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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

The Ninth and Second Circuit Limit Prolonged Detention to Six Months

The Second and Ninth Circuit have concluded that the prolonged detention of aliens for longer that six months, without a bond hearing, raises serious constitutional concerns, regardless of whether the alien is seeking admission or is in removal proceedings.

In ***Rodriguez v. Robbins,*** 804 F.3d 1060 (9th Cir. 2015), a class-action filed in 2007, in the Central district of California, the Ninth Circuit upheld in part a permanent injunction requiring automatic bond hearings for certain classes of aliens subject to prolonged detention.

Specifically, the court held that aliens who are subject to prolonged detention, under INA § 236(c), authorizing DHS to take into custody any alien who was inadmissible or deportable by reason of having committed certain offenses for as long as removal proceedings were "pending" are entitled to automatic individualized bond hearings and determinations to justify their continued detention.

Similarly, the court held that applicants for admission who are clearly and beyond a doubt not entitled to admission under INA § 235(b), are also entitled to an automatic individualized bond hearings after six months of detention. The court also held that an alien held in detention under INA § 236(a), pending decision on whether alien is to be removed from United States, is entitled to automatic individ-

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Attorney General Refers to Herself Decisions of the BIA Relating to the Application of Supreme Court's *Descamps* Decision

In ***Matter of Chairez & Matter of Sama,*** 26 I&N Dec. 686 (A.G. 2015), the Attorney General directed the BIA to refer two matters for her review, including the BIA's precedential decisions in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), and 26 I&N Dec. 478 (BIA 2015).

She invited briefs addressing the proper approach for determining "divisibility" within the meaning of *Descamps v. United States*, 133 S. Ct. 2276 (2013), including whether a criminal statute may be treated as "divisible" for purposes of the modified categorical approach only if, under applicable law, jurors must be unanimous as to the version of the offense committed.

In *Matter of Chairez*, the BIA interpreted *Descamps* to determine section 76-10-508.1(1)(a) of the Utah Code under which Chairez was convicted, to be "divisible" into three separate offenses with distinct *mens rea* only if Utah law requires jury

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Prolonged Detention Requires Automatic Bond Hearings

ualized bond hearings and determinations after six months of detention.

The court declined to uphold the district court's certification of a subclass of aliens detained under INA § 241(a), finding that as defined it excludes any detainee subject to a final order of removal and therefore "the subclass does not exist."

The could also upheld the district court's order regarding the burden and standard of proof at the bond hearings. The court held that it was bound by its precedent in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), which had held that "the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond."

The Second Circuit joined "the Ninth Circuit in holding that mandatory detention for longer than six months without a bond hearing affronts due process."

The court rejected the government's challenge to the district court's determination that IJs have to consider "the use of alternatives to detention in making bond determinations." At the bond hearing, the IJs "must consider the length of time for which a non-citizen has already been detained," but need not consider the likely duration of future detention and the likelihood of eventual removal,' said the court. Finally, the court held that "the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as 'the period of . . . confinement grows.'"

The court remanded the case to the district court to enter a revised injunction.

On October 28, the same day that the Ninth Circuit issued its ruling in *Rodriguez,* the Second Circuit in ***Lora v. Shanahan,*** 804 F.3d 601 (2d Cir. 2015), reached similar conclusions.

Alexander Lora, an LPR and citizen of the Dominican Republic, was convicted of drug related offenses, sentenced to probation, and taken into custody by ICE agents pursuant to INA § 236(c), over three years into his five-year probation term. After four months in immigration custody, Lora petitioned for a writ of habeas corpus. He contended, among other things, that he was eligible to apply for bail because the mandatory detention provision of § 236(c) did not apply to him because he had not been taken into custody "when released" and that indefinite incarceration without an opportunity to apply for bail violated his right to due process. The petition was granted and Lara was released on bond.

On appeal, the Second Circuit agreed with the government's position that the "when released" provision of § 236 (c) applies even if DHS does not detain an alien immediately upon release. However, the court held that "in order to avoid significant constitutional concerns surrounding the application of § 236(c), it must be read to contain an implicit temporal limitation." The court said that it was "specifically" joining "the Ninth Circuit in holding that mandatory detention for longer than six months without a bond hearing affronts due process." In particular, the court said that given the "pervasive confusion over what constitutes a 'reasonable' length of time that an immigrant can be detained without a bail hearing, the current immigration backlog and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous, the interests at stake in this Circuit are best served by the bright-line approach" adopted by the Ninth Circuit. Requiring a bail hearing at the end of the statutory mandatory detention period "affords more certainty and predictability," said the court.

The court disagreed with the government's view that "due process requires a 'fact-dependent inquiry' as to the allowable length of detention and there should be no bright-line rule for when detention becomes presumptively unreasonable." The court explained that without a six-month rule, endless months of detention, often caused by nothing more than bureaucratic backlog, has real-life consequences for immigrants and their families."

