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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

■ **APA**

►Preliminary injunction enjoining DAPA and extension of DACA upheld because plaintiff states have standing to challenge those programs and DHS violated the APA notice-and-comment (5th Cir.) **1**

■ **ASYLUM**

►Gang extortion was persecution "on account of" former gang membership (4th Cir.) **5**

►Alien failed to demonstrate crime in Guatemala constitutes changed conditions excusing untimely motion to reopen(1st Cir.) **4**

■ **CRIMES**

►Use of the circumstance-specific approach is proper in determining whether the requisite domestic relationship existed Under INA § 237(a)(2)(E)(i) (4th Cir.) **6**

■ **DUE PROCESS**

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►Court lacks jurisdiction to review discretionary "exceptional and extremely unusual" hardship determination for cancellation of removal (8th Cir.) **6**

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Fifth Circuit Upholds Preliminary Injunction Against DAPA And Finds That It Violates the INA

In *Texas v. United States*, __F.3d__, 2015 WL 6873190 (5th Cir. Nov. 25, 2015), the Fifth Circuit upheld a preliminary injunction enjoining DHS from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. The court held that the plaintiff states had satisfied the Article III standing requirements, finding that they were entitled to special solicitude when determining whether they had standing, and that the State of Texas had satisfied the injury element for standing.

The court then found that the states had established a substantial likelihood of success on the merits of their procedural APA claims, finding that the DAPA program was not exempt from the APA notice-and-comment requirement.

The court also reached the merits of the substantive APA claim and held that the DAPA program was "manifestly contrary" to the INA *finding inter alia*, that it "would dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country."

The Article III Standing Issue

The court initially determined that under *Massachusetts v. EPA*, 549 U.S. 497 (2007), the states were entitled to "special solicitude" in the standing inquiry because their interests implicate sovereignty concerns and they must rely on the federal government to protect those interests.

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New OIL Deputy Director Ernesto Molina

OIL Director David McConnell announced on November 2, 2015, that OIL Assistant Director Ernesto (Ernie) H. Molina, Jr., has been selected as OIL's new Deputy Director.

Mr. Molina joined OIL in 1995 and became a Senior Litigation Counsel in November 2000. In July 2008, he was selected to the position of Assistant Director, managing a team of 15 to 17 attorneys. Mr. Molina received his B.A. in Speech Communication from CalPoly, San Luis Obispo in 1992. In 1995 he received his J.D. from Santa Clara University.

As Deputy Director Mr. Molina

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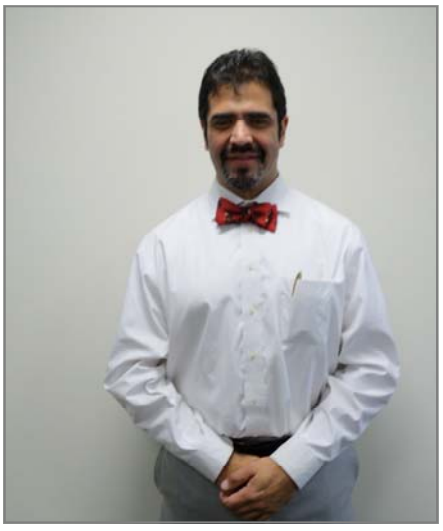

Ernesto H. Molina

Fifth Circuit Upholds Injunction Against DAPA

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The court then found that the standing of the states "was plain, based on the driver's-license rationale." First, the court found that State of Texas had shown injury by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries. The court disagreed with the government's suggestion that the costs would be offset by other benefits to the states, noting that it would not negate Texas's injury and that the analysis of standing "was not an accounting exercise."

Second, the court found that the injury was "fairly traceable" to DAPA because it would enable its beneficiaries to apply for driver's licenses. "This case is far removed from those in which the Supreme Court has held an injury to be too incidental or attenuated," said the court. Third, the court found that Texas had satisfied the standing requirement of redressability, because enjoining DAPA "could prompt DHS to reconsider its program, which is all plaintiff must show when asserting a procedural right."

Finally, the court held that the states also satisfied the APA's separate requirement that the interests they sought to protect were within the "zone of interests" of the INA. The court explained that since Congress "had allowed states to deny public benefits to illegal aliens . . . Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes."

Justiciability

The court disagreed with the government's contentions that judicial review was precluded under INA § 242(g) and 5 § 701(a)(2). The court explained that there is presumption of judicial review of administrative actions and that none of the actions at issue in the case arise from the DHS Secretary "decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any aliens," under INA § 242 (g). Similarly, the court determined that "regardless of whether the [DHS] Secretary has the authority to offer lawful presence or employment authorization in exchange for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion."

