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Immigration Litigation Bulletin

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District Court Enjoins DHS From Implementing Deferred Action Programs

In *Texas v. United States*, __F.Supp.3d__, 2015 WL 648579 (S.D. Tex. February 16, 2015) (*Hanen, J.*), the district court temporarily enjoined the implementation of several prosecutorial discretion actions set forth in a memorandum issued by the Secretary of Homeland Security on November 20, 2014. That memorandum provided guidance to DHS officials on granting deferred action to certain parents of American citizens and lawful permanent residents (DAPA), and expanded the Deferred Action for Childhood Arrivals (DACA) which DHS had established on June 15, 2012.

The court determined, after finding that at least one the plaintiffs had standing, that there was a likelihood that plaintiffs would prevail on the merits because DHS guidance on DAPA and DACA legislated a substantive rule without complying with the procedural requirements of the APA.

Background

This action was precipitated by the issuance of a memorandum by the Secretary of Homeland Security dated November 20, 2014, and entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents." The memo was directed to the heads of ICE, USCIS, and CBP, and was "intended to reflect new policies for the use of deferred action." In particular, the Secretary indicated that he was "expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for adults who have been in this country since January 1, 2010, and are the parents of U.S. citizens or lawful percent residents, and who are otherwise

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USCIS Administrative Appeals Office: Sister Adjudicator to the BIA

Ron Rosenberg and Charles "Locky" Nimick want you to know about the Administrative Appeals Office. The AAO, within United States Citizenship and Immigration Services, is an administrative appellate body which decides appeals from denials of about fifty different types of immigration benefits.

In this role, the AAO serves as the agency's mouthpiece on matters of law and policy. "We don't establish policy—we articulate it," explained Mr. Rosenberg, the AAO's Chief.

Mr. Rosenberg, joined by his Deputy Chief, Mr. Nimick, gave an overview of the AAO during a February 9, 2015 brown bag lunch visit to OIL, entitled An Overview of the Administrative Appeals Office at USCIS, and Hot Issues on Appeal.

Petitioners and applicants for certain immigration benefits—

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District Court Enjoins Implementation of Deferrred Action Programs

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not enforcement priorities" as set forth in another policy memorandum also issued by the Secretary on the same date. The Secretary "direct[ed] USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis" for individuals who met certain requirements. The Secretary also stated that "immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis."

The Lawsuit

The lawsuit was filed by the State of Texas and twenty-five other states or their representatives and sought to enjoin the implementation of the deferred action policies outlined by the Secretary in his November 20 memorandum. Plaintiffs alleged that the Secretary's actions violated the Take Care Clause, the APA and the INA.

In opposition the government first argued that the plaintiffs did not have standing to bring the injunctive action. On the merits, the government contended that DHS has prosecutorial discretion over aliens not lawfully in the U.S. and can grant deferred action to anyone it deemed eligible. The government further argued that discretionary decisions, like the DAPA program are not subject to the APA, and that the DAPA program is general guidance issued to DHS officials and elements of eligibility are not requirements that they are bound to honor and therefore this flexibility exempts DAPA from the APA.

Standing

The district court determined that plaintiffs, or at least the State of Texas, had Article III standing, that they had satisfied their burden to show prudential standing, and that they had standing under the APA.

The court first found that the States, or at least the State of Texas, would suffer an economic injury because the DHS guidance would create a new class of individuals who would be eligible to apply for drivers' licenses, the processing of which would impose substantial costs on the state, namely $130.89 per license. A portion of these costs, said the court, is directly traceable to fees mandated by federal law, including the verification of immigration status under the Systematic Alien Verification for Entitlements (SAVE) program.

The court found that plaintiffs demonstrated a "direct finite injury to the States" caused by the government's actions.

The court disagreed with the government's arguments that the DHS memo does not require states to provide any benefits to recipients of deferred action and that the alleged injuries were merely generalized grievances shared by all the states' citizens and thus insufficient to support standing. Instead, the court found that plaintiffs demonstrated a "direct finite injury to the States" caused by the government's actions. The court also determined that the remedy sought by plaintiffs, namely the enjoining of the implementation of the Secretary's guidance, would redress or prevent the alleged injury.