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Matter of Chairez Before AG

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unanimity regarding the mental state with which the accused discharged the firearm. Finding that such unanimity was not required in second-degree murder cases, the BIA held that DHS had not met its burden of showing that section 76-10-508.1 was divisible into three offenses with distinct *mens rea* and therefore failed to establish Chairez's removability as an alien convicted of an aggravated felony with respect to the *mens rea* necessary to constitute a crime of violence.

In referring the decisions of the BIA to herself for review, the Attorney General further stated that pending her review, prior BIA decisions addressing these questions shall not be regarded as precedential. Briefing is expected to be completed by January 8, 2016.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony

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

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Conviction – Divisibility Inconclusive Record

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

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Citizenship – Equal Protection

On September 21, 2015, the government filed a petition for rehearing en banc challenging the Second Circuit's published opinion in ***Morales-Santana v. Lynch***, 792 F.3d 256, which held that the former scheme for citizenship at birth abroad for children of one U.S. citizen and one alien violates equal protection because there is a different physical presence requirement for unwed mothers than unwed fathers. The *en banc* petition argues that the panel erred in its equal protection analysis and its rewrite of the scheme to expand citizenship, intruding on the prerogative of Congress, creating a circuit conflict and non-uniform rules for citizenship. On October 30, 2015, the panel amended its opinion to clarify that its statutory revision did not apply to married parents. The rehearing petition remains pending.

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Standard of Review – Nationality

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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Continuance – Waiver Standard

On July 14, 2015, over government opposition, the Seventh Circuit granted *en banc* rehearing in ***Bouras v. Lynch.*** The panel opinion, 779 F.3d 665 (now vacated), held that an IJ did not abuse his discretion in denying the alien's request for a continuance to obtain his former spouse's testimony in support of his request for a waiver under 8 U.S.C. § 1186a(c)(4) of the joint-petition requirement for removing the conditions on a grant of permanent resident status. Petitioner's supplemental brief to the *en banc* court relied on standard of proof for a good faith marriage waiver as described in the court's recent decision in *Hernandez-Lara v. Lynch*, 789 F.3d 800. The government supplemental brief, filed September 22, 2015, asks the *en banc* court to overrule *Hernandez-Lara*. *En banc* argument is set for December 1, 2015.

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Crime of Violence

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

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AILA Doc. No. 16071902. (Posted 7/19/16)

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ Applicant for Cancellation Failed to Meet His Burden of Proof Establishing that He Had Not Previously Been Convicted of a "Crime of Domestic Violence"

In ***Peralta Sauceda v. Lynch***, __F.3d__, 2015 WL 5970319 (1st Cir. October 14, 2015) (Torruella, *Lynch*, Kenyatta), the First Circuit upheld the BIA's denial of cancellation of removal because the petitioner failed to meet his burden of proving by a preponderance of the evidence that he had not previously been convicted of a "crime of domestic violence."

The petitioner, a native and citizen of Honduras, entered the United States illegally on December 23, 1993. On December 11, 2006, he pleaded guilty to Count One of a criminal complaint that charged him with assaulting his wife in violation of Me.Rev.Stat. Ann. tit. 17–A, § 207(1)(A). When placed in removal proceedings as an alien present without being admitted or paroled, petitioner conceded removability and requested cancellation. After a series of appeals to, and remands from the BIA concerning the applicability of the modified categorical approach to the Maine assault statute, the IJ held in her final order that petitioner was not eligible for cancellation of removal because he had failed to meet his burden of proving by a preponderance of the evidence that his 2006 assault conviction was not a "crime of domestic violence." The BIA affirmed.

In upholding the BIA's denial, the court rejected petitioner's argument that he had made a good-faith effort to find evidence that he had not been convicted under the "bodily injury" prong of the Maine statute and therefore its unavailability was not his fault. "But that is not how the burden of proof works," said the court. "Congress spoke clearly when it chose to place the 'burden of proof' on the alien requesting cancellation of removal. After all, cancellation of removal is not a context in which the alien is 'in the dock facing criminal sanctions,' but is instead one in which the alien seeks 'the government's largesse to avoid removal' . . . . We join five other circuits who have held that an inconclusive record cannot satisfy an alien's burden of proving eligibility for discretionary relief."

"We join five other circuits who have held that an inconclusive record cannot satisfy an alien's burden of proving eligibility for discretionary relief."

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SECOND CIRCUIT

■ Second Circuit Holds Agency Wrongly Applied the REAL ID Act's Credibility Standards When Assessing Removability and Inadmissibility

In ***Ahmed v. Lynch,*** 804 F.3d 237 (2d Cir. 2015) (Katzmann, *Hall*, Lohier), the Second Circuit held that the BIA erred when it applied the REAL ID Act's credibility standards in evaluating petitioner's marriage certificate.

The petitioner, Khaled Abdo Ali Ahmed, a citizen of Yemen, was admitted to the United States in 1989 as an unmarried son of a U.S. citizen. In 2009, DHS placed Ahmed in removal proceedings alleging he was married at the time of his admission to the United States and charged him with removability as an alien who (1) procured admission by fraud or the misrepresentation of a material fact, and (2) entered the United States without a valid visa.