"Neither the injunction nor compliance with the APA require the DHS Secretary to enforce the immigration laws or change his priorities for removal.

The court further explained that "neither the injunction nor compliance with the APA require the DHS Secretary to enforce the immigration laws or change his priorities for removal. . . . At its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis. . . .The federal courts are fully capable of adjudicating those disputes."

Likelihood of Success on the Merits

The court found that Texas had established a substantial likelihood of success on its claim that DAPA must be submitted for notice and comment. The court disagreed with the government's arguments that DAPA is exempt as an interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice. In particular, reviewing for clear error, the court found that the states had established "a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion," in the adjudication of DAPA applications. The court also explained that DAPA was not a procedural rule exempt from the APA notice-and-comment requirement because it modified substantive rights and interests.

Accordingly, the court held that the states had established a substantial likelihood of success on the merits of their procedural claim.

Substantive APA Challenge

As an alternate and additional ground for affirming the injunction, the court address the states' substantive claim under the APA and held that the DAPA was "foreclosed by Congress's careful plan," namely the "INA's intricate system of immigration classifications and employment eligibility."

The court explained that assuming *Chevron* deference applied, and that Congress had not directly addressed the precise question at hand, it would "strike down DAPA as an unreasonable interpretation that is 'manifestly contrary' to the INA." Moreover, "even with 'special deference' to the Secretary, the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization," said the court.

Dissenting Opinion

In a dissenting opinion, Judge King would have dismissed the case on justiciability grounds. Even if the case were justiciable, the dissenter would have held that the discretionary case-by-case DAPA adjudication would not be subject to the APA notice-and-comment requirement. Judge King would not have reached the APA substantive claim because of the limited record below on this issue. However, he found "unpersuasive" the majority conclusion that the DAA program was contrary to the INA and substantively violates the APA.

By Francesco Isgro, OIL

AILA Doc. No. 16071905. (Posted 7/19/16)

FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony

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

Contact: Patrick Glen, OIL
☎ 202-305-7232

Conviction – Divisibility Inconclusive Record

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

Contact: Patrick Glen, OIL
☎ 202-305-7232

Crime of Violence

On November 18, 2015, the Department filed a petition for *en banc* rehearing of the judgment in ***Dimaya v. Lynch***, 803 F.3d 1110 (9th Cir. 2015), in which a divided panel ruled 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 unconstitutionally vague in view of Johnson *v. United State*s, 135 S. Ct. 2521 (2015). The petition argues that ruling is incorrect, is already causing substantial disruption to the administration of the immigration and criminal laws in the Ninth Circuit, and will cause even greater disruption if extended to the more-than-a-dozen other federal statutes that use 18 U.S.C. § 16(b) or similar language. At the court's direction Dimaya has responded to the government's petition

Contact: Bryan Beier, OIL
☎ 202-514-4115

Jurisdiction – Criminal Alien Bar

On December 2, 2015, the government filed a response to the petition for a writ of certiorari in Ortiz-Franco v. Lynch (SCt No. 15-362), recommending that the Supreme Court grant certiorari and affirm the published decision by the Second Circuit, 782 F.3d 81, holding that it lacks jurisdiction over factual challenges to a denial of deferral of removal in the case of a criminal alien under 8 U.S.C. § 1252(a)(2)(C). The government response agrees with the petition for certiorari that there is an 8-2 conflict among the circuits on the application of the criminal alien bar to claims for deferral of removal under the Convention Against Torture (CAT). The government contends that the court below was correct rejecting three arguments for jurisdiction asserted by the alien: 1) the 9th Circuit's "on-the-merits" rule; 2) the 7th Circuit's ruling that deferral of removal is "final" enough for judicial review, but not "final" enough to implicate the criminal alien bar; or 3) 8 U.S.C. § 1252(a)(4) as evidence that CAT claims are not subject to the criminal alien bar. Two amicus briefs supporting certiorari were filed.

OIL Contact: Andy MacLachlan
☎ 202-514-9718

Injunction Against Executive Action

On November 20, 2015, the government filed a petition for a writ of certiorari in ***United States, et al. v. Texas, et al.*** (SCt No. 15-674), challenging the November 9, 2015 decision by the Fifth Circuit, 805 F.3d 653, affirming the injunction entered by a district court against the implementation of DHS's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and the expansion of Deferred Action for Childhood Arrivals (DACA) program. The court held that "[a]t least one state" - Texas - had Article III standing and a justiciable cause of action under the APA, and that respondents were substantially likely to establish that notice-and-comment rulemaking was required. The petition for certiorari (available at 2015 WL 7308179) argues, *inter alia*, that the court's merits rulings warrant review because they strip DHS of authority it has long exercised to provide deferred action, including work authorization, to categories of aliens.

