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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

BIA finds that "married women in Guatemala who are unable to leave their relationship" are a particular social group for purpose of asylum

In ***Matter of A-R-C-G***, 26 I&N Dec. (BIA 2014), the BIA held that an asylum applicant from Guatemala who had been victim of domestic violence in her native country was a member of a particular social group composed of "married women in Guatemala who are unable to leave their relationship."

The applicant and her three minor children entered the United States without inspection on December 25, 2005. She subsequently filed an application for asylum and withholding of removal. At the asylum hearing she testified that was married at age 17, and had suffered repugnant abuse by her husband. "This abuse included weekly beatings after the applicant had their first child. On one occasion, her husband broke her nose. Another time, he threw paint thibnner on her, which burned her breast. He raped her."

The applicant contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The applicant repeatedly tried to leave the

(Continued on page 2)

Ninth Circuit holds that second degree burglary under California law is not an aggravated felony for "attempted theft"

In ***Rendon v. Holder***, __ F.3d __, 2014 WL 4115930 (9th Cir. Aug. 22, 2014) (*Reinhardt*, Fisher, Murguia), the Ninth Circuit held that burglary under section 459 of the California Penal Code does not constitute an aggravated felony for attempted theft because "the presence of an 'or' between 'grand or petit larceny' and 'any felony' does not, in itself, render the statute divisible, and that, under *Descamps*, section 459 is indivisible as a matter of law." Because the BIA found the statute of conviction "divisible" and applied a modified categorical approach, the Court reversed and vacated its decision.

The petitioner, a Mexican citizen, was admitted to the United States in 1989 as an LPR. In 1996 petitioner was convicted of second-degree burglary in California state court under § 459/460(b) of the California Penal Code, which states, *inter alia*, that "[e]very person who enters any ... vehicle ..., when the doors are locked, ... with intent to commit grand or petit larceny or any felony is guilty of burglary." On the basis of that conviction, the former INS alleged that the petitioner was removable for having committed an aggravated felony. Ultimately, the IJ determined that the petitioner's conviction was an aggravated felony because it qualified under INA §§ 101(a)(43)(G)-(U), as an attempted theft offense, which ren-

(Continued on page 15)

Victims of domestic abuse can be a PSG

(Continued from page 1)
relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned. The applicant left Guatemala in December 2005, and she believes her husband will harm her if she returns.

The IJ found the applicant to be a credible witness but concluded that she had not demonstrated that she had suffered past persecution or a well-founded fear of future persecution on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship."

The IJ determined that there was inadequate evidence that the applicant's spouse abused her "in order to overcome" the fact that she was a "married woman in Guatemala who was unable to leave the relationship." The IJ found that the abuse was the result of "criminal acts, not persecution," which were perpetrated "arbitrarily" and "without reason." Accordingly, the IJ found that the applicant did not meet her burden of demonstrating eligibility for asylum and withholding.

On appeal, DHS initially argued that the IJ's decision should be upheld. However, following a request for supplemental briefing by the BIA on the issue of whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal, DHS conceded that the asylum applicant had established that she suffered past harm rising to the level of persecution. DHS also conceded that the persecution was on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship."

In light of DHS's concession, the BIA concluded that "DHS's position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term 'particular social group."

"Marital status can be an immutable characteristic where the individual is unable to leave the relationship."

The BIA explained that in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) and *Matter of W-G-R-,* 26 I&N Dec. 208 (BIA 2014), it held that an applicant seeking asylum based on his or her membership in a "particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.

Here, the BIA's first found that the applicant's group was composed of members who share the common immutable characteristic of gender. The BIA cited to *Matter of Acosta*, 19 I&N Dec. 211(BIA 1985), where it had held that sex is an immutable characteristic. The BIA further found that "marital status can be an immutable characteristic where the individual is unable to leave the relationship." However a determination of this issue, said the BIA "will be dependent upon the particular facts and evidence in a case."

Second, the BIA concluded that the group met the "particularity" requirement because "the terms used to describe the group -- 'married,' 'women,' and 'unable to leave the relationship' -- have commonly accepted definitions within Guatemalan society based on the facts in this case, including the [applicant's] experience with the police." The BIA pointed out "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation." The BIA found it "significant that the [applicant] sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a marital relationship."

Third, the BIA found that the applicant's group was "socially distinct within the society in question." In particular the BIA pointed to the record in the case which included "unrebutted evidence that Guatemala has a culture of 'machismo and family violence.'" The BIA further noted that although Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because according to the U.S. Dep't of State, Guatemala Country Reports, the National Civilian Police "often failed to respond to requests for assistance related to domestic violence."

The BIA emphasized that "cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information."

Finally, in light of the DHS stipulation that the applicant had suffered

(Continued on page 15)

AILA Doc. No. 15092900. (Posted 09/29/15)

FURTHER REVIEW PENDING: Update on Cases & Issues

Conviction - Possessing Illegal Drug Paraphernalia

On June 30, 2014, the United States Supreme Court granted 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. The government's brief is due on November 20, 2014.

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Consular Non-Reviewability

On October 6, 2014, the Supreme Court granted 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 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. The government's merits brief is due on December 1, 2014.

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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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Torture– Internal Relocation

On September 19, 2014, an *en banc* panel of the Ninth Circuit heard argument in ***Maldonado v. Holder***, No. 09-71491. A panel of the court had ordered the parties to file supplemental briefs on whether case should be heard en banc in the first instance to consider: (1) whether there is a conflict in our case law between *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011), and *Hasan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004), regarding which party bears the burden of proof on internal relocation; and (2) whether *Hasan* and *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008), improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible." The government's *en banc* merits brief argued that the court should clarify its conflicting precedents regarding the burden and standard for internal relocation as it relates to protection from torture, and that the court should abrogate its precedents permitting review of fact issues in cases of criminal aliens challenging CAT denials.

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Jurisdiction – Final Order

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

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BIA Standard of Review

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

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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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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

Asylum Applicant's Particular Social Group is Overly Broad and Applicant Failed to Establish a Nexus Between Her Feared Persecution and a Protected Ground

In *De Abarca v. Holder*, __ F.3d __, 2014 WL 3360690 (1st Cir. July 9, 2014) (Lynch, Stahl, *Lipez*), the First Circuit held that the BIA correctly rejected the petitioner's particular social group of "mothers of individuals who resisted gang activity" as overly broad. The petitioner, a citizen of El Salvador, was apprehended in 2007, at her place of employment and placed in removal proceedings. She subsequently filed applications for asylum, withholding of removal, and CAT protection. She claimed that one of her three sons resisted recruitment by the MS-13 gang and fled to the United States, while the other two stopped attending school to avoid the gangs. Petitioner believed that the son's absence would make her the primary target of the gangs' violence if she were to return to El Salvador.

The IJ determined that the asylum application was time-barred. The IJ denied withholding because petitioner's purported particular social group was overly broad and lacked the requisite social visibility; because she had not experienced past persecution; and because she had failed to prove a well-founded fear of future persecution. On appeal, the BIA affirmed but also determined that, if petitioner's social group was the nuclear family, she had failed to show causation—namely, that she would be persecuted as a result of her kinship.

