Immigration Law Update

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Drake University Law School General Practice CLE

Suzan M. Pritchett
Professor
Director, Clinics and Experiential Education

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Suzan M. Pritchett
Professor
Director, Clinics and Experiential Education
Drake University Law School

II. CASE LAW UPDATE

a. BOARD OF IMMIGRATION APPEALS

NEGUSIE, 28 I&N Dec. 120 (A.G. 2020)

(1) The bar to eligibility for asylum and withholding of removal based on the persecution of others does not include an exception for coercion or duress.

(2) The Department of Homeland Security does not have an evidentiary burden to show that an applicant is ineligible for asylum and withholding of removal based on the persecution of others. If evidence in the record indicates the persecutor bar may apply, the applicant bears the burden of proving by a preponderance of the evidence that it does not.

PAK, 28 I&N Dec. 113 (BIA 2020)

Where there is substantial and probative evidence that a beneficiary's prior marriage was fraudulent and entered into for the purpose of evading the immigration laws, a subsequent visa petition filed on the beneficiary's behalf is properly denied pursuant to section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c) (2018), even if the first visa petition was denied because of insufficient evidence of a bona fide marital relationship.

VOSS, 28 I&N Dec. 107 (BIA 2020)

If a criminal conviction was charged as a ground of removability or was known to the Immigration Judge at the time cancellation of removal was granted under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2018), that conviction cannot serve as the sole factual predicate for a charge of removability in subsequent removal proceedings.

J-G-T-, 28 I&N Dec. 97 (BIA 2020)

(1) In assessing whether to admit the testimony of a witness as an expert, an Immigration Judge should consider whether it is sufficiently relevant and reliable for the expert to offer an informed opinion, and if it is admitted, the Immigration Judge should then consider how much weight the testimony should receive.

(2) In considering how much weight to give an expert's testimony, the Immigration Judge should assess how probative and persuasive the testimony is regarding key issues in dispute for which the testimony is being offered.

A-C-A-A-, 28 I&N Dec. 84 (A.G. 2020)

(1) In conducting its review of an alien's asylum claim, the Board of Immigration Appeals ("Board") must examine de novo whether the facts found by the immigration judge satisfy all of the statutory elements of asylum as a matter of law. See Matter of R-A-F-, 27 I&N Dec. 778 (A.G. 2020).

(2) When reviewing a grant of asylum, the Board should not accept the parties' stipulations to, or failures to address, any of the particular elements of asylum—including, where necessary, the elements of a particular social group. Instead, unless it affirms without opinion under 8 C.F.R. § 1003.1(e)(4)(i), the Board should meaningfully review each element of an asylum claim before affirming such a grant, or before independently ordering a grant of asylum. See Matter of L-E-A-, 27 I&N Dec. 581, 589 (A.G. 2019).

(3) Even if an applicant is a member of a cognizable particular social group and has suffered persecution, an asylum claim should be denied if the harm inflicted or threatened by the persecutor is not "on account of" the alien's membership in that group. That requirement is especially important to scrutinize where the asserted particular social group encompasses many millions of persons in a particular society. (4) An alien's membership in a particular social group cannot be "incidental, tangential, or subordinate to the persecutor's motivation . . . [for] why the persecutor[] sought to inflict harm." Matter of A-B-, 27 I&N Dec. 316, 338 (A.G. 2018) (citations omitted). Accordingly, persecution that results from personal animus or retribution generally does not support eligibility for asylum.

R-C-R-, 28 I&N Dec. 74 (BIA 2020)

(1) After an Immigration Judge has set a firm deadline for filing an application for relief, the respondent's opportunity to file the application may be deemed waived, prior to a scheduled hearing, if the deadline passes without submission of the application and no good cause for noncompliance has been shown.

(2) The respondent failed to meet his burden of establishing that he was deprived of a full and fair hearing where he has not shown that conducting the hearing by video conference interfered with his communication with the Immigration Judge or otherwise prejudiced him as a result of technical problems with the video equipment.

NIVELO CARDENAS, 28 I&N Dec. 68 (BIA 2020)

(1) Where an alien who has been personally served with a notice to appear advising him of the requirement to notify the Immigration Court of his correct address fails to do so and is ordered removed in absentia for failure to appear for the scheduled hearing, reopening of the proceedings to rescind his order of removal based on a lack of proper notice is not warranted under section 240(b)(5)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(ii) (2018).