Civil Division Contact: Adam Jed, Counsel to the AAG

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

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Alien Failed to Demonstrate Crime in Guatemala Constitutes Changed Conditions Excusing Untimely Motion to Reopen

In *Mejia-Ramaja v. Lynch*, 806 F.3d 19 (1st Cir. November 20, 2015) (Torruella, *Selya*, Lynch), the First Circuit held that the BIA "acted well within the realm of its discretion" when it denied petitioner's untimely motion to reopen his removal proceeding to reapply for asylum and related relief based on the violent armed robbery of his family's business, a gas station, in Guatemala. The court held that petitioner failed to show changed country conditions because "the robbery at the gas station was merely one more ugly episode in a continuing pattern of crime and violence that has existed in Guatemala for several years."

Contact: Alexander J. Lutz, OIL
☎ 202-305-7109

First Circuit Holds Alien Categorically Ineligible for Cancellation of Removal under INA § 240A(a) Because Her Conditional LPR Status Had Been Terminated

In *Cabrera v. Lynch*, 805 F.3d 391 (1st Cir. 2015) (Howard, *Selya,* Thompson), the First Circuit held that a citizen of the Dominican Republic, who became a conditional lawful permanent resident based on her marriage to a United States citizen, became ineligible for cancellation of removal under INA § 240A(a) when the USCIS denied her joint petition to remove conditional status.

The petitioner entered the United States in January 1991 and married a U.S. citizen later that same year. Through that marriage, she was able to acquire status as a conditional lawful permanent resident on June 25, 1993. However, on August 8, 1997, the INS denied petitioner's joint petition (I-751) to remove her conditional status based on a finding of marriage fraud. As a result, her conditional was terminated. Petitioner did not seek review of the adverse determination. Shortly thereafter, the petitioner and her spouse became embroiled in divorce proceedings and a final divorce decree was entered on June 18, 1999.

In October of 2000, petitioner was placed in removal proceedings. The next year (while still in removal proceedings), the petitioner filed another I-751 petition with the USCIS, this time seeking a waiver of the joint petition requirements on the basis that she entered into her marriage in good faith. The USCIS denied it on October 5, 2006, relying on its previous finding of marriage fraud. Eventually the IJ upheld the denial of the waiver petition, finding that the petitioner had not carried her burden of proving that she had entered into her marriage in good faith. Relatedly, the IJ found that the petitioner was ineligible for cancellation of removal under § 240A(a) and, thus, pretermitted her application.

Because the denial of the joint petition terminated petitioner's residency status, which was not restored by the subsequent filing of a waiver petition, she was not a permanent resident when she applied for relief.

The court found that because the denial of the joint petition terminated petitioner's residency status, which was not restored by the subsequent filing of a waiver petition, she was not a permanent resident when she applied for relief. She "was, at most, a conditional lawful permanent resident from June 1993 through August 1997 -- a period of less than five years. This failure to satisfy the five-year prerequisite is, in itself, enough to find her ineligible for cancellation of removal under section 1229b(a)" explained the court.

Contact: Joanna Watson, OIL
☎ 202-532-4275

THIRD CIRCUIT

Third Circuit Holds Continuous Residency Clock Does Not Restart Where There Is a Procedurally Regular Reentry after a Clock-Stopping Event

In *Singh v. Att'y Gen.*, __F.3d __, 2015 WL 6719007 (3d Cir. November 4, 2015) (Fisher, Chagares, *Jordan*), the Third Circuit held that once a period of continuous residence has been terminated by an offense described in INA § 240A(d)(1), an alien generally may not start the continuous-residency clock anew by departing and lawfully reentering the United States.