Second, the court found that plaintiffs satisfied their burden to show prudential standing because the states pled a direct injury to their fiscal interests and their claims were within the "'zone of interests' to be protected by the immigration statutes at issue in this litigation."

Third, the court declined to reach the question of whether the States had *parens patria* standing finding that the suit was not ripe for adjudication because "the administrative decision from which the economic injury will flow has not been formalized." The States contended that the DHS guidance "will create an employment environment that will encourage employers to discriminate against lawfully present citizens."

Fourth, the court rejected plaintiffs' argument that they had standing under the "ambiguous standards" set forth in *Massachusetts v. E.P.A.*, 549 U.S 497 (2007), "based on their injuries caused by the Government's prolonged failure to secure the country's borders." Although the court found it "indisputable that the states are harmed to some extent by the Government's action and inaction in the area of immigration," the court concluded they had not shown that an injunction against DAPA would redress the particular damages that they claimed.

Fifth, the court found that the states had standing "because of the DHS' abdication of its statutory duties to enforce the immigration laws." The court acknowledged that "the concept of state standing by virtue of federal abdication is not well-established," and assumed that if this concept of standing would be recognized by the Fifth Circuit, the claims in the case would be "a textbook example."

Finally, the court concluded for the various reasons set forth in its analysis of standing and of the merits of the claims, that plaintiffs also satisfied the standing requirement under the APA.

The Merits of the States' Claims

On the merits the court held that the plaintiffs satisfied the requirements for preliminary injunction. The

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Implementation of Deferrred Action Programs Enjoined

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court found that the plaintiffs would likely prevail on the merits of their claim that DAPA violates the APA because it constitutes a substantive rule that was promulgated without notice and comment.

The court explained that the DAPA guidance constituted final agency action noting that DHS had already announced an implementation date. The court determined that plaintiffs, or at least the State of Texas, would be adversely affected by DHS' action, that DAPA contravened the "the express terms of the INA," and that the States were easily in the zone of interest contemplated by this nation's immigration laws."

The court then determined that the exemption from the APA's "presumption of reviewability" of non-enforcement decisions made by an agency, did not apply because this was not a case of "agency inaction," or refusal to enforce removal laws against an individual. Instead, said the court, "DHS has enacted a wide-reaching program that awards legal presence to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel. Absent DAPA, these individuals would not receive these benefits." Exercising prosecutorial discretion, explained the court, "does not also entail bestowing benefits. Non-enforcement is just that – not enforcing the law."

Assuming arguendo that a presumption of unreviewability applied, the court found that the plaintiffs had rebutted the presumption. The court explained that DHS' discretion was circumscribed by the INA and that there was no law or statute authorizing DAPA. The court disagreed with the government's contention that INA provisions and provisions in the Homeland Security Act delegating authority to the Secretary of Homeland to establish enforcement priorities, combined with inherent executive discretion, permit the establishment of DAPA. The court rejected the government's contention that its past uses of deferred action justifies DAPA as a lawful exercise of discretion. "Past action previously taken by the DHS does not make its current action lawful," said the court.

The court then determined that the issuance of the DAPA memo constituted rulemaking under the APA, an issue that the parties did not contest. However, the disputed question was whether government was exempt from complying with the APA's procedural mandate. The government argued that the memo was a policy that supplemented and amended guidance for the use of deferred action. The court however, found that the labeling of the memo as a "guidance" or "guidelines" was "disingenuous" because it was "contrary to the substance of DAPA." The court determined that the DAPA sets forth criteria that are binding, or that severely restrict DHS' officials discretion. The court also found that DAPA was "a new law" because it "confers benefits and imposes discrete obligations (based on detailed criteria) upon those charged with enforcing it."

Exercising prosecutorial discretion, explained the court, "does not also entail bestowing benefits. Non-enforcement is just that – not enforcing the law."

