Practice Advisory Series

RECENT DEVELOPMENTS IN ASYLUM LAW

2021

Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
Telephone: (213) 388-8693

Practice Advisory Forward

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This practice advisory provides an overview of recent developments in asylum law from Supreme Court cases to federal court of appeals decisions and BIA case summaries.

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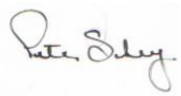

Peter Schey
President and Executive Director
Center for Human Rights and
Constitutional Law

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RECENT SUPREME COURT DEVELOPMENTS

Wolf v. Innovation Law Lab

The Supreme Court reversed the Ninth Circuit decision which ordered the Migrant Protection Protocol Program (MPP) suspended.

Texas v. Biden

On December 20, 2018, the Trump administration announced a new program, the Migration Protection Protocols (MPP) – colloquially known as "Remain in Mexico" – to, in the words of Secretary of Homeland Security Kirstjen M. Nielsen, "confront the illegal immigration crisis facing the United States." Announcement, Department of Homeland Security, Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration. MPP invokes Section 235(b)(2)(C) of the Immigration and Nationality Act, which provides: "In the case of an alien…who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C).

Under MPP, "individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings." Announcement, Department of Homeland Security, https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration. The announcement further outlined the MPP process as such:

> Aliens trying to enter the U.S. to claim asylum will no longer be released into our country, where they often disappear before a court can determine their claim's merits. Instead, those aliens will be processed by DHS and given a 'Notice to Appear' for their immigration court hearing. While they wait in Mexico, the Mexican government has made its own determination to provide such individuals humanitarian visas, work authorization, and other protections. Aliens will have access to immigration attorneys and to the U.S. for their court

> hearings. Aliens whose claims are upheld by U.S. judges will be allowed in. Those without valid claims will be deported to their home countries.

Id.

The new policy does not apply to, amongst other groups, unaccompanied children, and citizens of Mexico. U.S. Customs and Border Protection, MPP Guiding Principles, (Jan. 28, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

Though the program was announced in December 2018, it didn't go into effect until January 2019. President Trump suspended the program in March 2020 due to the onset of the COVID-19 pandemic. MPP was then ultimately terminated by the Biden administration in June 2021, resulting in litigation that will be discussed in further detail.

On Inauguration Day, January 20, 2021, then-Acting Secretary of Homeland Security David Pekoske suspended new enrollments in MPP. *See* Termination of the Migrant Protection Protocols Program, https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf. The following month, on February 2, 2021, President Biden issued Executive Order 14010, directing Secretary Mayorkas and other administration officials "to promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols." Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021), available at https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-toaddress-the-causes-of-migration-to-manage-migration. Finally, on June 1, 2021, pursuant to Executive Order 14010, Secretary Mayorkas terminated the MPP program. *See* Termination of the Migrant Protection Protocols Program, https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

The Secretary outlined various reasons for terminating the program, including those mentioned in the previous section of this memo.

Almost immediately after the Biden administration announced the suspension of new enrollments in MPP, the States of Texas and Missouri ("Plaintiffs") filed a lawsuit against the Biden administration ("Defendants") on April 2021 in the United States District Court for the Northern District of Texas. Plaintiffs subsequently filed an amended complaint in June following the administration's decision to terminate the program on June 1. The following sections outline the developments in the case.

1. District Court Proceedings

In their first amended complaint, the States of Texas and Missouri challenged the Administration's suspension and subsequent termination of MPP as:

> (1) [A]rbitrary and capricious agency action for a lack of reasoned decisionmaking, for a failure to consider state reliance interests, for a failure to consider alternative approaches to suspension, and for not stating a basis for the suspension; (2) a violation of notice-and-consultation requirements contained in an Agreement between DHS and Texas; (3) a violation of 8 U.S.C. § 1225, including DHS's obligation to detain migrants awaiting asylum hearings in the United States; and (4) a violation of the Take Care Clause of the United States Constitution.

First Amended Complaint at 9, Texas et al. v. Biden et al., No. 2:21-CV-067-Z, 2021 U.S. Dist. (N.D. Tex. Aug. 13, 2021), https://drive.google.com/file/d/1sdwgozc4fBNdc_PsocjQCwrm2QV292Rl/view?usp=sharing.

The Plaintiffs sought a preliminary injunction from the District Court to enjoin Defendants from terminating the MPP program.

On August 13, 2021, the Court entered judgment in favor of Plaintiffs, ordering Defendants to

> [E]nforce and implement MPP in *good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources.

Texas v. Biden, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 152438, at 52 (N.D. Tex. Aug. 13, 2021), available at https://drive.google.com/file/d/1PzbjbmUIdvCrhIUEhBdZOCOBYfjN1zUj/view?usp=sharing (emphasis in original).

Despite acknowledging that "Review under the APA's arbitrary and capricious standard is 'highly deferential,'" *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983) Judge Kacsmaryk concluded that the termination of MPP violated the APA. *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 152438, at 34. The Court reasoned that "Defendants failed to consider several critical factors," or "several of the main benefits of MPP." *Id.* at 36. The Court further concluded that "the June 1 Memorandum is not only arbitrary and capricious for a lack of reasoned decisionmaking, but it is also substantively unlawful because, in these circumstances, termination of MPP causes Defendants to systemically violate Section 1225." *Id.* at 46. From the Court's perspective, Section 1225 "provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory. Failing to detain or return aliens pending their immigration proceedings violates Section 1225." *Id.* at 43. However, it is worth noting, as the Court does in passing reference via footnote *Id.*, that 8 U.S.C. § 1182(d)(5)(A) actually affords DHS a third option: the discretion to parole. 8 U.S.C. § 1182(d)(5)(A). In any case, the District Court entered judgment in favor of the Plaintiffs.

2. Appellate Court Proceedings

Defendants appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit, seeking an emergency stay pending appeal. The Appeals Court held that Defendants failed to satisfy the four stay factors, thus holding in favor of Plaintiffs. *See State v. Biden*, No. 21-10806, 2021 U.S. App. LEXIS 24872 (5th Cir. Aug. 19, 2021), available at https://drive.google.com/file/d/1YpRiiqWFBzdFmzOhKWPqUdJHK9dS0v3Z/view?usp=sharing. Amongst other factors, the Court's decision was grounded in the fact that "The Government has not shown a strong chance of success on appeal." *Id.* at 19. In terminating MPP, Secretary Mayorkas did not consider "several 'relevant factors' and 'important aspect[s] of the problem.' *Michigan v. E.P.A.*, 576 U.S. 743, 750, 752 (2015) (quotations omitted); *see also Regents*, 140 S.

Ct. at 1910. These include (a) the States' legitimate reliance interest, (b) MPP's benefits, (c) potential alternatives to MPP, and (d) § 1225's implications." *Id.*

The Court rejected the Government's argument that "the States have no cognizable reliance interest in a *discretionary* program," *Id.* at 20 because, amongst other reasons, "states like Texas face fiscal harm from the termination of MPP." *Id.* at 21. Despite the Government's contention that DHS considered an alternative to terminating MPP, specifically, a "'Dedicated Docket' program designed to provide counsel to aliens in removal proceedings," *Id.* at 24 the Court found it unpersuasive since it falls "outside the ambit of MPP – and hence it does not count as a reasoned consideration of alternatives '*within* the ambit of the existing policy,'" as the Supreme Court contemplated in *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). *Id.*

Accordingly, the Court concluded that the Government will not be "irreparably harmed *during the pendency of the appeal*," and thus denied its motion for a stay pending appeal, while expediting its appeal for consideration. *Id.* at 31 (emphasis in original).