The petitioner became an LPR on June 1, 1994. On September 14, 2000, he was convicted of conspiracy to counterfeit passports, counterfeiting and using visas, and mail fraud. Petitioner later departed the U.S. and re-entered, on January 20, 2003. In late October 2009, he applied for admission to the United States as an LPR. He was instead detained by ICE on January 10, 2010. On January 19, 2010, he was served with an NTA charging him as an inadmissible arriving alien because he had committed a CIMT, namely his 2000 counterfeiting conviction. Petitioner admitted to the factual allegation but sought cancellation. He argued that his post-2003 time period — from the date of his reentry on January 20, 2003 to the service of his notice to appear on January 19, 2010 — satisfied the seven-year requirement of continuous residence under § 240A(a). The IJ, and on appeal the BIA, denied the request finding that petitioner could not begin a new period of continuous residence

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AILA Doc. No. 16071905. (Posted 7/19/16)

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after his 2003 readmission because his commission of a CIMT not only stopped the clock as to his preceding period of residency, but permanently prevented the clock from ever restarting as to a later period of residency.

The court concluded that its decision in *Nelson v. Attorney General*, 685 F.3d 318 (3d Cir. 2012), controlled petitioner's case. In *Nelson*, the court deferred to the BIA's interpretation in *Matter of Nelson*, 25 I&N Dec. 410 (BIA 2011), where the BIA found that the period of continuous residence ends at a clock-stopping offense where that offense is also charged as a ground for removability. However, the court added that "it would make more sense — and be more predictable — if the re-starting of the clock were instead contingent on events contemporaneous to re-entry," rather than the contents of an NTA, and suggested that the BIA "provide some clarity in this area."

"When the federal statute does not describe a generic offense, but instead 'refer[s] to the specific acts in which an offender engaged on a specific occasion," the circumstance-specific approach is appropriate.

Contact: Timothy Hayes, OIL
☎ 202-532-4335

FOURTH CIRCUIT

■ **Fourth Circuit Holds that the Use of the Circumstance-Specific Approach Is Proper in Determining Whether the Requisite Domestic Relationship Existed Under INA § 237(a)(2)(E)(i)**

In ***Hernandez-Zavala v. Lynch***, 806 F.3d 259 (4th Cir. 2015) (*Duncan*, Floyd, Hamilton), the Fourth Circuit held that when assessing whether an underlying state conviction qualifies as a crime of domestic violence under INA § 237(a)(2)(E)(i), the use of the circumstance-specific approach is proper in determining whether the requisite domestic relationship existed.

The court explained that "when the federal statute does not describe a generic offense, but instead 'refer [s] to the specific acts in which an offender engaged on a specific occasion," the circumstance-specific approach is appropriate. *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009). Under this approach, while the congruence of the elements of the underlying offense and the offense described in the federal statute must be assessed using the categorical approach, courts may consider other evidence to see if the necessary attendant circumstances existed."

The court, applying that approach, held that substantial evidence established that the alien's conviction for assault with a deadly weapon was against a person with whom he had a domestic relationship. Consequently, the court held that the alien was statutorily ineligible for cancellation of removal.

Contact: Ted Durant, OIL
☎ 202-616-4872

■ **Fourth Circuit Holds Gang Extortion Was Persecution "On Account Of" Former Gang Membership, and Remands to Decide Whether Particular Social Group Exists**

In ***Oliva v. Lynch***, __F.3d__, 2015 WL 7568245 (*Wynn*, Diaz, Davis) (4th Cir. November 25, 2015), the Fourth Circuit held that extortion and physical assault of a former gang member by the MS-13 gang in El Salvador was "on account of" membership in a group of "former gang members who left the gang, without its permission, for religious or moral reasons." The court found that the BIA interpreted "the nexus requirement too narrowly, and that [petitioner] successfully demonstrated that membership in his proposed social groups was at least one central reason for his persecution." The court also concluded that "the BIA failed to adequately address the record evidence in making its determination that [petitioner's] proposed social groups were not cognizable under the INA."

The petitioner entered the United States unlawfully in 2007. In July 2010, DHS instituted removal proceedings and, in July 2011, petitioner filed and application for asylum and withholding of removal. Petitioner claimed that at the age of sixteen he joined a gang called Mara Salvatrucha, also known as MS-13, while living in San Rafael Cedros in El Salvador. MS–13 forbids its members from quitting and kills anyone who attempts to leave the gang. However, MS–13 does allow gang members to become "inactive" members if they either devote themselves to the church or get married and start a family. MS–13 requires inactive members to pay "rent," a form of monetary tribute to the gang.

Petitioner sought to distance himself from the gang, became involved with the church, and moved to the capital city for two years. However, when he returned to his home town he was threatened by the MS-13 if he "did not start paying them 'rent.'" Petitioner stated that he paid roughly thirty percent of his income to the gang for seven or eight years. When he stopped paying "rent," the MS-13 threatened to kill him. Petitioner moved to the United State and settled in Virginia. In the summer of 2011, petitioner began receiving threatening phone calls originating in El Salvador.