Accordingly, the court found that DAPA was reviewable and that "its adoption has violated the procedural requirements of the APA." The court then concluded that the States "have clearly proven a likelihood of success on the merits."

In considering the injunction factor of irreparable harm, the court rejected plaintiffs' contention that DAPA would cause a humanitarian crisis along the southern border and will cause the State of Texas to spend millions of dollars in uncompensated healthcare for undocumented immigrants. The court explained that these alleged irreparable harms were not immediate, direct or presently-existing. Similarly, the court found that the general harms associated with illegal immigration are not immediately caused by DAPA. But, the court agreed with the plaintiffs that legalizing the presence of millions of people would a be "virtually irreversible" action once taken and that "this genie would be impossible to put back in the bottle." The court found that the injury to the government, even if DAPA is found to be lawful, would be insubstantial in comparing to plaintiffs' injuries.

In balancing the hardships to the parties, the court found that the government would not be harmed by the issuance of a preliminary injunction before a trial is held on the merits. The court also determined that although the interest of the public "may vary substantially," DHS compliance with the notice-and-comments procedures "will allow those interested to express their views and have them considered. When taking the interest of all concerned, the equities favor the issuance of an injunction to preserve the status quo."

Conclusion

The court indicated that it was not addressing plaintiffs' "likelihood of success on their substantive APA claim or their constitutional claims under the Take Care Clause/ separation of powers doctrine." Accordingly the court enjoined "the implementation of the DAPA program that awards legal presence and additional benefits to the four million or more individuals potentially covered by the DAPA Memorandum and to the three expansions/addition to the DACA program also contained in the same DAPA Memorandum."

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FURTHER REVIEW PENDING: Update on Cases & Issues

Jurisdiction – Equitable Tolling

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

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Conviction - Possessing Illegal Drug Paraphernalia

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

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Consular Non-Reviewability

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

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Standard of Review - Nationality Rulings

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

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Torture– Internal Relocation

On September 19, 2014, an *en banc* panel of the Ninth Circuit heard argument in ***Maldonado v. Holder***, No. 09-71491. A panel of the court had ordered the parties to file supplemental briefs on whether case should be heard en banc in the first instance to consider: (1) which party bears the burden of proof on internal relocation for CAT; and (2) whether the court improperly elevated the burden of persuasion by requiring that a CAT petitioner establish that internal relocation is "impossible."

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Conviction – Categorical Approach Divisibility

In a December 18, 2014 response to a *sua sponte* request of the Ninth Circuit, the government recommended en banc rehearing in ***Rendon v. Holder***, 764 F.3d 1077, if the panel does not correct the errors in its discussion of *Descamps v. United States* and divisibility.

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Asylum – State Dept Investigations

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

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Conviction – Divisibility Inconclusive Record

On January 15, 2015, the Ninth Circuit *sua sponte* directed the parties to file simultaneous briefs addressing whether ***Almanza-Arenas v. Holder*** should be reheard *en banc*. The panel ruled (771 F.3d 1184) 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 government response is due March 30, 2015.

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

First Circuit Holds No Per Se Bar to Considering a Police Report Involving Alien's Convictionless Arrest in Denying Voluntary Departure

In ***Arias-Minaya v. Holder***, __F.3d__, 2015 WL 855641 (1st Cir. February 27, 2015) (*Selya*, Souter, Lynch), the First Circuit held that, once the agency determines that a police report is reliable and that its use would not be fundamentally unfair, there is no per se bar to the agency's consideration of the report in determining whether the alien warrants discretionary relief.

The court held that there "is no per se bar to the agency's consideration of hearsay-laden police reports where convictions have not followed."

The petitioner entered the United States as a visitor and overstayed his visa. When DHS placed him in removal proceedings he applied for adjustment of status and voluntary departure. While the immigration proceedings were pending, the petitioner was arrested and charged in a Massachusetts state court with one count of assault with a dangerous weapon (a knife) and three counts of threatening to commit murder. Petitioner then abandoned his claim for adjustment of status but continued to press his claim for voluntary departure. The police report was introduced into evidence. At the end of the hearing, the IJ determined that, even though the criminal charges against the petitioner were still pending in state court, there was no reason to find the police report inaccurate or lacking in probative value. The IJ denied voluntary departure and ordered petitioner removed.

