

In ***Liu v. Lynch***, __ F.3d __, 2015 WL 3622192 (7th Cir. June 11, 2015) (*Flaum*, Kanne, Williams), the Seventh Circuit held that substantial evidence did not support four of the five of the IJ's reasons for discounting the alien's testimony, and the fifth reason – the alien's inconsistent testimony regarding when and how she obtained her visa to come to the United States – was not "independently sufficient" to support the agency's adverse credibility finding.

The court determined that, even applying the REAL ID Act standards, the latter inconsistency alone was not sufficiently material so as to discredit the alien's entire narrative

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about her underlying claim of persecution.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Domestic Abuse Did Not Rise to the Level of Past Persecution**

In ***Barillas-Mendez v. Lynch***, __ F.3d __, 2015 WL 3500143 (8th Cir. June 4, 2015) (*Colloton*, Bright, Shepherd), the Eighth Circuit held that petitioner did not establish past persecution based on domestic violence he experienced at the hands of his aunt or a beating by his cousin.

The petitioner, a Guatemalan citizen, claimed that from age thirteen to seventeen he resided with his aunt while his parents were in the United States. During this time, the aunt beat him every second day with either a piece of wood or electricity cable, leaving red marks and bruises. On one occasion petitioner was beaten by his second cousin who was a member of the MS-13 gang and who believed petitioner was a member of a rival gang. The IJ, and the BIA, denied asylum finding, *inter alia*, that the level of abuse petitioner suffered did not rise to the level of persecution.

"Whether harm amounts to persecution depends on the 'cumulative significance' of all instances of abuse."

In upholding the BIA's finding, the court noted that "neither isolated violence nor minor beatings require a finding of persecution," and that "whether harm amounts to persecution depends on the 'cumulative significance' of all instances of abuse." Here the court said that it was not compelled to find that the physical abuse inflicted by the aunt and the physical attacks by the cousin against petitioner amounted to persecution. The court explained that there was no evidence that petitioner had suffered lasting physical injury and that the bruises caused by the cousin did not compel a finding of persecution.

The court further concluded that petitioner had not demonstrated that the BIA failed to take into account either the cumulative impact of the harm or petitioner's age at the time of the harm in question.

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NINTH CIRCUIT

■ **Ninth Circuit Amends Prior Decision upon Denial of Petition for Rehearing En Banc, Again Upholds Agency's Adverse Credibility Determination**

In ***Angov v. Lynch***, __ F.3d __, 2015 WL 3540764 (9th Cir. June 8, 2015) (Thomas (dissenting), *Kozinski*, Trott), the Ninth Circuit denied a petition for rehearing en banc filed by the petitioner, amended its prior published decision, and again denied the alien's petition for review of the agency's denial of his applications for asylum and related protection.

In doing so, the panel majority rejected the petitioner's contention that the agency erred in considering the results of an overseas State Department investigation regarding his claim of persecution. Admission and consideration of the investigation neither implicated any due process concerns, nor did it violate any statutory right regarding the conduct of removal proceedings. As the report was properly admitted, the panel majority held that the agency's credibility determination, based in part on inconsistencies between the report and the alien's evidentiary proffer, was supported by substantial evidence.

Dissenting, Chief Judge Thomas would have excluded the report and held that record evidence failed to support the credibility determination.

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■ **Ninth Circuit Holds that $10,000 Threshold for Aggravated-Felony Money Laundering Is Determined Using Circumstance-Specific Analysis**

In ***Arce Fuentes v. Lynch***, __ F.3d __, 2015 WL 3605529 (9th Cir. June 10, 2015) (Pregerson, Fernandez, Nguyen) (*per curiam*), the Ninth Circuit held that the $10,000 monetary threshold in 8 U.S.C. § 1101(a)(43)(D)'s reference to a money laundering offense described in 18 U.S.C. § 1956 refers to the "specific circumstances" of the offense as opposed to a generic element. The court held that the BIA's reliance on a presentence report for the alien to determine the amount of funds laundered was therefore appropriate.