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Petitioner argued that his life would be threatened because of his membership in one of two particular social groups: (1) "Salvadorans who are former members of MS–13 and who left the gang, without its permission, for moral and religious reasons," and (2) "Salvadorans who were recruited to be members of MS–13 as children and who left the gang as minors, without its permission, for moral and religious reasons." The IJ found that "[t]he evidence indicates that the gang was not targeting [petitioner] because of his membership in a group consisting of former gang members who have either found religion or started families.... Rather, he was targeted for money." The BIA dismissed the appeal on two grounds. First, the BIA held that petitioner's proposed particular social groups were not cognizable under the INA. The BIA determined that there was little evidence in the record that Salvadoran society perceives individuals 'who left the [MS–13], without its permission,' under either of the two sets of proposed circumstances, as a distinct social group. Second, the BIA found that petitioner failed to demonstrate that the persecution he feared was on account of his membership in either of his proposed social groups—the nexus requirement.

The Fourth Circuit reversed the BIA, finding that the record compelled the conclusion that petitioner's persecution was on account of his status as a former member of MS–13. The court explained that it was "undisputed that MS–13 extorted [petitioner] on account of his leaving the gang . . . The gang did not demand money just for the sake of personal greed or as a random act of violence, but targeted him specifically because 'leaving the gang was not allowed' unless he paid rent." The court further stated that the fact that petitioner had left MS–13 for moral and religious reasons was not merely "incidental, tangential, superficial, or subordinate" to his refusal to pay . . . [ ] rather, it was a central reason for his persecution."

The court also determined that although the BIA had considered petitioner's assertion that former gang members have a social distinction because they suffer employment discrimination, it had failed to address any of the other evidence that petitioner put forth, including evidence of government — and community-driven programs to help former gang members rehabilitate themselves and an affidavit from a community organizer who stated that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches.

Accordingly, the court remanded the case to the BIA to determine whether petitioner's proposed social groups are cognizable in light of all of the relevant evidence.

Contact: Margaret Perry, OIL
☎ 202-616-9310

EIGHTH CIRCUIT

■ Eighth Circuit Holds It Lacks Jurisdiction to Review Discretionary "Exceptional and Extreme ly Unusual" Hardship Determination for Cancellation of Removal

In *Lemuz-Hernandez v. Lynch*, __F.3d __, 2015 WL 6666646 (8th Cir. November 2, 2015) (Wollman, Colloton, Kelly) (*per curiam*), the Eighth Circuit held that it lacked jurisdiction over discretionary denials of cancellation of removal, and that the petitioner failed to raise a meritorious constitutional claim or question of law that would circumvent the jurisdictional bar.

Petitioner sought cancellation claiming that his three U.S. citizen daughters would suffer sufficient hardship as a result of his removal to Honduras. The IJ denied the relief for failure to establish the hardship prong of the statute and the BIA affirmed.

Petitioner claimed that the IJ and the BIA had failed to consider evidence of the exceptional and extremely unusual hardship his children. The court found that the IJ's written decision "specifically states that she considered the evidence of hardship that [petitioner] asserts was ignored. Though the agency's consideration of the particular hardship factors that [petitioner] believed decisive may have been perfunctory, that is insufficient to establish legal or constitutional error."

Contact: Tracie Jones, OIL
☎ 202-305-2145

■ Eighth Circuit Holds Immigration Judge Acted Within Discretion in Denying Continuance

In *Choge v. Lynch*, 806 F.3d 438 (8th Cir. 2015) (Wolman, Colloton, *Kelly*), the Eighth Circuit held that the IJ acted within his discretion in denying a further continuance to petitioner who had failed to submit requisite documents for his adjustment-of-status application.

The petitioner, a citizen of Kenya who had violated his student status, had an approved I-130 and had submitted an application for adjustment of status. However, after four hearings, he had failed to comply with the application's requirements. The court noted that petitioner "was given ten months to pay the fee associated with his application, provide his fingerprints, submit an affidavit of support, and bring his wife to testify on his behalf, and he does not contend that the time provided was inadequate. Nevertheless, in the intervening months, he did none of these things." "No abuse of discretion is apparent here," concluded the court.