In upholding the BIA's rejection of the purported social group of "mothers of individuals who resisted gang activity," the court noted that the BIA had properly relied on *Tay-Chan v. Holder*, 699 F.3d 107, 112 (1st Cir. 2012), where the court had previously rejected as over broad the similarly claimed social group of "victims of gang threats and possible extortion."

The court further held that the BIA correctly determined that the petitioner failed to establish future persecution on account of her membership in a particular social group consisting of her nuclear family, affirming that the petitioner's fear of future persecution was too speculative and generalized to warrant relief.

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First Circuit Holds that BIA's Denial of Temporary Protected Status to Salvadoran Applicant Was Not Supported by Substantial Evidence

In *Shul-Navarro v. Holder*, __ F.3d __, 2014 WL 3893059 (1st Cir. August 11, 2014) (Howard, Thompson, and *Barron*), the First Circuit, granted a petition for review challenging the agency's determination that a Salvadoran TPS applicant did not establish the requisite period of residence in the United States.

The court ruled that the agency's determination was not supported by substantial evidence because neither the IJ nor the BIA discussed one particular piece of evidence – a September 2000 letter addressed to the applicant in the United States – that potentially supported his claim of residence in February 2001. The court remanded so that the BIA may further explain its decision in light of the September 2000 letter.

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The court held that the BIA correctly determined that the petitioner failed to establish future persecution on account of her membership in a particular social group consisting of her nuclear family.

First Circuit Holds No Basis to Disturb IJ's Finding that Asylum Applicant Failed to Establish Nexus Between Persecution and Particular Social Group

In *Guerra-Marchorro v. Holder*, __ F.3d __, 2014 WL 3719161 (1st Cir. July 29, 2014) (Lynch, Kayatta, *Barron*), the First Circuit held that no basis existed in the record to disturb the IJ's factual finding that petitioner failed to establish a nexus between his encounters with gangs in Guatemala and his purported particular social group of an "abandoned child." The court noted that the events petitioner described showed that the gang members who threatened or attacked him did so for reasons unrelated to his claimed status as an abandoned child, and showed, instead, that those gang members did not even know that his parents had emigrated.

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First Circuit Dismisses Petition for Review Challenging Discretionary Denial of Adjustment of Status

In *Jaquez v. Holder*, 758 F.3d 434 (1st Cir. 2014) (*Lynch*, Lipez, Howard), the First Circuit held that it lacked jurisdiction over the agency's discretionary denial of the petitioner's application for adjustment of status. The court considered the petitioner's purported legal arguments, but "simply describing these factual arguments as a claim that the agency committed an error of law is insufficient to confer jurisdiction."

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(Continued on page 5)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 4)

■ **First Circuit Holds that Persecution Requires More Than Sporadic Threats**

In ***De Zea v. Holder***, __ F.3d __, 2014 WL 3746814 (1st Cir. July 30, 2014) (*Lynch*, Howard, Lipez), the First Circuit held that the record did not compel the conclusion that the asylum applicant established past persecution or a clear probability of future persecution where she had made repeated trips to her native country and had received sporadic threats from her alleged enemies.

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■ **First Circuit Holds Alien's Admission During Plea Colloquy in State Court Satisfied Elements of Aggravated Federal Felony**

In ***Kaufmann v. Holder***, 759 F.3d 6 (1st Cir. 2014)(*Lynch*, Torruella, Thompson), the First Circuit held that the petitioner's admission during a plea colloquy, conducted in connection with his guilty plea to a Connecticut offense of possessing child pornography, that he had possessed multiple images of children "having sex," was sufficient to show that his state court conviction satisfied the elements of an aggravated federal felony of child pornography, so as to support his removal.

The court found the Connecticut statute divisible and applied the "modified categorical approach" as explained in *Descamps v. United States*, __U.S.__, 133 S. Ct. 2276 (2013). "Under the modified categorical approach, we may look to the record of conviction to determine whether the petitioner was convicted under one of the provisions that does satisfy the federal definition. [] When using this approach, we will find that a state conviction fits the federal definition only if the record shows as much through 'necessary' inferences; merely 'reasonable' inferences are insufficient."

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■ **First Circuit Holds Substantial Evidence Supported Determination that Petitioner Did Not Enter into Her Marriage with United States Citizen in Good Faith**

In ***Lin v. Holder***, __ F.3d __, 2014 WL 3399801 (1st Cir. July 14, 2014) (*Lynch*, Torruella, Thompson), the First Circuit held that the petitioner's lack of documentary evidence, failure to live with her husband for most of her marriage, and lack of knowledge about her husband, provided substantial evidence supporting the BIA's determination that petitioner did not enter into her marriage with her United States citizen husband in good faith, distinguishing *Cho v. Gonzales*, 404 F.3d 96 (1st Cir. 2005).

"It is not unusual or egregious for counsel to make tactical decisions that ultimately fizzle and redound to the client's detriment," noted the court.

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■ **First Circuit Holds that Alien is Bound by Concessions of Removability Made by His Counsel**

In ***Lima v. Holder***, 758 F.3d 72 (1st Cir. 2014) (Lynch, *Thompson*, Smith (by designation)), the First Circuit held that petitioner was bound by the concessions of removability made by his original and successor counsel that his state court convictions were for crimes involving moral turpitude and therefore supported his removal. "Where a noncitizen fails to demonstrate that his attorney's conduct was so egregious as to 'warrant releasing [him] from his attorney's concessions,' those admissions are binding upon him," said the court. Here, the court explained, counsel's factual admission that petitioner broke into a house, was a tactical decision because the petitioner did not have a meritorious defense to the charges of removability. "It is not unusual or egregious for counsel to make tactical decisions that ultimately fizzle and redound to the client's detriment," noted the court.

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■ **First Circuit Holds Alien Failed to Show that He Entered Marriage in Good Faith**

In ***Lamim v. Holder***, __ F.3d __, 2014 WL 3719163 (1st Cir. July 29, 2014) (Thompson, Kenyatta, *Barron*), the First Circuit held that the BIA properly applied "good faith" under 8 C.F.R. § 1216(e)(2)(i)(iv), to find that petitioner did not establish a "good faith" marriage to a U.S, citizen. The court cited documentation concerning the couple's cohabitation, the degree to which the couple's finances were commingled, any children born to the marriage, and other pertinent evidence. The court rejected the alien's argument that the IJ and BIA relied disproportionately on his out-of-wedlock child.

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■ **First Circuit Remands for Consideration of Whether Error of Fact Regarding a Gang's Extortion Demands Was Immaterial or Harmless**

In ***Perez v. Holder***, __ F.3d __, 2014 WL 3733983 (1st Cir. July 30, 2014) (*Lynch*, Lipez, Thompson), the first Circuit determined that reconsid-

(Continued on page 6)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 5)
eration was warranted because the agency made a factual error when it concluded that petitioner could have continued his social activism in El Salvador if he paid extortion money to gang members. The court held that remand was warranted because the BIA did not have the opportunity to consider, in the first instance, the government's argument that the IJ's error of fact was not material and harmless.