(2) The respondent's failure to update his address for over 18 years indicates a lack of due diligence and may properly be found to undermine the veracity of his claim that he has taken actions to maintain his rights in the underlying removal proceedings.

REYES, 28 I&N Dec. 52 (A.G. 2020)

(1) If all of the means of committing a crime, based on the elements of the statute of conviction, amount to one or more of the offenses listed in section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(43), then an alien who has been convicted of that crime has necessarily been convicted of an aggravated felony for purposes of the INA.

(2) The respondent's conviction for grand larceny in the second degree under New York Penal Law § 155.40(1) qualifies as a conviction for an aggravated felony for purposes of the INA. DHS charged that the respondent had been convicted of either aggravated-felony theft or aggravated-felony fraud, as defined in section 101(a)(43)(G) and (M)(i) of the INA, 8 U.S.C. § 1101(a)(43)(G) and (M)(i). Larceny by acquiring lost property constitutes aggravated-felony theft, and the parties do not dispute that the other means of violating the New York statute correspond to either aggravated-felony theft or aggravated-felony fraud.

P-B-B-, 28 I&N Dec. 43 (BIA 2020)

Section 13-3407 of the Arizona Revised Statutes, which criminalizes possession of a dangerous drug, is divisible with regard to the specific "dangerous drug" involved in a violation of that statute.

O-F-A-S-, 28 I&N Dec. 35 (A.G. 2020)

(1) Under Department of Justice regulations implementing the Convention Against Torture, an act constitutes "torture" only if it is inflicted or approved by a public official or other person "acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). This official capacity requirement limits the scope of

the Convention to actions performed "under color of law." Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002). Nothing in Matter of Y-L-, or any other Board precedent, should be construed to endorse a distinct, "rogue official" standard.

(2) The "under color of law" standard draws no categorical distinction between the acts of low- and high-level officials. A public official, regardless of rank, acts "under color of law" when he "exercise[s] power 'possessed by virtue of . . . law and made possible only because [he was] clothed with the authority of . . . law.'" West v. Atkins, 487 U.S. 42, 47 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

M-D-C-V-, 28 I&N Dec. 18 (BIA 2020)

Under section 235(b)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(C) (2018), an alien who is arriving on land from a contiguous foreign territory may be returned by the Department of Homeland Security to that country pursuant to the Migrant Protection Protocols, regardless of whether the alien arrives at or between a designated port of entry.

R. I. ORTEGA, 28 I&N Dec. 9 (BIA 2020)

(1) An alien who has conspired to enter into a marriage for the purpose of evading the immigration laws by seeking to secure a K-1 fiancé(e) nonimmigrant visa is subject to the bar under section 204(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c)(2) (2018).

(2) For purposes of section 204(c)(2) of the Act, a conspiracy requires an agreement to enter into a marriage for the purpose of evading the immigration laws and an overt act in furtherance of that agreement.

A-M-R-C-, 28 I&N Dec. 7 (A.G. 2020)

The Attorney General referred the decision of the Board of Immigration Appeals to himself for review of issues relating to the effect of timing of referral; whether the Board applied the correct legal standard and properly exercised its discretion in deciding issues related to the serious nonpolitical crime bar and the persecutor bar; and whether the Board applied the correct standard for determining whether a respondent's in absentia trial suffered from due process problems.

F-S-N-, 28 I&N Dec. 1 (BIA 2020)

To prevail on a motion to reopen alleging changed country conditions where the persecution claim was previously denied based on an adverse credibility finding in the underlying proceedings, the respondent must either overcome the prior determination or show that the new claim is independent of the evidence that was found to be not credible.

HERRERA-VASQUEZ, 27 I&N Dec. 825 (BIA 2020)

The absence of a checked alien classification box on a Notice to Appear (Form I-862) does not, by itself, render the notice to appear fatally deficient or otherwise preclude an Immigration Judge from exercising jurisdiction over removal proceedings, and it is therefore not a basis to terminate the proceedings of an alien who has been returned to Mexico under the Migrant Protection Protocols. Matter of J.J. Rodriguez, 27 I&N Dec. 762 (BIA 2020), followed.