While on appeal to the BIA, the criminal charges against petitioner were dismissed and upon his request his case was remanded to the IJ. The IJ then invited petitioner to submit a declaration describing his version of the events surrounding the arrest. Petitioner declined. The IJ again denied voluntary departure as a matter of discretion. The BIA subsequently affirmed the denial of voluntary departure and concluded that the IJ had not afforded undue weight to the facts contained in the police report because the police report was probative of factors relevant to the discretionary analysis and the petitioner was given every opportunity to refute the report's contents.

Before the First Circuit, petitioner contended that the agency either ignored or misconstrued applicable precedents in failing to exclude, as a matter of law, a police report that consisted mainly of hearsay statements and described an arrest that never culminated in a conviction. The court, without deciding whether petitioner had raised a colorable legal question, held that there "is no per se bar to the agency's consideration of hearsay -laden police reports where convictions have not followed." "[I]n the context of determining whether an alien warrants discretionary relief from removal, the fact of an arrest and its attendant circumstances, without more, may have probative value in assessing his character (and, thus, his suitability for discretionary relief), said the court. Accordingly, "neither the IJ nor the BIA committed any legal error by considering the police report describing the petitioner's arrest as a negative factor weighing against discretionary relief."

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First Circuit Dismisses Unreviewable Challenge to Discretionary Relief and Concludes Alien Failed to Exhaust Asylum Claim

In ***Ramirez-Matias v. Holder***, __F.3d__, 2015 WL 627208 (Howard, *Selya*, Thompson) (1st Cir. February 13, 2015), the First Circuit dismissed a petition for review filed by a Guatemalan national challenging the agency's denial of special rule cancellation of removal under NACARA, asylum, withholding, and CAT protection.

The IJ denied cancellation under NACARA on a finding that, although the petitioner met the continuous physical presence requirement and demonstrated the requisite level of hardship with respect to his special needs child, he did not merit a favorable exercise of discretion based on police reports evidencing two earlier domestic violence charges. The IJ also denied the petitioner's claims for asylum and withholding, finding, *inter alia*, that he failed to establish either past persecution or a well-founded fear of persecution, and rejected the petitioner's CAT claim for failure to establish a clear probability of torture. On appeal, the BIA affirmed the IJ's decision noting, in particular, that the IJ's denial of special rule cancellation of removal was an appropriate exercise of discretion.

Before the First Circuit, the petitioner challenged the IJ's reliance on hearsay evidence (particularly the police reports) to determine that the petitioner did not deserve a favorable exercise of discretion. Because this challenge, however, essentially constituted a challenge to the agency's discretionary weighing of the facts, the court dismissed it for lack of jurisdiction. "While Rumpelstiltskin may have claimed the ability to transform dross into gold, the petitioner cannot, by word play and exhortation, transform a factual question into a question of law," explained the court. Ac-

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cordingly, because the INA precludes review of discretionary denials of special rule cancellation of removal, and petitioner did not raise a question of law, the court held that it lacked jurisdiction to consider petitioner's argument.

The court also lacked jurisdiction to review the petitioner's "unexhausted theory as to why the IJ supposedly erred in denying him asylum and/or withholding of removal." "An alien cannot leapfrog over the BIA; that is, he cannot proffer a theory to the IJ, forgo any presentation of that theory to the BIA, and then resurrect the theory on a petition for judicial review," said the court.

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SIXTH CIRCUIT

■ Sixth Circuit Holds Petitioner's Conviction was for a Crime Involving Moral Turpitude and Affirms Denial of a 212(h) Waiver

In ***Fayzullina v. Holder***, 777 F.3d 807 (6th Cir. 2015) (Guy, *Rogers*, Donald), the Sixth Circuit held that petitioner was categorically convicted for a crime involving moral turpitude based on her conviction under 18 U.S.C. § 1001(a)(3).