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■ **First Circuit Remands to the BIA to Further Consider the Alien's Nexus and Past Persecution Claims**

In ***Oronez-Quino v. Holder***, __ F.3d __, 2014 WL 3623012 (1st Cir. July 23, 2014) (Torruella, Howard, *Thompson*), the First Circuit determined that documentary evidence established a nexus between the military's decision to bomb a Guatemalan asylum applicant's village during that country's civil war and his Mayan race and ethnicity. The court further held that substantial evidence did not support the BIA's conclusion that the alien failed to show past persecution, where the BIA did not address the harms the alien and his family experienced cumulatively and did not consider the harm the alien experienced from the perspective of a child his age when the events occurred.

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■ **First Circuit Affirms Asylum Applicant Failed to Establish Nexus Between the Threats He Received From His Daughter's Ex-Boyfriend and a Protected Ground**

In ***Moura v. Holder***, 759 F.3d 1 (1st Cir. 2014) (*Joyce*, Torruella, Lipez), the First Circuit held that the petitioner had not met his burden of proof for withholding of removal because the threats by his daughter's ex-boyfriend were the result of a personal dispute, not a protected ground. "Harm resulting from a personal dispute or personal antagonism is not a basis for withholding of removal," said the court.

The court further held that there was "scant evidence" that his daughter's ex-boyfriend still intended to harm him.

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■ **First Circuit Declines to Consider Arguments Raised for the First Time Before the Court and Upholds Denial of Motion to Reopen**

In ***Shah v. Holder***, 758 F.3d 32 (1st Cir. 2014) (*Lynch*, Thompson, Kayatta), the First Circuit affirmed the BIA's denial of the petitioner's motion to reopen where the arguments in his motion – and evidence proffered in support – did not sufficiently demonstrate a well-founded fear of persecution.

The court declined to consider the petitioner's claim that the BIA erred by failing to reevaluate the IJ's adverse credibility determination because he did not raise the issue first to the BIA in his motion to reopen. "We have consistently held that arguments not raised before the BIA are waived due to a failure to exhaust administrative remedies," noted the court. The court further rejected the petitioner's request to take judicial notice of information in a State Department report because he never presented the document in question to the BIA.

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"We have consistently held that arguments not raised before the BIA are waived due to a failure to exhaust administrative remedies."

■ **First Circuit Remands Asylum Case for Further Analysis of a Particular Social Group Claim Based on Family**

In ***Aldana-Ramos v. Holder***, __ F.3d __, (1st Cir. August 8, 2014) (*Lynch*, Torruela, Thompson), in response to the government's motion to amend, the First Circuit amended its June 27, 2014 published decision (2014 WL 2915920), correcting factual errors and misstatements of the law. The amended decision still holds that the BIA neglected record evidence that gang members targeted petitioners because of their family ties, committed legal error by not allowing for the possibility of mixed motives, and erroneously concluded that a family cannot qualify as a particular social group unless a family member can also claim another protected ground.

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■ **First Circuit Affirms Denial of Untimely Motion to Reopen On The Basis That Asylum Applicant Failed to Establish Changed Country Conditions for Christians in Indonesia**

In ***Sugiarto v. Holder***, __ F.3d __, 2014 WL 3765842 (1st Cir. August 1, 2014) (*Barron*, Thompson, Lipez), the First Circuit denied the petitioner's challenge to the agency's denial of her untimely motion to reopen, concluding that the BIA did not abuse its discretion in finding that the evidence, including an affidavit from Dr. Jeffrey Winters, showed a "persistence of negative conditions" for Christians in Indonesia, rather than changed country conditions. The court also rejected the petitioner's claim that the BIA's

(Continued on page 7)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 6)
opinion was too cursory where it identified the relevant record materials and explained why they were insufficient.

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SECOND CIRCUIT

■ **Second Circuit Remands for the BIA to Reconsider Particular Social Group in Light of Intervening Case Law**

In ***Paloka v. Holder***, __ F.3d __, 2014 WL 3865992 (2d Cir. August 7, 2014) (*Newman*, Walker, Calbranes), the Second Circuit remanded the case for the BIA to consider its intervening precedential decisions in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), to determine whether petitioner had established membership in a cognizable particular social group. The court noted that remand was appropriate because petitioner had suggested a new, narrower social group for the first time at oral argument, which the BIA should consider in the first instance.

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■ **Second Circuit Holds Alien's Fifth Larceny Conviction, Which Resulted in a Recidivist Sentencing Enhancement, Was an Aggravated Felony Theft Offense**

In ***Dawkins v. Holder***, __ F.3d __, 2014 WL 3907045 (2d Cir. August 12, 2014) (Parker, Hall, Livingston) (*per curiam*), the Second Circuit held that the petitioner's 2010 conviction for larceny, in violation of Connecticut General Statutes § 53a–125b, which resulted in a three-year suspended sentence after the alien admitted to being a persistent larceny offender, constituted an aggravated felony theft offense as defined in 8 U.S.C. § 1101(a)(43). Applying *United States v. Rodriquez*, 553 U.S. 377 (2008), the court held that it is the actual sentence imposed, including any recidivist enhancements, that is considered in evaluating whether a "term of imprisonment" is "at least one year."

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■ **Second Circuit Defers to the BIA's Determination that a State "Offense Described In" 18 U.S.C. § 844(i) Need Not Contain a Federal Jurisdictional Element**

In ***Luna v. Holder***, __ F.3d __, 2014 WL 4085865 (*Sack*, Raggi, Chin) (2d Cir. August 20, 2014), the Second Circuit split from the Third Circuit in holding that an alien's state arson offense need not contain a federal jurisdictional element in order to qualify as an "offense described in" 18 U.S.C. § 844(i), and thereby constituted an aggravated felony under INA § 101(a)(43)(E)(i). The court held that the BIA's interpretation of the relevant statutory provisions set forth in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), was reasonable and entitled to *Chevron* deference.

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■ **Second Circuit Holds that "Danbury-11" Aliens Failed to Establish Prima Facie Evidence of Egregious Violations Required to Suppress Evidence in Removal Proceedings**

In ***Maldonado v. Holder***, __ F.3d __, 2014 WL 3953651 (2d Cir. August 14, 2014) (Kearse, *Jacobs*, Lynch (dissenting)), the Second Circuit rejected arguments by five of the petitioners - known in the media as the "Danbury-11" - that evidence of their alienage and unlawful presence in the United States should have been suppressed in their removal proceedings, and that their removal proceedings should be terminated based on the manner they were arrested in a joint operation of immigration officers and Danbury, Connecticut police officers that targeted a gathering of day laborers creating traffic hazards.

The suppression motions had not presented prima facie evidence of the type of "egregious violations" required to suppress evidence in civil immigration proceedings .

