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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

"Escapee Mexican Child Laborers" Is Not A Cognizable Particular Social Group

In ***Gonzalez Cano v. Lynch,*** 809 F.3d 1056 (8th Cir. 2016) (Riley, Beam, Kelly), the Eighth Circuit upheld the BIA's decision that an applicant for withholding of removal failed to show that escaped Mexican child laborers are a "socially distinct" particular social group, or perceived as a cohesive group by society.

Petitioner's claim for withholding of removal was based on harm he suffered at the hands of a drug cartel in Mexico. When he was twelve years old he was kidnapped by cartel members and taken to a labor camp, where he and other captives were held and forced to work growing marijuana and other drug plants. Petitioner was held captive for five years until sometime in 2000 when a military group rescued him. Petitioner then spent several months in Mexico City after he was freed and eventually fled Mexico for the United States.

The IJ and BIA denied the request for withholding concluding that petitioner's claimed social group "escapee Mexican child laborers." was not socially distinct, and that he also failed to establish that the persecution he suffered was on account of his membership in that group.

In upholding the BIA's decision that "escapees Mexican child laborers" was not a particular social group, the court held that evidence that other people had suffered same type of harm as petitioner was by itself insufficient to establish that member of the group are "perceived as a cohesive

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Revocation Of Approved I-140 Visa Petition Not Subject To Review Under INA § 242(a)(2)(B)(ii)

In ***Bernardo v. Johnson***, __F.3d__, 2016 WL 378918 (1st Cir. January 29, 2016) (Lynch, Howard, Lipez), the First Circuit affirmed the dismissal, on jurisdictional grounds, of a challenge to USCIS's revocation of an approved employment-based immigrant visa petition.

The petitioner, M & K Engineering, Inc. ("M & K"), filed on February 11, 2004, an Application for Employment Certification for Samuel Freitas to work as an Assistant Delivery Supervisor. After the DOL granted the certification on October 11, 2006, M & K filed an I–140 Immigrant Petition for Alien Worker for Freitas. USCIS initially approved the visa petition on March 13, 2007. However, on September 22, 2010, the Director of the USCIS Texas Service Center issued a Notice of Intent to Revoke ("NOIR"). On November 15, 2010, the Director of the USCIS Texas Service Center issued a decision revoking the approval of the visa petition because the beneficiary had not met the minimum experience

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Court Lacks Jurisdiction to Review Revocation of Approved I-140

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requirements and because of inconsistencies in the evidence. That decision was affirmed by the AAO on June 28, 2013.

M & K filed a complaint with the district court but on November 12, 2013, the Administrative Appeals Office (AAO) withdrew its decision and reopened the matter *sua sponte*. The AAO requested additional evidence, which M & K provided. After considering the evidence, on February 28, 2014, the AAO dismissed the appeal, finding again that there were inconsistencies in the evidence, and that M & K had failed to prove that Freitas had the necessary work experience. M & K filed a complaint and on December 8, 2014, the district court granted the government's motion to dismiss the case for lack of subject matter jurisdiction.

The majority rejected petitioner's view that that the statutory language "good and sufficient cause" imposes a non-discretionary legal standard that is subject to judicial review.

On appeal to the First Circuit, petitioner argued that the court had the jurisdiction to consider the visa revocation under, inter alia, § 702 of the APA. The court noted, however, that § 701 of the APA "withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review.' Here, the "unambiguous language" of INA § 242 (a)(2)(B)(ii) withdraws judicial review from decisions 'the authority for which is specified ... to be in the discretion of the . . . Secretary of Homeland Security.'" The majority reasoned, joining most circuits that have addressed the issue, that the words "may," "at any time," and "for what he deems to be good and sufficient cause" in INA § 245 indicate that the decision to revoke the approval of a visa petition is a "decision or action . . . the authority for which is specified under this subchapter to be in the discretion of the . . . Secretary of Homeland Security" under INA § 242(a)(2)(B)(ii).

The majority rejected petitioner's view that that the statutory language "good and sufficient cause" imposes a non-discretionary legal standard that is subject to judicial review, and that Congress intended to incorporate its supposedly well-established meaning into § 245 when it reenacted the statute.

Judge Lipez wrote a lengthy dissent disagreeing with the majority's analysis. In his view, "the Secretary's visa revocation decision is subject to judicial review because the text of the pertinent statutes, the nature of the visa revocation decisions, and the overall statutory scheme do not rebut the presumption of judicial review applicable to immigration statutes."

Contact: Aaron S. Goldsmith, OIL-DCS
☎ 202-532-4107

"Escapee Mexican Child Laborers" not a PSG

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group by society." The court explained that "[s]uch a conclusion would require, for example, evidence that Mexican society 'recognizes the need to offer protection' to persons who have suffered this type of persecution, evidence that this group is commonly understood to suffer persecution with relative impunity, or evidence that members of the group are readily identifiable when their defining characteristics are known."

The court also held that petitioner failed to show a causal nexus between group membership and the harm suffered. The court explained that "among other causation problems, the most severe harm [petitioner] suffered—abduction and forced labor—are the characteristics that define his proposed particular social group. As such, his membership in that group could not have been the motive, at least initially, for the persecution."

Finally, the court said it was not necessary to reach the question of whether the Mexican government is unable or unwilling to control petitioner's persecutors, or consider the question of internal relocation or of changed circumstances.

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

NOTED

■ DHS has extended **Sudan's** designation for **Temporary Protected Status** (for an additional 18 months due to the ongoing armed conflict and extraordinary and temporary conditions in Sudan that prevent its nationals from safely returning. The extended designation is effective May 3, 2016, through November 2, 2017.