The petitioner, a native and citizen of Russia, entered the United States on May 31, 2005, as a nonimmigrant visitor. On March 17, 2006, she married a U.S. citizen and, shortly thereafter, petitioned to change her status to that of a lawful permanent resident. The government granted her petition on August 26, 2008. On August 5, 2009, a federal grand jury indicted petitioner and her husband on three counts of evading immigration laws through marriage fraud. The petitioner was ultimately convicted, pursuant to a plea of guilty, on one count of knowingly and willfully making and using a material false writing in her adjustment of status application, in violation of 18 U.S.C. § 1001(a)(3).

In September 2010, DHS placed the petitioner in removal proceedings as an alien inadmissible at time of her adjustment of status, under 8 U.S.C. § 1227(a)(1)(A), and as an alien convicted of a crime involving moral turpitude ("CIMT"), under 8 U.S.C. § 1227(a)(2)(A)(i). The petitioner acknowledged that she had pled guilty to lying about her marriage in the I-485, but denied that this misrepresentation rendered her inadmissible at the time she adjusted status and denied that she had been convicted of a CIMT. The IJ sustained both charges of removability, finding that petitioner was inadmissible at the time of her adjustment because her conviction met the requirements of a willful and material misrepresentation under 8 U.S.C. § 1182(a)(6)(C)(i), and that her conviction constituted a CIMT. Further, the IJ found the petitioner ineligible for a waiver under § 1227(a)(1)(H), because she was not being order removed for a false or misrepresentation but for her CIMT conviction, and ineligible for a waiver under § 1182(h) because she had not continuously resided in the U.S. for seven years before removal proceedings commenced. The BIA affirmed.

The court explained that its precedents "make clear that crimes of making deliberately dishonest statements involving material facts are inherently crimes involving moral turpitude.

The Sixth Circuit rejected petitioner's challenge to the agency's determination that her conviction under 18 U.S.C. § 1001(a)(3) constituted a CIMT. The court explained that its precedents "make clear that crimes of making deliberately dishonest statements involving material facts are inherently crimes involving moral turpitude. Those elements - materiality and knowledge - are manifestly present in [the petitioner's] case." The court also rejected petitioner's argument that the BIA failed to apply the correct framework in analyzing her claims, noting that there was no need to apply the modified categorical approach because the full range of conduct encompassed by the statute constitutes a CIMT.

Lastly, the court joined the Seventh and Ninth Circuits in holding that the waiver provision under 8 U.S.C. § 1227(a)(1)(H) does not apply to findings of removability under paragraph (a)(2) of the statute. The court also concluded that the petitioner could not obtain a *nunc pro tunc* waiver under INA § 212(h), acknowledging that the BIA has "definitively repudiated" this argument.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds Perjury Admission Is Substantial Evidence Supporting Denial of Relief

In ***Keirkhavash v. Holder***, __F.3d__, 2015 WL 735700 (7th Cir. February 23, 2015) (*Easterbrook*, Kanne, Hamilton), the Seventh Circuit held that petitioner's admission that she lied in her initial asylum application and immigration court hearing was substantial evidence supporting the denial of asylum and withholding of removal.

Petitioner's initial asylum application claimed that Iran would perse-

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cute her because, beginning in 1990, she had supported the Mojahedin-e Khalq (MEK), a group dedicated to the overthrow of Iran's government. The IJ credited petitioner's claim, but found petitioner ineligible for asylum because the State Department had classified MEK as a terrorist organization. The BIA upheld the denial of asylum but remanded for CAT consideration.

On remand, with new counsel, petitioner maintained that some unknown person had forged her signature on her statement in support of the request for asylum, and that, although both she and her father had given oral testimony consistent with the written statement, they had done so only because her lawyer told them to lie. Instead, Petitioner claimed that she would face persecution in Iran because her former husband had accused her of adultery and adulterous women are stoned to death. Petitioner also alleged that, despite her admission that she falsely claimed to have supported the MEK, Iran would nonetheless persecute her because of her prior claim. The IJ found that petitioner lacked credibility, citing the petitioner's initial false asylum application, and denied all relief and protection. The BIA dismissed the appeal and, following a remand, wrote a supplemental opinion explaining why it thought the IJ's credibility finding supported by the record.

