# Immigration Law Update

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Drake University Law School General Practice CLE

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# IMMIGRATION LAW UPDATE

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## II. CASE LAW UPDATE

### a. BOARD OF IMMIGRATION APPEALS

***MATTER OF EGIDIJUS SINIAUSKAS*, 27 I. & N. Dec. 207 (BIA 2018)**

**Holding:**

1. In deciding whether to set a bond, an Immigration Judge should consider the nature and circumstances of the alien's criminal activity, including any arrests and convictions, to determine if the alien is a danger to the community, but family and community ties generally do not mitigate an alien's dangerousness.
2. Driving under the influence is a significant adverse consideration in determining whether **an alien is a danger to the community in bond proceedings.**

***MATTER OF J-C-H-F-*, 27 I. & N. Dec. 21 (BIA 2018)**

**Holding:** When deciding whether to consider a border or airport interview in making a credibility determination, an Immigration Judge should assess the accuracy and reliability of the interview based on the totality of the circumstances, rather than relying on any one factor among a list or mandated set of inquiries.

***MATTER OF W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018)**

**Holdings:**

1. An applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate on the record before the Immigration Judge the exact delineation of any proposed particular social group.
2. The Board of Immigration Appeals generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge.

***MATTER OF JOSE MARQUEZ CONDE*, 27 I. & N. Dec. 251 (BIA 2018)**

**Holding:** We interpret the definition of a "conviction" to include convictions that have been vacated as a form of post-conviction relief--for example, for rehabilitative purposes--and we will continue to give them effect in immigration proceedings. However, we consider convictions that have been vacated based on procedural and substantive defects in the underlying criminal proceeding as no longer valid for immigration purposes.

***MATTER OF L-M-P-* 27 I. & N. Dec. 265 (BIA 2018**)

**Holdings:**

(1) The Department of Homeland Security has the authority to file a motion to reconsider in Immigration Court.

(2) An applicant in withholding of removal only proceedings who is subject to a reinstated order of removal pursuant to section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5) (2012), is ineligible for asylum.

***MATTER OF A-C-M-*, 27 I. & N. Dec. 303 (BIA 2018)**

**Holdings:**

(1) An alien provides "material support" to a terrorist organization if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree.

(2) The respondent afforded material support to the guerillas in El Salvador in 1990 because the forced labor she provided in the form of cooking, cleaning, and washing their clothes aided them in continuing their mission of armed and violent opposition to the Salvadoran Government.

***MATTER OF DANIEL GIRMAI NEGUSIE*, 27 I. & N. Dec. 347 (BIA 2018)**

**Holdings:**

(1) An applicant who is subject to being barred from establishing eligibility for asylum or withholding of removal based on the persecution of others may claim a duress defense, which is limited in nature.

(2) To meet the minimum threshold requirements of the duress defense to the persecutor bar, an applicant must establish by a preponderance of the evidence that (1) he acted under an imminent threat of death or serious bodily injury to himself or others; (2) he reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) he had no reasonable opportunity to escape or otherwise frustrate the threat; (4) he did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) he knew or reasonably

should have known that the harm he inflicted was not greater than the threatened harm to himself or others.

***MATTER OF AGUSTIN ORTEGA-LOPEZ*, 27 I. & N. Dec. 38 (BIA 2018)**

**Holdings:**

(1) The offense of sponsoring or exhibiting an animal in an animal fighting venture in violation of 7 U.S.C. § 2156(a)(1) (2006) is categorically a crime involving moral turpitude. Matter of Ortega-Lopez, 26 I&N Dec. 99 (BIA 2013), reaffirmed.

(2) An alien is ineligible for cancellation of removal under section 240A(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(C) (2012), for having "been convicted of an offense under" section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i) (2012), irrespective of both the general "admission" requirement in section 237(a) and the temporal (within 5 years of admission) requirement in section 237(a)(2)(A)(i)(I). Matter of Cortez, 25 I&N Dec. 301 (BIA 2010), reaffirmed.