■ DHS has redesignated **South Sudan** for **TPS** and extended the existing TPS designation for that country from May 3, 2016, through November 2, 2017, due to the ongoing armed conflict and extraordinary and temporary conditions in South Sudan that prevent its nationals from safely returning.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Aggravated Felony

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

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

Jurisdiction
Injunction Against Executive Action

On January 19, 2016, the Supreme Court granted the government's petition for a writ of certiorari in United States, in ***United States, et al. v. Texas, et al.*** (SCt No. 15-674), challenging the November 9, 2015 decision by the Fifth Circuit, 805 F.3d 653, affirming the injunction entered by a district court against the implementation of DHS's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and the expansion of Deferred Action for Childhood Arrivals (DACA) program. The court held that "[a]t least one state" - Texas - had Article III standing and a justiciable cause of action under the APA, and that respondents were substantially likely to establish that notice-and-comment rulemaking was required. The petition for certiorari (available at 2015 WL 7308179) argues, *inter alia*, that the court's merits rulings warrant review because they strip DHS of authority it has long exercised to provide deferred action, including work authorization, to categories of aliens. The parties' motion to exceed the word limitations was granted. The government merits brief is due March 4, 2016.

Civil Division Contact: Adam Jed, Counsel to the AAG

Expedited Removal
Right to Counsel

On December 4, 2015, the Ninth Circuit *sua sponte* requested views from the government and amici on whether it should rehear *en banc* its September 28, 2015 published decision in ***Pena v. Lynch***, 804 F.3d 1258, which held that the court lacks jurisdiction to review the procedural due process claim of the alien who placed in expedited removal and ordered removed that he did not knowingly and voluntarily waived right to counsel. The panel held that the statute does not deprive the alien of any forum to challenge his expedited removal proceedings, and although the available avenues of review provide no relief for the alien in the administrative context, the fact remains that avenues of review exist. On December 18, 2015, the government and amici filed responses. The government recommended against rehearing en banc because the panel decision was correct and the case implicated no conflict with the precedent decisions of the circuit or any other circuits. On February 1, 2016, the panel amended its opinion to clarify that colorable constitutional claims may be raised but Pena had not raised any and that the statute retains some avenues of limited judicial review.

OIL Contact: Papu Sandhu
☎ 202-616-9357

Conviction
Inconclusive Record

On February 3, 2016, a First Circuit panel, over government opposition, granted panel rehearing and ordered that its original opinion in ***Sauceda v. Lynch***, formerly at 804 F.3d 101, no longer be cited. In its request for views on rehearing, the panel ordered the parties to address five questions: Are all available *Shepard* documents in the record? May the IJ consider non-*Shepard* documents to determine if the alien met the burden? Does the government have a burden of production? If the record is inconclusive, does the *Moncrieffe* presumption apply? Should the case be remanded for the BIA to decide the effect of *Descamps* and *Moncrieffe* on the alien's burden to prove eligibility for discretionary relief? Oral argument is set for April 5, 2016.

Contact: Patrick Glen
☎ 202-305-7232

Crime of Violence

On February 9, 2016, the First Circuit ordered a response by the alien to the government rehearing petition challenging the published opinion in ***Whyte v. Lynch***, 807 F.3d 463, which held that the alien's Connecticut conviction for third-degree assault was not "aggravated felony." The rehearing petition argued that the Connecticut assault statute for intentionally causing physical injury (impairment of physical condition or pain) is a categorical match to the element of use of physical force against the person of another 18 U.S.C. § 16(a) (crime of violence). The court ordered that the parties address at least whether intentionally withholding medicine would violate Conn. Gen. Stat. 53a-61(a)(1), and if so, whether such withholding is a use of "violent" force under *Johnson v. U.S.*, 559 U.S. 133.

Contact: Bryan Beier
☎ 202-514-4115

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

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds No Abuse of Discretion in Denying Motion to Reconsider Where the Motion Sought to Raise a New Particular Social Group

In ***Hurtado v. Lynch***, 810 F.3d 91 (1st Cir. 2016) (*Lynch*, Stahl, Barron), the First Circuit held that the BIA did not abuse its discretion in denying petitioner's timely motion to reconsider the denial of withholding of removal.

The petitioner, Hurtado, a citizen of Honduras, was issued an NTA in 2009. He conceded removability and sought withholding of removal. He claimed fear of persecution based on his membership in a particular social group. In particular, Hurtado wrote in his application that he was pressured to join a gang "since [his] father had cars and [he] could use the cars to go around the country robbing and assaulting people with them." He wrote that he "fear[s] harm and mistreatment because [he] do[es] not want to belong to any gangs and [he] fear[s] that [he] will be harassed by gang members to join them if [he] return[s] to Honduras."

The IJ denied withholding finding *inter alia*, that Hurtado had not identified with particularity a social group and concluded that he did not demonstrate that it was more likely than not that his life or freedom would be threatened on the basis of being a member in a particular social group. On appeal to the BIA, Hurtado argued that he would be persecuted on account of having been a member of a group that oppose gang membership. The BIA agreed with IJ and dismissed the appeal.

Hurtado did not seek review of that decision, but filed instead a motion to reconsider. In his motion he argued that the BIA failed to examine the record and that his "testimony clearly stipulates to the fact that his family falls under the social group classification of business-owners and consequently, considered as a wealthy social group." The BIA denied the motion because Hurtado's claims were not raised in his appeal to the BIA or explicitly before the IJ, and so were beyond the scope of his motion to reconsider.

