U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 19, No. 4 APRIL 2015

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Attorney General Reconsiders and Vacates *Matter of Silva-Trevino*

In ***Matter of Silva-Trevino***, 26 I&N Dec. 550 (A.G. 2015), the Attorney General on April 10, 2015, vacated his decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), in light of its rejection in *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014), and by four other circuit courts, which "have created disuniformity in the Board's application of immigration law – as well as intervening Supreme Court decisions that cast doubt on [its] continued validity."

The BIA had initially determined in 2006, that Silva-Trevino, who conceded that he had been convicted of an aggravated felony (indecency with a child, § 21.11(a)(1) of the Texas Penal Code) had not been convicted of a CIMT because section 21.11(a)(1) criminalizes at least some conduct that does not involve moral turpitude. The Attorney General vacated that decision in 2008 and established a three-step framework of analysis for determining whether an alien had been convicted of a crime involving moral turpitude (CIMT) under INA § 212(a)(2).

Under that new approach IJs and the BIA were required to (1) look to the statute of conviction under the categorical inquiry and determine whether there was a "realistic probability" that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; (2) if the categorical inquiry did not resolve the question, engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript;

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Review Bar Applies to Challenges of CAT Denials by Aliens Convicted of Certain Criminal Offenses

In ***Ortiz-Franco v. Holder***, 782 F.3d 81 (2d Cir. 2015) (Jacobs, Droney, Lohier), the Second Circuit held that when an alien who is otherwise removable due to the commission of a covered criminal offense seeks deferral of removal under the CAT, appellate jurisdiction is limited by INA § 242(a)(2)(C), to the review of constitutional claims and questions of law.

The petitioner, citizen of El Salvador, was placed in proceedings as an alien present in the United States without being admitted or paroled, and as an alien convicted of a controlled substance violation and a crime of moral turpitude. Petitioner conceded his removability but applied for asylum, withholding of removal, and deferral of removal CAT. He claimed that, if he is returned to

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AILA Doc. No. 15100602. (Posted 10/05/15)

Attorney General Vacates *Matter of Silva-Trevino*

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and (3) if the record of conviction was inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.

On remand from the Attorney General, the IJ and the BIA, finding that the record of conviction was inconclusive, used Silva-Trevino's stipulations, testimony, and the victim's birth certificate, to concluded that he should have known the victim was a minor, and therefore found that he had been convicted of a CIMT.

In his order vacating the Attorney General 2008 decision, Attorney General Holder noted that the Fifth Circuit, and four other circuits, all agreed that the phrase "convicted of" as used in the INA forecloses any inquiry into evidence outside the record of conviction. Moreover, the original opinion, "has not accomplished its stated goal of 'establishing a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied,'" said the Attorney General. Finally, the Attorney General noted that several recent Supreme Court decisions have cast doubt on the validity of the third step of the framework of analysis set forth in the original opinion.

In his order vacating and remanding *Silva-Trevino*, the Attorney General directed the BIA to consider the following issues:

1. How adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the Act;

2. When, and to what extent, adjudicators may use a modified categorical approach and consider a record of conviction in determining whether an alien has been "convicted of . . . a crime involving moral turpitude" in applying section 212(a)(2) of the Act and similar provisions;

3. Whether an alien who seeks a favorable exercise of discretion under the Act after having engaged in criminal acts constituting the sexual abuse of a minor should be required to make a heightened evidentiary showing of hardship or other factors that would warrant a favorable exercise of discretion. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (addressing the exercise of discretion in view of alien's criminal acts).

By Francesco Isgro, OIL

Review of Criminal Alien CAT Denial Limited by § 242(a)(2)(C)

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El Salvador, members of La Mara Salvatrucha street gang ("MS–13") would torture and kill him because of information he provided to federal prosecutors in a proffer session.

The IJ determined that petitioner was ineligible for asylum and withholding due to his witness tampering conviction, and that he did not sustain his burden of demonstrating entitlement to CAT relief because he did not establish that it was more likely than not that he would be subject to torture in which the Salvadoran government would acquiesce. The BIA affirmed and dismissed the appeal.

