Immigration Law Update

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II. CASE LAW UPDATE

a. BOARD OF IMMIGRATION APPEALS

***Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019)**

(1) Torturous conduct committed by a public official who is acting "in an official capacity," that is, "under color of law" is covered by 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), but such conduct by an official who is not acting in an official capacity, also known as a "rogue official," is not covered by the Convention.

(2) The key consideration in determining if a public official was acting under color of law is whether he was able to engage in torturous conduct because of his government position or if he could have done so without a connection to the government.

***X-Q-L-*, 27 I&N Dec. 704 (BIA 2019)**

Reopening of proceedings to terminate a grant of asylum is warranted if the Department of Homeland Security has demonstrated that evidence of fraud in the original proceeding was not

previously available and is material because, if known, it would likely have opened up lines of inquiry that could call the alien's eligibility for asylum into doubt.

***C-A-S-D-*, 27 I&N Dec. 692 (BIA 2019)**

(1) To qualify for a waiver of inadmissibility under section 209(c) of the Immigration and Nationality Act, 8 U.S.C. § 1159(c) (2012), an alien who is found to be a violent or dangerous individual must establish extraordinary circumstances, which may be demonstrated by a showing of exceptional and extremely unusual hardship to the alien or to his qualifying relatives. *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), followed.

(2) Even if an alien establishes exceptional and extremely unusual hardship, the favorable and adverse factors presented must be balanced to determine if a waiver should be granted in the exercise of discretion.

***H-G-G-*, 27 I&N Dec. 617 (AAO 2019)**

For purposes of adjustment of status under section 245 of the Act, a recipient of Temporary Protected Status (TPS) is considered as being in and maintaining lawful status as a nonimmigrant only during the period that TPS is in effect; a grant of TPS does not constitute an admission, nor does it cure or otherwise impact any previous unlawful status.

***GONZALEZ LEMUS*, 27 I&N Dec. 612 (BIA 2019)**

(1) Because the identity of the drug involved is an element of the crime of possession of a controlled substance under section 124.401(5) of the Iowa Code, the statute is divisible (in the case of marijuana, methamphetamine, or amphetamine) as to the specific drug involved, and the record of conviction can be examined under the modified categorical approach to determine whether that drug is a controlled substance under Federal law.

(2) The respondent's conviction for possession of methamphetamine in violation of section 124.401(5) of the Iowa Code is a violation of a law relating to a controlled substance under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

***P. SINGH*, 27 I&N Dec. 598 (BIA 2019)**

(1) The standard of proof necessary to bar the approval of a visa petition based on marriage fraud under section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c) (2012), is "substantial and probative evidence."

(2) The degree of proof necessary to constitute "substantial and probative evidence" is more than a preponderance of evidence, but less than clear and convincing evidence; that is, the evidence has to be more than probably true that the marriage is fraudulent.

(3) The nature, quality, quantity, and credibility of the evidence of marriage fraud contained in the record should be considered in its totality in determining if it is "substantial and probative."

(4) The application of the "substantial and probative evidence" standard requires the examination of all of the relevant evidence and a determination as to whether such evidence, when viewed in its totality, establishes, with sufficient probability, that the marriage is fraudulent.

(5) Both direct and circumstantial evidence may be considered in determining whether there is "substantial and probative evidence" of marriage fraud under section 204(c) of the Act, and circumstantial evidence alone may be sufficient to constitute "substantial and probative evidence."

***D-A-C-*, 27 I&N Dec. 575 (BIA 2019)**

Immigration Judges have the authority to deny an application for temporary protected status in the exercise of discretion**.**

***ZHANG*, 27 I&N Dec. 569 (BIA 2019)**

(1) Under the plain language of section 237(a)(3)(D)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(3)(D)(i) (2012), it is not necessary to show intent to establish that an alien is deportable for making a false representation of United States citizenship.

(2) Although a Certificate of Naturalization (Form N-550) is evidence of United States citizenship, the certificate itself does not confer citizenship status if it is acquired unlawfully.