"The alien, not the Government, bears 'the initial burden of production of evidence' that he is eligible for discretionary relief."

The First Circuit agreed with the BIA that petitioner's new arguments "were previously available but not previously asserted," and therefore "the BIA did not abuse its discretion in denying his motion."

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

FIFTH CIRCUIT

Fifth Circuit Holds Alien's Submission of Inconclusive Record of Conviction Did Not Establish Eligibility for Adjustment of Status

In ***Le v. Lynch***, __F.3d__ (5th Cir. 2016) (*Stewart*, Clement, Elrod), the Fifth Circuit joined the majority of circuits in holding that an inconclusive record of conviction for a potentially disqualifying criminal offense cannot satisfy an applicant's burden of proving eligibility for discretionary relief.

The petitioner, Le, entered Canada as a refugee in 1978 and was subsequently convicted of two separate criminal offenses including a controlled substance offense in 1991. In 2002, Le was admitted to the United States on a thirty-day visitor's visa. In May of that same year, he was granted a nonimmigrant waiver of inadmissibility for one year through 2003. His wife, Thu Van Nguyen, became a naturalized United States citizen in 2005 and filed an "immediate relative" visa petition on Le's behalf in 2008. Le then applied for adjustment based on Nguyen's approved immediate relative visa petition. In his application, Le indicated that he was previously "arrested, cited, charged, indicted, fined, or imprisoned for breaking a[ ] law or ordinance" and that he was not pardoned for that offense. He attached a description of his criminal history that only listed his 1998 offense. USCIS denied the application for adjustment and commenced removability proceedings in 2009 for overstaying his visa.

At his removal hearing Le indicated his intention to apply for adjustment of status, but the IJ determined that Le was statutorily ineligible for adjustment because he did not meet "his burden of proof to show he was not convicted of an offense relating to a controlled substance." On appeal, the BIA affirmed the IJ noting ample evidence in the record to support finding a potentially disqualifying drug conviction. The BIA also determined that Le was not relieved of his burden of proof by asserting that the relevant records concerning his 1991 conviction no longer existed. Subsequently the BIA also denied Le's motion for reconsideration.

The court initially explained that in removal proceedings "the alien, not the Government, bears 'the initial burden of production of evidence' that he is eligible for discretionary relief." To meet his burden, Le was required to first identify the statute under which his criminal offense arose. The court noted that there

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was no evidence demonstrating whether he was convicted under a Canadian federal statute, a provincial law, or even a Toronto city ordinance. Moreover, the court found Le failed to show that his controlled substance offense did not "make it" a controlled substance offense under INA § 212 (a)(2)(A)(i)(II). This "inconclusive record of conviction is insufficient to meet his initial burden of demonstrating eligibility," said the court.

The court also found no abuse in the BIA's denial of the Le motion for reconsideration because Le had not established that he is admissible to the United States for permanent residence.

Contact: Jesse Matthew Bless, OIL
☎ 202-305-2028

SIXTH CIRCUIT

■ **Sixth Circuit Holds Substantial Evidence Supports Determination that Alien Failed to Establish Social Distinction of Group of Former Long-Term Gang Members**

In ***Zaldana Menijar v. Lynch***, __F.3d__, 2015 WL 9871351 (6th Cir. December 28, 2015) (*McKeague,* Batchelder, Stranch), the Sixth Circuit held that substantial evidence supported the BIA's determination that "El Salvadoran male youth, who were forced to actively participate in violent gang activities for the majority of their youth and who refused to comply with demands to show their loyalty through increasing violence," or "active and long-term former gang members," lacked the requisite social distinction within Salvadoran society.

The court deferred to the BIA's construction of the term "particular social group" as clarified 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). The court also held that the petitioner failed to establish a nexus between the persecution and his status as a former long-term gang member.

Contact: Sarah Byrd, OIL
☎ 202-305-7658

■ **Sixth Circuit Holds Immigration Judge's "Cherry Picking" of Inconsistencies Does Not Constitute Substantial Evidence Supporting Adverse Credibility Finding**

In ***Marouf v. Lynch***, 811 F.3d 174, (6th Cir. 2016) (*Merritt*, McKeague, White), the Sixth Circuit held that the IJ's adverse credibility finding and denial of asylum to a stateless Christian Palestinian family was not supported by substantial evidence.

The court said that the IJ's decision was insensitive to misunderstandings caused by language barriers, the use of translators, and cultural differences.

The court said that the IJ's decision was insensitive to misunderstandings caused by language barriers, the use of translators, and cultural differences. The court also concluded that the IJ improperly "cherry picked" an inconsistency to support the credibility finding.

Contact: Jamie Dowd, OIL
☎ 202-616-4866

■ **Sixth Circuit Holds Statutory Rape under California Penal Code Section 261.5(c) Categorically Qualifies as "Sexual Abuse of a Minor"**

In ***Esquivel-Quintana v. Lynch***, 810 F.3d 1019 (6th Cir. 2016) (*Boggs*, Cook, Sutton), the Sixth Circuit held that statutory rape under California Penal Code § 261.5(c), which requires an age gap of more than three years between the perpetrator and the victim, categorically qualifies as "sexual abuse of a minor" and an aggravated felony under INA § 101(a)(43)(A).

The court rejected the argument that the rule of lenity should resolve statutory ambiguities in the alien's favor and, instead, held that deference was due to the BIA's precedential opinion in the instant case, *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015), which reasonably interpreted "sexual abuse of a minor" as encompassing state statutory rape offenses involving 16- or 17-year old victims so long as the statute of conviction requires a "meaningful age differential" between the perpetrator and the victim.