***MATTER OF JULIO MEDINA-JIMENEZ*, 27 I. & N. Dec. 399 (BIA 2018)**

**Holding:** The categorical approach does not govern whether violating a protection order under 237(a)(2)(E)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(ii) (2012), renders an alien ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C) (2012); instead, Immigration Judges need only decide whether the alien has been convicted within the meaning of the Act and whether that conviction is for violating a protection order under section 237(a)(2)(E)(ii). Matter of Obshatko, 27 I&N Dec. 173 (BIA 2017), followed.

***MATTER OF J. M. ACOSTA*, 27 I. & N. Dec. 420 (BIA 2018)**

**Holdings:**

(1) A conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived.

(2) Once the Department of Homeland Security has established that a respondent has a criminal conviction at the trial level and that the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes, which the respondent can rebut with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court, and that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings.

(3) Appeals, including direct appeals, and collateral attacks that do not relate to the underlying merits of a conviction will not be given effect to eliminate the finality of the conviction.

***MATTER OF S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (BIA 2018)**

**Holdings:**

(1) Consistent with Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), immigration judges have no inherent authority to terminate or dismiss removal proceedings.

(2) Immigration judges may dismiss or terminate removal proceedings only under the circumstances expressly identified in the regulations, see 8 C.F.R. § 1239.2(c), (f), or where the Department of Homeland Security fails to sustain the charges of removability against a respondent, see 8 C.F.R. § 1240.12(c).

(3) An immigration judge's general authority to "take any other action consistent with applicable law and regulations as may be appropriate," 8 C.F.R. § 1240.1(a)(1)(iv), does not provide any additional authority to terminate or dismiss removal proceedings beyond those authorities expressly set out in the relevant regulations.
(4) To avoid confusion, immigration judges and the Board should recognize and maintain the distinction between a dismissal under 8 C.F.R. § 1239.2(c) and a termination under 8 C.F.R. § 1239.2(f).

***MATTER OF J-R-G-P-*, 27 I. & N. Dec. 482 (BIA 2018)**
**Holding:** Where the evidence regarding an application for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988), plausibly establishes that abusive or squalid conditions in pretrial detention facilities, prisons, or mental health institutions in the country of removal are the result of neglect, a lack of resources, or insufficient training and education, rather than a specific intent to cause severe pain and suffering, an Immigration Judge's finding that the applicant did not establish a sufficient likelihood that he or she will experience "torture" in these settings is not clearly erroneous.

### b. ATTORNEY GENERAL

***Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018)**
**Holding:** immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure. Accordingly, immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action. Where a case has been administratively closed without such authority, the immigration judge or the Board, as appropriate, shall recalendar the case on the motion of either party. AG overrules Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), Matter of W-Y-U-, 27 I&N Dec. 17 (BIA 2017), and any other Board precedent, to the extent those decisions are inconsistent with this opinion.

***Matter of L-A-B-R*, 27 I. & N. Dec. 405 (AG 2018)**
**Holdings:**
(1) An immigration judge may grant a motion for a continuance of removal proceedings only "for good cause shown." 8 C.F.R. § 1003.29.
(2) The good-cause standard is a substantive requirement that limits the discretion of immigration judges and prohibits them from granting continuances for any reason or no reason at all.
(3) The good-cause standard requires consideration and balancing of multiple relevant factors when a respondent alien requests a continuance to pursue collateral relief from another authority--for example, a visa from the Department of Homeland Security. See Matter of Hashmi, 24 I&N Dec. 785, 790 (BIA 2009).
(4) When a respondent requests a continuance to pursue collateral relief, the immigration judge must consider primarily the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings.

(5) The immigration judge should also consider relevant secondary factors, which may include the respondent's diligence in seeking collateral relief, DHS's position on the motion for continuance, concerns of administrative efficiency, the length of the continuance requested, the number of hearings held and continuances granted previously, and the timing of the continuance motion.

***Matter of A-B-*, 21 I&N Dec. 316 (AG 2018)**

**Holdings:**

(1) Matter of A-R-C-G-, 26 I&N Dec. 338 (BIA 2014) is overruled. That decision was wrongly decided and should not have been issued as a precedential decision.