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

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Summaries Of Recent Federal Court Decisions

NINTH CIRCUIT

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■ Ninth Circuit Holds Substantial Evidence Supports Determination that Asylum Applicant Failed to Establish Government Was Unable or Unwilling to Protect Him

In *Bringas-Rodriguez v. Lynch*, __ F.3d __, 2015 WL 7292592 (9th Cir. November 19, 2015) (Fletcher, *Bybee*, Settle), the Ninth Circuit held that bare hearsay assertions were insufficient to contradict the substantial country conditions evidence in this case.

The petitioner, a citizen of Mexico claimed that he suffered physical abuse at the hands of his father, who would tell him to "act like a boy, you're not a woman!" and to "do things a man does." His father also abused petitioners mother and siblings, but he says he was abused "most of all ... because [he] was different." Petitioner was later sexually abused by his uncle, cousins, and a neighbor. Petitioner first came to the United States with his mother and stepfather in 2002 when he was twelve, and he lived with them in Kansas for five months. Petitioner then moved back to Mexico because he was "troubled" over hiding his sexuality and history of abuse, and he wanted to live with his grandmother. Once back in Mexico, however, the abuse continued. In 2004, at age fourteen, petitioner returned to the United States to live with his mother and stepfather in Kansas and "to escape [his] abusers."

In September 2010, DHS instituted removal proceedings against the petitioner on the basis that in August 2010, he was convicted of "Contributing to the Delinquency of a Minor" in Colorado. Petitioner then filed applications for asylum, withholding of removal, and CAT protection. He explained that he feared returning to Mexico because he would be persecuted for being gay and the police would ignore his complaints. The IJ denied the asylum claim for being untimely. The IJ denied withholding finding that the sexual abuse did not constitute past persecution "on account of" a protected status, and that based on the Country Reports for Mexico, petitioner could relocate to a place like Mexico City without risking possible future abuse. The IJ also denied the request for protection under CAT because there was no evidence that the government routinely turns a blind eye to allegations of sexual abuse of children. On appeal, the BIA affirmed and also denied the asylum claim on the merits, assuming the application was timely filed.

Petitioner, by not reporting the sexual abuse to the police, "failed to prove that the government would be unwilling or unable to control his abusers," and therefore failed to establish his past persecution.

The Ninth Circuit upheld the BIA's finding that petitioner, by not reporting the sexual abuse to the police, "failed to prove that the government would be unwilling or unable to control his abusers," and therefore failed to establish his past persecution. The court also upheld the BIA's determination that no pattern or practice of persecution exists to support a claim of future persecution. The court declined to consider petitioner's claim that he had been singled out in the past for mistreatment for his membership in the disfavored group of homosexual men because he failed to exhaust this argument before the BIA. The court also upheld the denial of petitioner's CAT claim "because he did not show that he would more likely than not be tortured by or with the acquiescence of the Mexican government if he is removed to Mexico."

Finally, the court determined that the BIA did not abuse its discretion in finding that petitioner's HIV diagnosis, standing alone, did not require a remand to the IJ because he had not provided any additional country conditions evidence or specific arguments regarding how his status as an HIV positive homosexual changed the outcome of his case.

Contact: John W. Blakeley, OIL
☎ 202-514-1679

■ Ninth Circuit Holds that Petty Offense Exception Does Not Apply to Convictions for Crimes Involving Moral Turpitude Punishable by One Year in Prison

In *Mancilla-Delafuente v. Lynch*, __F.3d __, 2015 WL 6646272 (9th Cir. November 2, 2015) (Tallman, *Callahan*, Rosenthal), the Ninth Circuit held that a conviction for conspiracy to possess another's credit card, Nev. Rev. Stat. §§ 199.480 and 205.690(2), is a categorical crime involving moral turpitude because it requires an intent to defraud. The court deferred to the BIA's interpretation and held that the petty offense exception did not apply because the offense was punishable by imprisonment for up to one year.

Contact: David Schor, OIL
☎ 202-305-7190

TENTH CIRCUIT

■ Tenth Circuit Holds Government's Reliance on Hearsay in Removal Proceeding Did Not Violate Due Process

In *Vladimirov v. Lynch*, 805 F.3d 955 (10th Cir. 2015) (McHugh, Baldock, *O'Brien*), the Tenth Circuit

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held that the government's reliance on immigration officer reports and other agency-generated written materials to prove marriage fraud did not violate the alien's right to procedural due process.

Aliens in removal proceedings are entitled to procedural due process but that given the civil nature of the proceedings, "the extensive constitutional safeguards attending criminal proceedings do not apply."