Contact: Yedidya Cohen, OIL
☎ 202-532-4880

SEVENTH CIRCUIT

■ **Seventh Circuit Holds that Chinese Asylum Applicant Failed to Adequately Corroborate His Claim and Failed to Show a Nexus to Political Opinion**

In ***Chen v. Lynch***, 810 F.3d 466 (7th Cir. 2016) (*Kanne*, Rovner, Sykes), the Seventh Circuit held that substantial evidence supported the agency's finding that the petitioner, a Chinese asylum applicant who claimed to have been persecuted after protesting the seizure of his land, failed to adequately corroborate his claim.

The petitioner entered the United States in November 2005, following a claimed land dispute with the Chinese government. Earlier that year, the Chinese government decided to appropriate the land of about 300 farmers including that of petitioner. Petitioner and the farmers

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protested the land appropriation and improper compensation. Although petitioner was going to be compensated he claimed that he was entitled twice the amount in compensation. As a result petitioner and twenty other farmers were detained by the police. Petitioner was jailed for four days, mistreated, and beaten. Petitioner was released when he and his wife signed the land-transfer agreement. Petitioner then obtained a visa to travel to the United States claiming that he was a sales manager who wanted to learn about American production technology. The record indicated that he had already obtained a passport on May 19, 2005, just prior to the land dispute with the government.

The court rejected petitioner's claim that because the Chinese government controls everything in China and excludes its citizens from the decision and political process, every confrontation between the Chinese government and Chinese citizens "assumes a political significance."

On September 8, 2006, petitioner filed an affirmative asylum application. When that was not granted he was placed in removal proceedings where he renewed his claims for asylum, withholding, and CAT. The IJ determined that petitioner's testimony was credible but not detailed or persuasive enough without corroboration to meet his burden of proof. Alternatively, the IJ concluded that petitioner had not suffered harm rising to the level of past persecution, that he had not demonstrated that any harm he suffered was on account of a political opinion, and had failed to establish a well-founded fear of persecution. The IJ also denied withholding of removal and CAT protection because they required a higher burden of proof than asylum. The BIA affirmed the IJ's decision on the basis that findings of fact were not "clearly erroneous."

The Seventh Circuit agreed with the IJ's finding that petitioner had failed to adequately explain his lack of corroborating evidence, especially given that his wife continues to live in China. "Consequently, his failure to produce such evidence when required is fatal to his asylum claim," said the court. The court further held that substantial evidence supported the IJ's alternate finding that petitioner was not persecuted on account of his political opinion, explaining "there is no record evidence indicating that [petitioner] articulated any political opinion, belonged to any political organizations, or participated in any political activities."

The court rejected petitioner's claim that because the Chinese government controls everything in China and excludes its citizens from the decision and political process, every confrontation between the Chinese government and Chinese citizens "assumes a political significance." The court said that that there was "no support for his characterization of the Chinese political climate, nor does he provide adequate justification for such a broad interpretation of 'on account of a political opinion' in China, a view that would greatly enlarge the scope of asylum eligibility for applicants from that country."

Contact: Drew Brinkman, OIL
☎ 202-305-7035

■ **Seventh Circuit Holds that the Burden of Proof for Withholding of Removal Is Not Clear Probability**

In ***Gutierrez-Rostran v. Lynch***, 810 F.3d 497 (7th Cir. 2016) (Bauer, Hamilton, *Posner*), the Seventh Circuit held that the agency should have explained why it ignored or discounted certain evidence in the record in determining that petitioner, a citizen of Nicaragua, had not met his burden of proving a clear probability of future harm. In doing so, the court stated that Supreme Court precedent establishing that the proper burden of proof is "more likely than not" cannot be read literally, and should rather be understood to mean something akin to "reasonable probability."

Contact: Allison Frayer, OIL
☎ 202-532-4518

■ **Seventh Circuit Holds Alien's Drug Offense Terminated Accrual of Time for Cancellation of Removal**

In ***Isunza v. Lynch***, 809 F.3d 971 (7th Cir. 2016) (Rovner, Williams, *Shah* (N.D. Ill.)), the Seventh Circuit held that it lacked jurisdiction to review the underlying BIA order, and denied the petition for review concerning the motion to reconsider, finding that the BIA properly determined that the alien's conviction for a drug offense in 1998 stopped the accrual of his continuous residency for cancellation of removal, and not his subsequent return to the United States in 2000.

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

■ **Seventh Circuit Denies Withholding of Removal and CAT Protection Because Alien's Conviction Was Aggravated Felony and Particularly Serious Crime and Alien Lacked Evidence to Demonstrate Likelihood of Torture**

In ***Lopez v. Lynch***, 810 F.3d 484 (7th Cir. 2016) (*Bauer*, Flaum, Manion), the Seventh Circuit held alien's Indiana conviction for dealing over three grams of cocaine constituted an aggravated felony and, because his sentence was more than five years, his conviction was also a particularly serious crime under the modified categorical approach. Additionally, the court held substantial evidence supported the conclusion that petitioner failed to show that it was more likely than not that he would be subjected to torture if returned to

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Mexico. The court also held remand was unnecessary concerning the BIA's particularly serious crime analysis because of the futility doctrine.

Contact: Mona Yousif, OIL
☎ 202-616-4287

■ **Seventh Circuit Holds it Lacks Jurisdiction to Review Particularly Serious Crime Determination and Concludes BIA Exceeded Scope of Review in Reversing Grant of Deferral under CAT**

In *Estrada-Martinez v. Lynch*, 809 F.3d 886 (7th Cir. 2015) (Manion, Rovner, *Hamilton*), the Seventh Circuit reaffirmed that it lacks jurisdiction to review the agency's determination that a crime is "particularly serious."