3. The Supreme Court's Decision

On August 20, 2021, the Defendants (now applicants) applied to the Supreme Court

> [F]or a stay of the permanent injunction issued on August 13, 2021, by the United States District Court…pending the consideration and disposition of the government's appeal to the United States Court of Appeals for the Fifth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of Texas and for an Administrative Stay, Texas et al. v. Biden et al., No. 2:21-CV-067-Z, 2021(U.S. 2021), https://drive.google.com/file/d/1yw_fEqbiF_Jz7FBWECmosTPWoMkGg71_/view?usp=sharing.

The Defendants also requested an immediate administrative stay. *See Id.* In a one paragraph order issued on August 24, the Supreme Court denied the application for a stay. *See Biden v. Texas*, 210 L.Ed.2d 1014 (U.S. 2021). The Court concluded that the applicants "have failed to

show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Id.* Justices Breyer, Sotomayor, and Kagan would have granted the application.

Given the Supreme Court's refusal to grant the Biden administration's application for a stay, DHS announced that it will "abide by the court's order" and reinstate MPP in November, despite the pending appeal. Homeland Security (@DHSgov), Twitter (Oct. 14, 2021, 9:08 PM), https://twitter.com/DHSgov/status/1448863236464521240?ref_src=twsrc%5Etfw.

FEDERAL COURT OF APPEALS DECISIONS REGARDING ASYLUM ISSUES

9th Circuit Cases:

Alvarado-Herrera v. Garland, 993 F.3d 1187 (9th Cir. 2021)

Holding:

"The panel granted in part, denied in part, and dismissed in part, Israel Alvarado-Herrera's petition for review of an immigration judge's decision affirming an asylum officer's negative reasonable fear determination in reinstatement proceedings, and remanded with instructions.

As an initial matter, the panel concluded that it lacked jurisdiction to consider Alvarado-Herrera's contention that the Department of Homeland Security could not reinstate his 2013 expedited removal order because the order failed to comply with two regulatory provisions requiring certain signatures. The panel noted that the statute authorizing reinstatement of prior removal orders, 8 U.S.C. § 1231(a)(5), precludes most collateral attacks on the validity of the removal order being reinstated, unless the petitioner can show that a "gross miscarriage of justice" occurred during the earlier removal proceedings. The panel concluded that even that narrow sliver of jurisdiction is foreclosed when the underlying order was, as in this case, an expedited removal order. The panel explained the statute governing expedited removal orders, 8 U.S.C. § 1252(e), limits judicial review to three narrow issues, each of which must be raised in habeas corpus proceedings, concerning "whether the petitioner is an alien"; "whether the petitioner was ordered removed" under an expedited removal order; and whether the petitioner can prove that

he or she has lawful status in the United States as an asylee, refugee, or permanent resident. Because Alvarado-Herrera did not raise any such challenge, and this was not a habeas corpus proceeding, the panel dismissed this portion of the petition for lack of jurisdiction.

The panel rejected Alvarado-Herrera's contention that the agency lacked the statutory authority to create the reasonable fear screening process for withholding of removal and Convention Against Torture claims in reinstatement proceedings, and that Congress intended every non-citizen to receive a full due process hearing before an immigration judge. The panel concluded that the agency's adoption of the reasonable fear screening process was based on a permissible reading of 8 U.S.C. § 1231(a)(5) and § 2242 of the Foreign Affairs Reform and Restructuring Act, as it represented a reasonable effort to reconcile the two statutes' competing demands of allowing immigration officials to quickly identify and resolve frivolous claims to protection, thereby recognizing Congress's desire to ensure the swift removal of non-citizens subject to reinstatement, while at the same time, addressing the United States' treaty obligations by making it possible for those who do have a reasonable fear of persecution or torture to receive a hearing before an immigration judge at which they can establish their entitlement to appropriate relief.

The panel rejected Alvarado-Herrera's contention that the reasonable fear screening procedures violate the Fifth Amendment's Due Process Clause because they do not afford non-citizens the right to present new evidence during the review hearing before an immigration judge. The panel wrote that Alvarado-Herrera misconstrued the nature of a review hearing, at which the immigration judge sits in an appellate capacity, reviewing the written record prepared by the first-instance decision-maker (the asylum officer). The panel explained that due process does not mandate the right to present new evidence to an appellate tribunal when a litigant has been afforded a reasonable opportunity to present evidence to the first-instance decision-maker. The panel also concluded that nothing in the record supported Alvarado-Herrera's contention that the immigration judge failed to review the asylum officer's determination *de novo*, as the regulations require.

The panel held that substantial evidence supported the immigration judge's determination that Herrera-Alvarado failed to establish a reasonable fear of persecution on account of a protected

ground. The panel wrote that violence perpetrated by a gang to avenge the death of one of its members, without more, does not constitute persecution on account of a protected ground.

The panel held that substantial evidence did not support the immigration judge's determination that Alvarado-Herrera failed to establish a reasonable fear of torture with the consent or acquiescence of a public official, given Alvarado-Herrera's specific assertions of police complicity in the 18th Street gang's violent acts. Noting that the asylum officer refused to credit Alvarado-Herrera's assertions, which were based in part on media reports and common knowledge among Hondurans that it is well known that the police work for the gangs, that the police are allied with the 18th Street gang in particular, and that the police not only allow gang members to harm others but also provide information to gang members to help them find and kill people, the panel wrote that it was unclear what additional evidence the asylum officer expected Alvarado-Herrera to produce at that stage of the proceedings. The panel observed that non-citizens in reinstatement proceedings who express a fear of returning to their home country typically appear for a reasonable fear interview within a short time of their apprehension by immigration authorities, and that many, like Alvarado-Herrera, are being held in detention facilities and do not have legal representation. The panel wrote that, as a result, they cannot realistically be expected to produce for the asylum officer's review the kind of detailed country conditions evidence that would be introduced during a merits hearing before an immigration judge. The panel wrote that such a demand would be inconsistent with the purpose of a reasonable fear interview, which is simply to screen out frivolous claims for relief in as expeditious a manner as possible, and if a non-citizen provides an otherwise credible account concerning his fear of torture, his own statements can supply adequate support for claims about country conditions, at least for purposes of satisfying the ten percent threshold necessary to pass a reasonable fear screening interview. The panel remanded with instructions for the agency to provide Alvarado-Herrera a hearing before an immigration judge only as to the merits of his claim for protection under CAT.

E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640 (9th Cir. 2021)

The panel filed: 1) an order denying on behalf of the court a petition for rehearing en banc; 2) an amended opinion affirming the district court's grant of a temporary restraining order and a

subsequent grant of a preliminary injunction enjoining enforcement of a rule and presidential proclamation that, together, strip asylum eligibility from every migrant who crosses into the United States along the southern border of Mexico between designated ports of entry; and 3) an amended concurrence.

Addressing briefing on the President's revocation of the proclamation at issue, the panel agreed with the parties that this appeal was not moot, but declined to hold the case in abeyance while the government reviews the interim final rule at issue. The panel noted that the parties may address further developments and whether any such developments render the case moot on remand.

In the amended opinion, the panel explained that the Department of Justice and Department of Homeland Security adopted an interim final rule in November 2018 ("the Rule") that makes migrants who enter the United States in violation of a "presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico" categorically ineligible for asylum. The same day, President Trump issued a presidential proclamation ("the Proclamation") that suspended the entry of all migrants along the southern border of the United States for ninety days, except for any migrant who enters at a port of entry and properly presents for inspection.

Legal services organizations representing asylum-seekers ("the Organizations") sued to prevent enforcement of the Rule. The district court entered a temporary restraining order enjoining the Rule, and the government appealed, seeking a stay in this court of the district court's order pending appeal. In a published order, a motions panel denied the stay, and the Supreme Court denied a stay as well. The district court issued an injunction barring enforcement of the Rule, the government appealed, and this court consolidated the two appeals.

...