(2) An applicant seeking to establish persecution on account of membership in a "particular social group" must demonstrate: (1) membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; and (2) that membership in the group is a central reason for her persecution. When the alleged persecutor is someone unaffiliated with the government, the applicant must also show that her home government is unwilling or unable to protect her.

(3) An asylum applicant has the burden of showing her eligibility for asylum. The applicant must present facts that establish each element of the standard, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all of those elements.

(4) If an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim.

(5) The mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.

(6) To be cognizable, a particular social group must exist independently of the harm asserted in an application for asylum.

(7) An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.

(8) An applicant seeking asylum based on membership in a particular social group must clearly indicate on the record the exact delineation of any proposed particular social group.

(9) The Board, immigration judges, and all asylum officers must consider, consistent with the regulations, whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum.

### c. U.S. Court of Appeals for the Eight Circuit

***United States v. Ramirez-Jimenez*, 907 F.3d 1091 (8th Cir. 2018)**

**Background:** Defendant was convicted, upon a guilty plea, in the United States District Court the Northern District of Iowa, Linda R. Reade, J., of unlawful use of identification documents. Defendant appealed.

**Holding:** The Court of Appeals held that defendant was not deprived of effective assistance of counsel in connection with his plea where the record was clear that defense counsel and magistrate judge advise defendant that deportation was likely.

***Mayorga-Rosa v. Sessions*, 888 F.3d 379 (8th Cir. 2018)**

**Background**: Alien, an native and citizen of Guatemala, filed a petition for review of the order of the Board of Immigration Appeals (BIA), which dismissed the administrative appeal of the decision of the immigration judge (IJ), denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

**Holding:**

(1) IJ was not required to seek clarification as to the particular social group for alien's asylum claim;
(2) IJ was not required to make specific findings on each element of asylum claim; and
(3) Proposed social group of individuals in Guatemala, who were once recruited and threatened by gang members, but who did not join or assist the gang was not a discrete social group, as required to support asylum claim.

***Rivas v. Sessions*, 899 F.3d 537 (8th Cir. 2018)**

**Background:** Asylum-seeker who was citizen of El Salvador, and her children, petitioned for review of order of the Board of Immigration Appeals (BIA) denying their applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT).

**Holding:** Social groups of women who were targeted to become "gang girlfriends," and witnesses to crimes who reported the crimes to the police, were not sufficiently particular, and thus alien who was citizen of El Salvador was not entitled to seek asylum based on her alleged membership in those groups; proposed groups were not discrete with definable boundaries, but were rather amorphous, overbroad, diffuse, or subjective, El Salvadoran society did not meaningfully distinguish between women who were targeted to become gang girlfriends and women who were not, and witnesses to crimes who reported crimes to police were not socially distinct or identifiable within El Salvadoran society.

***Payeras v. Sessions*, 899 F.3d 593 (8th Cir. 2018)**

**Background:** Native and citizen of Guatemala filed petition for review of Board of Immigration Appeals (BIA) order dismissing her appeal of immigration judge's (IJ) denial of her motion to reopen her removal proceedings and rescind its in absentia removal order.

**Holdings:** The Court of Appeals, Kelly, Circuit Judge, held that:

(1) BIA abused its discretion when it failed to address whether her inability to get proper medical attention constituted exceptional circumstance sufficient to excuse her failure to attend her asylum hearing, and
(2) BIA abused its discretion when it failed to address alien's contention that she was not required to be physically present in United States when her asylum application was considered.

***Gomez-Rivera v. Sessions*, 897 F.3d 995 (8th Cir. 2018)**

**Background:** Alien, a native and citizen of El Salvador, petitioned for review of order of Board of Immigration Appeals (BIA) upholding immigration judge's (IJ) denial of his applications for asylum and withholding of removal.

**Holdings:** Evidence supported Board of Immigration Appeals' (BIA) finding that alien's membership in social group consisting of nuclear family members of his police officer father was not a central reason for his persecution by gangs in El Salvador, thus supporting BIA's denial of alien's asylum request; evidence indicated that gangs attempted to recruit alien in much the same way as other young men who were not related to police officers, alien's father left El Salvador several

years before gangs began to approach him, and alien's sister remained in El Salvador without persecution.