The court concluded that the BIA legally erred in reversing the prior grant of deferral of removal under CAT to the Honduran alien when it identified only one factual finding as clearly erroneous and otherwise impermissibly reweighed the facts. Although the court observed that the remaining facts were undisputed, it remanded in part to allow the BIA to correctly apply the clearly erroneous standard of review.

Contact: Jocelyn Wright, OIL
☎ 202-616-4868

EIGHTH CIRCUIT

■ **Eighth Circuit Holds that Solicitation of Prostitution is a Crime Involving Moral Turpitude**

In *Gomez-Gutierrez v. Lynch*, __F.3d__, 2016 WL 279261 (8th Cir. January 29, 2016) (*Riley,* Smith, Shepherd), the Eighth Circuit held that the petitioner failed to establish a realistic probability that Minnesota would apply Minn. Stat. Section 609.324, subd. 2 (2006) to circumstances that do not involve moral turpitude.

The court held that the BIA did not err in determining that petitioner's solicitation conviction involved a crime of moral turpitude, and did not abuse its discretion in denying petitioner's motion to reopen or reconsider. The court concluded that the BIA "thoughtfully considered [petitioner's] arguments and evidence, gave a rational explanation for its denial and provided sufficient analysis to allow meaningful review."

The BIA "thoughtfully considered [petitioner's] arguments and evidence, gave a rational explanation for its denial and provided sufficient analysis to allow meaningful review."

Contact: Nicole N. Murley, OIL-DCS
☎ 202-616-0473

■ **Eighth Circuit Holds Substantial Evidence Supports Denial of Asylum Because the Applicant's Fear of Harm in Nicaragua for Seeking Justice for His Brother's Death at the Hands of the Police is Not Objectively Reasonable**

In *Castillo v. Lynch*, 809 F.3d 449 (8th Cir. 2016) (Murphy, Melloy, *Smith*), the Eighth Circuit upheld the BIA's determination that petitioner's fear of future harm by the Nicaraguan police for seeking justice for his brother's death at the hands of a police officer was speculative, and therefore not objectively reasonable.

Petitioner claimed that his brother had been murdered by the police and one of the officers threatened petitioner's friend that "something might happen to him" if he told anyone what he saw.

Contact: Elizabeth Chapman, OIL
☎ 202-630-0101

■ **Eighth Circuit Holds Alien Did Not Present New and Previously Unavailable Evidence in Support of Motion to Reopen**

In *Makundi v. Lynch*, 809 F.3d 1023 (8th Cir. 2016) (Riley, *Bye*, Gruender), the Eighth Circuit held that an alien failed to support his motion to reopen with new and previously unavailable evidence because the materials he presented were previously in his possession and not recovered from his prior attorney, who had been disbarred. The court held that the BIA's decision was "rational and in accordance with the record."

Contact: Robert Michael Stalzer, OIL
☎ 202-532-4598

■ **Eighth Circuit Holds that It Lacks Jurisdiction to Review Discretionary Denial of Adjustment of Status Based on Marriage Fraud Notwithstanding Approved VAWA Self-Petition**

In *Mutie-Timothy v. Lynch*, __F.3d__, 2016 WL 336202 (8th Cir. January 28, 2016) (*Wollman*, Beam, Gruender), the Eighth Circuit held that it lacks jurisdiction to review the agency's discretionary denial of an alien's adjustment of status application. The court determined that the agency had made a discretionary determination when it concluded the petitioner committed marriage fraud and was not credible and was not entitled to adjustment of status merely because she had an approved Violence Against Women Act (VAWA) petition. The court reasoned that the alien's argument that the IJ had committed legal error

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in concluding that she was not a legitimate beneficiary under the VAWA despite her approved VAWA petition mischaracterized the immigration judge's treatment of the approval of that petition, and did not present a claim of legal error in the agency decision.

Contact: Elizabeth Kurlan, OIL-DCS
☎ 415-871-6455

■ **Eighth Circuit Holds that Substantial Evidence Supports Agency Finding that Alien Who Checked the "Citizen or National" Block on I-9 Form Was Making False Claim of Citizenship**

In ***Godfrey v. Lynch***, __F.3d__, 2016 WL 279261 (8th Cir. January 22, 2016) (Riley, *Bye,* Gruender), the Eighth Circuit held that despite the IJ's finding that the petitioner was generally credible testifying that he did not know what "national" meant, the other record evidence supported the IJ's finding that the petitioner was making a false claim of citizenship when he checked the "citizen or national" block on his I-9 Form.

The petitioner, Munna Godfrey, is a 36–year–old native of Tanzania who came to the United States in May 2002 with an F-1 visa to attend Wichita State University. Months later he dropped out of Wichita State, but he remained in the United States. In 2004 he married Traci Godfrey, with whom he has one biological son and four step-children. After dropping out of Wichita State, Godfrey attended other colleges and worked at a supermarket and College Hill Nursing and Rehabilitation Center. Each employer required Godfrey to fill out an I–9 Employment Eligibility Verification form, and each time he filled out the form, Godfrey checked a box indicating he was "a citizen or national of the United States."

In December 2005, Traci Godfrey filed an I–130 on behalf of her husband, which was approved in September 2006. Godfrey then applied to the USCIS to adjust his status. However, USCIS denied the application in October 2006 because Godfrey admitted he had falsely represented that he was a United States citizen when he applied to a community college. On April 17, 2009, USCIS served Godfrey with a NTA, which charged him with violating the terms of his student visa. Godfrey conceded he was removable, but requested a hearing on his application for adjustment.