Next, the panel considered the government's challenge to the court's jurisdiction. First, the panel concluded that the Organizations had established organizational standing by showing that the Rule perceptibly impaired their ability to perform their services. Second, the panel rejected the government's argument that the court should avoid interfering with the Rule on the ground that the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the

government's political departments largely immune from judicial control. The panel explained it was responsible for reviewing whether the government has overstepped its delegated authority under the Immigration and Nationality Act ("INA") and encroached upon Congress's legislative prerogative. Third, the panel rejected the government's argument that three statutory provisions, 8 U.S.C. §§ 1252(e)(3), 1252(a)(5), and 1252(b)(9), divested this court of jurisdiction. The panel explained that none of these provisions have any bearing on the Rule because they govern judicial review of removal orders or challenges inextricably linked with actions taken to remove migrants from the country. Finally, the panel concluded that the Organizations fell within the zones of interests of the INA.

The panel next addressed the Organizations' likelihood of success on the merits of their claims under the Administrative Procedure Act ("APA"). Applying the *Chevron* framework, the panel held that the Rule conflicts with the INA's section on asylum, which states that a migrant may apply for asylum when she is "physically present in the United States" or "arrives in the United States (whether or not at a designated port of arrival...)[.]" 8 U.S.C. § 1158(a)(1). Because the Rule requires migrants to enter at ports of entry to preserve their eligibility for asylum, the panel explained that it is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in § 1158(a).

The panel further concluded that, even if the text of § 1158(a) were ambiguous, the Rule fails at the second step of *Chevron* because it is an arbitrary and capricious interpretation of the statute. The panel explained that the BIA and this court have long recognized that a refugee's method of entry is a discretionary factor in determining whether the migrant should be granted relief, but that the method of entry should be carefully evaluated in light of the harsh consequences that may result. Thus, the panel concluded that, given the Rule's effect of conditioning asylum eligibility on a factor that has long been understood as worth little if any weight in adjudicating asylum applications, it is an arbitrary and capricious interpretation of § 1158(a).

The panel also concluded that the Rule is unreasonable in light of the United States's treaty obligations under the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees.

The panel briefly addressed the procedural arguments raised by the parties regarding whether the Rule was invalid because it was issued without public notice and comment or complying with the thirty-day grace period required by the APA. The panel concluded that the Rule likely does not properly fall under the good-cause exception or the foreign-affairs exception to these procedural requirements.

Next, the panel concluded that the Organizations had demonstrated a sufficient likelihood of irreparable injury to warrant injunctive relief, explaining that the Organizations had shown that they will suffer a significant change in their programs and a concomitant loss of funding absent a preliminary injunction. The panel also concluded that the public interest weighs sharply in the Organizations' favor.

Finally, addressing the scope of the remedy, the panel concluded that the district court did not abuse its discretion in issuing an injunction preventing any action to implement the Rule. The panel noted that the Organizations do not limit their potential clients to refugees who enter only at the Mexican border with California and Arizona, and that the government had not proposed an alternative form of the injunction that accounts for the scope of the harms, but applies only within the Ninth Circuit.

Tornes v. Garland, 993 F.3d 743 (9th Cir. 2021)

Holding:

“The panel granted Maria Rodriguez Tornes's petition for review of the Board of Immigration Appeals' decision reversing an immigration judge's grant of asylum and withholding of removal, and remanded, holding that the evidence compelled the conclusion that Rodriguez established a nexus between her mistreatment in Mexico and her feminist political opinion.

The panel noted that under the Attorney General's recent decision in *Matter of A-B-*, 28 I. & N. Dec. 199 (A.G. 2021) ("Matter of A-B-II"), in order to establish the requisite nexus for asylum relief, a protected ground (1) must be a but-for cause of the wrongdoer's act; and (2) must play more than a minor role—in other words, it cannot be incidental or tangential to another reason for the act. The panel explained that this standard was substantively indistinguishable from this circuit's precedent. The panel wrote that the fact that an unprotected ground, such as a personal

dispute, also constitutes a central reason for persecution does not bar asylum. Rather, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is "one central reason" for his or her persecution.

Observing that this court has held repeatedly that political opinions encompass more than electoral politics or formal political ideology or action, the panel wrote that it had little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes. The panel concluded that Rodriguez's testimony concerning equality between the sexes, her work habits, and her insistence on autonomy compelled the conclusion that she has a feminist political opinion. The panel also held that the record compelled the conclusion that Rodriguez's political opinion was at least one central reason for her past persecution. The panel explained that some of the worst acts of violence came immediately after Rodriguez asserted her rights as a woman, and that the fact that some incidents of abuse may also have reflected a dysfunctional relationship was beside the point, as Rodriguez did not need to show that her political opinion—rather than interpersonal dynamics—played the sole or predominant role in her abuse. By demonstrating that her political opinion was "one central reason" for her persecution, the panel concluded that Rodriguez likewise established that her political opinion was "a reason" for her persecution for purposes of withholding of removal.

Because in granting relief under the Convention Against Torture the agency necessarily determined that Rodriguez carried her burden to prove the other elements of her claims for asylum and withholding of removal, the panel concluded that Rodriguez's petition presented a recognized exception to the ordinary remand rule under *I.N.S. v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002) (per curiam). The panel explained that because the agency concluded that Rodriguez met the higher burden of establishing that she is likely to be tortured, she necessarily met the lower burdens for asylum and withholding relief of establishing that she has a well-founded fear, or clear probability, of persecution. Similarly, because the Board determined that the Mexican government would acquiesce to Rodriguez's torture, the panel concluded that the Board had necessarily decided that the Mexican government would be unwilling or unable to protect Rodriguez from future persecution. The panel also concluded that because the Board determined that it would be unreasonable for Rodriguez to relocate within Mexico to avoid future torture, she likewise could not relocate to avoid future persecution.

The panel held that Rodriguez was thus eligible for asylum and entitled to withholding of removal, and it remanded for the Attorney General to exercise his discretion whether to grant Rodriguez asylum, and if asylum is not granted, to grant withholding of removal."

Park v. Barr, 2020 U.S. APP (March 13, 2020) (unpublished)

Holding: Substantial evidence supported the BIA's finding that the South Korean citizen demonstrated neither actual past persecution nor a well-founded fear of future persecution and was ineligible for asylum defined under 8 U.S.C. § 1101(a)(42) because evidence showed that South Korea would be both willing and able to protect him should he be targeted for harm; [2]-Substantial evidence supported the denial of South Korean citizen's claim for CAT relief under 8 C.F.R. § 1208.16(c)(2) because he was not tortured in South Korea in the past, and the record did not support a finding that he was more likely than not to be tortured upon return.

Guerra v. Barr (March 3, 2020) (unpublished)

Facts: Panel allowed a review of BIA's reversal of an IJ's grant of deferral of removal under the CAT holding that the "Board erred by conducting a de novo review of the IJ's factual findings, rather than reviewing them for clear error.

Holding: Where an IJ granted the application of a mentally ill citizen and national of Mexico for deferral under the CAT, the BIA erred when it reversed this decision because the BIA did not properly review it under the IJ's factual findings for clear error per 8 CFR § 1003.1(d)(3)(i) (required that it be remanded to the BIA). Under the clear error standard, the IJ's choice could not be clearly erroneous. The BIA failed to apply clear error review when rejecting the IJ's determination that Mexican health care workers acted with specific intent to harm mental health patients and when rejecting the IJ's determination that Mexican health care workers acted with specific intent to harm mental health patients.

Lado v. Wolf, 2020 U.S. App. (9th Circuit)

Facts: Plaintiff Al Otro Lado (an organization committed to assisting potential asylees in the United States) along with thirteen individual Plaintiffs (Al Otro Lado), challenged the government's policy of turning down asylum seekers at ports of entry on the southern border and telling them to come back later to file for asylum (this policy also known as "metering" or "waitlist system").

