NIPNLG Litigation Meeting Agenda
Condado Plaza Hilton Hotel, San Juan, Puerto Rico
Room: Miramar I
Thursday, October 24, 2013, 9AM – 5PM

Introductions

1. Motions to reopen when there is a reinstatement order – Trina Realmuto (15 min)

2. Reasonable fear / credible delays – Maria Andrade (15 min)

3. Descamps and Moncrieffe issues – Sejal Zota and Dan Kesselbrenner (45 min)

   **Morning Break (15 min)**

4. Police Practice Issues – intersection with SB1070 § 2(b) – Cecillia Wang (30 min)

5. CARRP – Stacy Tolchin (15 min)

6. Terrorism-related inadmissibility grounds (TRIG) – Marc Van Der Hout (15 min)

7. Suppressing identity – Kristin McCleod-Ball (20 min)

8. Supreme Court Update – Becky Sharpless (15 min)

   **Lunch Break (60 min)**

9. Proportionality – Stacy Tolchin (10 min)

10. Detention litigation updates – Judy Rabinovitz and Michael Tan (30 min)
    -- prolonged detention litigation
    -- “when released” litigation
    -- Matter of Joseph issues
    -- IJ authority to release on conditions of supervision (ROR)

11. Equal Access to Justice Act (EAJA) Issues – Maria Baldini-Poternin (15 min)

12. Other issues

Closing announcements and comments
TOPIC OVERVIEWS AND ADDITIONAL RESOURCES

1. **Motions to reopen when there is a reinstatement order**
INA § 231(a)(5), 8 U.S.C. § 1231(a)(5) reads:

Reinstatement of removal orders against aliens illegally reentering
If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

In two recent (bad) decisions, the Seventh Circuit held that this language is a permanent bar; i.e., than anyone who is, or who has been, subject to a reinstatement order cannot seek reopening of the prior order. See *Zambrano-Reyes v. Holder*, 725 F.3d 744, 751 (7th Cir. 2013) (rehearing pending); *Cordova-Soto v. Holder*, No. 12-3392, -- F.3d -- (7th Cir. Oct. 15, 2013) (rehearing planned).


2. **Delays in reasonable fear interviews**
The delay in the issuance of “reasonable fear” and “credible fear” interviews is problematic because in some instance the applicant is waiting detained for many weeks, if not a month, before the interview is scheduled. Is there a legal basis to require expedited the interviews? Where is the delay most problematic?


3. **Descamps & Moncrieffe**


If a state court conviction for marijuana distribution fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it cannot be an “aggravated felony” for immigration purposes, the U.S. Supreme Court held on April 23. Under the Court’s “categorical approach,” a statute that punishes conduct that includes the transfer of small amounts of marijuana for no remuneration cannot be a “drug trafficking” aggravated felony, the Court held.

The Court’s decision also provides a helpful guideline for assessing the immigration consequences of other convictions. The Court affirmed and reiterated that, in assessing the immigration consequences, generally it is not what the defendant did that is the determining factor. Rather, in applying the categorical approach, the courts must look to the minimum conduct required under the statute of conviction. When the categorical approach is followed, the crime categorically is or is not an aggravated felony based on the elements of the statute under which the defendant was convicted – the actual conduct of the defendant is not determinative. *Moncrieffe v. Holder*, 2013 U.S. Lexis 3313 (Apr. 23, 2013).

-- Thanks to Nadine Wettstein for this summary.


In *Descamps*, the Supreme Court strongly re-affirmed that if a statute is not divisible into distinct offenses, an adjudicator cannot look behind the statute of conviction to examine the details of the person’s conduct. The Court held that a conviction for California burglary is never for generic burglary under federal sentencing enhancements because it does not contain an element of unlawful entry and that a
federal sentencing judge may not apply the modified categorical approach and look to the underlying court record when the statute of conviction has a single, indivisible set of elements.


4. **Police Practice Issues – intersection with SB1070 § 2(b)**

In June 2012, the Supreme Court handed down its landmark decision in Arizona v. United States, which held that state and local law enforcement agencies cannot detain people based upon suspected undocumented immigration status, but allowed the notorious “show me your papers” provision to go into effect. In this session, we will explore the question of what comes next as we tackle those state laws and other local police practices that continue to cause civil rights violations on the ground.

5. **CARRP**

The “Controlled Application Review and Resolution Program” (CARRP) is a program underlying the adjudication of USCIS applications. Essentially, if an individual is on a security list (such as a no fly list), or is associated with an individual who is a “known suspected terrorist,” the CARRP directs the delay or denial of applications for adjustment of status, naturalization, asylum, etc. This results in unreasonable delays of applications and pretextual denials based on grounds that in other circumstance would never have triggered a denial. We also are seeing criminal prosecutions for lying on immigration applications, which then result in deportability. Are there grounds to systemically challenge the program, which is clearly affecting Muslim and Middle Eastern men, and what are the best approaches to fight removal?