Petitioner knew the difference between a citizen and a national, and represented himself as a citizen because he believed he needed to be a citizen to keep his job.

Before an IJ Godfrey testified that when he filled out the I–9 forms he hoped his employer would believe he was a United States citizen because he would not have a job if his employer found out he was not a United States citizen. The IJ found Godfrey's testimony credible, but also found Godfrey had falsely represented himself to be a citizen, not a national, on the I–9 Form, a non-waivable violation under INA § 212(a)(6)(C)(ii)(I). The BIA adopted and affirmed the IJ's decision. Godfrey filed a petition for review and then successfully argued that his case be remanded to the BIA to determine whether an I–9 could be used as evidence in a removal proceeding.

While the case was pending on remand, the Eight Circuit held in *Downs v. Holder*, 758 F.3d 994, 998 (8th Cir. 2014), that an I–9 could be used as evidence in a removal proceeding, and the BIA subsequently issued a decision with the same holding. *Matter of Bett*, 26 I&N Dec. 437 (BIA 2014). Citing these two cases, the BIA held in Godfrey's case that the IJ properly considered the I–9 forms, and it dismissed Godfrey's appeal. Petitioner then again filed a petition for review.

The court held that, based on Godfrey's testimony, his prior false claims of citizenship, and the false claim of citizenship he made after removal proceedings commenced, the BIA's and IJ's finding that Godfrey falsely represented himself to be a "citizen" was supported by substantial evidence. The court noted that the evidence showed Godfrey knew the difference between a citizen and a national, and represented himself as a citizen because he believed he needed to be a citizen to keep his job. The court rejected Godfrey's claim that the IJ had violated his right to Due Process when the IJ admitted the I–9 indicating he would grant adjustment pending submission of biometrics. The court explained that the IJ had not concluded Godfrey's proceedings before he admitted the I–9 and that the IJ's decision to admit the I–9 was not a fundamental procedural error.

Contact: Norah Ascoli Schwarz, OIL
☎ 202-616-4888

NINTH CIRCUIT

■ **Ninth Circuit Reaffirms Precedent that BIA's Decision Remanding for Proceedings Related to Voluntary Departure Is a Final Order of Removal**

In ***Mendoza Rizo v. Lynch***, 810 F.3d 688 (9th Cir. 2016) (M.D. Smith, N.R. Smith, *Scheindlin* (S.D.N.Y.)), the Ninth Circuit held that *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (*en banc*), did not disturb the court's precedent set forth in *Pinto v. Holder*, 648

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F.3d 976, 980 (9th Cir. 2011), that a decision of the BIA dismissing an alien's appeal, but remanding for proceedings related to voluntary departure, constitutes a final order of removal. The court reasoned that, when the BIA remands for voluntary departure, "all substantive matters judicially reviewable by this court have been finalized."

Here, the petitioner, a citizen of Nicaragua, claimed persecution on account of his father's murder by Sandinista political opponents in Nicaragua in 2001. The IJ found that petitioner's asylum claim untimely and that he did not have a well-founded fear of persecution, including future persecution. However, petitioner was granted voluntary departure.

On appeal, the BIA determined that petitioner had not meaningfully challenged the IJ's disposition of his asylum claim and rejected petitioner's claim that the aggressive questioning by the IJ had violated his due process rights. The BIA, however, remanded the case to the IJ solely for proceedings related to the granting of voluntary departure

The court agreed that petitioner had not meaningfully challenged the IJ's disposition of his asylum claim on appeal, and therefore had failed to exhaust his asylum claim.

The court also found that the underlying IJ proceeding was not "so fundamentally unfair that the [petitioner] was prevented from reasonably presenting his case."

Contact: Craig Newell, OIL
☎ 202-514-0298

Felony child abuse under California Penal Code § 273a(a) does not constitute a crime of violence under 18 U.S.C. § 16, and therefore is not an aggravated felony under INA § 101(a)(43)(F).

■ **California Penal Code § 273a(a) Is Not a Divisible Statute Because it Provides Alternative Means and Not Alternative Elements for Committing Felony Child Abuse**

In ***Ramirez v. Lynch***, 810 F.3d 1127 (9th Cir. 2016) (Wardlaw, Kennelly, *Paez*), the Ninth Circuit granted the petition for review, concluding that the petitioner's conviction for felony child abuse under California Penal Code § 273a(a) does not constitute a crime of violence under 18 U.S.C. § 16, and therefore is not an aggravated felony under INA § 101(a)(43)(F).

The petitioner, a citizen of El Salvador entered the United States as an LPR in 1992. All of his immediate family members are U.S. citizens. Petitioner graduated from high school in the United States and subsequently enlisted in the U.S. Navy, serving for four years. In February 2000, petitioner was convicted of felony child abuse, in violation of CPC § 273a(a), and was sentenced to 8 years and 4 months of imprisonment. He appealed his conviction, but the California Court of Appeal affirmed. He was subsequently placed in removal proceeding under INA § 237(a)(2)(A)(iii) as an alien convicted of a "crime of violence," under INA § 101(a)(43)(F) and 18 U.S.C. § 16. The BIA concluded that CPC § 273a(a) was divisible and, applying the modified categorical approach, held that petitioner had been convicted of a crime of violence.

The court held that CPC § 273a(a) is broader than the generic federal definition of a crime of violence, but also not a divisible statute subject to the modified categorical analysis because its alternative *mens rea* requirements are not elements, but an alternative means for accomplishing a single indivisible crime.