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■ **Ninth Circuit Holds Conviction for Misdemeanor Unlawful Laser Activity is Not Categorically a Crime Involving Moral Turpitude**

In ***Coquico v. Lynch***, __ F.3d __, 2015 WL 3756470 (9th Cir. June 17, 2015) (Thomas, *O'Scannlain*, McKeown), the Ninth Circuit held that a Filipino citizen's conviction under California Penal Code § 417.26 (unlawful laser activity to-

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wards a peace officer) is not categorically a crime involving moral turpitude. The BIA had concluded that the conviction was a CIMT because "the crime is committed against a peace officer and the nature of the crime involves using a device which gives the appearance or facade of the use of a deadly weapon."

The court found that "not only do other Cal.Penal Code provisions show that using a laser pointer is not equivalent to terrorizing someone with a laser targeting device, but § 417.26 does not include any "appears-to-be-a -deadly-weapon" element." Therefore, said the court, " the BIA's importation of an 'appearance of a deadly weapon' element into § 417.26 is incorrect." Consequently, because the BIA had failed to identify the elements of the crime correctly, the court concluded that its CIMT analysis was not entitled to *Skidmore* deference.

The court then decided the issue de novo and concluded that § 417.26 "can be violated by conduct that bears a striking resemblance to non-turpitudinous simple assault, and little similarity to turpitudinous terrorizing threats." Therefore, the court concluded that petitioner's conviction was not categorically a crime involving moral turpitude and found it unnecessary to remand the case to the BIA to apply the modified categorical approach.

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■ **Ninth Circuit Holds that Applicant for Special Rule Cancellation of Removal Cannot Automatically Utilize 212(h) Waiver of Inadmissibility**

In ***Garcia-Mendez v. Lynch***, __ F.3d __, 2015 WL 3540882 (9th Cir. June 8, 2015) (Clifton, Kleinfeld, *Seeborg*), the Ninth Circuit deferred to the BIA's interpretation in *Matter of YNP*, 26 I&N Dec. 10 (BIA 2012), that an applicant for special rule cancellation of removal is distinct from a "VAWA self-petitioner" and thus not automatically eligible for a 212(h) waiver of inadmissibility.

Garcia-Mendez, a native and citizen of Mexico, first entered the U.S., without admission, in 1989. In 2001, he was charged with removability as an alien in the U.S. without admission or parole. In May 2002, less than two weeks before his removal hearing, he married Crystal Lopez, a U.S. citizen. Garcia-Mendez conceded removability, but applied for cancellation of removal, claiming extremely unusual hardship to his citizen wife. While his application was pending, Garcia-Mendez was convicted of three crimes: possessing, receiving, or uttering forged paper; second degree burglary of a commercial structure; and attempted petty theft.

"Aliens who apply for special rule cancellation" are not included in the "definitional list" of persons classified as VAWA self petitioners.

Garcia-Mendez separated from his wife in August 2004. On June 4, 2007, he filed an I-360 petition seeking designation as a Violence Against Women Act (VAWA) self-petitioner on the grounds that his wife had battered him, which would enable him to seek a section 212(h) waiver of inadmissibility due to his criminal convictions. On April 1, 2010, USCIS rejected his I-360 petition on the grounds that he failed to demonstrate that he married Lopez in good faith.

Garcia-Mendez then filed an application for special rule cancellation on the same grounds as his I-360 petition. On September 27, 2010 an IJ denied the application, finding that Gacia-Mendez CIMTs rendered him facially ineligible for special rule cancellation. Garcia-Mendez appealed to the BIA, which affirmed the IJ's ruling in an unpublished decision.

Before the Ninth Circuit petitioner argued that, as an applicant for special rule cancellation, he automatically qualifies as a VAWA self-petitioner and alternatively that he is entitled to seek a section 212(h) waiver solely on the grounds of his application for special rule cancellation. The court found that a plain text reading of INA § 101(a)(51)(A)-(G) indicates that "aliens who apply for special rule cancellation" are not included in the "definitional list" of persons classified as VAWA-self petitioners, and that interpreting the statute as petitioner suggests would be contrary "the manifest intent of Congress."