The court held that the suppression motions had not presented prima facie evidence of the type of "egregious violations" required to suppress evidence in civil immigration proceedings, and therefore the IJ had properly denied a hearing on their motion to suppress and terminate proceedings.

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■ **Second Circuit Holds the Convention Against Transnational Organized Crime Does Not Provide Immigration Relief**

In ***Doe v. Holder***, __ F.3d __, 2014 WL 4067164 (*Parker*, Livingston, Droney) (2d Cir. August 19, 2014), the Second Circuit held that the witness protection provisions found in Article 25 of the United Nations Convention Against Transnational Organized Crime is not a self-executing treaty and thus does not provide a private right of action or immigration relief. The court recognized that existing domestic legislation complies with the United States' treaty obligations.

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(Continued on page 8)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

■ **Second Circuit Holds Political Activism in the United States May Constitute Changed Circumstances to Excuse Untimely Asylum Filing**

In ***Lin v. Holder***, __ F.3d __, 2014 WL 4067162 (2d Cir. August 19, 2014) (Jacobs, *Calabresi*, Pooler), the Second Circuit held that it had jurisdiction to consider whether political activity in the United States constituted "changed circumstances" excusing an untimely asylum application. Based on 8 C.F.R. § 1208.4(a)(4)(i)(B), the court concluded that petitioner's activities outside of China may constitute changed circumstances, and remanded for the agency to determine in the first instance whether the alien's newfound activism increased his risk of persecution in China. The court invited the BIA to issue a precedent decision addressing this question. The court also concluded that the BIA's alternative ruling that petitioner did not establish a well-founded fear of future persecution was impermissible fact-finding, because the IJ had not made a well-founded fear finding.

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■ **Second Circuit Remands for Application of Correct Legal Standard to Mixed Motive Claim**

In ***Acharya v. Holder***, __ F.3d __, 2014 WL 3821132 (2d Cir. August 5, 2014) (Katzmann, Jacobs, *Pooler*), the Second Circuit remanded for the BIA to apply the correct legal standard to petitioner's asylum claim. The court held that the IJ had improperly analyzed petitioner's mixed motive claim by requiring him to show that his political opinion was "the central reason" as opposed to "at least one central reason" for his persecution, and that the BIA could not remedy the error on appeal because it failed to consider how the error may have colored the IJ's findings of fact.
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■ **Second Circuit Holds Written Frivolousness Warning On Asylum Application Sufficient**

The written warning contained in the asylum application afforded sufficient notice of the consequences of filing a frivolous application pursuant to INA § 208(d)(4)(A).

In ***Niang v. Holder***, __ F.3d __, 2014 WL 3929088 (2d Cir. August 13, 2014) (Sack, Hall, Livingston) (*per curiam*), the Second Circuit joined the Seventh, Ninth, Tenth, and Eleventh Circuits in holding that the written warning contained in the asylum application afforded sufficient notice of the consequences of filing a frivolous application pursuant to INA § 208(d)(4)(A). The court further held that nothing in the INA expressly requires any oral warning to be given by an IJ.

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THIRD CIRCUIT

■ **Third Circuit Holds Inconclusive Record of Conviction Does Not Satisfy Applicant's Burden of Demonstrating Eligibility for Relief from Removal**

In ***Syblis v. Att'y Gen. of the U.S.***, __ F.3d __, 2014 WL 4056557 (3d Cir. August 18, 2014) (*Fisher*, Jordan, Scirica), the Third Circuit held that an applicant for cancellation of removal failed to carry his statutory burden to establish eligibility because his conviction for possession of drug paraphernalia constituted a law relating to a controlled substance and he failed to show that the controlled substance involved in his conviction was not defined by federal law.

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FOURTH CIRCUIT

■ **Fourth Circuit Remands to the BIA to Consider the Asylum Applicant's Proposed Particular Social Group and Nexus Claims**

In ***Cordova v. Holder***, __ F.3d __, 2014 WL 3537873 (4th Cir. July 18, 2014) (*Motz*, Agee (dissenting), Thacker), the Fourth Circuit remanded the case to the BIA for additional explanation of its determination that the petitioner failed to demonstrate membership in a cognizable social group or a nexus to a statutorily protected ground.

The petitioner, a citizen of El Salvador, claimed that he belonged to a social group of family members of persons who have been killed by rival gang members, as well as being threatened themselves for refusing to join a gang.

The court concluded that the BIA erred by not addressing the IJ's failure to analyze the family-based particular social group that petitioner had actually proposed, and that this omission also required remand because the BIA also "failed to build a rational bridge between the record and the agency's legal conclusion."

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■ **Fourth Circuit Holds Asylum Applicant Ineligible for NACARA because of the Persecutor Bar**

In ***Quitanilla v. Holder***, 758 F.3d 570 (4th Cir. 2014) (Motz, *King*, Duncan), the Fourth Circuit held that the petitioner was ineligible for special rule cancellation under the NACARA, because his service as a

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

sergeant in long-range reconnaissance patrols in the Salvadoran army during the civil war constituted assistance with or participation in persecution. The IJ determined that as a sergeant in the Salvadoran military petitioner oversaw the investigation and capture of his adversaries, and then transferred his captives to a military unit with a record of human rights abuses.

The court held that in assessing the applicability of the persecutor bar, it accepts the IJ's factual determinations, including credibility determinations, and that the IJ's factual determinations in this case belied the petitioner's arguments that he was just a soldier.

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FIFTH CIRCUIT

■ **Fifth Circuit Upholds the Denial of Withholding, But Remands for Further Consideration of a CAT Claim Under the "Color of Law" Legal Standard**

In *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014) (King, Haynes, *Graves*), the Fifth Circuit upheld the BIA's finding that petitioner would not be persecuted on account of a protected ground because neither economic extortion nor being mistaken for an affluent Salvadoran national were protected grounds. "This court does not recognize economic extortion as a form of persecution under immigration law, nor does it recognize wealthy Salvadorians as a protected group," it said.

However, the court vacated the BIA's denial of CAT protection. The BIA determined that it was unclear whether the men who threatened and beat the petitioner were actual police officers. The court found that the BIA failed to consider the alternate view of the evidence that the extortionists may have received their information about him from other government officials acting in their official capacity.

The court remanded for the BIA to consider the evidence under "the color of law" legal standard.

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■ **Fifth Circuit Holds Controlled Substance Conviction Serves as Ground of Inadmissibility for Special Rule Cancellation of Removal**

An alien's conviction for possession of marijuana serves as a ground of inadmissibility for Special Rule Cancellation of Removal even if the ground of inadmissibility was not charged in the Notice to Appear.

In *Rodriguez-Benitez v. Holder*, __ F.3d __, 2014 WL 3953950 (5th Cir. August 13, 2014) (*Higginbotham*, Clement, Higginson), the Fifth Circuit held that the alien's conviction for possession of marijuana serves as a ground of inadmissibility for Special Rule Cancellation of Removal even if the ground of inadmissibility was not charged in the Notice to Appear. The court reasoned that the burden of proof falls on the alien to demonstrate that there are no disqualifying grounds for the requested relief.