Lado claimed that asylum seekers are turned away to deter individuals from seeking asylum and not as the government asserts, to handle each port's lack of capacity to process new potential asylees. Al Otro Lado presented declarations from a collection of different countries and walks of life who were turned away from border to honor the metering policy and told to wait for an "opportunity to submit their applications." While the government does not keep record of the people turned away by CPB officers, other workers with the Unites States government have created waitlists.

In 2019, Department of Homeland Security and the Department of Justice issued a joint interim final rule entitled "Asylum Eligibility and Procedural Modifications." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). The Rule provides:

(c) Mandatory denials—

(4) Additional limitation on eligibility for asylum. Notwithstanding the provisions of § 208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:

(i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country. Al Otro Lado moved for a preliminary injunction to stop the enforcement of the Rule against provisional class members. It asserted that if the Rule 'applied to non-Mexican asylum seekers metered at the border before July 19, 2019', it would postpone their ability to apply for asylum in the US, and a significant proportion of class members could be precluded from accessing any asylum process altogether since applicants for asylum need to submit their petitions "within 30 days of entering Mexico" and thus as the District Court emphasized, would unintentionally give up their right to claim

asylum in the United States. While it is possible to seek waiver of Mexico's 30-day bar, Al Otro Lado maintained that "it is nearly impossible to do so without legal counsel," which most applicants cannot afford.

Holdings: (1) "Where a preliminary injunction enjoined enforcement of 8 C.F.R. § 208.13(c)(4), which provided that a noncitizen who entered, attempted to enter, or arrived in the U.S. at the southern border on or after July 16, 2019 was not eligible for asylum unless they applied for asylum in another country, the government was not entitled to a stay pending appeal;(2)-The government failed to show harm from denying the stay due to delay in processing these asylum applications and any administrative burdens in implementing the injunction were not irreparable harm; (3) The government also failed to show a sufficient likelihood of success on the merits of its appeal because the district court's statutory analysis was sufficiently sound and persuasive such that it was likely correct; (4) Issuance of a stay would cause substantial and irreparable injury to the asylum seekers."

Irreparable harm:

An applicant for a stay must show that it is "necessary to avoid likely irreparable injury to the applicant while the appeal is pending." 'Showing some possibility of irreparable injury is insufficient. See id at 11.

The government estimated that 'identifying class members' will weigh the efficiency of the asylum interview process since DHS does not maintain lists of citizens who were metered and the only way to identify these class members is for USCIS "to spend an additional 15 to 30 minutes per person asking as many as 30 additional questions during each credible fear screening interview." The government did not show that any actual interview is 15 to 30 minutes or '30 additional questions were devoted to whether the individual asylum applicant sought entry at POE before July 16, 2019. The government also did not indicate what the additional 30 questions could be. The court found the government made a weak showing that it would suffer harm during the requisite period. In fact, Al Otro Lado submitted records that USCIS determined that an applicant was not a member of the class by asking two questions. The government also declined to use waitlists produced by the Mexican government or others it depended for the

metering policy even though it is available. Thus, it is unlikely the injunction would major delays since once they make it to the front, they would have to be interviewed by an asylum offer regardless of whether the rule is applied.

Succeed on merits

The government's argument that class members were in Mexico on the Rule's effective date (July 16, 2019) is unlikely to succeed because it would mean that class members would did not come before to be turned away or that only the second arrival would have legal significance. Under section 1158 (a)(1) two classes of aliens can apply for asylum: (1) any alien 'who is physically present in the United States' and (2) any alien 'who arrives in the United States.'" 394 F. Supp. 3d at 1199 which the District court reasoned meant different things when "applying the rule against surplusage". As such, the government has not met its burden to make a "sufficiently strong showing of a likelihood of success on the merits."

Substantially Injure Class members

Al Otro Lado offered substantial evidence showing that the Rule would cause irreparable injury to the them because "[t]hey returned to Mexico reasonably believing that if they followed these procedures, they would eventually have an opportunity to make a claim for asylum in the United States." The Rule would now make them ineligible for asylum in the United States, and they cannot in all probability pursue asylum in Mexico "because they did as the Government initially required and waited" for their number to be called. The district court provided that "[t]his situation, at its core, is quintessentially inequitable," and likely will substantially injure class members.

Back in 2017, a class of asylum seekers sued the Trump administration challenging CBP policy to "turn back" asylum seekers or expose them to metering. Under pretenses that the U.S. was at capacity, CBP routinely turned away asylum seekers in violation of U.S. and international law. In November 2019, a California federal court granted these asylum seekers provisional class certification and a preliminary injunction to protect their access to asylum if they transited

through a third country. This injunction was necessary after the Trump administration issued an interim final rule (IFR) barring all non-Mexican asylum seekers who transited through a third country from applying for asylum in the U.S. on or after July 16, 2019—but began applying this ban to the metered class of asylum seekers who had sought entry before July 16, 2019. 11 In December 2019, the Trump administration appealed the district court's ruling and successfully obtained an emergency stay of the injunction pending appellate review. √ Status: Preliminary injunction upheld on appeal. 12 On March 5, 2020, the Ninth Circuit removed the emergency stay and reinstated the district court's preliminary injunction, protecting "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019, because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process." 13 This ruling restored the right to 3 seek asylum for the class of asylum seekers who were turned back or metered and barred from seeking asylum before July 16, 2019.

Innovation Law Lab v. Wolf (Feb 28, 2020) [Note Supreme Court recently revived MPP by staying this decision]

Plaintiffs sought a preliminary injunction to prevent the Migrant Protection Protocols ("MPP") whereby non-Mexican asylum seekers who arrive at the southern border of the United States are required to wait in 'Mexico until their asylum applications are adjudicated.'

In regards to the merit of the case, the panel followed the analysis in East Bay Sanctuary Covenant v. Trump (9th. Cir. Feb. 28, 2020) for persuasive authority.

On the merits, the primary issue was whether the return-to-Mexico requirement of the MPP was inconsistent with § 1225 (b) arguing that applicants under b(1) (b1 pertaining applicants who came to the border with either fraudulent documents or no documents) should not have to wait in Mexico since the requirement is inapplicable under the plain meaning of § 1225.

The panel acknowledged that b(1) and b(2) applicants both have distinct routes to arrive at removal or expedited proceedings that do not apply to each other. As Plaintiffs are organizations whose work is severely undermined by not having the opportunity to help and represent asylum seekers when they are told to wait in Mexico thus essentially barring help these organizations can help, Plaintiffs have third party standing.

Merits of the Case Reasoning:

Return to Mexico

Under the language of § 1225 b(1) applicants are more numerous but b(2) applicants are a broader category in that b(2) applicants are more "inadmissible" than b(1) since they are the undesirable applicants that are criminals (of moral turpitude crimes) , terrorists, have communicable diseases etc. does not require that. The panel discussed b(2) applicants ("other aliens to whom b(1) applicants). While both can be placed in removal proceedings, the "statutory procedures" are not identical. In some circumstances (b)(2) applicants can be returned to a "territory contiguous to the United States" pending his or her removal proceedings under § 1229(a) but there is no such return procedure for (b)(1) applicants.

The statutory question was whether a (b)(1) applicant could be returned to a "territory contiguous to the United States" pending his or her removal proceeding under § 1229(a). The panel found that under the plain language of § 1229 (b) and under the Government's "longstanding practice" there is nothing that points to this understanding:

"There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an "officer shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution "shall" be referred by the immigration officer to an "asylum officer" for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the determination of the asylum officer—either expedited removal or detention pending further consideration. § 1225(b)(1)(B)(ii)-(iii). There is nothing in § 1225(b)(1) stating, or even suggesting, that a § (b)(1) applicant is subject to the "return" procedure of § 1225(b)(2)(C)."