At the removal hearing, both Ahmed and DHS submitted marriage certificates reflecting different marriage dates. The certificate introduced by DHS stated that Ahmed was married in 1988—one year prior to his admission to the United States and was issued by "The religious Court in the city of Ibb," and had been submitted to the USCIS by Ahmed in connection with a 2007 Form N–400 Application for Naturalization. DHS also offered Ahmed's 2007 naturalization application as further evidence of his removability. The printed text of the application stated that Ahmed married in 1994. The application, however, contained a handwritten correction, dated and initialed by Ahmed, changing the marriage date from 1994 to 1988. Ahmed submitted, as proof of the date he claimed he was married, a 1994 marriage certificate. The 1994 certificate was issued by "The Republic of Yemen, Ministry of Interior, Civil Affairs and Civil Registry Authority," was signed by the Civil Registry's Secretariat, and bore a seal.

The IJ and the BIA determined that DHS had demonstrated Ahmed's removability by clear and convincing evidence because Ahmed, who was admitted to the United States as an unmarried son of a United States citizen, was married at the time of his admission. In particular, relying on the credibility provisions of the REAL ID Act, INA § 208(b)(1)(B)(iii), the BIA determined that the IJ's adverse credibility determination was not clearly erroneous. The BIA therefore concluded that Ahmed had "not rebutted the evidence in the record that he was married at the time he was admitted." The BIA, however, did not discuss the 1994 marriage certificate.

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AILA Doc. No. 16071902. (Posted 7/19/16)

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The Second Circuit first faulted the BIA's failure to consider Ahmed's certificate, which stated that he first married five years after his admission. "Given that the removability determination was focused exclusively on whether Ahmed was married when he entered the United States in 1989, the BIA's failure even to mention the 1994 marriage certificate compellingly suggests that the certificate was ignored. This failure to consider material evidence warrants remand because it has deprived us of the opportunity to provide meaningful judicial review."

The court determined that "The REAL ID Act's credibility standard, by its statutory terms, is limited to applications for relief."

Second, the court determined that "the BIA erred by assessing the credibility of Ahmed's testimony concerning his removability under the credibility provisions of the REAL ID Act (codified at 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C)). The REAL ID Act's credibility standard, by its statutory terms, is limited to applications for relief."

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■ **Second Circuit Sua Sponte Clarifies Citizenship Equal Protection Ruling; Government Petition for Rehearing En Banc Remains Pending**

In *Morales-Santana v. Lynch*, __F.3d__, 2015 WL 6600567 (*Lohier*, Carney, Rakoff (by designation)) (2d Cir. October 30, 2015), the Second Circuit panel amended its July 8, 2015, published opinion, at 792 F.3d 256, to clarify that its remedy only makes the physical presence requirement for unmarried fathers equivalent to the requirement for unmarried mothers, without affecting the requirement for married parents. The opinion continues to hold that the distinction between unmarried fathers and mothers violates equal protection. The government's petition for rehearing *en banc* remains pending.

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FIFTH CIRCUIT

■ **Fifth Circuit Denies *Sua Sponte En Banc* Call, Retains Holding that "Wave-Through" Admission Falls Within "Admission in Any Status" Satisfying Cancellation Requirement**

In *Rubio v. Lynch*, 2015 WL 6657575 (5th Cir. October 28, 2015) (Haynes, Stewart, Brown), the Fifth Circuit denied a *sua sponte* en banc call with four judges (*Jones*, Smith, Clement, and Owen) publishing a dissent regarding congressional intent. In its May 21, 2015, published opinion (787 F.3d 288), the Fifth Circuit reversed the BIA's holding that the alien's 1992 "wave-through" admission into the U.S. did not constitute an "admi[ssion] in any status" under the cancellation statute.

The dissenters noted that "the panel's interpretation deprives the statutory phrase 'in any status' of meaning. Moreover, by allowing this provision to cover aliens who were mistakenly admitted without legal status, the panel renders § 1229b(a) far broader than Congress intended. For whatever reason, the government has not sought *en banc* rehearing. However, the panel's statutory misinterpretation is sufficiently significant that we should have corrected it." The dissenting judges said that "the panel had no authority to amend the law by depriving 'status' of its customary meaning in immigration law and, worse, of any meaning in this provision."

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■ **Fifth Circuit Holds that Possession of a Small Amount of Marijuana in a School Zone Qualifies for the Personal Use Exception**

In *Esquivel v. Lynch*, 803 F.3d 699 (5th Cir. 2015) (*Jolly*, Higgenbotham, Owen (dissenting)), the Fifth Circuit held that the plain language of INA § 237(a)(2)(B)(i), concerning the personal use exception for a small amount of marijuana, rendered the petitioner eligible for cancellation of removal, despite the fact that his offense occurred in a school zone.