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SIXTH CIRCUIT

■ **Sixth Circuit Holds that Immigration Judges Have Initial Jurisdiction Over Asylum Applications Filed by Former UACs**

In *Harmon v. Holder*, 758 F.3d 728 (6th Cir. July 10, 2014) (Cook, *Stranch*, Carr), the Sixth Circuit held that the Trafficking Victims Protection Reauthorization Act's jurisdictional provisions do not transfer jurisdiction to USCIS where an asylum application is filed by an alien after turning eighteen years of age. Because the former unaccompanied petitioner child was 23 at the time she first filed her asylum application, the IJ had jurisdiction to adjudicate her claim.

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■ **Sixth Circuit Holds that USCIS's Decision to Terminate an Alien's Refugee Status Not a Final Agency Action Reviewable in District Court Under the APA**

In *Jama v. DHS*, __ F.3d __, 2014 WL 3673441(6th Cir. July 25, 2014) (Norris, *Clay*, Kethledge), the Sixth Circuit) held that USCIS's decision to terminate petitioner's refugee status was not a final agency action reviewable in district court under the APA. The court reasoned that such decisions are intermediate steps in the government's decision-making process that trigger removal proceedings, and that review of the termination decision could only occur as part of a petition for review.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds Substantial Evidence Supports Frivolousness Finding**

In *Albu v. Holder*, __ F.3d __, 2014 WL 3824239 (7th Cir. August 5, 2014) (*Wood*, Hamilton, Kendall (by designation)), the Seventh Circuit held that the BIA's frivolousness finding was supported by substantial evidence where the applicant: (1) knew his asylum claim was fraudulently created by his attorney; (2) signed his application containing the consequences for knowingly filing a frivolous application; and (3) testified

(Continued on page 10)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)
only that he could not recall whether an interpreter orally translated the warnings during the asylum interview, despite record evidence of a signed oath indicating that he received the warnings.

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■ Seventh Circuit Holds that the BIA and IJ Applied the Wrong Legal Standard and Disregarded Important Evidence

In ***Sobalova v. Holder***, __F.3d __, 2014 WL (7th Cir. July 24, 2014), 3635003 (Tinder, *Hamilton*, Kapala (by designation)), the Seventh Circuit concluded that the BIA and the IJ applied the wrong legal standard in determining that petitioner had not been persecuted. The court held that the IJ and the BIA applied the compelling evidence standard for assessing persecution claims rather than the "standard that applies to their own judgments in the first instance." The court further held that because the IJ and the BIA misconstrued and disregarded important evidence, the decision to deny the petitioner's asylum application was not supported by reasoned analysis.

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■ **Seventh Circuit Upholds the BIA's Interpretation of the Child Status Protection Act's "Sought-To-Acquire" Provision, but Concludes that the BIA Erred in Applying Its New Rule Retroactively**

In ***Velasquez-Garcia v. Holder***, __F.3d __, 2014 WL 3611591 (7th Cir. July 23, 2014), (*Wood*, Hamilton, Kendall (by designation)), the Seventh Circuit deferred to *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012), in which the BIA interpreted the Child Status Protection Act's ambiguous "sought-to-acquire" provision to require an alien to file an application for lawful permanent residence within one year of a visa number becoming available. However, the court determined that this interpretation was a new rule that could not be applied retroactively to applications for lawful permanent residence filed prior to the BIA's decision in *Matter of O. Vasquez*.

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INA § 242(a)(2)(B) precludes jurisdiction over challenges to an IJ's application of the law to the facts of a case when the grounds for relief sought are discretionary.

■ **Seventh Circuit Holds IJ Abused Discretion In Denying Motion For Continuance By Ignoring Mishandled Evidence Submitted for Visa Denial Appeal**

In ***Yang v. Holder***, __ F.3d __, 2014 WL 3686082 (7th Cir. July 25, 2014) (*Wood*, Cudahy, Rovner), the Seventh Circuit held that it lacked jurisdiction to review petitioner's untimely asylum application, and agreed that the agency properly denied petitioner's applications for withholding of removal under the INA and CAT where the petitioner failed to comply with the biometrics requirements. However, the court concluded that the IJ abused his discretion in his consideration of the Matter of *Hashmi*, 24 I&N Dec. 785, 790-91 (BIA 2009), factors in denying the petitioner's motion for a continuance pending the adjudication of a remanded appeal of a visa petition denial to the District Director.

The court determined that the failure to consider the government's misplacement of evidence submitted in support of the petitioner's appeal contesting a sham marriage finding was an abuse of discretion.

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■ **Court Lacks Jurisdiction over an IJ's Application of the Law to the Facts of a Case for Discretionary Relief**

In ***Adame v. Holder***, __ F.3d __, 2014 WL 3909115 (7th Cir. August 12, 2014) (*Wood*, Posner, Flaum), the court held that INA § 242(a)(2)(B) precludes jurisdiction over challenges to an IJ's application of the law to the facts of a case when the grounds for relief sought are discretionary, and that in such a case the subpart (B) preclusion is unaffected by § 242(a)(2)(D). In so doing, the court reconsidered and reaffirmed its position that its jurisdiction is limited to constitutional claims and questions of statutory construction only.

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■ **Seventh Circuit Gives Chevron Deference to Agency's Interpretation of Eligibility Requirements for Cancellation of Removal**

In ***Coyomani-Cielo v. Holder***, 758 F.3d 908 (7th Cir. 2014) (Posner, *Flaum*, Manion) the court held that the BIA's interpretation of the statutory eligibility requirements for cancellation for certain nonpermanent residents in *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) was entitled to *Chevron* deference. Specifically, the court upheld the BIA's determination that, when determining eligibility for cancellation of removal, it would look only at the elements of the crime and sentence potentially imposed in the cross-referenced provisions of 8 U.S.C. § 1229b(b)(1)(C); it would not consider the portions of the cross-referenced provisions that refer to an alien's immigration status.

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(Continued on page 11)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

■ **Seventh Circuit Holds that IJ's Refusal to Grant Asylum Applicant a Further Continuance Did Not Violate the Petitioner's Procedural Rights**

In ***Ortiz-Estrada v. Holder***, 757 F.3d 677 (7th Cir. 2014) (Wood, *Posner*, Sykes), the Seventh Circuit held that the IJ properly ruled that there was no need to await the disposition of the petitioner's pending criminal proceeding because there was sufficient evidence before the immigration court to find that he lacked good moral character for cancellation of removal. The petitioner, a Mexican citizen, entered the United States in 1996, when he was 20 years old and as the court noted "had accumulated an impressive string of sanctions for a variety of traffic offenses." Indeed, the court noted, his last offense occurred while his removal proceedings were pending when he was charged with eight traffic offenses, four of which involved "aggravated" driving under the influence.