In addition, there is nothing to indicate that an applicant may be "returned" under § 1225(b)(2)(C) since a (b)(2) applicant is "clearly beyond a doubt entitled to be admitted," she or

her "shall be detained" for a removal proceeding and that this does not apply to (b)(1) applicants. Further subparagraph (c) also provides that an applicant under (b)(2) instead of being detained "may be returned" to a contiguous territory to the United States until the proceeding. The language under the section also specifies that the automatic removal proceedings for (b)(2) applicants does not apply for (b)(1) applicants. Thus, the return while pending proceedings is only authorized for (b)(2) applicants. Despite the Government arguing that the language in b(2) applies to "all applicants" the panel emphasized that the language under the section provides that the two groups are separate and non-overlapping categories. The government made other arguments including (b)(1) applicants are more culpable but the panel concluded that the government has this understanding backwards under the plain meaning to § 1225. Thus, plaintiffs showed a likelihood of success on the merits of their claim that the MPP is inconsistent with 8 USC 1225 (b).

Refoulement

Plaintiffs also argued that the MPP is invalid because it violated the United States treaty-based anti-refoulement obligations which although was unnecessary to decide, was nonetheless addressed.

Refoulement occurs when a government "returns aliens to a country where lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion." The United States adopted Article 33 of the 1951 United Convention Relating to the Status of Refugees in the 1980 Act (the anti-refoulement provision). Plaintiffs provided several aspects of the MPP that did not protect against refoulement. For instance, to stay in the United States while awaiting removal proceedings, the asylum seeker must now show that "it is more likely than not that he or she will be persecuted in Mexico." This is a high standard in comparison to the "credible fear" applied in screening interviews with asylum officers since this only requires "a significant possibility" of persecution. In addition, the MP does not entitle tie to prepare, advance notice of the criteria the asylum officer will use, lawyer assistance during the hearing etc. In comparison, the asylum seeker in a removal under § 1229(a) is entitled all of these. Finally, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico but the applicant must volunteer it

without any prompting. Under existing regulations, the asylum officer carrying out an credible fear interview is instructed " to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). The asylum officer is specifically directed to "determine that the alien has an understanding of the credible fear determination process." § 208.30(d)(2)."

While the Government argued that asylum seekers who actually fear returning to Mexico would have "every incentive" to raise their fear and that violence on protected ground is unlikely, the Government pointed to no evidence supporting this. To the contrary, Plaintiffs provided various sworn declarations indicating that threats to non-Mexican asylum seekers were often persecuted because of their nationality and had substantial threats of harm. Thus, there is a significant likelihood of irreparable harm if the MPP was not enjoined.

Overall, the factors for a preliminary injunction including likelihood of success on the merits, significant likelihood of irreparable harm if the MPP is not enjoined, balance of factors and public policy favored plaintiffs in upholding the preliminary injunction to enjoin the MPP.

Singh v. Barr (January 16, 2020)

Facts: Affirmed IJ determination for three reasons: (1) BIA found no error in that the IJ determination that Singh's demeanor during his hearing indicated that his testimony was not truthful. Testimony did not sound like it was from personal experience. (2) Substantial evidence supports agency conclusion that Singh was not credible because of the lack of detail in his testimony (could not identify with any **specificity** his political party's platform, what the members do, or the structure). (3) Testimony and written declaration were not consistent (Singh wasn't able to explain why he failed to mention any mention of an attack on his parents by a rival political party after he left India).

Factors Considered for Credible Testimony

- "Unemotional with flat affect" (needs to be more emotional?)
- detail or lack of detail in testimony

- consistencies between testimony and written declaration
- Need to be able to authenticate documentation
- CAT: substantial evidence also supported that BIA's denial of Singh's application for CAT release. "An applicant for Cat must show that "it is more likely than not that he…would be tortured"

Cervantes v. Barr (January 14, 2020)

Mother and son who are citizens of Mexico petitioned for review of an order of the BIA dismissing their appeal regarding claim for asylum, withholding of removal, and relief under CAT.

(1) To show membership of a particular group is the basis of claim for persecution and (2) the persecution was done by govt or by forces that the govt was unable to control or unwilling to control.

- Group: Married women in Mexico who are unable to leave their relationship (had not shown she could not leave because she lived apart from him for over a year when she moved from Michoacan to Tijuana since he did not stop her from leaving even though he verbally threatened her).
- Also failed to demonstrate that the Mexican government was not able to protect her from her husband. (Police responded to her in-laws on two occasions regarding her husband even though they were unable to find/arrest him). She was also unable to get a protective order (had provided that there are parts of Mexico where protective order are not issued to DV victims but MIchoacan is not such an area)

(2) Could not show that their membership in the proposed group was "one central reason" for abuse since Jose St had killed a man in prison, engaged in public fights, threatened his parents, assaulted Acosta's stepfather, and was involved with drug cartels.

Khadka v. Barr (January 7, 2020) (unpublished)

Holding: Substantial evidence supported the BIA's adverse credibility determination under 8 U.S.C.S. § 1158(b)(1)(B)(iii) against the citizen from Nepal because he testified that he sought medical attention after he was first attacked by the Maoists but did not mention that during any of his earlier statements to immigration officials or in his asylum application (this was found to be highly suspect)

To qualify for withholding of removal, an applicant must show that it is more likely than not that he would be subject to persecution because of a protected ground. To qualify for relief under Convention Against Torture, an applicant must show that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.

Escobar v. Barr (January 7, 2020) (unpublished)

- A potential asylee's evidence regarding threats and abuse need to be taken into consideration when they are deemed credible in assessing their application for removal.
- When a potential asylee reasonably believes that they are covered by an alternative application, it can count an extraordinary circumstance that justifies filing outside of the one-year deadline for asylum application.
- Class of aliens returning home from the United States is too broad to account as a valid social group.

Holding/Reasoning:

- Denial of work authorization is not a changed circumstance under § 1158 (does not alter an asylum's legal status
- Government's grant and subsequent denial of work authorization in this case may count as an extraordinary circumstance since Escobar reasonably believed that he was still covered by his father's application and thus did not need to file an application of his own
- Remanded to BIA to consider whether Escobar applied within a "reasonable period" after learning that the DHS had declined to renew his work authorization

- (2) to qualify for removal, an applicant must prove that "his or her life or freedom would be threatened in the proposed country of removal on account of a "protected ground".
- To qualify for removal, an applicant must prove that "his or her life or freedom would be threatened in the proposed country on removal on account if a protected ground" If a petitioner shows that he suffered persecution in the past, the BIA must assume that he would suffer future persecution on the same grounds. Estobar is challenging BIA's finding that he did not suffer past persecution:
- The BIA failed to consider Estobar's credible testimony that the Diaz-Escobar "suffered serious and credible death threats. His father's asylum application, placed into evidence by Dias' Escobar explained how the "guerilla fights shot, kidnapped, and tortured the father because of his service in the Salvadoran military. During that kidnapping, the guerrillas told Dias Escobar's father that they would "kill his family if the father id not collaborate with the guerillas. They also threatened to kill his mom in letters if they did not leave the neighborhood. Diaz also witnessed the same group torturing. Since the IJ found his testimony credible, it should have been deemed true. Abeve v. Mukasey, 548 F.3d 787 (9th Cir. 2008. Remanded due to failure of BIA to consider the evidence.
- (3) Held: Class of aliens returning to their home country from the United States "is too broad to qualify as a cognizable social group." Diaz-Escobar failed to identify a protected ground for which he would face persecution, BIA's denial of withholding based on future persecution.
- (4) Diaz-Escobar also appeals the BIA's decision denying CAT relief. Found that Diaz-Escobar did not show he faced a "particularized threat of torture" – only showed generalized evidence of violence and crime which insufficient to warrant CAT protection.

An alien's petition was affirmed in part and remanded since the government's grant and subsequent denial of work authorization in the present case might count as an extraordinary circumstance, and the BIA had to consider whether he applied for asylum within a reasonable period after learning the Department of Homeland Security declined to renew his work authorization, and, as to the claim for withholding of removal, neither the IJ nor the BIA acknowledged his allegations of torture--not even to question their credibility; [2]-The alien's

petition was denied in part since substantial evidence supported the BIA's decision to deny his request for CAT protection.