Before the Second Circuit, petitioner argued that the IJ and BIA had erred in concluding that he did not show the requisite likelihood of torture or that any torture by gang members would occur with the acquiescence of El Salvador. The court agreed with the government's argument that it lacked jurisdiction to consider the petition for review because its jurisdiction was limited to consideration of questions of law and constitutional claims, and petitioner only challenged the factual findings.

The court rejected petitioner's contention that the language "any cause or claim" under § 242(a)(4) widened appellate jurisdiction to review a final order of removal entered against a criminal alien. The court explained that § 242(a)(4) "simply serves to 'confirm[ ]' that the statutory right to judicial review exists only as part of a review of a final order of removal," and that the statutory purpose of that provision was "to limit all aliens to one bite of the apple and thereby streamline what the Congress saw as uncertain and piecemeal review of orders of removal."

"Congress, or the Supreme Court, can tell us who has it right and who has it wrong."

Accordingly, because the petitioner challenged only the IJ factual findings, the court dismissed the petition for lack of jurisdiction.

In a concurring opinion, Judge Lohier noted that the Seventh and Ninth Circuits had reached opposite results. He found it "a statutory stretch to accept the Seventh Circuit's view [in *Wanjiru v. Holder*, 705 F.3d 258 (7th Cir.20130] that CAT deferral of removal is at once non-final for purposes of avoiding the jurisdiction-stripping provision, § 242(a)(2)(C), but final "enough" to permit judicial review of CAT deferral claims under § 242(a)(4)." Judge Lohier also suggested that given the split in the circuits on this issue, "Congress, or the Supreme Court, can tell us who has it right and who has it wrong."

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AILA Doc. No. 15100602. (Posted 10/05/15)

FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction – Equitable Tolling

On April 29, 2015, the Supreme Court heard oral argument on the alien's petition in ***Mata v. Holder***, in which the Fifth Circuit held that it lacks jurisdiction to review the BIA's decision denying a request for equitable tolling of the 90-day filing deadline for motions to reopen. In its response to the petition for certiorari, the government argued that the Fifth Circuit holding is erroneous. The Supreme Court appointed amicus counsel to defend the judgment below.

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Conviction - Possessing Illegal Drug Paraphernalia

On January 14, 2015, the Supreme Court heard argument on the alien's petition for *certiorari* in ***Mellouli v. Holder***, No. 13-1034 (U.S.) to review an Eighth Circuit decision (published at 719 F.3d 995) holding him deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on a drug paraphernalia conviction. The Eighth Circuit ruled that the BIA precedent *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (2009), is entitled to deference regarding drug paraphernalia offenses under the laws of States that have enacted the Uniform Controlled Substances Act.

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Consular Non-Reviewability

On February 23, 2015, the Supreme Court heard argument on the government's petition for certiorari in ***Kerry v. Din***, from the Ninth Circuit's published decision, 718 F.3d 856. The government presented the questions: 1) whether a consular officer's denial of a visa to a U.S. citizen's alien spouse impinges upon a fundamental liberty interest (family/marital unity) of the citizen that is protected under the Due Process Clause; and 2) whether a U.S. citizen whose constitutional rights have been affected by denial of a visa to an alien is entitled to challenge the denial in court and to require the government, in order to sustain the denial, to allege what it believes the alien did that would render him ineligible for a visa.

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Standard of Review - Nationality Rulings

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

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Asylum – State Dept Investigations

The Ninth Circuit requested a government response to the alien's petition for *en banc* or panel rehearing challenging the Court's published decision in ***Angov v. Holder***, 736 F.3d 1263, which held that the alien has the right to obtain documents, identities of investigators and witnesses, and testimony of the State employees involved in the investigation of his asylum claims by the Consulate in Romania. The government opposed rehearing on May 9, 2014.

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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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AILA Doc. No. 15100602. (Posted 10/05/15)

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds Petitioner Assisted in the Unlawful Entry of Other Aliens

In ***Dimova v. Holder,*** 783 F.3d 30 (1st Cir. 2015)(Torruella, *Thompson*, Kayatta), the First Circuit held that petitioner knowingly assisted other aliens to enter the United States in violation of law when she drove them from a designated meeting spot near the border toward their destination.