The court also found that Garcia-Mendez did not otherwise qualify as a VAWA self-petitioner. The court granted *Chevron* deference to the BIA's decision in *Matter of Y-N-P-*, upon which it relied to find Garcia-Mendez ineligible for the § 212(h) waiver. The court first determined that the language of the 212(h) statute is ambiguous in regards to whether among those eligible for the waiver are only § 245 adjustment of status applicants, or those who receive adjustment of status as a result of special rule cancellation as well. In step two of *Chevron*, the court held that "the BIA arrived at a permissible construction of an ambiguous statutory scheme," when it deemed that the § 212(h) waiver applies only to § 245 adjustment of status recipients.

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■ **Ninth Circuit Holds Alien's Plea to a Lesser-Included Offense Established that Alien Possessed Drug Specified in Complaint**

In ***Ruiz-Vidal v. Lynch***, __ F.3d __, 2015 WL 3756517 (9th Cir. June 17, 2015) (Reinhardt, *Kozinski*, Clifton), the Ninth Circuit held that the Mexican alien's conviction record reliably established that he possessed methamphetamine, and was thus removable. Applying the modified categorical approach, the court ruled that the alien's no contest plea to a lesser-included offense of drug possession, stemming from a methamphetamine possession for sale charge, convincingly established the drug he possessed. Judge Reinhardt dissented, contending that this finding erroneously established a new exception to *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (*en banc*), for pleas to lesser-included offenses.

The court determined it was not the Congressional intent to limit motions by aliens who had departed during removal Proceedings.

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■ **Ninth Circuit Holds Every Alien has Statutory Right to File One Motion to Reopen and Reconsider, Irrespective of How that Alien Departed the United States**

In ***Toor v. Lynch***, __ F.3d __, 2015 WL 3756503 (9th Cir. June 17, 2015) (*Reinhardt*, N. Smith, Hurwitz), the Ninth Circuit joined six other circuits in holding that the regulatory departure bar is invalid because it conflicts with an alien's statutory right to file one motion to reopen and reconsider.

Toor, a native of India, was admitted to the U.S. as an LPR on a conditional basis in 2003. The conditions were removed in 2005. On August 23, 2007, DHS charged petitioner with misrepresentation of material fact on a visa application and lacking a valid entry document. On November 3, 2008, an IJ sustained both charges of removability, granting petitioner until December 18 to apply for relief. Petitioner did not apply for relief within the given period, so the IJ ruled that he had waived and abandoned his requests for relief and ordered Toor removed to India. Petitioner filed a timely MTR on the grounds that the IJ could not order him removed since he had departed from the U.S. before the court had issued its ruling. The IJ denied his motion for a lack of jurisdiction under the regulatory departure bar, and alternatively on the merits. The BIA dismissed the appeal for lack of jurisdiction under 8 C.F.R. § 1103.2(d) and did not reach the merits of the motion.

The Ninth Circuit applied a *Chevron* analysis to the BIA's application of the regulatory departure bar, asking first whether or not Congress had spoken directly regarding the question at issue. The court found that "the text of IIRIRA makes clear that the statutory right to file a motion to reopen and a motion to reconsider is not limited by whether the individual had departed the United States. The regulatory departure bar, therefore, fails at the first step of *Chevron*." In so deciding the court agreed with the holdings of the First, Third, Fourth, Fifth, Tenth, and Eleventh Circuits.

The court emphasized that the statute clearly states that "an alien may file one motion to reopen proceeding" and "one motion to reconsider a decision." Because "the statute does not contain any requirement that the non-citizen filing a motion... remain physically in the United States during the immigration proceedings," the court determined it was not the Congressional intent to limit motions by aliens who had departed during removal proceedings. The court remanded the case to the BIA on the merits of petitioner's motion.

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DISTRICT COURTS

■ **Southern District of New York Holds that the Doctrine of Consular Nonreviewability Precludes Claim Alleging Consular Delay in Processing Visa Applications**

In ***Al Naham v. U.S. Dep't of State***, __ F.Supp.2d __, 2015 WL 3457448 (S.D.N.Y. June 1, 2015) (Oetken, J.), the District Court for the Southern District of New York dismissed plaintiffs' complaint for lack of jurisdiction under the doctrine of consular nonreviewability. In 2010, plaintiffs, who are citizens and residents of Yemen, had submitted visa applications to the U.S. Embassy in Yemen. Plaintiffs sought to compel action on their visa applications. The court rejected plaintiffs' attempt to distinguish cases involving consular inaction from cases involving refusal of a visa, holding that the doctrine of consular nonreviewability applied equally in both cases. Because plaintiffs could not raise any constitutional claim, the court held that consular nonreviewability precludes jurisdiction over the action.