The petitioner, a Mexican citizen, was admitted to the United States as an LPR in 2001, when he was 16 years old. In 2003, he was convicted of the Class A misdemeanor of possession of marijuana (4.6 grams) within 1,000 feet of his high school, a "drug-free zone" under Texas law. In 2011, petitioner was again convicted of possession of marijuana, a Class B misdemeanor. In 2012 petitioner traveled to Mexico and when he sought reentry to the United States, DHS discovered his prior convictions. It then instituted removal proceedings against him, alleging that he was inadmissible under INA § 212(a)(2)(A)(i)(II) because of his 2011 conviction for possession of marijuana.

When placed in removal petitioner sought cancellation but DHS contended that, in the light of his 2003 conviction and the INA § 240A's "stop-time rule," petitioner did not satisfy the continuous-residence requirement. Agreeing with DHS, the IJ determined that petitioner's 2003 conviction rendered

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petitioner inadmissible under § 212 (a)(2)(A)(i)(II), such that, under the stop-time rule, his period of continuous residence ended in 2003. Accordingly, the IJ concluded that petitioner was ineligible for cancellation. The BIA affirmed the IJ, but on a different ground. The BIA held, that petitioner's 2003 conviction triggered the stop-time rule not because (as the IJ had held) it rendered him inadmissible, but because it rendered him removable under § 237(a)(2)(B)(i).

In *Matter of Moncada–Servellon*, 24 I&N Dec. 62 (BIA 2007), the BIA interpreted this "personal-use exception" to cover only offenses that, in addition to constituting "a single offense involving possession for one's own use of 30 grams or less of marijuana," are also the "least serious" drug offenses under the law of the state in which they were committed.

The court declined to give *Chevron* deference to the BIA because "*Moncada–Servellon's* interpretation of the personal-use exception is contrary to the plain meaning of the statute."

The court declined to give *Chevron* deference to the BIA because "*Moncada–Servellon*'s interpretation of the personal-use exception is contrary to the plain meaning of the statute." The court explained that "*Moncada–Servellon's* interpretation reads into the text of the personal-use exception a requirement that simply isn't there." The court also foud that *Moncada–Servellon's* interpretation runs afoul of the "elementary canon of construction that when Congress uses different terms, 'each term is to have a particular, nonsuperfluous meaning.'" Unlike other provisions in the statute, "Congress spoke not of 'simple possession' but of 'possession for one's own use,'" said the court.

Judge Owen, in a dissenting opinion, would have concluded that petitioner's possession conviction included the added school zone element, such that the exception should not apply. "The majority opinion adopts a perverse construction of 8 U.S.C. § 1227(a)(2)(B)(i), and in particular, fails to give the words 'other than' their natural and commonly-understood meaning," he wrote.

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SEVENTH CIRCUIT

■ Seventh Circuit Reverses on Adverse Credibility, Holds Applicant Could Show Persecution Under "Other Resistance to a Coercive Population Control Program" Provision

In ***Wang v. Lynch***, __ F.3d __, 2015 WL 6457899 (7th Cir. October 26, 2015) (Posner, *Kanne*, Hamilton), the Seventh Circuit granted a petition from a Chinese citizen seeking asylum based on his country's family planning policies.

The petitioner sought asylum and withholding of removal based on his resistance to China's coercive population-control policy. Petitioner alleged he was beaten by government officials while opposing his wife's involuntary fitting with a contraceptive device.

An IJ found that petitioner did not testify credibly about the crux of his claim and could not show past persecution because he resisted only his wife's forced contraceptive implant as opposed to a forced abortion or sterilization. The BIA affirmed, finding the IJ's adverse credibility finding not clearly erroneous.

The court found that the IJ had misunderstood petitioner's testimony about the nature of the procedure his wife ultimately received—the implantation into her arm of a contraceptive device. This was simply petitioner's "innocent confusion over the name of his wife's medical procedure, namely the difference between that and sterilization and should not have been used by the IJ to discredit his testimony, said the court. Additionally, the court also held that the IJ erred by concluding, alternatively, that petitioner had not demonstrated past persecution. Petitioner's "claim that he was punished for opposing the efforts of family-planning officials to enforce the population-control program, either by sterilizing him or his wife or by implanting a contraceptive device into his wife's arm, [] falls within the protection of the statute," said the court.

Accordingly the court granted the petition and remanded to the BIA to determine whether petitioner's resistance and interference with the family-planning officials qualifies as "other resistance" and whether the beating petitioner suffered constituted persecution.

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■ Seventh Circuit Upholds Denial of Asylum for Failure to Corroborate Claim, Holds that No Notice of Corroboration Is Required

In ***Darinchuluun v. Lynch***, __F.3d__, 2015 WL 5868309 (7th Cir. October 8, 2015) (*Ripple*, Williams, Sykes), the Seventh Circuit held that under INA § 208(b)(1)(B)(ii), the agency properly concluded that the asylum applicant failed to sufficiently corroborate his claim.