The petitioner, a citizen of Bulgaria, emigrated to the United States in the summer of 2002 after she "won a green card lottery." Petitioner, an emergency medical technician, later met Milan Mihaylov, a neighbor and a co-worker who also worked as a nurse.

Mihaylov concocted a scheme to smuggle his wife and child into the United States from Canada, and enlisted petitioner's help. Petitioner testified that she did not know that Mihaylov and his family did not have permission to enter the United States. Petitioner flew to Canada and then drove the Mihaylovs south toward, Vermont. She dropped them off in a dirt road in a remote area near the U.S. border and given a map of where they would be located after crossing into the U.S. Petitioner was "surprised" by this turn of events, and even though she realized the Mihaylovs had likely crossed into the United States illegally, drove to the area where they had likely crossed into the United States illegally and picked them up. Petitioner and the Mihaylovs were subsequently apprehended by border patrol agents in Vermont, and petitioner was ultimately charged as removable under INA § 237(a)(1)(E)(i), for having engaged in alien smuggling.

The IJ believed petitioner's story, but found her removable because, by coming back for and picking up the Mihaylovs, she "knowingly ... encouraged, induced, assisted, abetted, or aided any ... alien to enter or try to enter the United States in violation of law." The IJ found that petitioner "knew at the time that she returned to pick the family up that they had entered [the] country illegally."

On appeal, the BIA also concluded that petitioner "had the requisite intent when she knowingly travelled [sic] to the designated pick-up point, to aid the family in their entry into the United States." The BIA further noted that it was immaterial that the Mihaylovs had already entered the United States and that they did not cross the border with any assurance of petitioner's help because, ultimately, her coming back for them was a knowing, affirmative act of assistance. Petitioner then filed a motion to reconsider, but that too, was denied.

"An 'entry' requires: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) an inspection and admission by an immigration officer, or (b) an actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint."

The First Circuit first rejected petitioner's contention that since the Mihaylovs had already "entered" the United States, she could not be subject to a smuggling offense. The court deferred to the BIA's definition of the term "entry" in *Matter of Martinez-Serrano*, 25 I&N Dec. 151 (BIA 2009), namely that "an 'entry' requires: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) an inspection and admission by an immigration officer, or (b) an actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint." Here, the court found that although there was no evidence showing the Mihaylovs were under surveillance from the time they crossed the border to the moment of their arrest mere hours later, the record demonstrated that they "did not exercise their free will in any meaningful way after their physical crossing. The only thing the Mihaylovs did in the United States was to wait overnight, in a remote wooded area, for [petitioner] to pick them up."

Second, the court also rejected petitioner's argument that she had not rendered assistance within the meaning of the statute because she had not acted in accordance with a prearranged plan, and because there was no causal connection between her actions and the Mihaylovs' entry. The court held that "an individual need not be physically present at the time and place of the illegal crossing to have assisted an illegal entry." The court found that petitioner "somehow eased or facilitated what she knew to be an attempted illegal entry," and that was sufficient under the statute, regardless of whether there had been a plan or causal connection. The court also rejected as meritless the argument that she had been motivated solely out of concern for the Mihaylovs' child when she picked them up inside the U.S. border.

The court found it unnecessary to address the denial of the motion to reconsider, noting its de novo review finding that the BIA had not erred in affirming the IJ.

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■ **Second Circuit Remands BIA Decision Holding that Failing to Report Felony is Moral Turpitude Crime**

In ***Lugo v. Holder***, 783 F.3d 119 (2d Cir. 2015) (*Calabresi*, B.D. Parker, Livingston), the Second Circuit vacated and remanded a decision of the BIA's that held that misprision of felony is a crime involving moral turpitude. The court noted that the Ninth Circuit's decision in *Robles-Urrea v. Holder,* 678 F.3d 702 (9th Cir. 2012), created a circuit split since the Eleventh Circuit had adopted the contrary rule in *Itani v. Ashcroft,* 298 F.3d 1213 (11th Cir. 2002). Thus, the court asked the BIA on remand to clarify its position on whether misprision of felony is a CIMT after the Ninth Circuit's reversal in *Robles-Urrea.* The court also requested that, if the BIA continued to adhere to the rule that misprision of felony is a CIMT outside of the Ninth Circuit, it should also consider retroactivity in this case.