***NAVARRO GUADARRAMA*, 27 I&N Dec. 560 (BIA 2019)**

Where an alien has been convicted of violating a State drug statute that includes a controlled substance that is not on the Federal controlled substances schedules, he or she must establish a realistic probability that the State would actually apply the language of the statute to prosecute conduct involving that substance in order to avoid the immigration consequences of such a conviction. *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), reaffirmed.

***ANDRADE JASO and CARBAJAL AYALA*, 27 I&N Dec. 557 (BIA 2019)**

An Immigration Judge has the authority to dismiss removal proceedings pursuant to 8 C.F.R. § 239.2(a)(7) (2018) upon a finding that it is an abuse of the asylum process to file a meritless asylum application with the U.S. Citizenship and Immigration Services for the sole purpose of seeking cancellation of removal in the Immigration Court.

***MIRANDA-CORDIERO*, 27 I&N Dec. 551 (BIA 2019)**

Pursuant to section 240(b)(5)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(B) (2012), neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien who was served with a notice to appear that did not specify the time and place of the initial removal hearing failed to provide an address where a notice of hearing could be sent. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), distinguished**.**

***PENA-MEJIA*, 27 I&N Dec. 546 (BIA 2019)**

Neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien did not appear at a scheduled hearing after being served with a notice to appear that did not specify the time and place of the initial removal hearing, so long as a subsequent notice of

hearing specifying that information was properly sent to the alien. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), distinguished.

***MENDOZA-HERNANDEZ* and *CAPULA-CORTES*, 27 I&N Dec. 520 (BIA 2019)**

A deficient notice to appear that does not include the time and place of an alien's initial removal hearing is perfected by the subsequent service of a notice of hearing specifying that missing information, which satisfies the notice requirements of section 239(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a) (2012), and triggers the "stop-time" rule of section 240A(d)(1)(A) of the Act, 8 U.S.C. § 1229b(d)(1)(A) (2012). *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), distinguished; *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), followed.

***A. VASQUEZ*, 27 I&N Dec. 503 (BIA 2019)**

Under the plain language of section 101(a)(43)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(H) (2012), kidnapping in violation of 18 U.S.C. § 1201(a) (2012) is not an aggravated felony.

b. ATTORNEY GENERAL

***L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)**

(1) In Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2018), the Board of Immigration Appeals improperly recognized the respondent's father's immediate family as a "particular social group" for purposes of qualifying for asylum under the Immigration and Nationality Act.

(2) All asylum applicants seeking to establish membership in a "particular social group," including groups defined by family or kinship ties, must establish that the group is (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.

(3) While the Board has recognized certain clans and subclans as "particular social groups," most nuclear families are not inherently socially distinct and therefore do not qualify as "particular social groups."

(4) The portion of the Board's decision recognizing the respondent's proposed particular social group is overruled. See Matter of L-E-A-, 27 I&N Dec. at 42–43 (Part II.A). The rest of the Board's decision, including its analysis of the required nexus between alleged persecution and the alleged protected ground, is affirmed. See id. at 43–47 (Part II.B).

***CASTILLO-PEREZ*, 27 I&N Dec. 664 (A.G. 2019)**

(1) The Immigration and Nationality Act's "good moral character" standard requires adherence to the generally accepted moral conventions of the community, and criminal activity is probative of non-adherence to those conventions.

(2) Evidence of two or more convictions for driving under the influence during the relevant period establishes a presumption that an alien lacks good moral character under INA § 101(f), 8 U.S.C. § 1101(f).

(3) Because only aliens who possessed good moral character for a 10-year period are eligible for cancellation of removal under section 240A(b) of the INA, 8 U.S.C. § 1229b(b), such evidence also presumptively establishes that the alien's application for that discretionary relief should be denied.

***THOMAS and THOMPSON*, 27 I&N Dec. 674 (A.G 2019)**

(1) The tests set forth in *Matter of Cota-Vargas, Matter of Song*, and *Matter of Estrada* will no longer govern the effect of state-court orders that modify, clarify, or otherwise alter a criminal alien's sentence.

(2) Such state-court orders will be given effect for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding; these orders will have no effect for immigration purposes if based on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or the avoidance of immigration consequences.