Contact: Anh-Thu P. Mai-Windle, OIL
☎ 202-353-7835

■ **Ninth Circuit Affirms in Part and Reverses in Part a Challenge to Adam Walsh Act**

In ***Reynolds v. Johnson***, 2015 WL 9584386 (9th Cir. December 31, 2015)(Kozinski, Christen, Hurwitz), the Ninth Circuit, in a unpublished order, affirmed in part and reversed in part an order by the District Court for the Southern District of California dismissing plaintiff's claims for lack of jurisdiction.

Plaintiff challenged USCIS's implementation of a provision of the Adam Walsh Act (AWA) that bars citizens with convictions for specified sex offenses from filing a petition for alien relative (Form I-130) unless USCIS finds in its "sole and unreviewable" discretion that the citizen poses no risk to the alien beneficiary.

In a decision of first impression, the Ninth Circuit concluded that it lacked jurisdiction to review USCIS's risk assessment "because a no-risk determination is committed to the 'sole and unreviewable discretion' of the Secretary of Homeland Security." The court also held that the USCIS's application of the provision to convictions that pre-date the AWA did not violate the Ex Post Facto Clause. However, the court concluded that it had jurisdiction over plaintiff's claim that the application of the AWA unconstitutionally burdens his fundamental right to marry. Accordingly, it remanded case for consideration of the constitutional claim.

Contact: Sarah Wilson, OIL-DCS
☎ 202-532-4700

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TENTH CIRCUIT

■ Tenth Circuit Holds that Petitioner's Testimony Must Be Credible and Persuasive in Light of the Record as a Whole to Establish Continuous Physical Presence

In *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243 (10th Cir. 2016) (*O'Brien*, Bacharach, Phillips), the Tenth Circuit held that petitioner's generally credible testimony as to his date of entry into the United States for purposes of establishing the ten-year continuous physical presence requirement for cancellation of removal was not sufficiently persuasive to establish that he met the requirement.

The petitioner, a Mexican citizen, claimed that he had entered the United States in March 1996. He remembered that date because his wife, who remained in Mexico, was pregnant with the second of their four children at the time. He claimed to have lived in the United States continuously since then, except for a brief, two-month trip back to Mexico in mid–1999 when his wife was ill—after which border patrol twice hindered his reentry. His wife joined him here sometime in 2000.

The petitioner was placed in removal proceedings following a domestic violence incident with his teenage son that led to a simple assault conviction. Petitioner conceded removability but requested cancellation of removal. The IJ found petitioner statutorily ineligible for cancellation because he had not demonstrated a ten-year continuous physical presence in the United States from April 1, 1998, to April 1, 2008; good moral character for that time period; and exceptional and extremely unusual hardship. The IJ also denied voluntary departure. The BIA affirmed the denial of cancellation for failure to establish a ten-year continuous physical presence in the United States, and also affirmed the denial of voluntary departure.

The Tenth Circuit concluded that petitioner had established continuous physical presence in the United States from 1999 to 2008, but that the pre-printed affidavits the alien presented to establish presence before 1999 contained only minimal information about the affiants or petitioner's specific location. The court noted that "all eight affidavits hail from the same template, with three fill-in-the-blanks and three typewritten, boilerplate sentences."

Finally, the court held that it lacked jurisdiction to review the IJ's discretionary denial of voluntary departure because petitioner had not raised a constitutional claim or question of law.

Contact: Thankful Vanderstar, OIL
☎ 202-616-4874

ELEVENTH CIRCUIT

■ Eleventh Circuit Strictly Applies Exhaustion Requirement and Finds No Jurisdiction to Consider Petitioner's Persecution Claims

In *Jeune v. U.S. Att'y Gen.*, 810 F.3d 792 (11th Cir. 2016) (W. Pryor, *J. Carnes*, Siler (by designation)), the Eleventh Circuit held that it lacked jurisdiction to consider various "legal" claims because petitioner failed to sufficiently exhaust his remedies.

The petitioner, a Haitian citizen, was paroled into the United States from Haiti in 2004 and became a permanent resident in 2006. In 2009 he was convicted for possessing cocaine and in 2012 he was convicted for carrying a concealed firearm. In light of those convictions DHS instituted removal proceedings. Petitioner conceded removability but sought asylum, withholding, and CAT protection. He claimed that as a homosexual he was a member of a particular social group and that he expressed he had been mistreated in Haiti on account of his sexual orientation. The IJ concluded that petitioner's mistreatment constituted only harassment and discrimination, and simply did not rise to the level of severity necessary to support a conclusion that petitioner had been persecuted while living in Haiti. On appeal, the BIA agreed with the IJ that any harassment petitioner had suffered in Haiti did not amount to persecution. The BIA also agreed with the IJ's determination that petitioner had not met his burden to prove that he would suffer "persecution countrywide in Haiti on account of his sexual preference and/or transgenderism."

The court determined that it lacked jurisdiction to review petitioner's claim that he had established past persecution as a "gay men" because it had not been sufficiently articulated to the BIA and therefore he had failed to exhaust it."

Preliminarily, the court noted that because petitioner was removal as a criminal alien, its review was limited to review of constitutional errors or questions of law. The court then determined that it lacked jurisdiction to review petitioner's claim that he had established past persecution as a "gay man" because it had not been sufficiently articulated to the BIA and therefore he had failed to exhaust it."