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THIRD CIRCUIT

■ **Third Circuit Remands Removal Where Unapportioned General Military Sentence Applied to Five Convictions, One a Possible Aggravated Felony**

In *Chavez-Alvarez v. Att'y Gen. of the U.S.*, 783 F.3d 478 (3d Cir. 2015) (*Smith*, Jordan, Van Antwerpen), the Third Circuit held that the BIA committed legal error in concluding petitioner's sodomy conviction was categorically, an aggravated felony with a term of imprisonment of at least one year.

The petitioner is a Mexican citizen who became an LPR in 1989. While serving in the United States Army in Korea, petitioner engaged in sexual contact with the female platoon member which eventually led to his plea of guilty for violating various articles in the congressionally-enacted Uniform Code of Military Justice, including sodomy. Petitioner was sentenced to 18-month confinement and received a bad-conduct discharge.

On June 5, 2012, DHS instituted removal proceedings against the petition, alleging that he had been convicted of an aggravated felony based on his commission of a crime of violence, and that he had been convicted of two or more crimes involving moral turpitude. The IJ and later the BIA in a precedent decision, found petitioner removable as charged and denied his request for a waiver under INA § 212(h).

The court determined that the criminal alien's mandatory detention since June 2012 had become unreasonable under the circumstances of the case.

In reversing the BIA, the court found that regardless of whether petitioner's "sodomy conviction is a crime of violence, he did not receive a sentence 'for which the term of imprisonment [was] at least one year.'" The court determined that the record was "devoid of any indication as to how or if the military judge apportioned the general sentence [of 18 months] among petitioner's various convictions."

The Court remanded the case to the BIA to consider whether petitioner is removable as an alien convicted of two crimes involving moral turpitude.

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■ **Third Circuit Orders Bond Hearing for Alien after As-Applied Constitutional Review of His Detention**

In *Chavez-Alvarez v. Warden, York Co. Prison*, 783 F.3d 469 (3d Cir. 2015) (Rendell, Jordan, *Nygaard*), the Third Circuit reversed the Middle District of Pennsylvania, granted the alien's habeas petition, and ordered a bond hearing within ten days. The court determined that the criminal alien's mandatory detention since June 2012 had become unreasonable under the circumstances of the case. The court concluded that, although the government acted reasonably in the alien's removal proceedings, the alien also acted in good faith in addressing complicated issues in the case and, thus, his detention became unreasonable after one year.

The court reiterated its holding in *Diop v. ICE*, 656 F.3d 221 (3d Cir. 2011), that whether an alien's mandatory detention under 8 U.S.C. § 1226(c) has become unreasonable is a highly fact-specific determination, and rejected the alien's and amicus ACLU's request to establish a "presumptively reasonable period" of six months after which mandatory detention must be justified by the government at a bond hearing.

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FOURTH CIRCUIT

■ **Fourth Circuit Defers to the BIA's Decision in *Matter of Cortez-Canales* Concluding that the Cancellation of Removal Statute Refers Only to the Criminal Offenses Specified in the Removability Provisions**

In ***Hernandez v. Holder,*** 783 F.3d 189 (4th Cir. 2015) (Traxler, *Niemeyer*, Motz), the Fourth Circuit deferred to the BIA's interpretation in ***Matter of Cortez-Canales***, 25 I&N Dec. 301 (BIA 2010), to find that petitioner's petit larceny conviction in

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violation of Virginia law was crime of moral turpitude, rendering her ineligible for cancellation of removal.

Petitioner contended that even though she had committed a CIMT for which a sentence of one year could have been imposed, she nonetheless remained eligible for cancellation of removal because her offense was excepted by the petit-offense exception contained in § 212(a)(2).

The court concluded that the BIA had reasonably interpreted the non-permanent-resident cancellation-of-removal statute to reference only the criminal offenses listed in INA §§ 212 (a)(2) and 237(a)(2) & (3), without regard to the immigration-specific contours of those removability provisions.