K-S-E-, 27 I&N Dec. 818 (BIA 2020)

For purposes of determining whether an alien is subject to the firm resettlement bar to asylum, a viable and available offer to apply for permanent residence in a country of refuge is not negated by the alien's unwillingness or reluctance to satisfy the terms for acceptance.

J-J-G-, 27 I&N Dec. 808 (BIA 2020)

(1) The exceptional and extremely unusual hardship for cancellation of removal is based on a cumulative consideration of all hardship factors, but to the extent that a claim is based on the health of a qualifying relative, an applicant needs to establish that the relative has a serious medical condition and, if he or she is accompanying the applicant to the country of removal, that adequate medical care for the claimed condition is not reasonably available in that country.

(2) The Immigration Judge properly determined that the respondent did not establish eligibility for cancellation of removal because he did not demonstrate that his qualifying relatives will experience hardship, including medical, economic, and emotional hardship, that rises to the level of exceptional and extremely unusual.

R-A-V-P-, 27 I&N Dec. 803 (BIA 2020)

The Immigration Judge properly determined that the respondent was a flight risk and denied his request for a custody redetermination where, although he had a pending application for asylum, he had no family, employment, or community ties and no probable path to obtain lawful status so as to warrant his release on bond.

W-E-R-B-, 27 I&N Dec. 795 (BIA 2020)

(1) An Interpol Red Notice may constitute reliable evidence that indicates the serious nonpolitical crime bar for asylum and withholding of removal applies to an alien.

(2) The respondent's violation of article 345 of the Salvadoran Penal Code, which proscribes participation in an illicit organization whose purpose is the commission of crimes, was "serious" within the meaning of the serious nonpolitical crime bar.

JIMENEZ-CEDILLO, 27 IN Dec. 782 (BIA 2020)

Sexual solicitation of a minor in violation of section 3-324(b) of the Maryland Criminal Law with the intent to engage in an unlawful sexual offense under section 3-307 is categorically a crime involving moral turpitude. Matter of Jimenez-Cedillo, 27 I&N Dec. 1 (BIA 2017), reaffirmed.

R-A-F- , 27 I&N Dec. 778 (A.G. 2020)

(1) The Board of Immigration Appeals should consider de novo the application of law to the facts of this case, including whether the deprivations that the respondent would be likely to encounter upon removal to Mexico would constitute "torture" within the meaning of the Department of Justice regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994).

(2) To constitute "torture" under these regulations, an act must, among other things, "be specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. § 1208.18(a)(5). "'[T]orture' does not cover 'negligent acts' or harm stemming from a lack of resources." Matter of J-R-G-P-, 27 I&N Dec. 482, 484 (BIA 2018) (citing Matter of J-E-, 23 I&N Dec. 291, 299, 301 (BIA 2002)).

(3) To constitute "torture," an act must also be motivated by "such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind." 8 C.F.R. § 1208.18(a)(1).

E-R-A-L-, 27 I&N Dec. 767 (BIA 2020)

(1) An alien's status as a landowner does not automatically render that alien a member of a particular social group for purposes of asylum and withholding of removal.

(2) To establish a particular social group based on landownership, an alien must demonstrate by evidence in the record that members of the proposed group share an immutable characteristic and that the group is defined with particularity and is perceived to be socially distinct in the society in question.

(3) The respondent's proposed particular social groups—comprised of landowners and landowners who resist drug cartels in Guatemala—are not valid based on the evidence in the record.

J.J. RODRIGUEZ, 27 I&N Dec. 762 (BIA 2020)

Where the Department of Homeland Security returns an alien to Mexico to await an immigration hearing pursuant to the Migrant Protection Protocols and provides the alien with sufficient notice of that hearing, an Immigration Judge should enter an in absentia order of removal if the alien fails to appear for the hearing.

L-N-Y-, 27 I&N Dec. 755 (BIA 2020)

In assessing whether to grant an alien's request for a continuance regarding an application for collateral relief, the alien's prima facie eligibility for relief and whether it will materially affect the outcome of proceedings are not dispositive, especially where other factors—including the uncertainty as to when the relief will be approved or become available—weigh against granting a continuance.