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■ **Seventh Circuit Holds BIA Did Not Properly Conduct Three-Step *Silva-Trevino* Inquiry, as It Failed to Consider Petitioner's Affidavit on Inconclusive Conviction Record**

In ***Sanchez v. Holder***, 757 F.3d 712 (7th Cir. July 9, 2014) (*Flaum*, Rovner, Kendall), the Seventh Circuit concluded that the BIA improperly failed to proceed to the third step prescribed in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), when it determined that the petitioner failed to meet his burden of demonstrating eligibility for relief where conviction documents did not show that he was not convicted of a crime involving moral turpitude. The court held that, though the petitioner could not satisfy his burden of demonstrating eligibility for relief by presenting an inconclusive record of conviction, the BIA should have then considered other evidence, including petitioner's affidavit.

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■ **Seventh Circuit Holds That BIA May Not Deny Discretionary Relief Based Solely on Arrests**

In ***Avila-Ramirez v. Holder***, __ F.3d __, 2014 WL 4099729 (7th Cir. August 21, 2014) (Posner, Tinder, *Williams*), the Seventh Circuit held that the BIA impermissibly relied on uncorroborated police reports of arrests to find that the petitioner had failed to show rehabilitation after his latest conviction in 1990. The court noted that petitioner had testified credibly that he had never committed any wrongdoing after 1990, and no convictions ever followed the arrests. The court held that the BIA failed to follow its precedent and remanded for additional consideration.

"Absent an egregious violation of the Fourth Amendment or other liberty which transgresses the fundamental fairness of the removal proceedings or affects the probative value of the evidence obtained, the exclusionary rule is not available in the removal context."

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■ **Seventh Circuit Holds BIA Engaged in Permissible Construction of Stop-Time Rule**

In ***Wang v. Holder***, __ F.3d __, 2014 WL 3456928 (7th Cir. July 16, 2014) (Bauer, Hamilton, *Wood*), the Seventh Circuit deferred to the BIA's construction in Matter of Camarillo, 25 I&N Dec. 6444 (BIA 2011), of the provision of the INA indicating that an applicant for cancellation stops accruing continuous physical presence in the United States once the applicant is served with a "notice to appear," even when the notice did not contain the date and time of the applicant's initial hearing in immigration court. Petitioner argued that he did not receive an effective NTA because it did not comply with § 1229(a)(1)(G)(i) and include the date and time of his hearing.

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EIGHTH CIRCUIT

■ **Eighth Circuit Upholds Agency's Admission of Form I-9 and Community College Application to Determine Whether Petitioner Made a False Claim to Citizenship**

In ***Downs v. Holder***, 758 F.3d 994 (8th Cir. July 14, 2014) (Riley, Loken, *Bye*), the Eighth Circuit held that the IJ properly admitted the petitioner's I-9 Employment Verification Form to determine whether she was removable and ineligible for adjustment of status for falsely claiming United States citizenship. The court ruled there was no prohibition on the use of the I-9 in removal proceedings.

The court additionally concluded that, even if a violation of the Federal Educational Rights and Privacy Act occurred when USCIS obtained the alien's educational records, exclusion of the documents was not warranted. "Absent an egregious violation of the Fourth Amendment or other liberty which transgresses the fundamental fairness of the removal proceedings or affects the probative value of the evidence obtained, the exclusionary rule is not available in the removal context to remedy a mere statutory violation of the FERPA," said the court.

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(Continued on page 12)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

Records Tampering Conviction is Categorically a Crime Involving Moral Turpitude

In *Villatoro v. Holder*, __ F.3d __, 2014 WL 3704037 (8th Cir. 28, 2014) (*Smith*, Colloton, Gruender), the Eighth Circuit concluded that a conviction for tampering with records was categorically a crime involving moral turpitude rendering petitioner statutorily ineligible for cancellation of removal. The court observed that the state statute required the knowing intent to deceive, injure, or conceal any wrongdoing, and further noted petitioner's failure to identify any actual case in which a defendant was convicted of records tampering where the conduct at issue was not turpitudinous.

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■ **Eighth Circuit Holds It Lacks Jurisdiction to Consider Claim of Direct Persecution Where Only Derivative Claim Was Exhausted**

In *Goswell-Renner v. Holder*, __ F.3d __, 2014 WL__ (Smith, *Colloton*, Gruender) [8th Cir. On August 7, 2014, the Eight Circuit, held that it lacked jurisdiction over a claim of direct persecution as a result of the petitionre having only exhausted administrative remedies regarding a derivative claim of persecution rather than a direct claim that was developed for the first time in the petition for review.

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■ **Eighth Circuit Holds It Lacks Jurisdiction to Review BIA's Decision Declining to Exercise Its Authority to Reopen Sua Sponte**

In *Barajas-Salinas v. Holder*, __ F.3d __, 2014 WL 3719099 (8th Cir. July 29, 2014) (Bye, *Colloton*, Gruender), the Eighth Circuit held that it lacked jurisdiction to review the BIA's denial of a motion to reopen declining to exercise its authority to reopen *sua sponte*. The court reasoned that, although the petitioner alleged that the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), represented a "fundamental change in the law," there was "no meaningful standard against which to judge the agency's exercise of discretion" in that area.

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■ **Eighth Circuit Holds that Probationary Jail Term Constitutes a Term of Imprisonment for Aggravated Felony Purposes**

In *Hernandez v. Holder*, __ F.3d __, 2014 WL 3704029 (8th Cir. July 28, 2014) (Loken, *Murphy*, Limbaugh), the Eighth Circuit concluded that the petitioner's 365-day jail term, which was imposed as a condition of probation, satisfied the INA's definition of "term of imprisonment," rendering him removable as an aggravated felon. The court additionally joined multiple circuits in holding that Congress intended that the aggravated felony bar to asylum apply to convictions entered before the enactment of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.

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■ **Eighth Circuit Holds it Lacks Jurisdiction over Denial of Discretionary Relief and Petitioner Has No Constitutionally Protected Liberty Interest in Discretionary Relief**

In *Nunez-Portillo v. Holder*, __ F.3d __, 2014 WL 3971482 (Riley, Benton, *Kelly*) (8th Cir. August 15, 2014), the Eighth Circuit held that it lacked jurisdiction to review the BIA's discretionary determination denying petitioner's application for cancellation of removal, because he did not establish the requisite hardship. Additionally, the court held that petitioner had no constitutionally protected liberty interest in discretionary relief in the form of cancellation of removal.

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■ **Eighth Circuit Holds Applicant Failed to Establish that Gangs Targeted His Family as a Group, Required to Constitute a Social Group**

In *Antonio-Fuentes v. Holder*, __ F.3d __, 2014 WL 4116696 (8th Cir. August 22, 2014) (Smith, *Colloton*, Grueder), the Eighth Circuit held that petitioner's purported social group comprised of Salvadoran men who fear gang violence because a family member is a former gang member lacked the requisite visibility, noting that visibility in this context refers to whether the members of the group are perceived as a group by society, and in that regard the petitioner did not establish that his family suffered from a higher incidence of crime than the rest of the population.