In upholding the agency's decision, the court explained that "the IJ gave a powerful reason for disbelieving [petitioner] and her father: both are confessed liars who offered no documentary evidence or other corroboration for the revised asylum request. The request depends entirely on the testimony of two people who have admitted committing perjury in order to obtain immigration benefits for [petitioner]. A person avowedly willing to put self-interest ahead of the legal obligation to tell the truth has no entitlement to be believed when he changes stories after the first implodes."

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"A person avowedly willing to put self-interest ahead of the legal obligation to tell the truth has no entitlement to be believed when he changes stories after the first implodes."

NINTH CIRCUIT

■ **Ninth Circuit Holds Ineffective Assistance of Counsel Claim Fails Because Cancellation Claim Was Not Plausible**

In *Martinez-Hernandez v. Holder*, __F.3d__, 2015 WL 756024 (Melloy, Bybee, Ikuta) (*per curiam*) (9th Cir. February 24, 2015), the Ninth Circuit held that the BIA did not abuse its discretion in denying petitioner's motion to reopen on the basis of ineffective assistance of counsel.

Petitioner contended before the BIA that his prior counsel had been ineffective for failure to seek cancellation of removal. The BIA found that petitioner had satisfied the procedural requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), but denied the motion on the merits because petitioner presented no argument or evidence tending to show "exceptional and extremely unusual hardship" to a qualifying relative, as required under § 240A(b)(1)(D).

The Ninth Circuit affirmed the BIA's decision, explaining that even assuming inadequate performance by counsel, petitioner "failed to make the necessary threshold showing that his claim for cancellation of removal was "plausible." Consequently, petitioner had failed to make a threshold showing of prejudice, as the court could not conclude that counsel's inadequacies "may have affected the outcome of the proceedings."

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■ **Ninth Circuit Holds That Gang Enhancement Provision Is Insufficient To Render Underlying Felony Categorically A Crime Involving Moral Turpitude**

In *Hernandez-Gonzalez v. Holder*, __F.3d__, 2015 WL 618776 (9th Cir. February 13, 2015) (*Reinhardt*, Fisher, Murguia), the Ninth Circuit held that felony possession of an unlawful weapon, subject to gang-related enhancement, was not categorically a crime involving moral turpitude. The court explained that there was a realistic probability that the enhancement could be applied to an offense that did not involve moral turpitude and that the enhancement statute did not require an intent to assist in non-turpitudinous conduct.

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TENTH CIRCUIT

■ **Immigration Proceedings Conducted By Video Conference Are Governed by the Circuit Law Where the Charging Document Is Docketed and a § 212(h) Waiver Is Available to Aliens Who Adjust to Lawful Permanent Resident Status**

In *Medina-Rosales v. Holder*, __F.3d__, 2015 WL 756345 (*Kelly*, Baldock, Moritz) (10th Cir. February 24, 2015), the Tenth Circuit concluded that the petitioner's proceedings were controlled by Tenth Circuit law, despite the fact that the IJ sat in Dal-

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las, since the charging document listed Tulsa, Oklahoma, as the hearing location. "The charging document establishes the hearing location, regardless of the location of the IJ and the holding of a video conference hearing," said the court.

On the merits, petitioner challenged the IJ's finding that he was ineligible for waiver under INA § 212 (h) because he had been convicted of the aggravated felony of grand larceny after acquiring LPR status. The court agreed with the majority of the circuits which have concluded that § 212(h) unambiguously dictates that aliens who adjust status to that of a lawful permanent resident were not "admitted" to the United States as aliens lawfully admitted for permanent residence and thus are eligible to seek § 212(h) waiver.

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■ **An Alien Subject to Reinstatement Does Not Have a Reviewable Final Order of Removal Until the Completion of Reasonable Fear Proceedings**

In *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015) (Briscoe, Matheson, McHugh), the Tenth Circuit dismissed a petition for review for lack of jurisdiction.