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■ Fourth Circuit Holds Transfer to District Court Is Not Warranted

In ***LeBlanc v. Holder***, __F.3d__, 2015 WL 1787703 (4th Cir. April 21, 2015) (*Shedd*, Duncan, Agee), the Fourth Circuit held that the denial of a Form I-130 Petition for Alien Relative was not a final order of removal and, thus, the court lacked jurisdiction over the petition for review. The court examined the transfer provision in 28 U.S.C. § 1631 and determined a transfer would be appropriate where (1) the appellate court lacked jurisdiction, (2) the transferee court would have possessed jurisdiction at the time of filing, and (3) the transfer was in the interest of justice. Here, the court concluded that a transfer was not warranted in the interest of justice.

The court noted however, that the outcome did not "deprive individuals in [petitioner's] situation of judicial review. Relief from an adverse BIA action on an I–130 petition may lie in the district court under the Administrative Procedures Act, which provides a right of action for an individual 'suffering legal wrong because of agency action.' 5 U.S.C. § 702. Jurisdiction for such claims exists in the district court, 28 U.S.C. § 1331, and they must be brought within six years, 28 U.S.C. § 2401(a)."

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SEVENTH CIRCUIT

■ Seventh Circuit Affirms District Court's Denial of Petitioner's Citizenship Claim, Finding No Clear Error

In ***Mathin v. Kerry***, 782 F.3d 804 (7th Cir. 2015) (Posner, Kanne, *Rovner*), the Seventh Circuit affirmed the district court's determination that petitioner failed to prove by a preponderance of the evidence that he was born in the United States. The petitioner, who obtained a delayed birth certificate from Illinois, filed a claim under 8 U.S.C. § 1503 after the State Department denied him a passport. The State Department's own investigation revealed that the petitioner's citizenship claim, which was based on the story that his parents came to the United States from India when his mother was eight months pregnant and left shortly after he was born, was fraudulent.

The court concluded that the BIA's ruling was procedurally defective because it did not make an adverse credibility finding.

Following lengthy discovery (including a deposition in Hong Kong and extensive briefing over whether the Hague Evidence Convention applied) and a bench trial, the district court determined that the petitioner's account lacked sufficient evidence, a conclusion that the Seventh Circuit determined was not clearly erroneous.

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■ Seventh Circuit Concludes BIA Abused Discretion by Denying Motion to Reopen Based on Ineffective Assistance of Counsel

In ***Chen v. Holder***, 782 F.3d 373 (7th Cir., April 1, 2015)(Posner, Kanne, Tinder) (*per curiam*), the Seventh Circuit held that the BIA's abused its discretion in determining that the petitioner failed to show enough prejudice to sustain an ineffective assistance of counsel claim in light of the his submission of fraudulent birth certificates of his child to support his claim that he violated China's family planning policy.

The petitioner who had entered the United States in 2005, claimed in a motion to reopen that he had been provided ineffective assistance of counsel by his prior two attorneys. In particular he contended that each inconsistency or deficiency identified by the IJ could be attributed to his counsel's incompetence. The BIA determined that while the attorneys' performance was substandard, and petitioner had complied with the requirements of *Matter of Lozada*, petitioner failed to show prejudice.

The court concluded that the BIA's ruling was procedurally defective because it did not make an adverse credibility finding and ignored the petitioner's meritorious argument that corroborating evidence was needed because of the inconsistencies between his testimony and evidence that was a result of his ineffective assistance of counsel.

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The court remanded the case to the BIA to determine if petitioner's attorneys "incompetently neglected to offer evidence and arguments that might have resolved the inconsistencies identified by the IJ. If so (or if the Board assumes so), it should decide whether the IJ would have ruled against [petitioner] anyway."

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■ Seventh Circuit Holds Adverse Credibility Determination Based on Discrepancies in Airport Interviews Was Flawed

In ***Nadmid v. Holder***, __ F.3d __, 2015 WL 1787066 (7th Cir. April 21, 2015) (Bauer, Manion, *Williams*), the Seventh Circuit held that an IJ's adverse credibility determination was flawed because the IJ incorrectly relied on discrepancies between airport interviews and hearing testimony to discredit petitioner.

The court held that an IJ's adverse credibility determination was flawed because the IJ incorrectly relied on discrepancies between airport interviews and hearing testimony to discredit petitioner.