Zuniga v. Barr (December 26, 2019)

Facts: Mr. Zuniga, a Mexican national, illegally entered the United States when he was a child. In 2012, he was convicted in a conspiracy to manufacture and distribute drugs and launder money. While he was in prison, immigration authorities served Zuniga with a Notice of Intent to Issue a Final Administrative Removal Order. Since he had been convicted of a drug trafficking aggravated felony, he was placed in expedited removal proceedings pursuant to 8 USC § 1228(b). He expressed his fear for persecution if removed to Mexico due to his testimony regarding the cartel's involvement and then referred to an asylum officer to interview in order to assess if his fear was reasonable. The asylum officer ultimately concluded there was no reasonable fear and Mr. Zuniga requested review by an Immigration Judge. His notice provided that You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court. If you wish to be so represented, your attorney or representative should appear with you at this hearing." The Judge in a video conference asked whether Mr. Zuniga had a lawyer and Mr. Zuniga responded, "I do not." The Judge continued on with questioning him regarding his asylum officer interview and the substance of the matter and found that Mr. Zuniga did not have reasonable fear.

Issue: Do non-citizens subject to expedited removal under 8 USC § 1228 have a statutory right to counsel in reasonable fear proceedings before immigration judges? Yes.

Holding:

Section § 1228 provides that ""proceedings [for removal of criminal non-citizens] shall be conducted in conformity with section 1229a," 8 U.S.C. § 1228(a)(1), which provides a statutory right to counsel in ordinary removal proceedings, 8 U.S.C. § 1229a(b)(4)(A). Section 1228 also states that [**12] in deciding where to detain non-citizens under this section, and "the

Attorney General shall make reasonable efforts to ensure that the alien's access to counsel and right to counsel under [8 U.S.C.] section 1362," which likewise provides for the right to counsel in removal proceedings, "are not impaired." 8 U.S.C. § 1228(a)(2).” The plain language of the statute supports that there is a statutory right to counsel even though the Government argued that a 1999 memo from the Executive office for Immigration Review (“EOIR”) give the right to the IJ in deciding whether a noncitizen may be represented. Since this conflict with the plain language supported in the statute, Mr. Zuniga had a right to representation by an attorney in his reasonable fear review hearing before the IJ. P. 469.

Hernandez v. Barr (December 18, 2019)

Facts: Mr. Hernandez, a native and citizen of Mexico, petitioned review of an order of the BIA dismissing his appeal from the decision of an immigration judge (IJ), which decision denied his application for cancellation of removal. He contended that the IJ violated his due process rights by failing to tell him the relevant hearing procedures necessary to him.

Holding/Reasoning:

(1) IJ adequately explained relevant procedures: “IJ informed Mr. Hernandez that he had a right to self-representation, hat he would have nearly two months to find a replacement attorney after the withdrawal of his first lawyer, and to this end should refer to a list of legal aid lawyers (provided by the IJ); that his children need not testify because testifying at their young age could be traumatic; that his wife was permitted to, but need not, testify; that he could bring witnesses to the hearing to testify about anything positive in petitioner's past in order to shed light on petitioner's criminal history; that he could bring any documents he would like the IJ to consider; and that the IJ, at the hearing, would ask petitioner questions about his application in order to bring out his story”. In addition, The IJ did not rely exclusively on proofs submitted by Mr. Hernandez’s former counsel but instead fulfilled the IJ’s duty to probe all the relevant facts by asking about things such as chronology of events, hardships he might his family might endure when removed, and facts regarding his moral character.

(2) Where Mr. Hernandez did not indicate that he feared returning home due to potential persecution, the IJ did not have a duty to instruct him for potential eligibility for asylum or develop facts necessary to establish such relief.

(3) Mr. Hernandez's other arguments were not considered because they were not raised before to the BIA.

Khan v. Barr (December 10, 2019)

Facts: Mr. Khan petitioned for review of the BIA decision affirming the IJ's denial of his applications for asylum, withholding of removal, and Convention Against Torture (CAT).

Holding:

Mr. Khan argued that the denial of his asylum and withholding of removal claims should be reversed because the denial rests on an adverse credibility determination that is not supported by substantial evidence. "Under the substantial evidence standard, the court upholds the Board's determination unless the evidence in the record compels a contrary conclusion." Where there is "specific and cogent" reasons, it "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." The specific and cogent reasons here were as follows: Mr. Khan "altered a police report before submitting it to the immigration court" and could not explain why he described himself as a common worker in his political party but was also prominent enough to appear on stage with the local mayor even though he was afforded several opportunities to do so.

Due Process:

- To establish due process, Mr. Khan must show (1) that the proceeding was so fundamentally unfair that he was prevented from reasonably presenting on his case," and (2) the due process violation resulted in "prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation."

Douglas v. Barr (November 27, 2019)

Nigel Douglas, a native and citizen of Guyana, petitions pro se for review for review of the BIA order dismissing his appeal from an IJ decision denying relief from removal.

U.T. v. Barr: November 2019

Under these agreements, known as ACAs, individuals would be prohibited from applying for asylum in the U.S. if the following four requirements are met: 1) the U.S. entered into a bilateral or multilateral agreement; 2) at least one of the signatory countries is a "third country" for the asylum seeker; the asylum seeker's "life or freedom would not be threatened in that third country" on account of their race, religion, nationality, political opinion, or particular social group; and 4) the "third country provides [asylum seekers] removed there . . . 'access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.'" **"**Under this new rule, asylum officers and CBP would have the discretion to conduct threshold screenings to determine which country will consider an asylum seeker's claim"

2nd Circuit Cases:

Hernandez-Chacon v. Barr, 948 F.3d 94 (January 23, 2020)

[1]-An applicant was not entitled to asylum under 8 U.S.C.S. § 1158(b) on her claim that she would be persecuted on account of her membership in a particular social group -- Salvadoran women who had resisted the sexual advances of a gang member -- because she failed to provide sufficient evidence that her proposed subset of Salvadoran women was a socially distinct group; [2]-The petition for review was granted in part, however, as to her claim that if she returned to El Salvador she would be persecuted by gang members because of her political opinion -- her opposition to the male-dominated social norms and the brutal treatment of women in El Salvador -- because the agency did not adequately consider whether her refusal to acquiesce was or could be seen as an expression of political opinion given the political context of gang violence and the treatment of women in El Salvador.

BIA CASE SUMMARIES AND PRACTITIONER TIPS

Matter of E-R-A-L, Respondent (Feb 10, 2020)

Facts:

Respondent, Mr. E-R-A-L, is a native citizen and landowner to El Progresso, Guatemala. Respondent was threatened on two occasions in 2008 by members of the "Cuaches" drug cartel where they approached Respondent and his father and threatened to kill them if they did not use their land to cultivate marijuana for the cartel. One month after this incident, Respondent's father was fatally shot. In addition, the cartel had also threatened to kill Respondent's godfather if he did not cultivate marijuana on his land and his godfather was ultimately killed in 2007. In 2008, the cartel shot and killed the godfather's teenage son in front of his grandparents. Respondent left Guatemala after this incident and entered the Unites States seeking asylum. Respondent's mother and sister have moved to another part of Guatemala since then (without incident). To establish his case for asylum, Respondent proposed that he fell under the following social groups: (1) landowners, (2) landowners who resist drug cartels, and (3) members of the respondent's family and the Immigration Judge concluded that none of the groups set forth Respondent's eligibility for asylum or withholding of removal under the Act.

Standard:

Whether a particular group has been established is a question of law which under a de novo standard. P.770 (check).