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■ **Middle District of Pennsylvania Grants Government's Motion to Dismiss Constitutional and APA Challenges to Adam Walsh Act**

In ***Bittinger v. Johnson***, No. 14-cv-1560 (M.D. Pa. June 22, 2015) (Kane, J.), the District Court for the Middle District of Pennsylvania dismissed a complaint filed by a visa

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H1-B Fraudulent Scheme Exposed

In ***U.S. v. Kalu***, __ F.3d __, 2015 WL 3939007 (10th Cir. June, 29, 2015) (*Matheson*, Bacharach, Moritz), the court affirmed the conviction of Kizzy Kalu, who was found guilty of various crimes in connection with a fraudulent scheme to import nurses from the Philippines to perform unspecialized labor, and an order to forfeit $475,592.94 and provide $3,790,338.55 in restitution.

Mr. Kalu began his fraudulent plan by submitting 41 H-1B visa petitions for foreign nationals, primarily of Filipino origin, purporting that these individuals would be working as "nurse instructor/supervisors" for Adam University (AU). To do so he requested that the foreigners paid him a fee, of around $6,500. Kalu was able to circumvent the federal government's H-1B visa cap, which limits H-1B visas to 65,000 a year, by claiming that the nurses would be working for AU, which, being an educational institution was exempt from the cap. The fraudulence of Mr. Kalu's claims became clear when, upon arrival, the foreign nationals discovered they would not be working for AU, but rather for Mr. Kalu's for-profit corporation, Advanced Training and Education for Foreign Healthcare Professionals Group, LLC ("FHPG"), which placed them as employees in Colorado nursing homes, in unspecialized labor positions. Mr. Kalu also arranged for the foreign nationals' remuneration, off of which he took a portion for personal profit. The nursing homes typically paid FHPG $35/hour for the nurses' labor, of which the nurses would receive $20 from FHPG. Additionally, Kalu eventually told many of the nurses they would have to find their own nursing jobs without the assistance of FHPG. However, they would still need to pay him over $1,000 per month, regardless of whether they found another job. He threatened to report them, have their visas revoked, have them deported, or charge them a $25,000 penalty for breaches of contract.

In completing the H-1B visa applications for the foreign nationals, Kalu misrepresented a variety of facts and neglected to change or update these applications, even after AU no longer had a physical presence in Colorado, deceiving the nurses, his attorney and immigration officials. On the visa applications Kalu claimed that the nurses would be working as "nurse instructor/supervisors" for AU, not unspecialized workers for FHPG. The visa application also falsely indicated that the nurses would be receiving $72,000 a year, satisfying the H-1B requirement that they earn more than the prevailing wage for Denver, while none of them received this amount generally earning $20/hour and working outside of Denver. Kalu also did not indicate on the visa petition that he would be retaining a sizable portion of the nurse's wages for personal profit. In addition at least fourteen nurses were forced to provide labor under the threat of deportation.

Kalu pled not guilty at his district court trial, claiming that he was merely a middleman, who acted in good-faith, and that AU was responsible for providing the nurses with the job positions and pay promised in the visa petitions. He was found guilty of mail fraud, encouraging and inducing an alien, visa fraud, forced labor, trafficking in forced labor, and money laundering, and sentenced to 130 monthS in prison on some counts and 120 on others, to be served concurrently. In his appeal to the Tenth Circuit Kalu claimed that the district court failed to instruct the jury properly on certain provisions of the crimes he was accused of, however the court found that although certain instructions did show to have plain errors they did not warrant reversal, as they did not affect the fairness of the trial. In his appeal, Kalu also claimed that the restitution award was based on improper calculations; however the court concluded that the restitution award was proper.