Petitioner's removal order had been reinstated on July 11, 2014. During the reinstatement process, petitioner expressed a fear that she would be harmed if returned to her home country and was referred to an asylum officer for a reasonable fear hearing. Petitioner then sought judicial review of the reinstatement order.

The court, in an issue of first impression, held that an alien whose order of removal had been reinstated, and who received reasonable fear proceedings under 8 C.F.R. § 208.31, did not have a reviewable final order of removal. The court explained that "when an alien pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete. And, although the reinstated removal order itself is not subject to further agency review, an IJ's decision on an application for relief from that order is appealable to the BIA. Thus, the rights, obligations, and legal consequences of the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete."

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DISTRICT COURTS

■ **Central District of California Approves Class Settlement in Litigation Challenging Voluntary Return Practices in Southern California**

In *Lopez-Venegas v. Johnson*, No. 2:13-cv-3972 (C.D. Cal. February 26, 2015) (*Kronstadt, J.*), the District Court for the Central District of California entered an order approving the class-wide relief and attorneys' fees portions of the parties' comprehensive settlement agreement. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) will pay $700,000 in attorneys' fees and costs. Starting on June 27, 2015, aliens residing in Mexico, if they were processed during a certain period for voluntary return in southern California while possibly eligible for legal status or relief, will have six months to apply for class membership. ICE and CBP will adjudicate the applications and grants will allow applicants to seek physical entry into the U.S.

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■ **Southern District Of West Virginia Orders Seller Of Expired Baby Formula To Surrender Citizenship**

In *USA v. Samih Fadl Jammal*, No. 12-7925 (S.D.W.V. February 10, 2015) (*Chambers, J.*), the Southern District of West Virginia granted summary judgment for the United States in a suit to denaturalize an individual who had engaged in a $1.75 million scheme to sell baby formula beyond its expiration date. The court found that the defendant had committed unlawful acts during the statutory period and that he had committed a CIMT. The court did not grant summary judgment on the counts that charged defendant with giving false testimony and with procuring his citizenship through concealment or willful fact because they were issues of fact. The court directed defendant to surrender his certificate of naturalization and all citizenship documents within ten days.

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■ **District of New Jersey Dismisses Challenge to Fiancée Visa Denial for Lack of Jurisdiction**

In *Hampton v. Holder*, 14-cv-05446 (D.N.J. February 4, 2015) (*Shipp, M.),* the court granted the government's motion, dismissing the complaint with prejudice. The U.S. citizen petitioner and her fiancée beneficiary challenged the Department of State's denial of their fiancée visa application. Following oral argument, the court decided not to stay the case pending the Supreme Court's resolution of *Din v. Kerry*. The court ruled that the doctrine of consular nonreviewability precluded review of the visa denial and rejected the plaintiffs' due process claims, concluding that there is no constitutionally protected interest in a fiancée relationship.

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AILA Doc. No. 15100507. (Posted 10/05/15)

The Administrative Appeals Office

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primarily employment-based visas, but also a variety of other benefits, including Temporary Protected Status and fiancé(e) petitions—may appeal an adverse USCIS field office decision to the AAO.

AAO review is designed to ensure consistency and accuracy in interpreting immigration law and policy. Thus, the AAO has the discretion to accept appeals upon the certification by a USCIS field office of an unusually complex issue of law or fact.

Messrs. Rosenberg and Nimick made the case for why recipients of adverse immigration-benefits decisions (whom Mr. Rosenberg charmingly referred to as "customers") should appeal to the AAO, rather than proceeding directly to federal court. For one thing, they explained, the AAO appeal process has gotten much shorter in recent years; with AAO's roughly 100 officers and supervisors handling around 6000 appeals per year, Mr. Rosenberg and Mr. Nimick spoke very proudly of having "no lines, no waiting."

And unlike appeals before other administrative bodies like the Board of Immigration Appeals, the AAO permits litigants to supplement the record on appeal.