In the hearing testimony, the petitioner, a businessman from Mongolia, said that the airport interviews were conducted in Russian, a language other than his native language, and that the inconsistencies in his testimony resulted from that language barrier.

The court held that the interview transcripts indicated a significant language barrier, granted the petition, and remanded.

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EIGHTH CIRCUIT

■ Asylum Applicant Failed to Demonstrate That His Fear of Persecution Was on Account of His Membership in a Particular Social Group

In ***Martinez-Galarza v. Holder***, 782 F.3d 990 (8th Cir. 2015) (*Beam*, Bye, Benton), the Eighth Circuit upheld the denial of petitioner's claim that he was a member of a social group "consisting of people who have provided information to [ICE] to enable that organization to remove individuals residing illegally in the [United States]," as well as a member of a second social group consisting of "witnesses for ICE."

The petitioner, a Mexican citizen, argued that following his arrest by ICE, he provided information on his nephew, which resulted in his arrest and subsequent removal to Mexico in November 2010. Petitioner feared for his life because his nephew claimed that he had "ended his American dream." The nephew had also threatened petitioner's brother. The IJ and the BIA denied petitioner's asylum claim as untimely and denied withholding because the claimed social groups lacked social visibility and particularity.

The Eight Circuit held that petitioner had failed to demonstrate that his fear of persecution was on account of his membership in a particular social group. Petitioner's nephew alleged reason for wanting to harm petitioner because he ended his "American dream—is motivated by purely personal retribution, and thus not a valid basis for an asylum claim," said the court.

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NINTH CIRCUIT

■ Ninth Circuit Denies Government Rehearing Petition Seeking to Correct Court's Analysis Involving Divisibility of California Burglary Statute

In ***Rendon v. Holder***, (9th Cir., April 2, 2015) in a published order, the Ninth Circuit panel (Reinhardt, Fisher, Murguia) (*per curiam*), denied the Government's petition for panel rehearing of the court's judgment, and denied *en banc* rehearing on behalf of the court, over two dissents by a total of nine judges (rehearing denial at 782 F.3d 466; original opinion at 764 F.3d 1077).

The panel ruled that a statute cannot be divisible with respect to a particular matter, such that convictions thereunder may be analyzed using a modified categorical approach, unless state law establishes a jury unanimity requirement with respect to that matter. After the government petitioned for panel rehearing urging reconsideration regarding divisibility under *Descamps v. United States*, 133 S. Ct. 2276 (2013), and that the court's judgment rests on a misunderstanding of the relevant California burglary statute, the court *sua sponte* called for briefing on whether the case should be reheard *en banc*, to "address the proper approach for determining divisibility" of a criminal statute under *Descamps*.

Judge Graber [joined by Judges O'Scannlain, Gould, Tallman, Bybee, Callahan, Bea, and Ikuta] and Judge Kozinski wrote opinions dissenting from denial of *en banc* rehearing.

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■ **Ninth Circuit Holds that California Penal Code § 273.5 is Categorically a Crime of Domestic Violence**

In ***Marquez Carillo v. Holder***, 781 F.3d 1155 (9th Cir. 2015) (Pregerson, *Fernandez*, Nguyen), the Ninth Circuit upheld the BIA's determination that a conviction under Cal. Penal Code § 273.5(a) is categorically a CIMT.

The petitioner, a Mexican citizen, the United States as a lawful permanent resident in July 1971. In January 2005, petitioner was arrested for domestic violence and shortly thereafter DHS charged him with removability as an alien who in 2002 had been convicted of corporal injury to his spouse, a crime of domestic violence. Petitioner then applied for cancellation of removal. An IJ found that Marquez met the statutory elements for eligibility for cancellation, but denied discretionary relief because the negative factors in his background, outweighed the positive. The IJ also found that his conviction for domestic violence under Cal.Penal Code § 273.5(a) was categorically a CIMT. The BIA adopted and affirmed the IJ's decision.