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petitioner challenging the Adam Walsh Act ("AWA") provision that bars petitions of individuals convicted of certain sex offenses unless the Secretary of Homeland Security determines in his "sole and unreviewable discretion" that the petitioner poses no risk to the beneficiary. The court ruled that the AWA, in conjunction with 8 U.S.C. § 1252(a)(2)(B)(ii), bars all challenges to the Secretary's no risk analysis, including claims that the agency acted unconstitutionally in conducting that analysis.

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■ **Post-Order Detention Statute Controls Detention Pending Reasonable Fear Proceedings**

In ***Gomez v. Tsoukaris***, No. 2:14-CV-01400 (D.N.J., May 29, 2014) (Chesler, J.), the court found that the alien's removal order was a final order when it was reinstated, and that the subsequent start of reasonable fear proceedings did not move him into pre-order detention status Because the alien remains well within the six-month post-order detention period found reasonable by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the court dismissed the petition.

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Temporary Protected Status for Nationals of Nepal

Secretary of Homeland Security Jeh Johnson announced his decision to designate Nepal for Temporary Protected Status (TPS) for 18 months based on the conditions resulting from the devastating magnitude 7.8 earthquake that struck Nepal on April 25, 2015, and the subsequent aftershocks. As a result, eligible nationals of Nepal residing in the United States may apply for TPS with U.S. Citizenship and Immigration Services (USCIS). The Federal Register notice published today provides details and procedures for applying for TPS.

The TPS designation for Nepal is effective June 24, 2015, and will be in effect through December 24, 2016. The designation means that, during the designated period, eligible nationals of Nepal (and people without nationality who last habitually resided in Nepal) will not be removed from the United States and may receive an Employment Authorization Document (EAD). The 180-day TPS registration period begins June 24, 2015 and runs through December 21, 2015.

To be eligible for TPS, applicants must demonstrate that they satisfy all eligibility criteria, including that they have been both "continuously physically present" and "continuously residing" in the United States since June 24, 2015. Applicants also undergo thorough security checks. Individuals with certain criminal records or who pose a threat to national security are not eligible for TPS. The eligibility requirements are fully described in the Federal Register notices and on the TPS Web page at www.uscis.gov/tps.

Applicants may request that USCIS waive any or all TPS-related fees based on inability to pay by filing Form I-912, Request for Fee Waiver, or by submitting a written request. Fee-waiver requests must be accompanied by supporting documentation. USCIS will reject any TPS application that does not include the required filing fee or a properly documented fee-waiver request. All USCIS forms are free. Applicants can download these forms from the USCIS website at www.uscis.gov/forms or request them by calling USCIS toll-free at 1-800-870-3676.

Jurisdiction Over Sua Sponte Reopening

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acknowledged that the motion was untimely but argued that his previous counsel's ineffective assistance was an exceptional circumstance entitling him to equitable tolling of the time limit. The BIA disagreed and dismissed the motion as untimely and also declined to reopen Mata's removal proceedings *sua sponte* under 8 CFR § 1003.2(a). On appeal, the Fifth Circuit construed Mata's equitable tolling claim as an invitation for the BIA to exercise its regulatory authority to reopen the proceedings *sua sponte*, and — because circuit precedent forbids the court to review BIA decisions not to exercise that authority —dismissed Mata's appeal for lack of jurisdiction.

Mata then filed a petition for certiorari but because the government agreed with him that the Fifth Circuit had jurisdiction, the Court appointed an *amicus curia* to defend the judgment below.

Writing for a 8-1 majority, Justice Kagan explained that "every alien ordered removed" has a statutory right to file one motion to reopen and whenever the BIA "denies an alien's statutory motion to reopen a removal case, courts have jurisdiction to review its decision." The reason for the BIA's denial of the motion "makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision." The jurisdiction of the court remains "unchanged" if the BIA "in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate *sua sponte* authority to reopen the case."

The Court noted that in *Kucana* v. *Holder*, 558 U.S. 233 (2010), it had declined to decide whether courts have jurisdiction to review the BIA's discretionary use of *sua sponte* authority to reopen a case, and "assuming arguendo" that courts lack such authority, "it means only that judicial review ends after the court has evaluated the BIA's ruling on the alien's motion to reopen."