The ability to offer new evidence on appeal, among other characteristics of the AAO appeal process, may explain why thirty to forty percent of AAO appeals—each of which begins with reconsideration by the field office—result in favorable action by the field office. Thus, an AAO appeal can potentially be a speedy, inexpensive, and successful alternative to proceeding directly to federal court.

The AAO issues primarily "non-precedent" decisions, which apply existing law and policy to the facts of a given case. These decisions, as well as a recently-issued AAO practice manual, appear on AAO's website.

But the AAO also has what Mr. Rosenberg calls a "superpower": issuing precedent decisions, to provide clear, uniform guidance to adjudicators and the public on the proper interpretation of law and policy. But approving a precedent decision requires an elaborate internal review process by many different Government offices. And because these steps make it so difficult to issue precedent decisions, in the past twenty-five years, AAO has issued just seven of them, Mr. Rosenberg explained. "We have this superpower, and we're not exercising it."

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Charles "Locky" Nimick, Francesco Isgro, Ron Rosenberg, David McConnell

INDEX TO CASES SUMMARIZED IN THIS ISSUE

OIL TRAINING CALENDAR

March 30, 2015. Webinar with USCIS on the "US" nonimmigrant visa. 1:00-2:30 pm LSB-5421.

April 27, 2015. Presenting Effective Oral Argument. 2:00-3:30 LSB 5421. This training is provided by OIL Assistant Director Greg Mack.

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NOTED....

Excerpts of Statement issued by the DHS Secretary on February 17, 2015

We strongly disagree with Judge Hanen's decision to temporarily enjoin implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and expanded Deferred Action for Childhood Arrivals (DACA). The Department of Justice will appeal that temporary injunction; in the meantime, we recognize we must comply with it.

The Department of Justice, legal scholars, immigration experts and even other courts have said that our actions are well within our legal authority. Our actions will also benefit the economy and promote law enforcement. We fully expect to ultimately prevail in the courts, and we will be prepared to implement DAPA and expanded DACA once we do.

AILA Doc. No. 15100507. (Posted 10/05/15)

USCIS UPDATES

DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants

USCIS is extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based LPR status. DHS amended the regulations to allow these H-4 dependent spouses to accept employment in the United States. *See* 37 *Fed. Reg.* 10284 (Feb 25, 2015)

Finalizing the H-4 employment eligibility was an important element of the immigration executive actions President Obama announced in November 2014. Extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants is one of several initiatives underway to modernize, improve and clarify visa programs to grow the U.S. economy and create jobs.

"Allowing the spouses of these visa holders to legally work in the United States makes perfect sense," Rodríguez said USCIS Director León Rodríguez. "It helps U.S. businesses keep their highly skilled workers by increasing the chances these workers will choose to stay in this country during the transition from temporary workers to permanent residents. It also provides more economic stability and better quality of life for the affected families."

Eligible individuals include certain H-4 dependent spouses of H-1B nonimmigrants who:

►Are the principal beneficiaries of an approved Form I-140, Immigrant Petition for Alien Worker; or

►Have been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act.

The Act permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status.

DHS expects this change will reduce the economic burdens and personal stresses H-1B nonimmigrants and their families may experience during the transition from nonimmigrant to lawful permanent resident status, and facilitate their integration into American society. As such, the change should reduce certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking lawful permanent residence, which will minimize disruptions to U.S. businesses employing them. The change should also support the U.S. economy because the contributions H-1B nonimmigrants make to entrepreneurship and science help promote economic growth and job creation. The rule also will bring U.S. immigration policies more in line with those laws of other countries that compete to attract similar highly skilled workers.

Under the rule, eligible H-4 dependent spouses must file Form I-765, Application for Employment Authorization.

USCIS estimates the number of individuals eligible to apply for employment authorization under this rule could be as high as 179,600 in the first year and 55,000 annually in subsequent years. The rule becomes effective May 26, 2015.

SOURCE: USCIS

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

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

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

Office of Immigration Litigation

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

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