The petitioner, Vladimir Vladimirov, a native of Bulgaria, entered the U.S. in February 1996 as a nonimmigrant visitor authorized to stay until August of 1996, but he did not depart. In July of 2005, he married Valentina Bakhrakh, a United States citizen. Bakhrakh filed an I–130 petition for alien relative on Vladimirov's behalf. Based on the I–130 petition, Vladimirov filed an I–485 application to adjust status.

Following an investigation by USCIS Officers Shelly Randall and Janet Gibson, Bakhrakh withdrew the I–130 petition. Based on the withdrawal and the evidence contradicting a bona fide marriage, Officer Randall denied Vladimirov's I–485 application to adjust status. An NTA was then issued to Vladimirov alleging he had "entered into a sham marriage with Valentina Bakhrakh in order to obtain lawful permanent resident status."

Vladimirov requested a hearing before an IJ. At the hearing, DHS presented the testimony of Officer Randall, who read from the agency file and provided information from Officer Gibson's official reports. Bakhrakh also testified, claiming she was threatened and coerced into withdrawing the I–130 petition for alien relative. Vladimirov did not testify. The IJ determined the government had met its burden to establish removability based on marriage fraud and ordered Vladimirov removed to Bulgaria. Vladimirov's appeal to the BIA was dismissed.

The Tenth Circuit readily dismissed Vladimirov's claims that he had not received fair notice of the fraud charges against him and that DHS had not established by clear and convincing evidence that he had engaged in fraud and willful misrepresentation. The court found that the NTA provided adequate notice of the charges against him and that the evidence in the record, including the couple's discrepant testimony about their life together, indicated they were not in a valid marriage. "This evidence, together with Vladimirov's admission to the invalidity of the marriage and Bakhrakh's withdrawal of the I–130 petition for alien relative, was sufficient to meet the government's burden," explained the court.

The court also rejected Vladimirov's argument that the IJ and BIA violated his due process rights because he was not given an opportunity to cross-examine Officer Gibson; because the I-213 had been improperly admitted and its contents were unreliable; and, because evidence that Officer Gibson threatened and coerced Bakhrakh to withdraw the I-130. The court explained that aliens in removal proceedings are entitled to procedural due process but that given the civil nature of the proceedings, "the extensive constitutional safeguards attending criminal proceedings do not apply." Consequently, Vladimirov did not have an absolute right to cross-examine Officer Gibson and her reports, even though they contained hearsay, were not *per se* inadmissible. The court found that "Officer Gibson's evidence was probative and there is no indication that its use was fundamentally unfair." The court also rejected the claim that the Form I–213 was inadmissible because it contained unreliable "triple hearsay." The court explained that the I-213 is "presumptively reliable administrative document," and Vladimirov had "not rebutted the presumption of reliability, nor did he demonstrate any inaccuracy in the Form I–213".

Finally, the court found that Vladimirov had not shown that Bakhrakh had been threatened and coerced to withdraw the I–130. The court agreed with the BIA's observation that "informing someone of the legal consequences of marriage fraud and perjury is not coercive."

Contact: Rebekah Nahas, OIL
☎ 202-598-2261

■ **Tenth Circuit Affords *Chevron* Deference to *Matter of Strydom* Holding that a No-Contact Provision of a Protective Order Involves Protection Against Credible Threats of Violence**

In ***Cespedes v. Lynch***, 805 F.3d 1274 (10th Cir. November 19, 2015) (*Hartz*, O'Brien, Phillips), the Tenth Circuit deferred to the BIA's decision in *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011), which held that a violation of a no-contact provision of a domestic-violence protective order subjects an alien to removal under INA § 237(a)(2)(E)(ii).

The petitioner, citizen of Venezuela, entered the United States as a nonimmigrant tourist on January 11, 2011. His status was adjusted to lawful permanent resident on October 25, 2012. Later he was charged in Utah state court with domestic violence and on April 24, 2013, that court issued a protective order, specifically, the no-contact provision. In November 2013, Mr. Cespedes pled guilty to attempted violation of the protective order entered under the Cohab-

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Summaries Of Recent Federal Court Decisions

itant Abuse Procedures Act. On May 14, 2014, the DHS brought a charge to remove petitioner under § 237(a)(2)(E)(ii), which authorizes the removal of an alien who "is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury." The IJ, and on appeal the BIA determined that under *Matter of Strydom*, petitioner was removal as charged.

The Tenth Circuit noting that there was "room for debate on the meaning of 'the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury,'" deferred nonetheless to the BIA's interpretation in *Matter of Strydom* because it "was a reasonable construction of the statutory language." The court explained that, because of the "significant risk of escalation into violence," the BIA reasonably concluded that no-contact provisions seek to protect against credible threats of violence.