***Sagoe v. Sessions*, 887 F.3d 417 (8th Cir. 2018)**

**Background:** Alien, a native and citizen of Ghana, filed petition for review of a decision of the Board of Immigration Appeals (BIA), which affirmed immigration judge's (IJ) termination of alien's permanent resident status and removal order.

**Holdings:** Substantial evidence supported finding of the Board of Immigration Appeals (BIA) that alien's marriage to United States citizen was sham to procure immigration benefit, warranting termination of permanent resident status of alien spouse and order for her removal, although state probate court ruled that alien was citizen's lawful surviving spouse under Minnesota law, where probate court's ruling did not address issue before the BIA, and there was significant evidence that couple did not intend to establish shared life together at time they were married.

***Molina-Cabrera v. Sessions*, 905 F.3d 1103 (8th Cir. 2018)**

**Background:** Alien, a native of Ecuador, applied for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). After an immigration judge denied relief, the Board of Immigration Appeals dismissed alien's appeal. Alien petitioned for review.

**Holding:** Alien, a native of Ecuador, did not have well founded fear of future persecution, as required for asylum application, from local politician and political party leader who beat alien after he refused to join party, where alien fled his city to another city after the beating, politician approached alien's grandmother and brother once but no other times, alien's brother and sister continued to live in Ecuador without incident, alien was able to obtain a room and work in other city without being approached by politician, and he stayed in Ecuador for weeks without incident, despite submitting documents with his name to government.

***United States v. Ngombwa*, 893 F.3d 546 (8th Cir. 2018)**

**Background:** Defendant was convicted in the United States District Court for the Northern District of Iowa, Linda R. Reade, J., of unlawful procurement of naturalization, conspiracy to commit unlawful procurement of naturalization, and making false statements to government officials, and subsequently, 2017 WL 508208, was sentenced to a 180-month prison term. Defendant appealed.

**Holdings:** The Court of Appeals, Shepherd, Circuit Judge, held that:

(1) Court of Appeals would consider claim of ineffective assistance of counsel on direct appeal;
(2) Counsel's failure to contact and interview five of defendant's family members did not amount to ineffective assistance;
(3) Grouping of convictions for sentencing purposes was proper;
(4) Sentencing under version of Sentencing Guidelines in effect on date of sentencing did not violate Ex Post Facto Clause;
(5) Sentencing court properly relied on defendant's in absentia convictions in Rwandan tribal courts to determine criminal history category;
(6) Witness statements were properly considered at sentencing; and
(7) Sentencing court could properly consider testimony of an expert via videolink from the United Kingdom.

### d. U.S. SUPREME COURT

***Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)**

**Background:** Plaintiff, a Mexican citizen and lawful permanent resident, sought writ of habeas corpus, as well as declaratory and injunctive relief on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing, asserting constitutional and statutory claims for individualized bond hearings.

**Holdings:**

1. Immigration and Nationality Act (INA) provisions applicable primarily to detention of aliens seeking entry to United States could not be plausibly interpreted as implicitly placing six-month limit on detention or requiring periodic bond hearings, and
2. INA provision, carving out narrow conditions under which Attorney General may release on bond aliens detained pending their removal based on criminal offenses or terrorist activities, could not be plausibly interpreted as implicitly placing six-month limit on detention or requiring periodic bond hearings.

***Trump v. Hawaii*, 138 S. Ct. 2392 (2018)**

**Background**: State of Hawai'i as operator of state university system, individual citizens or lawful permanent residents with relatives applying for immigrant or nonimmigrant visas, and nonprofit organization that operated a mosque in Hawai'i brought pre-enforcement action against President, Executive Branch officials and agencies, and the United States, seeking to prohibit implementation and enforcement of Presidential Proclamation to extent that it indefinitely barred entry by nationals from six predominantly Muslim countries (Iran, Libya, Syria, Yemen, Somalia, and Chad).