***M-S-*, 27 I&N Dec. 509 (A.G. 2019)**

(1) *Matter of X-K-,* 23 I&N Dec. 731 (BIA 2005), was wrongly decided and is overruled.

(2) An alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond. Such an alien must be detained until his removal proceedings conclude, unless he is granted parole.

c. U.S. COURT OF APPEALS FOR THE EIGHT CIRCUIT

De Guevara v. Barr, 919 F.3d 538 (8th Cir. 2019)

Background: Natives and citizens of El Salvador filed petition for review of Board of Immigration Appeals (BIA) order affirming immigration judge's (IJ) denial of their application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

Holdings: The Court of Appeals, Loken, Circuit Judge, held that:

1 phone call and letter demanding money that alien received from gang did not constitute past persecution;

2 substantial evidence supported finding that alien failed to prove that she had well-founded fear of future persecution; and

3 "Salvadoran female heads of households" did not constitute particular social group.

Pereida v. Barr, 916 F.3d 1128 (8th Cir. 2019)

Background: Alien, a native and citizen of Mexico, petitioned for review of an order of the Board of Immigration Appeals (BIA) affirming an immigration judge's grant of the Department of Homeland Security's (DHS) motion to pretermit alien's cancellation of removal application based on alien's no contest plea to a state charge of attempted criminal impersonation arising from the use of a fraudulent social security card to obtain employment.

Holding: Beam, Circuit Judge, held that under the modified categorical approach, it was not possible to ascertain which subsection of divisible statute formed the basis for conviction, and therefore whether alien was convicted of a crime involving moral turpitude (CIMT), and thus alien failed to satisfy burden to establish eligibility for cancellation of removal.

Jima v. Barr, 942 F.3d 468 (8th Cir. 2019)

Background: Native and citizen of South Sudan filed petition for review of decision of Board of Immigration Appeals (BIA) reversing immigration judge's (IJ) order granting him deferral of removal under Convention Against Torture (CAT).

Holdings: The Court of Appeals, Grasz, Circuit Judge, held that:

1 alien's Iowa conviction for willful injury causing bodily harm qualified as aggravated felony warranting his removal, and

2 BIA did not engage in impermissible factfinding when it reversed IJ's order.

Lesum v. Barr, 915 F.3d 1189 (8th Cir. 2019)

Background: Alien, a native and citizen of Bangladesh who had been admitted to the United States as a nonimmigrant student but who had dropped out of school and remained in the country without authorization, petitioned for review of an order of the Board of Immigration Appeals (BIA) denying alien's application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT), which was based on allegations that alien suffered persecution in Bangladesh due to being gay.

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

1 time for filing asylum application accrued, and one-year limitations period began to run, when alien arrived in the United States;

2 nine-month delay in filing asylum application from termination of nonimmigrant student status was unreasonable;

3 allegations that alien suffered persecution by his college classmates when he was locked in his dorm room for several days did not rise to the level of persecution required to be entitled to withholding of removal; and

4 alien was not entitled to protection under CAT

Cardoza Salazar v. Barr, 932 F.3d 704 (8th Cir. 2019)

Background: Alien, a citizen of El Salvador, filed petition for review of determination of the Department of Homeland Security (DHS) which found him removable based on his Iowa conviction for an aggravated felony, and also filed petition for review of DHS' issuance of a Final Administrative Removal Order (FARO).

Holdings: Consolidating the petitions, the Court of Appeals, Grasz, Circuit Judge, held that:

1 alien's Iowa forgery conviction qualified as an aggravated felony; and

2 alien was not prejudiced by violation of his due process and statutory rights.

Zazueta v. Barr, 916 F.3d 708 (8th Cir. 2019)

Background: Lawful permanent resident (LPR) alien, a native and citizen of Mexico, filed a petition for review of an order of the Board of Immigration Appeals (BIA), 2017 WL 8787244, affirming the removal order of the immigration judge (IJ).