Contact: Tim Ramnitz, OIL
☎ 202-616-2686

DISTRICT COURTS

■ District of Columbia Denies Preliminary Injunction Motion Seeking to Halt Department of Labor's H-2A Foreign Labor Program

In *Hispanic Affairs Project v. Perez*, __F. Supp.3d__, 2015 WL 6692192 (D.D.C. October 31, 2015) (Howell, J.), the District Court for the District of Columbia denied a preliminary injunction motion filed by a putative class of current migrant sheep and goat herders and former American herders seeking to enjoin a DOL rule governing the visa program for temporary agricultural workers in the herding industry.

The genesis of this litigation dates back to October 7, 2011, when a group of agricultural workers challenged the validity of two Training and Employment Guidance Letters ("TEGLs"), issued in 2011, for failing to comply with the APA's notice-and-comment requirements. These TEGLs provided special procedures for hiring foreign temporary workers on general agricultural H–2A visas to work as cattle, goat and sheep herders on the open range on terms intended to avoid adversely affecting the wages and working conditions of U.S. workers similarly employed. Eventually, the D.C. Circuit held that the plaintiffs had standing and that the 2011 TEGLs were subject to the APA's notice-and-comment requirements and, thus, were procedurally invalid. *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C.Cir. 2014). On remand, the district court entered a remedial order, directing the government to promulgate a new rule according to notice-and-comment procedures and, with the consent of all parties, required *vacatur* of the invalid 2011 TEGLS upon the effective date of the new rule. *Mendoza v. Perez*, 72 F.Supp.3d 168, 175 (D.D.C. 2014). The 2015 Rule, when it becomes effective, will replace and vacate both of the invalid 2011 TEGLs.

This latest lawsuit was initially filed in the District Court for the District of Colorado. The plaintiffs members, former and current H-2A sheepherders, challenged the DOL wage rate as being too low and improper because DOL had not applied the methodology authorized under the 2011 Sheeperder TEGLI when determining the prevailing rate. Accordingly, plaintiffs sought to enjoin DOL from further certifying additional H-2A sheepherders. Following a denial of an ex-parte motion for a TRO, the case was transferred to the District Court for District of Columbia

The court concluded that the plaintiffs had failed to demonstrate irreparable harm primarily because halting the herding visa program would not actually ameliorate their alleged harms, namely the lost backway wages. The court also noted that plaintiffs delay in bringing the lawsuit undermined their argument that they were suffering irreparable harm. The court then determined that the balance of hardships favored the government because halting the program would harm American employers, communities that rely on those industries, market participants, and program participants.

Contact: Erez Reuveni, OIL-DCS
☎ 202-307-4293

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OIL TRAINING CALENDAR

January 21, 2016. Lunch & Learn Brown Bag with Mathew E. Price, author of *"Rethinking Asylum: History, Purpose, and Limits"*

INSIDE OIL

OIL Attorneys and Staff Receive Awards

The following OIL attorneys were recognized at the Civil Division Awards Ceremony: Assistant Director **Michael Lindemann**, received the AAG's Career Service Award in recognition of exceptional talent, professionalism, and commitment to the mission of the Civil Division for over 30 years; Senior Litigation Counsel, **Papu Sandhu** received the Dedicated Service Award in recognition of his 15 years of service in the Civil Division and his record of outstanding actions and accomplishments and the highest standards of excellence and dedication; Paralegal **Karen Drummond**, received the Award for Excellence in Paralegal Support; Trial Attorneys **Samuel Go**, **Zoe Heller**, **Neelam Ihsanullah**, and Senior Litigation counsel **Andrew MacLachlan** received the Special commendation Award.

Recognized as outstanding mentors were Trial Attorneys, **Ed Wiggers, Chris Martin, Jesse Bless, Claire Workman, Walter Bocchini, and Ben Moss.**

Ernesto Molina, OIL Deputy Director

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will be managing a variety of topic areas, such as district court litigation, intellectual property administration, metrics, and hiring.

On a personal note, Mr. Molina, who is an avid hockey fan, has played ice hockey in the DC area for 17 years. He has also performed in several plays, including local productions of of West Side Story, Much Ado About Nothing, A Midsummer Night's Dream, and Dracula!

Board Members Linda Wendtland and Roger Pauley, shown here with OIL Director David McConnell, participated at OIL's 21st Annual Immigration Law Seminar held on Nov 2-6, 2015.

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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linda.purvin@usdoj.gov