ROSALES VARGAS and ROSALES ROSALES, 27 I&N Dec. 745 (BIA 2020)

A notice to appear that does not include the address of the Immigration Court where the Department of Homeland Security will file the charging document, see 8 C.F.R. § 1003.15(b)(6) (2019), or include a certificate of service indicating the Immigration Court in which the charging document is filed, see 8 C.F.R. § 1003.14(a) (2019), does not deprive the Immigration Court of subject matter jurisdiction.

SALAD, 27 I&N Dec. 733 (BIA 2020)

The offense of making terroristic threats in violation of section 609.713, subdivision 1, of the Minnesota Statutes is categorically a crime involving moral turpitude.

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

Velasquez, Ortiz v. Barr, 2020 WL 6290677

Background: In first case, applicants, citizens of El Salvador who had unlawfully entered the United States but had received Temporary Protected Status (TPS), sought review of denial of their applications to be Lawful Permanent Residents (LPR) by the U.S. Citizenship & Immigration Services (USCIS). Applicants filed motion for summary judgment, and government filed motion to dismiss. The United States District Court for the District of Minnesota, Joan N. Ericksen, Senior District Judge, 355 F.Supp.3d 779, granted applicants' motion, denied government's motion, and remanded matter to agency. Government appealed. In second case, applicants, one a citizen of El Salvador and the other a citizen of Honduras, who both entered the U.S. unlawfully without

inspection but were later granted TPS, brought action under the Administrative Procedure Act (APA) against the Department of Homeland Security (DHS), USCIS, and.

Holding: The Court of Appeals, Kelly, Circuit Judge, held that as a matter of first impression for the court, a TPS recipient who entered the U.S. without inspection is nevertheless deemed "inspected and admitted" and thus eligible for adjustment of status to LPR.

Affirmed.

Kassim v. Barr, 954 F.3d 1138

Background: Alien, who was citizen of Somalia, filed petition for review of decision of the Board of Immigration Appeals (BIA) reversing Immigration Judge's grant of waiver of inadmissibility and deferral of removal.

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

1 it was within BIA's discretion to deny Somali alien's application for waiver of inadmissibility, and

2 remand to immigration judge was required on request for deferral of removal under the Convention Against Torture (CAT).

Petition granted in part, denied in part, and remanded.

SILVESTRE-GIRON v. Barr, 949 F.3d 1114

Background: Native and citizen of Guatemala filed petition for review of final order of Board of Immigration Appeals (BIA) dismissing her appeal from immigration judge's (IJ) order denying her request for withholding of removal and protection under Convention Against Torture (CAT).

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

1 substantial evidence supported BIA's finding that alien's family membership was not central reason for persecution she feared in Guatemala, and

2 substantial evidence supported BIA's conclusion that it was not likely alien would suffer torture by or with consent or acquiescence of public official in Guatemala.

Jimenez Galloso v. Barr, 954 F.3d 1189

Holding: Petitioner "contends that, under 8 U.S.C. § 1101(a)(42) and caselaw, she is only required to prove that the Mexican government is 'unable' or 'unwilling' to control [her persecutor's] actions; yet the BIA stated she must prove that the Mexican government 'condones' [her persecutor's] behavior or, as the IJ noted, is 'completely helpless' to prevent it. The BIA has adopted, and we have approved as reasonable, a definition of 'persecution' that requires a harm to be 'inflicted either by the government of [a country] or by persons or an organization that the government was unable or unwilling to control.' *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998)…. To the extent that the [condone/completely helpless] standard conflicts with the [unable/unwilling] standard, the latter

standard controls. See *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("[W]hen faced with conflicting panel opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict.") (cleaned up). *Compare Miranda*, 139 F.3d at 627 (applying the [unable/unwilling] standard), *with Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (stating for the first time that a petitioner must show the government condones or is completely helpless to prevent a private actor's behavior)."

Bakor v. Barr, 958 F.3d 732

Background: Alien, a lawful permanent resident who was originally from Nigeria, petitioned for review of Board of Immigration Appeals' (BIA) determination that he was removable on ground he had been convicted of two or more crimes involving moral turpitude.