Holding: The Court of Appeals, Shepherd, Circuit Judge, held that alien's deferred judgment of conviction for possession with intent to deliver controlled substance, in violation of Iowa law, was a "conviction" for immigration purposes.

d. U.S. SUPREME COURT

Nielsen v. Preap, 139 S. Ct. 954, 203 L. Ed. 2d 333 (2019)

Background: In first case, aliens brought immigration § 2241 habeas corpus class action against officials from Department of Homeland Security (DHS) and Department of Justice (DOJ), challenging aliens' mandatory detention without bond under Immigration and Nationality Act (INA), and seeking injunctive and declaratory relief that they and proposed class members were required to be afforded bond hearings so an Immigration Judge (IJ) could determine whether they should be released during pendency of removal proceedings

Holding: The Supreme Court, Justice Alito, held that INA's mandatory-detention requirement, without release on bond or parole, is not limited to situations in which a covered alien is taken into custody by immigration officials as soon as the alien in released from criminal custody.

III. ADMINISTRATIVE RULES AND POLICY UPDATE[1]

a. EXPANDED EXPEDITED REMOVAL

i. **Proposed Policy:** On July 22, 2019, DHS published a Notice to "exercise the full remaining scope of its statutory authority" to qualifying noncitizens in "expedited removal" if they cannot prove they have been continuously physically present in the United States for two years.

ii. **Current Status:** In litigation. On September 27, 2019, a D.C. federal judge issued a nationwide preliminary injunction temporarily blocking the expanded expedited removal policy. . This means that expedited removal only applies to persons who arrive at a port-of-entry or within 100 miles of the border with fraudulent or insufficient documents for right now.

b. THIRD-COUNTRY ASYLUM RULE

i. **Policy:** This policy adds a bar to asylum for all individuals who enter or attempt to enter across the southern border after July 16, 2019, if they did not seek protection from a third country while en route to the United States

[1] Penn State Immigrants Rights Clinic, Immigration in the Time of Trump, https://pennstatelaw.psu.edu/immigration-time-of-trump

ii. **Current Status:** In litigation. On September 11, 2019, the Supreme Court reinstated the interim final rule nationwide in a brief unsigned order pending litigation on the merits in the courts.

c. REMAIN IN MEXICO POLICY

i. **Policy:** Allows certain noncitizens entering or seeking admission to the U.S. from Mexico – without papers or proper documentation – to be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings.

ii. **Current Status:** In litigation. On May 7, 2019, the Ninth Circuit granted a motion to stay the district court's injunction. This means that the administration may continue to return asylum seekers to Mexico pending litigation on the merits in the courts.

d. FAMILY SEPARATION

i. ***Flores* Regulations:** https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children

ii. **Status of the rule**: The rule took effect 60 days after publication in the Federal Register but was blocked on September 27, 2019 by the Honorable Dolly M. Gee of the Central District of California, who is overseeing the Flores Settlement Agreement (FSA). The Court issued a permanent injunction, finding that the rule was inconsistent with the FSA because it eliminates the FSA's protections. For the administration to modify the FSA, which is a binding contract and consent decree, Judge Gee noted there must be either a change in law from Congress or compliance must be illegal or impossible due to a change in law or facts. The FSA provides for its own termination upon the publication of final regulations consistent with its terms

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

e. DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

i. **Current status:** On November 12, 2019, the Supreme Court of the United States heard oral arguments in the case of *Department of Homeland Security v. Regents of the University of California*, consolidated with *Trump v. NAACP* and *McAleenan v. Vidal,* to decide whether the Department of Homeland Security (DHS) can lawfully rescind the Deferred Action for Childhood Arrivals policy (DACA).