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■ **Government's Rebuttal Evidence Was Admissible, But Frivolousness Determination Was Not Adequately Explained or Supported**

In *Limbeya v. Holder*, __ F.3d __, 2014 WL 4116511 (8th Cir. August 22, 2014) (Riley, Benton, *Kelly*), the Eighth Circuit held that the government's impeachment evidence was admissible, but remanded for reconsideration and clarification of the frivolousness determination. The court determined that the name of the preparer of the asylum application is not a material element of the claim, and petitioner did not admit to fabricating anything other than the preparer's name and address.

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(Continued on page 13)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

NINTH CIRCUIT

■ Ninth Circuit Holds Statutory Terrorism Bar at 8 U.S.C. § 1182(a)(3)(B) Applies Retroactively

In *Bojnoordi v. Holder*, 757 F.3d 1075 (9th Cir. 2014) (*Gould*, Smith, Korman (by designation)), the Ninth Circuit held that substantial evidence supported the agency finding that in the 1970s, prior to its designation in 1997 as a terrorist organization by the Secretary of State under 8 U.S.C. § 1182(a)(3)(B)(vi)(I), the Mohahedi-e-Khalq ("MEK") engaged in terrorist activities, and that the statutory terrorism bar at 8 U.S.C. § 1182(a)(3)(B) applied retroactively to the alien's material support of the MEK during the 1970s.

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■ Ninth Circuit Denies Rehearing in Case Holding That Statute is Divisible Under *Descamps* and Conviction is Controlled Substance Offense Under Modified Categorical Approach

In *Coronado v. Holder*, __ F.3d __, 2014 WL 3537027 (9th Cir. July 18, 2014) (Benavides (by *dissenting*), Bybee, *Nguyen*), the Ninth Circuit amended its prior decision (747 F.3d 662) and denied petitioner's motion for rehearing. As in its original decision, the court, applying *Descamps v. United States*, 133 S. Ct. 2276 (2013), concluded that the agency properly applied the modified categorical approach to determine that an alien convicted of possessing methamphetamine in violation of Cal. Health & Safety Code § 11377(a) is inadmissible because § 11377(a) is a divisible statute.

Nevertheless, the court remanded the case to permit the BIA to address in the first instance the alien's due process claims alleging ineffective assistance of counsel and bias by the IJ

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■ Ninth Circuit Holds that Alien's Conviction for Attempted Possession of a Dangerous Drug Constitutes a Controlled Substance Violation

In *Juarez-Alvarado v. Holder*, __ F.3d __, 2014 WL 3608713 (9th Cir. July 23, 2014) (Christen, *Fisher*, Gould), the Ninth Circuit dismissed the petition for review, in part, due to petitioner's failure to exhaust his arguments regarding the attempt element of his conviction. The court further denied the petition, in part, holding, under the modified categorical approach, that the government met its burden to prove removability based on attempted possession of methamphetamine. The court concluded that, while it could not consider the indictment because the count as originally charged was dismissed and the alien pled to a lesser charge in a modified count, it could consider a page in the indictment that described the substance as methamphetamine because the statement was specifically incorporated into the alien's plea agreement as the factual basis supporting his guilty plea.

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■ Ninth Circuit Holds It Has Jurisdiction to Grant Citizenship to Rectify a Due Process Violation

In *Brown v. Holder*, __ F.3d __, 2014 WL 4056527 (*Clifton*, Tallman, Benavides (by designation)) (9th Cir. August 18, 2014), the Ninth Circuit held that it has authority to grant citizenship to rectify a due process violation. The court transferred the matter to the district court, pursuant to 8 U.S.C. § 1252(b)(5)(B), for resolution of issues of fact related to a delay by the former INS in adjudicating the naturalization application of petitioner's mother, and obstruction of petitioner's attempts to naturalize. The court also held that the INS's failure to follow its own regulations did not amount to a due process violation, and that citizenship cannot be granted by estoppel. The court joined the Tenth, Fifth, and Eleventh Circuits in holding that completion of an oath with an INS officer does not satisfy the "public ceremony" requirement of 8 U.S.C. § 1448(a).

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■ Conviction for Misuse of Passport to Facilitate an Act of International Terrorism is a CIMT, but Also Holds that BIA Erred by Denying Deferral of Removal

In *Nguyen v. Holder*, __ F.3d __, 2014 WL 3953758 (9th Cir. August 14, 2014) (*Pregerson*, Wardlaw, Tallman), the Ninth Circuit held that the alien's misuse of his brother's passport to travel to the Philippines in an attempt to plant explosives at the Vietnamese embassy was a crime involving moral turpitude, but determined that the BIA's conclusion that the Vietnamese government was unaware of the alien's conduct and unlikely to torture him was not supported by substantial evidence.

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TENTH CIRCUIT

■ BIA Did Not Abuse of Discretion to Deem Cancellation of Removal Application Abandoned When Alien Failed to Obtain Biometrics

In *Ramirez-Coria v. Holder*, __ F.3d __, 2014 WL 3765825 (10th Cir. August 1, 2014) (Matheson, *Anderson*, Phillips), the Tenth Circuit held that it was not an abuse of discretion for the IJ to deem a cancellation application abandoned when the applicant failed to obtain biometrics after two and one-half years. The court concluded that the appli-

(Continued on page 14)

AILA Doc. No. 15092900. (Posted 09/29/15)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)
cant knew he had to complete the biometric requirement, knew the penalties for failing to do so, and had ample time within which to complete it, and any reasons given by him for his failure, such as his inability to obtain a birth certificate or other identification, were attributable to him.

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■ **Tenth Circuit Holds the BIA Abused Its Discretion in Concluding that Evidence Accompanying a Motion to Reopen Was Similar to Evidence Previously Presented**

In *Martinez Molina v. Holder*, __ F.3d __, 2014 WL 4068574 (*Bacharach*, Hartz, McKay) (10th Cir. August 19, 2014), the Tenth Circuit held that the BIA had properly denied a motion to reopen with regard to one petitioner, but abused its discretion in denying the motion regarding the second petitioner because the additional evidence of physical presence submitted with the motion supported his claim of ineffective assistance of counsel by addressing one of the IJ's reasons for denying the original application for cancellation of removal.

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds that a Five-Year Indian Degree Is Not Equivalent to a United States Master's Degree**

In *Viraj, LLC v. U.S. Atty. Gen.*, 2014 WL 4178338 (11th Cir. August 25, 2014) (Carnes, Tjoflat, Fay) (*per curiam*), the Eleventh Circuit, in an unpublished decision affirmed the district court's grant of summary judgment in the government's favor, rejecting an APA and Equal Protection challenge to USCIS's denial of an employment-based visa petition. Plaintiffs claimed that the beneficiary's three-year Indian bachelor's degree and two-year Indian Master's degree were together equivalent to an advanced U.S. degree. The court determined that USCIS's reliance on the Electronic Database for Global Education (EDGE), a web-based resource, was within the agency's discretion. The court found no evidence that visa petitions for beneficiaries with Indian master's degrees were denied on any basis other than the legitimate determination that the foreign degree was not equivalent to an advanced degree, as required by 8 C.F.R. § 204.5 (k)(2).