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

1 alien's Minnesota conviction for criminal sexual conduct in the fifth degree was categorically a crime involving moral turpitude, and

2 alien's Minnesota conviction for knowing and willful failure to register as a sex offender was a crime involving moral turpitude.

Petition denied.

c. U.S. SUPREME COURT[1]

Department of Homeland Security v. Regents of the University of California, 140 S. Ct. 1891 (2020).
Takeaway: The Supreme Court allowed Deferred Action for Childhood Arrivals (DACA) to survive, holding that the Trump administration's 2017 attempted rescission of the program was invalid. While the decision was a win for Dreamers, allowing them to enjoy continued protections for the immediate future, the Court made clear that the administration could attempt to end DACA again, provided it offered a sufficient rationale.

Hernandez v. Mesa, 140 S. Ct. 735 (2020).
Takeaway: In a case closely followed by advocates to determine whether federal personnel could be held accountable for misconduct, the Supreme Court held that there was no remedy available to non-U.S. persons located outside the United States. Ruling in a case involving a foreign person on Mexican soil who was shot and killed by Border Patrol personnel standing on U.S. soil, the Court determined that the U.S. Constitution has limited applicability to foreigners located across the border. In cases of cross-border excessive force by federal officers, international victims and their relatives located outside the United States cannot bring suit seeking monetary damages from U.S. officials.

[1] Summaries taken from National Immigration Forum, *Review of the Supreme Court's 2019-2020 Immigration Cases*, https://immigrationforum.org/article/review-of-the-supreme-courts-2019-2020-immigration-cases/.

Kansas v. Garcia, 140 S. Ct. 791 (2020)
Takeaway: In this case, the Supreme Court allowed states to prosecute individuals for identity theft when they have used fraudulent Social Security Numbers (SSNs) or other false documentation on tax-withholding forms. Because many unauthorized immigrants use false documentation for initial hiring paperwork, *Garcia* threatens to upend federal leadership over immigration policy. In permitting Kansas to prosecute immigration-related offenses under state law, the majority paves the way for other states to follow Kansas's lead and prosecute unauthorized workers on state criminal charges

Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020)
Takeaway: Federal courts generally cannot review credible fear determinations for asylum seekers in an expedited removal context. This decision limits the due process protections available to asylum seekers, giving front-line immigration officers the final say in deciding whether an asylum-seeker has a credible fear of persecution and is eligible to apply for asylum.

Nasrallah v. Barr, 140 S. Ct. 1683 (2020).
Takeaway: The Supreme Court established that federal courts have jurisdiction to review whether the government was justified in denying an immigrant's application for protection under the United Nations Convention Against Torture (CAT). The decision reinforces due process protections for deportable persons who fear persecution if they are sent back to their home countries.
Discussion: This case examined whether federal courts have jurisdiction to review applications for protection under the CAT when the applicant has committed an offense precluded from judicial review under 8 U.S.C. § 1252(a)(2)(C).

Shular v. United States, 140 S. Ct. 779 (2020).
Takeaway: This case dealing with the complex question of what constitutes a "serious drug offense" under federal criminal law could make it easier for the government to remove lawfully present immigrants who have been convicted of state-level drug crimes. The decision enables specific state-level drug convictions to qualify as federal-level narcotics violations, which can be a basis for deportation.

Barton v. Barr, 140 S. Ct 1442 (2020).
Takeaway: Cancellation of removal is a type of relief that many lawful permanent residents (LPRs) rely on if the government tries to deport them. This decision may make LPRs ineligible for cancellation of removal if they previously committed a crime within their first seven years residing in the U.S., even if the government waits years to initiate removal proceedings against them or if that offense is not related to the rationale for the deportation. This ruling will make it easier for the government to deport LPRs with criminal records.

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III. ADMINISTRATIVE RULES AND POLICY UPDATE

a. 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. **Summary of the rule:** **https://www.ilrc.org/sites/default/files/resources/overview_of_public_charge_and_benefits-march2020-v3.pdf**

iii. **Current status:** in effect for applications postmarked after February 24, **2020**

b. ASYLUM

i. ***See HTTPS://PENNSTATELAW.PSU.EDU/SITES/DEFAULT/FILES/PROPOSED%20RULE%20ON%20ASYLUM_WH_CAT_SUMMARY.PDF for proposed changes***