The court then concluded that petitioner had failed to prove the likelihood of future persecution countrywide on account of his sexual orientation. The court rejected petitioner's contention that the IJ and the BIA had erred because they failed to consider the impact of his

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transgender status separately from that of his homosexuality. The court found that petitioner had only raised the claim of persecution "as a gay man. In any event, the court held that the BIA gave "reasoned consideration" to the petitioner's claim that he would be persecuted in Haiti on account of his homosexuality and transgenderism. Finally, the court concluded that the BIA applied the correct legal standard on the issue of relocation because its decision cited a relevant precedent.

Contact: Drew Brinkman, OIL
☎ 202-305-7035

DISTRICT COURTS

■ **District of Columbia Grants Government's Motion for Limited Relief and Extends Stay of Vacatur of F-1 STEM OPT Employment Authorization Program by 90 Days**

In *Wash. Alliance of Tech. Workers v. DHS*, __F.Supp.3d__, 2016 WL 308775 (DDC Jan. 23, 2016) (*Huvelle, J.*), the District Court for the District of Columbia granted the government's motion for limited relief under Rule 60(b)(6) and extended the stay of vacatur of the 2008 STEM optional practical training (OPT) employment authorization rule (the "2008 rule") for F-1 students from February 12, 2016 to May 10, 2016.

This action was precipitated when DHS in April 2008, promulgated an interim final rule, without notice and public comments, that extended the maximum OPT period from twelve months to twenty-nine months for students with qualifying degrees in science, technology, engineering, or math ("STEM"). Plaintiffs challenged the OPT program, and in particular, whether DHS had good cause to waive notice-and-comment before promulgating the 2008 Rule. The district court found no justification for waiving notice-and-comment—even accepting the importance of STEM workers to the economy, because DHS had long been aware of the purported "emergency" and had failed to act until 2008. The court further held that the appropriate remedy was vacatur of the 2008 Rule. However, given the "substantial hardship for foreign students and a major labor disruption for the technology sector," the court it stayed the effect of vacatur for six months to allow DHS enough time to promulgate a replacement rule.

The court initially determined that it had jurisdiction to consider the government's motion notwithstanding that the case is on appeal before the D.C. Circuit. The court found that an extension of the stay of the vacatur would not have any effect on the issues currently on appeal.

The court also held that DHS's unexpected inability to promulgate the replacement rule – based on the unprecedented public response, 50,500 comments received, and the need for extensive training of agency personnel on the new rule and related outreach to the regulated community – demonstrated extraordinary circumstances justifying an extension of the stay of vacatur.

The court accordingly extended the stay to prevent the possibility of any regulatory gap while DHS finalized a new STEM OPT employment authorization rule. The court emphasized that it would not consider any additional requests for relief.

Contact: Sarah Wilson, OIL-DCS
☎ 202-532-4700

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EOIR Swears in Nine Immigration Judges

On January 29, 2016, at the U.S. Court of Appeals for the Armed Forces in Washington D.C., Acting Chief Immigration Judge Print Maggard presided over the investiture of nine new immigration judges, who were appointed to their positions by Attorney General Loretta E. Lynch.

Judge **Xiomara Davis-Gumbs**, appointed to the Dallas Immigration Court, earned a BS from John Jay College of Criminal Justice, and a JD from Touro College, Jacob D. Fuchsberg Law Center. She served with the USCIS Office of the Chief Counsel in Dallas and with ICE Office of the Chief Counsel in Newark, and as an Asylum Officer with the Office of International Operations.

Judge **Jennifer M. Gorland**, appointed to the Detroit Immigration Court, received a BS from the University of Michigan and a JD from Wayne State University School of Law. Judge Gorland served as an AUSA in the Eastern District of Michigan, in Detroit, and as an associate for Pepper, Hamilton and Scheetz, in Detroit.

Judge **Denise C. Hochul,** appointed to the Buffalo Immigration Court, received a BA from the State University of New York at Buffalo and a JD from the Ohio Northern University, Claude W. Pettit College of Law. She served with ICE OPLA in Buffalo, and as a SAUSA in the Western District of New York.

Judge **Mark J. Jebson**, appointed to the Detroit Immigration Court, received a BA from the University of California, Los Angeles, a JD from the John Marshall Law School, and a Master of Laws degree from the New York University School of Law. He served with ICE Office of Chief Counsel in Detroit, and as a SAUSA in the Eastern District of Michigan, and an AUSA in the Northern District of Texas, in Dallas.

Judge **Ramin Rastegar**, appointed to the Newark Immigration Court, received a BS from George Mason University and a JD from New York Law School. He served as assistant chief counsel in the Office of the Chief Counsel, in New York.

Judge **Shifra Rubin**, appointed to the Newark Immigration Court, received a BA from Rutgers University and a JD from Rutgers School of Law. Judge Rubin served in various capacities for the Immigration Representation Project, Legal Services of New Jersey, in Edison, N.J.

Judge **Meredith B. Tyrakoski**, appointed to the San Antonio Immigration Court, received a BA from Northwestern University and a JD from the William and Mary School of Law. She served as an AUSA in Omaha and El Paso, and as SAUSA in Los Angeles.

Judge **Daniel H. Weiss**, appointed to the Dallas Immigration Court, received a BA from the University of Pennsylvania and a JD from the University of Maryland School of Law. He served as senior trial attorney in Civil Rights Division, and as an assistant public defender in the State of Maryland.

Judge **Margaret M. Kolbe,** appointed to the New York Immigration Court, received a BA in 1987 from the University of Cincinnati, a MA from the University of Cincinnati, and a JD from the Notre Dame Law School. She served as assistant AUSA in the Eastern District of New York, as an attorney advisor for the BIA, and as a Peace Corps volunteer in Gabon.

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.

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