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■ **Eleventh Circuit Holds that Written Frivolous Warnings Contained in Asylum Application Constitute Sufficient Notice of Consequences of Filing Frivolous Asylum Application**

In *Ruga v. U.S. Att'y Gen.*, 757 F.3d 1193 (11th Cir. 2014) (*Martin*, Hull, Marcus), the Eleventh Circuit agreed with the Seventh, Ninth, and Tenth Circuits' holdings that written warnings of the consequences of filing a frivolous asylum application contained in the application itself constituted sufficient notice of the severe consequences of filing a frivolous application. The court further held that the IJ's grant of a motion to reopen subsequent to an *in absentia* removal order did not require the reissuance of the frivolous warnings.

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■ **Eleventh Circuit Holds Aggravated Felons Are Required to Exhaust Legal Challenges in Expedited Removal Proceedings**

In *Malu v. U.S. Att'y Gen.*, __ F.3d __, 2014 WL 4073115 (11th Cir. August 19, 2014) (Tjoflat, *Pryor*, Scola (by designation)), the Eleventh Circuit held that an alien in expedited removal proceedings could not challenge the classification of her criminal conviction as an aggravated felony in a petition for review, because she had not exhausted that issue in her administrative proceedings, as provided by 8 C.F.R. § 238.1. Accordingly, the court concluded it was barred by the criminal-alien review bar of INA § 242(a)(2)(C) from considering the merits arguments for the petitioner's withholding of removal claim.

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DISTRICT COURTS

■ **Western District of Texas Holds Federal Courts Lack Jurisdiction to Adjudicate Wrongful Detention Claims Raised by American Indians Protected by the Jay Treaty of 1796**

In *Hodgson v. United States*, No. 13-cv-702, (W.D. Tex. August 19, 2014) (Ezra, J.) , the District Court for the Western District of Texas dismissed a claim (2014 WL 4161777) under the Federal Tort Claims Act (FTCA) raised by a Native American born in Canada alleging that he was wrongfully detained by ICE for 70 days pending removal proceedings because, under the Jay Treaty of 1796, he cannot legally be removed to Canada, and therefore cannot legally be detained pursuant to an immigration detainer. The court held that 8 U.S.C. § 1252(g) bars review of plaintiff's wrongful detention and related tort claims because the decision to detain plaintiff arose directly from the decision to commence proceedings. The court also held that the FTCA's "discretionary function" exception shielded the United States from any liability, as the decision to investigate plaintiff and to issue a detainer based on probable cause were "classic" discretionary functions.

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California Second Degree Burglary

(Continued from page 1)
dered the petitioner deportable and ineligible for the discretionary relief of cancellation of removal. On appeal, the BIA employed a modified categorical approach to determine that the petitioner had been convicted of California Penal Code §459 for "entering a locked vehicle with the intent to commit larceny," and thus had been convicted for attempted theft.

The court concluded that the BIA impermissibly employed the modified categorical approach. Looking to the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), the court concluded that the modified categorical approach applied "only when the state statute at issue is divisible." The Court determined that after *Descamps*, "the critical distinction is that while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes." The court further concluded that the "elements" are only those portions of the statute that the jury must agree upon to find the defendant guilty. Thus, "any statutory phrase that — explicitly or implicitly — refers to multiple, alternative means of commission must still be regarded as indivisible if the jurors need not agree on which method of committing the offense the defendant used."

The court found that its conclusion "mirror[ed]" the BIA's understanding of *Descamps*. In *Matter of Chairez*, 26 I. & N. Dec. 349 (BIA 2014), the BIA determined that a statute is divisible only if, *inter alia*, "it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction." Like the court, the BIA concluded that "an offense's 'elements' are those facts about the crime which '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find ... unanimously and beyond a reasonable doubt.'"

A generic attempted theft offense includes two elements: an intent to commit a theft offense and an overt act constituting a substantial step towards the commission of the offense. Applying its understanding of *Descamps* to petitioner's conviction, the court ruled that the "jury need not agree on which of the substantive offenses the defendant intended to commit – only that he intended to commit an offense listed in the statute." Thus, because "the jury could convict a defendant of section 459 without agreeing on whether a defendant had the intent to commit, on the one hand, 'grand or petit larceny,' or, on the other hand, any non-theft felony, we (and the BIA) cannot determine that the jury in such a case concluded, beyond a reasonable doubt, that the defendant attempted a theft offense rather than a non-theft felon." Accordingly, the court concluded that the California statute was "indivisible" and not susceptible to a modified categorical inquiry.

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(Continued from page 2)
mistreatment rising to the level of past persecution, and that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group, the BIA remanded the case to the IJ to determine whether the Guatemalan government was unwilling or unable to control her husband.

By Francesco Isgro, OIL

INDEX TO CASES SUMMARIZED IN THIS ISSUE

NOTED

Ebola Outbreak-related Immigration Relief Measures to Nationals of Guinea, Liberia and Sierra Leone Currently in the United States

The USCIS is offering relief measures to nationals of Guinea, Liberia and Sierra Leone who are currently in the United States.

Immigration relief measures that may be available if requested include:

- Change or extension of nonimmigrant status for an individual currently in the United States, even if the request is filed after the authorized period of admission has expired;
- Extension of certain grants of parole made by USCIS;
- Expedited adjudication and approval, where possible, of requests for off-campus employment authorization for F-1 students experiencing severe economic hardship;
- Expedited processing of immigrant petitions for immediate relatives (currently in the United States) of U.S. citizens;
- Expedited adjudication of employment authorization applications, where appropriate; and
- Consideration for waiver of fees associated with USCIS benefit applications.

Deferred Enforced Departure Extended for Eligible Liberians in U.S

On September 26, the USCIS announced that it will automatically extend Employment Authorization Documents (EADs) for Liberian nationals covered under Deferred Enforced Departure (DED). Current DED Liberia EADs that have an expiration date of Sept. 30, 2014, will now be valid through March 30, 2015.

This automatic extension of EADs follows President Obama's announcement of his decision to extend DED through September 30, 2016, for qualified Liberians and those individuals without nationality who last habitually resided in Liberia. The six-month automatic extension of existing EADs allows eligible Liberian nationals to continue working in the United States while they file their applications. The extension also gives USCIS time to process and issue the new EADs.

Deferred Enforced Departure for Liberian nationals was scheduled to end on Sept. 30, 2014. However, President Obama determined that there are compelling foreign policy reasons to extend DED for eligible Liberian nationals currently living in the United States under the existing grant of DED.

OIL TRAINING CALENDAR

November 18-21, 2014. OIL 20th Annual Immigration Law Seminar will be held at the Liberty Square Bldg, in Washington, DC. This is an intermediate immigration law course and is intended for government attorneys who have had some exposure to immigration law or who are interested in a comprehensive review of the law.

Attorneys from our client agencies and Assistant United States Attorneys are invited to attend. There is no charge for attending the seminar though attendees are expected to cover their own travel expenses.

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

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

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

Office of Immigration Litigation

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

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