The petitioner, Darinchuluun, claimed in his asylum application that he had been persecuted in his native Mongolia as a result of his attempts to bring to light an illegal smuggling operation. According to his testimony,

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when he was working at the railroad in the capital city of Ulaanbaatar, he discovered that guns and ammunitions were being smuggled in a box car that was supposed to contain coal. He was threatened with harm if he reported his discovery but nonetheless reported the find, albeit to no avail, to his supervisor. In 2006 he reported the matter to the Russian director of the railroad, who later following another conversation with petitioner, was stabbed in the back and hospitalized for one month. Subsequently, petitioner and the Russian director reported a shipment of illegal cargo to the police who seized the goods. Shorty thereafter the Russian director died, while on a trip of accidental carbon monoxide poisoning. Petitioner believed that the Russian director had been murdered.

Petitioner left Mongolia for Switzerland on October 22, 2006, on a student visa. In July 2007, he returned to Mongolia because his father had been attacked an abducted. The assailant had shown him an article where petitioner had been interviewed in a Swiss paper concerning the illegal shipments. In August 2007, petitioner left Mongolia and traveled to Russia until the fall of 2009 when he returned to Mongolia and applied for a visa to come to the United States stating that he wanted to purchase poker-game software. He entered the United States in February 2010 and, prior to the expiration of his visa, applied for asylum. His application was not granted and he was served with an NTA where he renewed his asylum claim.

Following a hearing, an IJ found that Darinchuluun was credible, but that he had failed to offer sufficient corroborating evidence to substantiate his claims. The BIA similarly denied Mr. Darinchuluun relief and also denied his request for a remand so that he could supplement the administrative record.

The court found that the record supported the conclusion that Darinchuluun did not provide evidence that corroborated the key elements of his claim. In particular, the court noted that "in determining that there was a need for further corroboration, the IJ certainly acted reasonably in focusing on Mr. Darinchuluun's failure to apply for asylum in Switzerland and Russia." The court further held that the IJ was not required to provide notice to the alien of the need to corroborate his claim. The court reiterated that the REAL ID Act places "immigrants on notice of the consequences for failing to provide corroborative evidence."

The court reiterated that The REAL ID act places "immigrants on notice of the consequences for failing to provide corroborative evidence."

Finally, the court also upheld the BIA's denial of a motion to reopen, because petitioner failed to show that the evidence he sought to introduce was both material and could not have been presented earlier.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds Alien Forfeited His Right to a Hearing by Failing to Timely Assert that Right and the Government Established Removability as an Alien Who Falsely Claimed U.S. Citizenship**

In ***Muiruri v. Lynch***, 803 F.3d 984 (8th Cir. 2015)(Loken, *Benton*, Shepherd), the Eighth Circuit held that petitioner forfeited his right to a hearing when he failed to assert that right in a timely manner.

The petitioner, Muiruri, a native of Kenya, overstayed his student visa and was apprehended by officials. In a sworn statement, Muiruri admitted to falsely representing himself as a U.S. citizen. DHS then charged him with two counts of removability: (1) overstaying his visa in violation of INA § 237(a)(1)(C)(I), and (2) falsely representing himself as a U.S. citizen in violation of INA § 237(a)(3)(D). He applied for adjustment-of-status based on marriage to a U.S. citizen. Muiruri conceded the first count of removability, but denied falsely representing himself as a U.S. citizen—which would ban him from reentering the United States. The IJ then scheduled a "removal hearing" on the false-representation and adjustment-of-status claims. A month before the removal hearing, Muiruri filed a "Motion to Suppress." He argued he had been illegally searched and seized, and his sworn statement coerced. He further alleged a lack of sufficient evidence for the false-representation charge. DHS then submitted I–9 forms and an employment application where Muiruri had checked the box indicating U.S. citizenship. On March 14, 2013—a week before the removal hearing—the immigration judge issued an order denying the Motion to Suppress and finding a violation of INA § 237(a)(3)(D). At the merits hearing, Muiruri acknowledged that the IJ order mooted his adjustment claim but told the IJ that he would not appeal the withholding claim only the suppression denial. The BIA affirmed

Before the Eighth Circuit, petitioner claimed that he was denied a merits hearing on the false-representation charge in violation of due process, the INA, and agency regulations. The court held that Mui-

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ruri forfeited his right to a hearing when he requested the IJ to follow a certain course of action and when the judge did so, he did not object. The court also held that the government established Muiriri's removability given that it produced several I-9 forms where he had checked the box claiming to be a United States citizen or national and additional evidence showing that he had falsely represented himself as a United States citizen to gain employment.

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■ Eighth Circuit Holds that Adverse Credibility Determination Was Supported by Substantial Evidence and that Alien Was Not Prejudiced by Any Ineffective Assistance of Counsel

*In **Amardeep Singh v. Lynch***, 803 F.3d 988 (8th Cir. 2015) (*Riley*, Benton, Shepherd), the Eighth Circuit upheld the BIA's adverse credibility determination, holding that record evidence did not compel reversal given the totality of the circumstances.