Consequently the Court concluded that "the Court of Appeals did not lose jurisdiction over the Board's denial of Mata's motion just because the Board also declined to reopen his case sua sponte."

In a dissenting opinion, Justice Thomas would also have reversed the decision below because in his view the court had erred in applying a categorical rule that all motions that are untimely must be construed as motions for *sua sponte* reopening.

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New Immigration Judges

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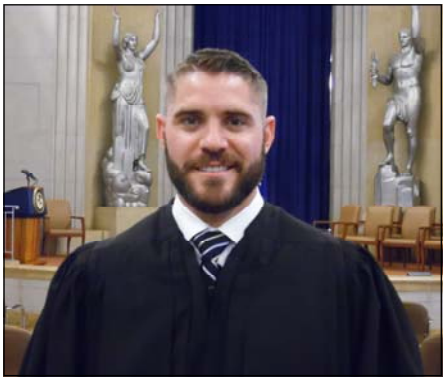
From October 2006 to May 2015, Judge Holyoak served as trial attorney within the Office of Immigration Litigation, Civil Division, Department of Justice. From 2003 to 2006, he was an attorney at Spriggs & Hollingsworth, in Washington, D.C. From 2002 to 2003, Judge Holyoak was an attorney at Maggio & Kattar, in Washington, D.C. Judge Holyoak is a member of the District of Columbia and Florida Bars.



Judge Dalin R. Holyoak

Judge Chales S. Greene, III, was appointed by Attorney General Eric Holder to begin hearing cases in June 2015. Judge Greene received a bachelor of arts degree in 1989 from Duke University and a juris doctorate in 1997 from the University of California Boalt Hall School of Law. From June 2010 to May 2015, Judge Greene served as trial attorney within the Office of Immigration Litigation, Civil Division, Department of Justice. From 2005 to 2010, he served at the National Security Division in various capacities including deputy unit chief and attorney advisor, National Security Division, DOJ, in Washington, D.C. From 2001 to 2005, Judge Greene was an attorney at Hogan & Hartson LLP, in Washington, D.C. From 1990 to 1994, he served in the U.S. Army. Judge Greene is a member of the District of Columbia Bar.

Judge Charles S. Green, Chief Immigration Judge Brian M. O'Leary

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

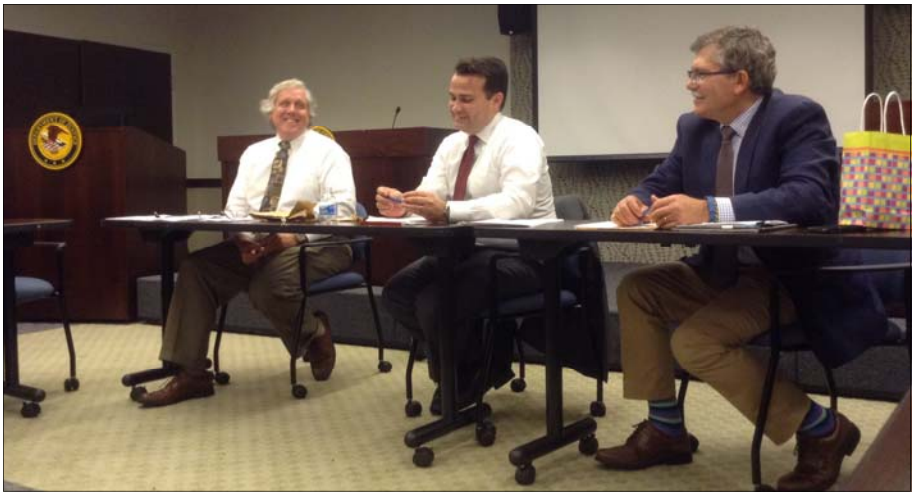
October 6-9, 2015. OIL new attorney training. Contact Jennifer Lightbody at 202-616-9352.

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

Prof. Christopher Walker Speaks on The Ordinary Remand Rule

Prof. Christopher J. Walker of the Ohio State University Moritz College of Law spoke on July 6 at the OIL Brown Bag Lunch & Learn Program. Prof. Walker discussed his recent law review article on the ordinary remand rule in immigration cases and his continuing research in the interaction between courts of appeals and government agencies.