The Ninth Circuit rejected petitioner's contention that § 273.5 is not a categorical crime of domestic violence within the meaning of INA § 237(a)(2)(E)(i) because § 273.5 casts its protective mantel over too many categories of victims. The court found it "apparent that both statutes encompass crimes committed by a spouse or former spouse, by a person with whom the victim shares a child, and by a cohabitant or former cohabitant." The only variation between the two statutes is section 237(a)(2)(E)(i)'s reference to a victim who cohabits "as a spouse," but California case law, explained the court, "has made it plain that a spouse-like relationship is implicit."

The court further held that, in any event, the breadth of the inclusionary provision under INA § 237(a)(2)(E)(i) encompasses the victims specifically listed in § 273.5.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds Florida Offense of Uttering a Forged Instrument Is Categorically an Aggravated Felony and a Crime Involving Moral Turpitude**

In ***Walker v. U.S. Att'y Gen.***, 783 F.3d 1226 (11th Cir. 2015) (Tjoflat, *Pryor*, Barksdale (by designation)), the Eleventh Circuit held that a Florida conviction for uttering a forged instrument is categorically an aggravated felony under INA § 101(a)(43)(M)(i) because it necessarily involves an act of deceit.

When uttering a forged instrument "whether done with intent to injure or intent to defraud, a violator must knowingly deceive—that is, he must state something is true that he knows is, in fact, false."

The petitioner, a citizen of Jamaica, was admitted to the United States as a lawful permanent resident in 1990. In 2001, he pleaded no contest to three counts of uttering a forged instrument under Fla. Stat. § 831.02. One of the counts involved an amount over $10,000. In 2010, the DHS commenced removal proceedings against alleging that petitioner was removable under INA § 237(a)(2)(A)(iii) because he committed a crime involving deceit or fraud in which the loss to the victim or victims exceeds $10,000. Additional charges were subsequently lodged alleging that petitioner was also removable because he had been convicted of multiple crimes involving moral turpitude. An IJ ruled and on appeal the BIA, ruled that petitioner's convictions were an aggravated felony and crimes of moral turpitude.

In upholding the BIA's decision the court explained that when uttering a forged instrument "whether done with intent to injure or intent to defraud, a violator must knowingly deceive—that is, he must state something is true that he knows is, in fact, false." Consequently, that deceit makes a violation of section § 831.02 an "aggravated felony." For the same reason, the court also concluded that the offense is categorically a crime involving moral turpitude because "[u]ttering a forged instrument is 'behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.'"

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DISTRICT COURTS

■ **Western District of Washington Certifies Class and Grants Plaintiff's Motion for Summary Judgment, Holding that EOIR May Not Refuse to Consider Requests for Conditional Parole**

In ***Rivera v. Holder,*** 2015 WL 1632739 (W.D. Wash., April 13, 2015) (*Lasnik, J.*), the District Court for the Western District of Washington certified a class and granted the lead plaintiff's motion for summary judgment. The court first concluded that plaintiff, who received a bond hearing and had bond set at $3,500, but who had requested release on conditional parole, had standing to challenge EOIR's policy of refusing to consider such requests. The court then concluded that 8 U.S.C. § 1226(a)(2)(B), which permits the release of aliens from

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custody pending resolution of their removal proceedings either "on—(A) bond of at least $1,500 . . . ; *or* (B) conditional parole" requires immigration judges to consider requests for release on conditional parole. Accordingly, the court held that EOIR's interpretation of the statute and its policy of refusing to consider such requests were unlawful and that all bond hearings during which EOIR refused to consider such requests constituted "defective bond hearing [s]." The court enjoined the practice and ordered the parties to provide further briefing concerning how to provide class members with non-defective bond hearings in accordance with the decision.

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■ **Western District of Texas Partially Dismisses Case Involving the Interplay Between the Hague Convention on International Child Abduction and Asylum**