Decision:

On appeal, The Board of Immigration affirmed this decision finding that Respondent did not establish that the proposed groups were "(1) composed of members who share a common or immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." See p. 767.

Holding, Rationale, and Practitioner's Tips:

(1) Common or Immutable Characteristics

Landownership as a Social Group:

In order to establish that landownership is an immutable characteristic, an applicant must show that his or her ownership of land is, "beyond the [applicant's] power…to change or is so fundamental to [his or her] identity or conscience that it ought not be required to change." See p. 770.

Here, Respondent did not "meaningfully dispute that ownership of his family's land could cease through 'giving up' or selling that property." See 771. Moreover, Respondent's family left that after Respondent left and have not been bothered since. See id.

Practitioner's Tip:

Practitioner's should focus on how a person's social group status remains static despite attempts to try anything different so as to show an "immutable characteristic".

(2) Defined with Particularity

Even if a group of landowners share an immutable characteristic, that group must also be defined with sufficient particularity and be perceived as distinct by the society in question. See id. (Social distinction test). P. 770 The social group should be discrete and not amorphous. Social groups defined by their vulnerability to private criminal activity likely lack the particularity required… where broad swaths of society may be susceptible to victimization.

The BIA provided that Respondent's "proposed social groups are also amorphous and lack particularity because they can encompass landowners of varying backgrounds, circumstances, and motivations. Arguably, his proposed groups could encompass anyone who owns any amount or type of land in Guatemala. In fact, the respondent conceded that the cartel wanted his family's land because it was conducive to growing drugs, and there is no indication that their land was unique in this respect." See Matter of A-B-, 27 I&N Dec. 316, 335 (A.G. 2018) ("Social groups defined by their vulnerability to private criminal activity likely lack the particularity required…). Judge Maphrus furthered that the proposed groups lack particularity because respondent provides "no clear benchmark for determining who falls within the group," such as specifying the level of resistance against the cartels a landowner must participate in or

what must incentivize a landowner to resist the cartels before he or she can be a part of said group. See id.

Practitioner's Tip:

To establish particularity, it is helpful for Practitioners to have a **"clear benchmark"** such that specificities of the groups like backgrounds, circumstances, or motivations are highlighted. There must be more than a 'vulnerability to private criminal activity' where specific reasons and standards are outlined as to what makes this group particularly susceptible or unique in comparison to others to be socially distinct. Per Cordoba v. Holder (2013), wealthy landowners can be seen as a 'valid particular social group' because there was evidence to suggest that wealthy landowners are specifically targeted for persecution in Respondent's motherland and that he and his family are "distinguished landowners" in the region. See Footnote 4, p. 767. (Ex. More than conducive to growing drugs, so perhaps like a family name).

(3) Socially distinct within the society in question

There was no record evidence demonstrating that respondent's proposed groups are perceived as "significantly distinct groups" within the society in question, El Progreso, Guatemala. See p. 772. Proposed groups must be "set apart, or distinct, from other persons within the society in some significant way." See id. "The persecutor' perception is not itself enough to make a group socially distinct…" Moreover, there must be a clear nexus between 'membership in a particular social group and the persecution.' See id. Social group status should be "merely incidental, tangential, or subordinate to the cartel's motives." See p. 773.

Respondent's assertion that Guatemalan landowners are susceptible to cartels that wish to use their land does not make this group socially distinct since it is not enough to have a threat of theft or coercion to create a distinct social group. See id. Further, the cartel's actions showed that they were after respondent's land and not his landowner status since there has been no indication that the cartel has been after respondent, or his family after they relocated. Just because the cartel might retaliate if the respondent tries to reclaim his land, the cartel's motives would be more incidental to respondent's status as a landowner due to the fact that respondent is threatening their "territorial power" rather than respondent's social group status. See p. 772-73.

Thus, on appeal, the court ruled that the Immigration Judge did not clearly err when he established that "the cartel was not motivated by its desire to overcome the respondent's membership in groups comprised of landowners and landowners who resist cartels in Guatemala" but rather "greed and desire to expand its territory and sustain its local criminal enterprise." See id.

Practitioners Tip

Practitioners should be aware of the need to describe beyond a threat of criminal activity by virtue of something like possessions. It looks like Judge Malphrus is articulating that something more inescapable to a group of persons is needed to be categorized as socially distinct, seemingly a high standard.

Family as a Social Group

An alien's family based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor. Death of one family member, doesn't necessarily trigger it for all.

Rules:

(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.

Other Issues:

Convention Against Torture

No indication that the cartel has ay continued interest in locating respondent, let alone torture him, based on the fact that he holds title to his family's property.

Matter of J.J. Rodriguez

Decided January 31, 2020

Facts: J.J Rodriguez was charged by the Department of Homeland Security (DHS) for not having valid documentation when he entered California and was sent back to Mexico while awaiting his hearing pursuant to Migrant Protection Protocols (MPP). Mr. Rodriguez did not come back to San Diego for his hearing and the DHS requested that the Immigration Judge enter an in absentia order of removal because he was provided with adequate notice and the MPP Sheet advised Mr. Rodriguez of the procedure for getting transportation for the hearing. The Immigration Judge ruled that DHS did not provide Mr. Rodriguez with sufficient notice and terminated Mr. Rodriguez's removal proceedings without prejudice citing due process concerns. DHS appealed the decision on the basis that the Immigration Judge erred because Respondent signed the MPP sheet given in both English and Spanish even though there is no requirement that an alien be given documents in their native language. See p. 765.

Holding: "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." P. 762-764.

Rationale:

Judge Malphrus reasoned DHS complied with MPP that went into effect allowing DHS to "return certain foreign individuals entering or seeking admission to the U.S. from Mexico---illegally or without proper documentation---…to Mexico…for the duration of their immigration proceedings. See p. 763. In addition, the level of notice Mr. Rodriguez received satisfied requirements of due process: Due process requires "that the alien be provided with notice of proceedings and an opportunity to be heard." *Matter of G-Y-R,* 23 I&N Dec. 181, 186 (BIA

2001). See p. 764. The notice must be "reasonably calculated to apprise the alien of his or her scheduled hearing and the immigration charges." Id. Respondent was personally served and notified of the time and place of his proceedings and informed him of the consequences of failing to appear. See p. 764. The DHS also provided Mr. Rodriguez with an MPP Sheet, which detailed the time and place Mr. Rodriguez needed to arrive at the port of entry so that he could be transported to his hearing. Id. While the IJ expressed that Mr. Rodriguez might have not understood these instructions, Judge Malphrus maintained that there was no indication that he did not since he was provided the papers in his language and signed them. Further, there were no considerations taken as to what potential difficulties Mr. Rodriguez may have faced since 'even though there are concerns regarding difficulties that other aliens have faced after being returned to Mexico since these weren't the cases here.' p.764.

Practitioner's Tips:

There does not seem to be much regard for the circumstances respondents might be in after being ordered back to their native country and practitioners might want to document all client contact if their client is ordered back while awaiting proceedings to document that their client is facing difficulties and thus cannot appear to prevent an absentia order. In addition, there is a minimal standard for notice requirements as all that is required is a signature by the respondent where the time and place is recorded so practitioners might want to take extra steps to make sure their clients understand all such instructions. Practitioners should be aware that there is a leaning towards these removal orders since the Immigration Judge's decision was actually vacated here on the grounds that he did not allow the DHS to present evidence based on the respondent's removability even though the Judge reasoned that there was enough notice. Judge Malphrus said the Immigration Judge clearly erred here showing the strict standards respondents are expected to follow.

Matter of Angel Mayen-Vinalay

January 22, 2020

Facts:

In 2018, Respondent, a native of Mexico who enter the United States in 1997, was convicted of attempted possession of a controlled substance under Illinois law. In January 2019, the Department of Homeland Security detained the respondent and placed him in removal proceedings, 'charging him with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (2018), as an alien present in the United States without being admitted or paroled, and section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a controlled substance violation." At a hearing on March 14, 2019, Respondent explained that he was going to petition for U nonimmigrant visa with the USCIS but was waiting for authorities to send him law enforcement certification. The Immigration Judge granted Mr. Vinalay a continuance to allow him time to file an application for relief and update his status on the U visa petition.