Prof. Walker received his law degree from Stanford and did a brief stint in the Civil Division Appellate Staff. He clerked for Justice Anthony Kennedy and Judge Alex Kozinski.



David M. McConnell, Christopher J. Walker, Francesco Isgro

AILA Doc. No. 15100701. (Posted 10/07/15)

Three Former OIL Attorneys Among Newly Appointed Immigration Judges

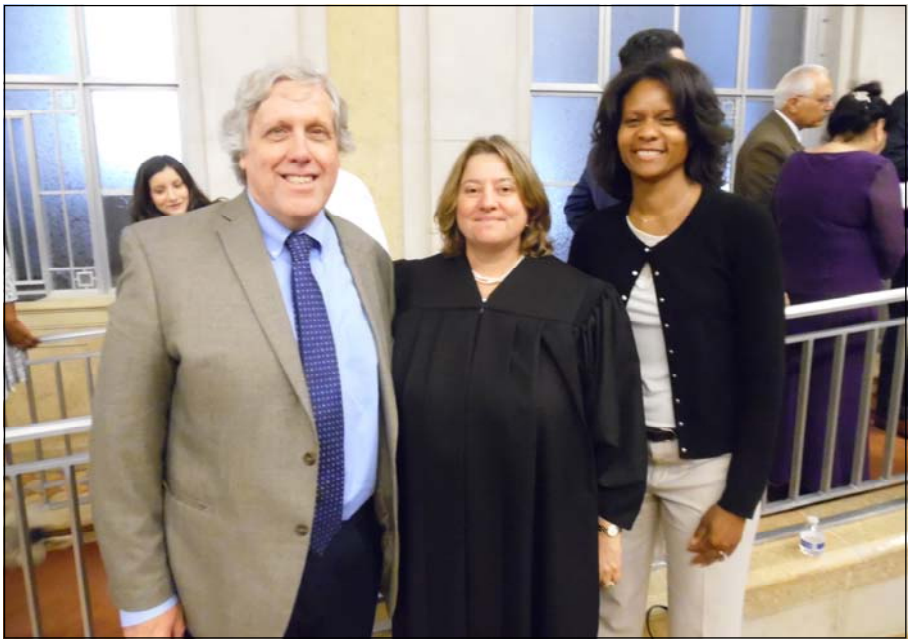
Congratulations to all eighteen Immigration Judges who received their judicial robes at an investiture ceremony held in the Great Hall at the Department of Justice on June 19, 2015. We especially extend congratulations to three former OIL attorneys Dalin R. Holyoak, Patricia Buchanan, and Charles S. Greene, III.

Judge Patricia Buchanan, who will be serving in the Immigration Court in New York City, was appointed by Attorney General Eric Holder to begin hearing cases in June 2015. Judge Buchanan received a bachelor of arts degree in 1985 from Syracuse University and a juris doctorate in 1990 from the City University of New York School of Law. From December 2003 to May 2015, Judge Buchanan served in various roles within the Immigration Unit, U.S. Attorney's Office for the Southern District of New York, including assistant U.S. attorney, deputy chief and chief.

From 2001 to 2003, Judge Buchanan served as a trial attorney within the Office of Immigration Litigation, Civil Division, Department of Justice. From 1996 to 2001, she served as an attorney for the former Immigration and Naturalization Service, in New York. From 1995 to 1996, she was an attorney at Westchester/Putnam Legal Services Inc., in White Plains, N.Y. From 1991 to 1995, Judge Buchanan was an attorney at Mid-Hudson Legal Services, Inc., in Poughkeepsie, N.Y.

Judge Dalin R. Holyoak, who will be serving in the San Francisco Immigration Court, was appointed by Attorney General Eric Holder to begin hearing cases in June 2015. Judge Holyoak received a bachelor of arts degree in 1997 from Southern Utah University and a juris doctorate in 2002 from the George Washington University School of Law.

(Continued on page 15)



OIL Director David M. McConnell, Immigration Judge Patricia Buchanan, OIL Deputy Director Michelle Latour

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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