**Holdings:**

1. President fulfilled requirement, for Immigration and Nationality Act (INA) provision delegating authority to President to suspend entry by aliens or classes of aliens, of finding that entry of aliens from covered countries would be detrimental to interests of U.S.;
2. INA provision prohibiting national origin discrimination in issuing immigrant visas does not constrain President's delegated authority to suspend entry by aliens or classes of aliens;
3. Rational basis review would be applied to Establishment Clause claim, which concerned entry of foreign nationals;
4. Proclamation did not violate the Establishment Clause; and
5. Forcible relocation of U.S. citizens to concentration camps, solely and explicitly on basis of race, is objectively unlawful and outside the scope of Presidential authority, abrogating *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194.

***Pereira v. Sessions*, 138 S. Ct. 2105 (2018)**

**Background:** Noncitizen, a native and citizen of Brazil, filed petition for review of Board of Immigration Appeals (BIA) order upholding immigration judge's (IJ) denial of his application for cancellation of removal and order of removal for failure to establish continuous physical presence.

**Holding:** The Supreme Court, Justice Sotomayor, held that a putative "notice to appear" that fails to designate the specific time or place of a noncitizen's removal proceedings is not a "notice to appear under section 1229(a)" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and so does not trigger the Act's stop-time rule ending the noncitizen's period of continuous presence in the United States.

***Sessions v. Dimaya*, 138 S.Ct. 1204 (2018)**

**Background:** Native of the Philippines filed petition for review of Board of Immigration Appeals' (BIA) determination that his California convictions for first-degree burglary were categorically "crimes of violence" rendering him removable for having been convicted of aggravated felony. The United States Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 803 F.3d 1110, granted petition. Certiorari was granted.

**Holding:** The Supreme Court, Justice Kagan, held that residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's (INA) definition of aggravated felony, was impermissibly vague in violation of due process, abrogating United States v. Gonzalez-Longoria, 831 F.3d 670.

## III. POLICY UPDATE

### a. FAMILY SEPARATION

i. Proposed *Flores* Regulations: https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children

ii. Executive Order on Family Separation: https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/

### b. DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

i. Northern District of California injunction: https://assets.documentcloud.org/documents/4345908/2017Civ-17-05211-DACA.pdf

ii. U.S. Court of Appeals for Ninth Circuit: upholding preliminary injunction: http://cdn.ca9.uscourts.gov/datastore/general/2018/11/08/18-15068%20Opinion.pdf

iii. Eastern District of New York injunction: https://www.nilc.org/wp-content/uploads/2018/02/Batalla-Vidal-v-Nielsen-updated-pi-order-2018-02-13.pdf

iv. District of Columbia injunction: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-23

1. Limited stay of order: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-32

v. Texas denial of preliminary injunction: https://www.scribd.com/document/387497934/DACA-PI-decision?campaign=SkimbitLtd&ad_group=66960X1516588Xba707c5b8ea4fdbd72fc15355afe996b&keyword=660149026&source=hp_affiliate&medium=affiliate

### c. TEMPORARY PROTECTED STATUS

- **Sudan,** designation will terminate on Nov. 2, 2018
- **Nicaragua,** designation will terminate on Jan. 5, 2019
- **Nepal,** designation will terminate on June 24, 2019
- **Haiti,** designation will terminate on July 22, 2019
- **El Salvador,** designation will terminate on Sept. 19, 2019
- **Honduras,** designation will terminate on Jan. 5, 2020

i. Northern District of California Injunction: https://www.uscis.gov/sites/default/files/USCIS/Laws/ramos-v-nielsen-order-granting-preliminary-injunction-case-18-cv-01554-emc.pdf

### d. EXECUTIVE ORDERS ON IMMIGRANT ENFORCEMENT

i. Executive Order: "Enhancing Public Safety in the Interior of the United States" (Interior Enforcement): https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/

ii. Executive Order: Border Security and Immigration Enforcement Improvements: https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/

### e. PUBLIC CHARGE GROUND OF INADMISSIBILITY

i. **USCIS Information: https://www.uscis.gov/legal-resources/proposed-change-public-charge-ground-inadmissibility**

ii. **Proposed Rule: https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds**

### f. ASYLUM, WITHHOLDING, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

i. Interim Final Rule: https://www.gpo.gov/fdsys/pkg/FR-2018-11-09/pdf/2018-24594.pdf

ii. Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States: https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/