The petitioner, Singh, entered the United States near Hidalgo, Texas, in August 2011, without a valid visa or other entry document. Singh claimed to be a Sikh and a member of the Shirmoani Akali Dal Amritsar party led by Sardar Simranjit Singh Mann (Mann Party). When detained by DHS, Singh asserted he feared persecution by the rival India Congress Party (Congress Party) if returned to India. Singh told a DHS asylum officer that members of the Congress Party had twice beaten him for refusing to switch parties. The officer found Singh had "a credible fear of persecution" for his political opinion and referred Singh's application for further consideration.

On September 9, 2011, DHS initiated removal proceedings. Conceding removability, Singh applied for asylum, withholding of removal, and CAT protection. Following a hearing, the IJ determined that Singh's was "not credible because his testimony contradicted information he gave at his [credible fear interview with the asylum officer] and because he was nonresponsive and evasive during cross-examination." The IJ found "[s]ome testimony was unbelievable" and some was "directly contradicted" by "the corroborating evidence," but all lacked sufficient record support. Alternatively, the IJ denied asylum, withholding, and CAT on the merits. Singh then obtained new counsel and appealed to the BIA. The BIA agreed with the IJ and also rejected Singh's ineffective assistance claim.

The IJ's adverse credibility determination "was based on substantial record evidence and supported by specific, cogent reasons."

In upholding the IJ's adverse credibility determination, the court said the finding "was based on substantial record evidence and supported by specific, cogent reasons." The court rejected Singh's arguments that any inconsistencies were minor and that he lacked notice of corroboration. "Singh received sufficient notice and a fair opportunity to obtain and present evidence to corroborate his claim," said the court. Finally, the court rejected the ineffective assistance of counsel claim, concluding that there was no prejudice even if counsel was ineffective.

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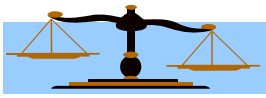
NINTH CIRCUIT

■ Ninth Circuit Defers to BIA's Interpretation That Failure of NTA to Specify Date and Location of Removal Hearing Does Not Affect the Stop-Time Rule

In ***Moscoso-Castellanos v. Lynch***, 803 F.3d 1079 (9th Cir. 2015) (*Graber*, Watford, Tunheim), the Ninth Circuit deferred to the BIA's interpretation in *Matter of Camarillo*, 25 I &N Dec. 644 (BIA 2011), to find that the service of notice to appear to petitioner triggered the stop-time rule for accrual of statutory period of physical presence for cancellation of removal regardless of whether it included date and time of hearing.

The petitioner, who arrived in the United States in April 1997, was served with an NTA on April 7, 2005. That NTA stated *inter alia*, that the removal hearing would be held "on a date to be set at a time to be set." On April 14, 2005, petitioner received a hearing notice providing him with the date and time of his hearing, which he attended on April 20, 2005. On August 24, 2011, petitioner applied for cancellation of removal. The IJ found that petitioner was statutorily ineligible for cancellation of removal because only eight years had elapsed between his arrival in the United States (in 1997) and service of the NTA (in 2005). Relying on *Camarillo*, the BIA affirmed.

Before the Ninth Circuit, petitioner argued that he had accrued continuous physical presence until at least 2008, when a corrected NTA was served, or until 2011, when he applied for cancellation. The court found that the statute was susceptible to various interpretations and therefore under *Chevron* step one, the statute was ambiguous. The court then determined that the BIA in *Camarillo* had identified a number of



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reasons for its holding that service of the NTA triggers the stop-time rule even if the NTA does not include the date and location of the hearing and found that its construction of the statute was reasonable. Applying the BIA's interpretation, the court held that petitioner accrued only eight of the requisite ten years of physical presence at the time he was served with the notice and was therefore ineligible for relief.

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■ Ninth Circuit Holds 18 U.S.C. § 16(b) is Void for Vagueness

In ***Dimaya v. Lynch***, 803 F.3d 1110 (9th Cir. 2015) (*Reinhardt*, Wardlaw, Callahan), the Ninth Circuit held that 18 U.S.C. § 16(b) (incorporated into INA § 101(a)(43)(F)'s definition of a crime of violence), is unconstitutionally vague.

The petitioner, a citizen of the Philippines, was admitted to the United States in 1992 as an LPR. In both 2007 and 2009, petitioner was convicted of first-degree residential burglary under California Penal Code § 459 and sentenced each time to two years in prison. DHS charged that petitioner was removable because he had been convicted of a "crime of violence … for which the term of imprisonment [was] at least one year"-- an aggravated felony under § 101(a)(43)(F). The IJ and on appeal the BIA concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force," and therefore petitioner was convicted of a crime of violence.