In *Sanchez v. Sanchez,* No. 5:12 -cv-00568 (W.D. Tex. April 27, 2015) (Rodriguez, J.), the District Court for the Western District of Texas dismissed a petition for the return of three unaccompanied Mexican refugee minors under the Hague Convention on International Child Abduction. After coming to the United States, the children expressed a fear of return to their home country and were placed in the custody of the Department of Health and Human Services (HHS). The children's mother, still in Mexico, brought a Hague Convention lawsuit against the children's foster care agency, petitioning for their return to Mexico. The district court granted the petition, ordering that the children be returned. At around the same time, the children applied for asylum in the United States, which United States Citizenship and Immigration Services granted. The children appealed the district court's order to the Fifth Circuit, which remanded the case to the district court to consider the evidence supporting the asylum grants. The district court scheduled a week-long evidentiary hearing starting on April 27, 2015. On April 25, the mother decided to dismiss her petition for return, expressing a desire that her children stay in the United States. The mother moved to amend her petition to gain "access" to the children; *i.e.*, to visit them periodically. The court dismissed the return case, finding that the children would be in grave harm if they returned to Mexico, and ordered additional briefing on the issue of whether mother is entitled to "access" and, if so, what remedy the court may provide.

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■ **Eastern District of California Holds USCIS Did Not Have to Provide Opportunity to Cross-Examine Witnesses Before Denying Visa Petition on Marriage-Fraud Grounds**

In *Alabed v. Crawford*, 2015 WL 1889289 (E.D. Cal. April 24, 2015), the District Court for the Eastern District of California granted summary judgment to the Government on plaintiffs' claim that due process entitles them to an opportunity to cross-examine adverse witnesses before USCIS can deny a visa petition on marriage-fraud grounds. The court held that the Ninth Circuit's decision in *Ching v. Mayorkas*, 725 F.3d 1149 (9th Cir. 2013), did not establish a general right to cross-examine witnesses in all visa petition adjudications, even in cases where the record includes evidence from an ex-spouse, and that, in plaintiffs' case, due process did not require a hearing or opportunity for cross-examination.

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OIL TRAINING CALENDAR

June 4, 2015. Brown Bag Lunch & Learn with ***Jedidah Hussey***, USCIS Director Asylum Office, Arlington, VA. Noon-1:00 pm LSB–5421

July 6, 2015. Brown Bag Lunch & Learn with ***Prof. Christopher Walker***, Michael E. Moritz College of Law, who will discuss his research on the evolution of administrative law's ordinary remand rule in the immigration context. Noon-1:00 pm LSB LL-100.

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 202-616-9352 or at Jennifer.Lightbody@usdoj.gov for additional information.

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DHS UPDATES

USCIS Reaches FY 16 H-1B Cap

On April 7, 2015, USCIS reached the congressionally mandated H-1B cap for fiscal year (FY) 2016. USCIS also received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced degree exemption.

The USCIS will use a computer-generated process, also known as the lottery, to randomly select the petitions needed to meet the caps of 65,000 visas for the general category and 20,000 for the advanced degree exemption.

USCIS will first randomly select petitions for the advanced degree exemption. All unselected advanced degree petitions will become part of the random selection process for the 65,000 general limit. The agency will reject and return filing fees for all unselected cap-subject petitions that are not duplicate filings.

Before running the lottery, USCIS will complete initial intake for all filings received during the filing period, which ended April 7. Due to the high number of petitions, USCIS is not yet able to announce the date it will conduct the random selection process.

USCIS will continue to accept and process petitions that are otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap, and who still retain their cap number, will also not be counted toward the congressionally mandated FY 2016 H-1B cap. USCIS will continue to accept and process petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States;
- Change the terms of employment for current H-1B workers;
- Allow current H-1B workers to change employers; and
- Allow current H-1B workers to work concurrently in a second H-1B position. U.S. businesses use the H-1B program to employ foreign workers in occupations that require highly specialized knowledge in fields such as science, engineering and computer programming.

NOTED

ICE Joins Instagram

ICE has launched an official Instagram account. ICE's Instagram account features behind-the-scenes photographs of the agency's day-to-day operations, including a broad array of investigations and priority removals. Check it at http://instagram.com/ICEgov.

ICE Tracks Foreign Students

According to a recent Student and Exchange Visitor Program (SEVP) report, there were more than 1.1 million nonimmigrant students studying in the United States as of February 2015; the majority of whom were from China, India and South Korea.

ICE uses the Student and Exchange Visitor Information System (SEVIS) to maintain information on students who are in the United States on F and M visas, as well as SEVP-certified schools that enroll them. SEVIS also maintains information on U.S. Department of State-designated exchange visitor program sponsors and J-1 visa exchange visitor program participants.

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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