6. **Terrorism-related inadmissibility grounds (TRIG)**

“Terrorism-related inadmissibility grounds” (TRIG), predates the CARRP program, but is also related to national security concerns. The TRIG grounds refer to the inadmissibility grounds at INA § 212(a)(3)(B) and usually refer to the broad “material support” provisions at INA § 212(a)(3)(B)(iv)(Vi). Queries regarding cases can be sent to TRIGQuery@uscis.dhs.gov.

We are widely losing arguments that there is no “duress” defense exception to the material support statutes, and courts are relying on the discretionary waiver at INA § 212(d)(3) to address any duress issues, even though that waiver is purely political and appears to be unreviewable. Annachamy v. Holder, 686 F.3d 729 (9th Cir.2012) amended by No. 07-70336, ___ F.3d. ___ 2013 WL 4405687 (9th Cir. Aug. 19, 2013); Alturo v. U.S. Atty. Gen., 716 F.3d 1310, 1314 (11th Cir. 2013); Barahona v. Holder, 691 F.3d 349, 356 (4th Cir. 2012).

7. **Suppressing identity**

When individuals seek to suppress illegally obtained evidence in their removal proceedings, DHS sometimes argues that “identity-related” evidence, such as a passport, fingerprints, birth certificate, or other documents establishing who an individual is, can never be suppressed. In making this argument, the government relies on the Supreme Court’s statement that “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest . . . .” INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). Courts are divided on how to understand this statement; some circuits have interpreted the phrase to mean that an unconstitutional search or seizure cannot deprive a court of the ability to exercise personal jurisdiction over the body of a defendant, while others hold that evidence establishing identity cannot be suppressed under any circumstances.

However, even where the Lopez-Mendoza identity statement is read narrowly to concern a court’s personal jurisdiction, the government’s use of a respondent’s identifying information may complicate suppression of evidence in practice, especially for individuals with previous contact with immigration authorities. In a recent decision, the Second Circuit held that Lopez-Mendoza merely stated a
jurisdictional rule, but found that “a person’s ‘identity,’ insofar as necessary to identify the individual subject to judicial proceedings, is not suppressible on a purely practical level.” Pretzantzin v. Holder, 725 F.3d 161, 170 (2d Cir. 2013). The court did not specify what information courts need to identify a respondent — but suggested that, at the least, evidence later identified solely through the use of an individual’s name would be admissible.

Further, several courts have recognized that identity-related evidence may be suppressed in criminal illegal reentry proceedings if it is gathered for investigatory purposes — but distinguish fingerprints obtained to investigate a criminal charge from those obtained after an arrest solely intended to lead to removal proceedings. See, e.g., United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007). Additional strategies are needed to distinguish identity-related ICE’s investigatory evidence from evidence acquired during routine booking procedures and to build upon decisions in criminal cases.

**Resources:** Pretzantzin v. Holder; United States v. Oscar-Torres.

8. **Supreme Court Update**
   From AIC’s Supreme Court Update, http://www.legalactioncenter.org/supreme-court-update
   Court to Hear Child Status Protection Act Case
   Mayorkas v. DeOsorio, No. 12-930 (cert. granted June 24, 2013)
   The Supreme Court will hear oral argument on December 10, 2013 in this case, which involves the Child Status Protection Act (CSPA). The Court will consider whom Congress intended to benefit by INA § 203(h)(3), a provision which allows beneficiaries of certain visa petitions to retain earlier priority dates after “aging-out” (turning 21) and losing child status. The government sought Supreme Court review of an en banc decision of the Ninth Circuit holding that § 203(h)(3) applied to derivative beneficiaries of the Family 3d and 4th preference categories, as well as those in the Family 2A category. DeOsorio v. Mayorkas, 695 F.3d 1003 (9th Cir. 2012). In so holding, the Ninth Circuit rejected the Board of Immigration Appeals’ interpretation of § 203(h)(3) as applying only to derivative beneficiaries of the Family 2A preference category. Matter of Wang, 25 I&N Dec. 28 (BIA 2009).

9. **Proportionality**
   The “proportionality” argument is premised on the notion that in individual circumstances, removal is a penalty that is grossly disproportionate under the Eight and Fifth Amendments. The Supreme Court’s decision in Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010), now establishes that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Because removal is a direct penalty of the criminal convictions, the Eighth Amendment prohibits a penalty that is disproportionate to the crimes committed. Further, the Fifth Amendment Due Process clause also prohibits a penalty that is grossly disproportionate to the conduct in the civil context. If there is such a constitutional violation, then the violation trumps the application of the removal statute in such a case. Further, we are arguing that the immigration judges have the authority to administratively close cases, pursuant to Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), in order to avoid such a constitutional violation. Pending case: Barukh v Holder, No. 13-71665 (9th Cir.)

10. **Detention update**
    Background resource: ACLU prolong detention practice advisories and issue brief, located at: https://www.aclu.org/immigrants-rights/immigration-detention

11. **Equal Access to Justice (EAJA) Issues**