"As with ACCA, § 16(b) … requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,' " not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. "

The court determined that § 16 (b)'s language has the same indeterminacy as the Armed Career Criminal Act's "residual clause" definition of a violent felony in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, said the court, the Supreme Court held that ACCA's residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" by "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." "As with ACCA, § 16(b) (as incorporated in 8 U.S.C. § 1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,' " not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson*, these uncertainties render the INA provision unconstitutionally vague," explained the court.

Judge Callahan, in a dissenting opinion, disagreed with the majority's interpretation of the Supreme Court decision in *Johnson*, writing that, that ruling "does not infect 18 U.S.C. § 16(b)—or other statutes—with unconstitutional vagueness." "The Supreme Court will be surprised to learn that its opinion in *Johnson* rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal* [543 U.S. 1 (2004)] (stating in *dicta* that burglary is the "classic example" of an offense that would satisfy § 16(b)), and specifically concluded with the statement limiting its potential scope. I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit."

The court also reaffirmed that a noncitizen may bring a vagueness challenge to the definition of a crime of violence

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TENTH CIRCUIT

■ Tenth Circuit Holds that Agency Precedent Does Not Retroactively Bar Adjustment of Status

In ***Robles v. Lynch***, 803 F.3d 1165 (10th Cir. 2015) (Tymkovich, *Gorsuch*, Holmes), the Tenth Circuit joined other circuits that have suggested that "a new agency rule announced in a *Chevron* step two/ *Brand X* adjudication should be treated 'no different[ly] from a new agency rule announced by notice-and-comment rulemaking … for purposes of retroactivity analysis.'" Here the BIA had found petitioner ineligible for adjustment of status based on its decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). According to the court, *Briones* represented a quasi-legislative announcement of a new rule of general applicability that effectively overruled circuit precedent and therefore did not apply retroactively to bar petitioner's application for adjustment of status.

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DISTRICT COURTS

■ Western District of Washington Denies Temporary Restraining Order in Putative Class Action by Alien Workers Challenging Revised October Visa Bulletin

In ***Mehta v. Department of State*** (W.D. Wash. October 7, 2015)

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(Martinez, J.), the District Court for the Western District of Washington, in an order reported at 2015 WL 5839435, denied a temporary restraining order sought by a putative class of alien workers allegedly affected by a revision of the October Visa Bulletin. Plaintiffs sought an order requiring U.S. Citizenship and Immigration Services to accept adjustment of status applications for EB-2 alien workers from China and India under the superseded bulletin. The court concluded that plaintiffs failed to show likely success on claims that rescission of the superseded bulletin violated the Administrative Procedure Act or that a visa bulletin change could violate due process. Plaintiffs also failed to show irreparable harm or that an injunction would be in the public interest.

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■ **Prior Petition Denial After Fraud Was Revealed Supported Later Petition Denial Based on Marriage-Fraud Bar**

In *Patel v. Johnson*, (C.D. Cal. October 7, 2015) (Carter, J.), the District Court for the Central District of California granted the government's motion for summary judgment, affirming the denial of a visa petition based on the alien's prior fraudulent marriage. The court held that the BIA's adverse credibility determination against the alien was reasonable, and substantial evidence supported the decision. The court rejected plaintiffs' claim that, prior to denying the second wife's visa petition based on prior marriage fraud, USCIS had to notify the first wife and offer her an opportunity to rebut even though she had abandoned her own petition for the alien. Applying the marriage fraud bar did not violate the first wife's due process rights because agency regulations do not require notice to a prior petitioner.

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■ **Western District of Missouri Affirms H-1B Petition Denial Concluding that the Proffered Accountant Position Did Not Qualify as a Specialty Occupation**

In *Engaged in Life v. Jeh Johnson* (W.D.Mo. October 13, 2015) (Whipple, D.), the Western District of Missouri affirmed USCIS's denial of an H-1B petition. The court affirmed that the job at issue was a non-specialty occupation Bookkeeper, Accounting, and Auditing Clerk position and not a specialty occupation Accounting position. The court rejected plaintiffs' argument that an Accountant position never requires a Bachelor's degree. Finally, the court determined that a labor certification issued by the DOL is not a determination by DOL that the position is a specialty occupation; DOL determines wage issues while USCIS determines whether a position qualifies as a specialty occupation.

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

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

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New Attorneys Join OIL

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clerked for the Honorable Mark Recktenwald, Chief Justice of the Hawaii Supreme Court.

Kathleen Kelly Volkert is a former OIL trial attorney and is excited to return. She began her legal career as a U.S. Navy JAG Officer, where she served as a defense attorney and legal assistance attorney at Naval Air Station Pensacola, Florida. Her follow-on tour was as an administrative law attorney in the Office of the Judge Advocate General in Washington, D.C. Upon leaving active-duty, Kathleen accepted the position of trial attorney at OIL from 2007-2010. During her time away from OIL, Kathleen served as a consultant for PASSUR Aerospace, Inc., an aviation intelligence company. She is a graduate of Arizona State University (B.A.) and Albany Law School (J.D.).