1. NEVER HAD DACA: NOT ELIGIBLE TO APPLY NOW
2. DACA HAS NOT BEEN EXPIRED OR TERMINATED: ELIGIBLE TO APPLY FOR A TWO-YEAR RENEWAL

3. DACA HAS EXPIRED: ELIGIBLE TO APPLY FOR A TWO-YEAR RENEWAL OR AN INITIAL DACA REQUEST (DEPENDING ON DATE OF EXPIRATION)
4. DACA HAS TERMINATED: ELIGIBLE TO FILE AN INITIAL DACA REQUEST

ii. Northern District of California injunction: https://assets.documentcloud.org/documents/4345908/2017Civ-17-05211-DACA.pdf
iii. 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
iv. 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
v. 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
vi. 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

f. TEMPORARY PROTECTED STATUS

i. **Policy:** Under the current administration, the former or current Secretary of Homeland Security has announced multiple decisions to end the TPS designations of Sudan (announced Oct. 2017), Haiti (announced Nov. 2017), Nicaragua (announced Nov. 2017) and El Salvador (announced Jan. 2018), Nepal (announced May 2018), and Honduras (announced July 2018).

ii. **Current status:** In *Ramos v. Nielsen*, on Oct. 3, 2018, the U.S. District Court for the Northern District of California blocked DHS from implementing and enforcing decisions to terminate TPS for Sudan, Nicaragua, Haiti, and El Salvador, pending further resolution of the case. DHS published a notice in the Federal Register on March 1, 2019 extending TPS for Salvadorans, Haitians, Nicaraguans, and Sudanese through January 2, 2020 as a result of the litigation. IN addition, in *Bhattari et al v. Nielsen*, on February 10, 2019, six TPS holders and two U.S. citizen children of TPS recipients filed a class action lawsuit against DHS in the U.S. District Court in the Northern District of California Under the stipulation order signed by the judge on March 12, 2019 TPS for Nepal and Honduras will remain in place for at least six months after the appeal in Ramos v. Nielsen, is decided.

iii. 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

g. PUBLIC CHARGE GROUND OF INADMISSIBILITY

i. Final Public Charge Rule: https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds

ii. **Current status:** Judges before U.S. District Courts for the Southern District of New York, Northern District of California, Eastern District of Washington, Northern District of Illinois, and District of Maryland have ordered that DHS cannot implement and enforce the final rule on the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act. The court orders also postpone the effective date of the final rule until there is final resolution in the cases. Most of the injunctions are nationwide, and prevent USCIS from implementing the rule anywhere in the United States.

h. SPECIAL IMMIGRATION JUVENILE STATUS (SIJS)

i. **Proposed Rule:** https://www.govinfo.gov/content/pkg/FR-2011-09-06/pdf/2011-22625.pdf

ii. **Current Status:**

1. Comment period for proposed rule ended Nov. 15, 2019.
2. AAO Adopted Decisions:[2]
    a. The SIJS order should contain all three findings—dependency or custody, parental reunification, and best interest—explicitly. In the SIJS order itself, or through other evidence, petitioners should provide evidence of the factual basis for each of the three required SIJS findings.
    b. The SIJS order must cite state law for each of the three SIJS findings—dependency or custody, parental reunification, and best interest.
    c. USCIS may recognize nunc pro tunc orders that remedy initial deficiencies if they are issued pursuant to the particular state's nunc pro tunc requirements. Thus, orders issued nunc pro tunc should cite to the state law or procedure that permits such orders.
    d. Depending on the circumstances, USCIS may consider juvenile court orders entered after the SIJS petition is filed, in addition to the initial order submitted with the SIJS petition.
    e. USCIS may recognize orders issued after age 18 if the state court has jurisdiction under state law to make judicial

[2] CLINIC/ILRC, PRACTICE ALERT SIJS POLICY UPDATES AND PROPOSED REGULATIONS, https://www.ilrc.org/sites/default/files/resources/2019.11_practice_alert_-_sijs_policy_update.pdf.

determinations about the child's dependency and/or custody and care as a juvenile.

f. USCIS will rely on state law definitions of the term "juvenile" or its equivalent, so it is important that state law definitions of "juvenile" or its equivalent include youth ages 18 to 20 who are seeking state court protection and SIJS findings.
g. USCIS is no longer requiring that the juvenile court had jurisdiction to place the child in the custody of the unfit parent as part of the parental reunification requirement.
h. The AAO decisions direct that in exercising consent, USCIS looks to the "nature and purpose" of the state court proceedings and requires that the court have granted relief from parental maltreatment, rather than merely SIJS findings.