Sarah E. Witri spent the past two years working as a JLC at the Chicago Immigration Court. Previously, she litigated protective order cases in Baltimore as a Staff Attorney at the House of Ruth on a Venable Access to Justice Fellowship. During law school, she was an intern at the Baltimore Immigration Court and the ICE Office of Chief Counsel. She received her B.A. in International Relations from Wheaton College in Massachusetts and her J.D. from the University of Baltimore.

New Attorneys Join OIL

Lindsay Dunn received both her undergraduate and law degrees from Columbia University. During her time at Columbia, she completed a study abroad program in literary theory at New College at Oxford University and was also a human rights fellow at the Legal Resources Centre in Durban, South Africa. Immediately prior to joining the Department of Justice, she was an associate at the New York offices of Cleary Gottlieb Steen & Hamilton LLP, where she also served as an extern in not-for-profit law at Lawyers Alliance for New York. From 2012-2014, she was an AUSA in her hometown of Indianapolis, Indiana, before returning to the East Coast to join OIL. She also serves as a member of the creative development team of an emerging "green" Union for Ethical Biotrade member company focused on economic development and environmental conservation efforts in rural Mozambique.

Elizabeth Fitzgerald-Sambou received her B.A. in 2010 from New York University and her J.D. in 2013 from St. John's University School of Law. She joins OIL after working for two years as a law clerk at the Miami Immigration Court. Prior to that, she interned at UNICEF Mozambique and participated in her law school's Refugee and Immigrant Rights Clinic at Catholic Charities.

Christina P. Greer received her B.A. in 2005 from The University of Memphis and her J.D. in 2013 from Case Western Reserve University School of Law. She spent the last two years working as an Attorney Advisor with the Cleveland Immigration Court. As a law student, Christina interned at the Cleveland Immigration Court and was a summer law intern at EOIR's Office of General Counsel. She also worked for a business immigration firm and an immigration firm that specialized in removal defense. Prior to law school, Christina was a middle and high school Spanish teacher and worked as a paralegal for an immigration attorney whose practice focused on family-based immigration.

Saad Gul was a technology consultant with Cambridge Technology Partners in his pre-law life . Saad obtained his BA from Davidson College, and his JD cum laude from Wake Forest University. After Wake Forest, Saad clerked for Chief Judge John C. Martin of the North Carolina Court of Appeals, and Justice Patricia Timmons-Goodson of the North Carolina Supreme Court. Prior to OIL, Saad worked with Steptoe & Johnson LLP and Saul Ewing LLP in their Washington offices.

Maarja Tiganik Luhtaru received both her J.D. (2013) and her B.A. (2010) from University of California, Los Angeles. She joined OIL after working for two years as an Attorney Advisor with the Los Angeles Immigration Court. She also interned at the Los Angeles Immigration Court during law school.

Vanessa Otero is a former OIL trial attorney (2006-2009) and she is pleased to return to the office. She recently completed her LL.M. in Public International Law at Leiden University in the Netherlands and subsequently worked for the International Criminal Tribunal for Rwanda in the Hague. Prior to that, she clerked for the Hon. Chris McAliley at the U.S. District Court in Miami. She received her J.D. from Loyola University New Orleans and her B.A. from the University of Miami.

Greg Pennington received his B.A. from the University of South Florida and his J.D. from West Virginia University. Following law school, Greg worked as a law clerk in the United States District Court for the Northern District of West Virginia, and as an Attorney Advisor for the Harlingen and Port Isabel Immigration Courts.

Sarah Pergolizzi has twice interned with OIL (summers of '11 and '12) and is very happy to have "boomeranged" her way back. She spent her last two years as an Attorney Advisor in the El Paso Immigration Court. She received her B.A. (2010) and J.D. (2013) from the University of Virginia.

Sergio Sarkany hails from California, where he received his B.A. in 1996 from U.C. Berkeley and his J.D. from The University of San Francisco in 2002. Sergio spent most of legal career as a judge advocate with the U.S. Navy, where he practiced as a criminal and civil trial attorney, as well as an appellate advocate. Before coming to OIL, Sergio acted as a counsel on the U.S. Senate Judiciary Committee, with emphasis in criminal and terrorism-related issues

Stratton Christopher Strand joined OIL after working in the Appellate Division of the U.S. Attorney's Office for the District of Columbia. Stratton received his J.D. from the University of California, Los Angeles, and his B.A. from Dartmouth College.

Steven Uejio is a graduate of Claremont McKenna College and the University of California, Hastings College of the Law. After law school, he clerked for the Hon. Melvin Brunetti of the Ninth Circuit before joining the Appellate Section of the Tax Division through the Attorney General's Honors Program. Most recently, Steven

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Front: ***Dave McConnell (OIL Director), Sarah Pergolizzi, Elizabeth Fitgerald-Sambou, Sergio Sarkany, Kathleen Volkert, Stratton Strand;*** **Back:** ***Saad Gul, Greg Pennington, Sarah Witri, Maarja Luhtaru, Lindsay Dunn, Steven Uejio.*** ***(Bios on page 9)***

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

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