At a hearing conducted on April 17, 2019, the respondent indicated that he would not be pursuing an application for relief but he mentioned that he had received the LEV and mailed his petition for a U visa to the USCIS on April 12, 2019. P. 756. The respondent also applied for waivers of his inadmissibility per section 212(d)(3)(A)(ii) of the Act. Id.

Thereafter, at an individual hearing on May 29, 2019, the Immigration Judge granted Mr. Vinalay's request for waivers of inadmissibility but declined to further continue proceedings to await the adjudication of his U visa petition and also ordered him removed from the United States. On appeal, Mr. Vinalay challenged his denial for a continuance and while pending, he filed a motion to remand the record to the Immigration Court based on an information letter he got from the USCIS on Sept 19, 2019. The letter from USCIS provided that while Mr. Vinalay had established eligibility for U nonimmigrant status, the USCIS could not statutory cap for U visas has been reached for the fiscal year.

Holding:

"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."

Rationale, and Practitioner's Tips:

Motion for Continuance:

A continuance may be granted under the discretion of an Immigration Judge "for good cause shown." 8 C.F.R. § 1003.29 (2019); see also Matter of L-A-B-R-, 27 I&N Dec. 405, 405 (A.G. 2018). See p. 757. Factors considered include, (1) the DHS's response to the motion, (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors." Matter of Sanchez Sosa, 25 I&N Dec. 807, 813–14 (BIA 2012). See p. 757. The Attorney General further articulated that the Immigration Judge and this Board 'must consider and balance all relevant factors.' Id. The primary factors include "(1) the likelihood that the alien will receive the collateral relief, and (2) whether the relief will materially affect the outcome of the removal proceedings." See id. In addition, relevant secondary factors such as "the [alien's] diligence in seeking collateral relief, [the] DHS's position on the motion for continuance, and concerns of administrative efficiency." (citing Matter of Hashmi, 24 I&N Dec. 785, 790, 793 (BIA 2009)). 3 "The length of the continuance requested, the number of hearings held and continuances granted previously, and the timing of the continuance motion" can also be considered. Id. "As with any balancing analysis requiring consideration of multiple factors, [an alien's] strength on certain factors may compensate for a weaker showing on others." See p. 757.

The Board reasoned that while there was no dispute that the respondent is 'prima facie eligible for a U visa and that a grant of his visa petition by USCIS would materially affect the outcome of his removal proceedings, in considering a request for a continuance regarding an application for collateral relief, these primary factors are not dispositive.' Turning to the secondary factors, the Board found that Mr. Vinalay's lack of diligence in pursuing a U-Visa, the DHS's opposition to the continuance, and concerns regarding administrative efficiency all weighed against him so to show that the Immigration Judge did not clearly err.

Diligence: The board found that although Mr. Vinalay was seemingly eligible for a U visa since 2009 (a decade before his removal hearing), he only filed petition for this a month before his removal hearing. Mr. Vinalay did not show what steps, if any, he took to file for a U visa between 2009 and the time he filed his U-Visa. Thus, the Immigration Judge did not clearly err

in finding that Mr. Vinaly did not exercise due diligence in trying to get a U-Visa. It was "unreasonable and indicative of a lack of due diligence." See p. 758.

Practitioner's Tips: Practitioners can show any and all steps and a timeline to show when their client may have taken steps to file for a U-Visa. If the client filed before their removal hearing, it is important to emphasize this point and ideally filing several months ahead to show diligence. Specifying the steps taken at every stage might create a record for the client to demonstrate that they were being diligent. Practitioners might also want to explain or provide good reasons as to why a client may not have filed for a U-Visa well in advance of a removal hearing.

DHS Opposition: Weighs against granting continuance.

Administrative Efficiency:

The Board explained that since "neither party provided the Immigration Judge with an estimated processing time the adjudication of the respondent's visa petition before the USCIS," Mr. Vinalay requested a continuance for an indeterminate period of time. This was premised on the reasoning that a Judge can only grant a "reasonable adjournment" per *Ramirez-Sanchez*. Moreover, the USCIS informed Mr. Vinalay that the statutory cap for U visas has been reached and would not grant a new petition until new visas become available. This made it uncertain as to when a visa would be approved or become available. Thus, the request was too "speculative and indefinite." See p. 758-759.

Practitioner's Tips: Providing an estimated processing time for adjudication should be given so that this factor does not negatively impact the client. However, an applicant's deferred status can also be argued against removal since it reduces the speculative nature of the matter. It can help look into guidelines of deferred action since essentially an applicant has been given eligibility and can be approved as soon visas become available.

Detained Status:

Immigration Judges also consider an alien's detained status since these cases should be typically expedited on the matter of administrative efficiency. See p. 759. "Immigration Judges should consider whether an alien is detained in determining the length and number of continuances that are appropriate. Granting an indeterminate continuance greatly impacts administrative efficiency in a typical case, but particularly where, as here, the alien is detained." See id.

Practitioner's Tips:

Practitioners should highlight when an applicant is not detained. Detained applicants for U-Visas might find it harder to get continuances.

Due Process:

In order to establish a denial of the right to due process, respondent must show that he was prejudiced by the Immigration Judge's actions. See id. The board reasoned that USCIS hds not yet approved the U visa petition and that Respondent may continue to pursue his U visa, even after removal. Additionally, written changes to oral transcript by the Judge did not prejudice the respondent since these were minor. See 760.

Matter of Y-I-M, Applicant

December 12, 2019

Facts:

Applicant, a citizen of Ukraine was admitted to the United States in 2008 under the Visa Waiver Program and sought asylum within a year of arriving. The DHS placed him under asylum only proceedings. Applicant testified that he was a member of the Russian Orthodox Christian Church and refused to serve in the Ukrainian military because of his religious beliefs. As a consequence, he feared that he would be persecuted because of his religion and for being a "military deserter." In 2007 and 2008, he was called to military services and per his request, was allowed to do alternative military service in communications and further stated he was required to partake in weapons training and was discharged as a private soldier without a rank after 1

year. He further stated that he was recalled for military duty in August 2014 and requested alternative service again due to his view. After this, he was called a military deserter and military officers beat him on two occasions leaving him with various injuries including post-contusion pneumonia and internal bleeding for which he received medical care. called him a deserter and beat him on two occasions. One day after receiving treatment, he went to Hungary and got a fraudulent passport. He returned to Ukraine the next day for more medical treatment. In September 2014, he filed a complaint against the military officers but was attacked by then on his way home.

The Immigration Judge found that the applicant was not credible because of his inconsistencies in the record and the applicant appeals this arguing that the Immigration Judge erred by not identifying the inconsistencies and giving him an opportunity to respond. He further contended that DHS's questioning on the inconsistencies did not suffice. See p. 724-725.

Decision/Holding:

Affirmed. (1) Immigration judge may rely on inconsistencies to support an adverse credibility as long as either immigration judge, applicant, or ICE and applicant has been given opt to explain during hearing. (2) An Immigration Judge may, but is not required to, personally identify an obvious inconsistency where it is reasonable to assume that the applicant was aware of it and had an opportunity to offer an explanation before the Immigration Judge relied on it.

"There is no clear error in the Immigration Judge's adverse credibility finding. The Immigration Judge gave specific and cogent reasons for his adverse credibility determination, which included examples of significant internal inconsistencies in the applicant's testimony, inconsistencies and omissions between his testimony and the documentary evidence he submitted, and the implausibility of his testimony."

Rules:

IJ may base a credibility finding on, among other factors, "the inherent plausibility of the applicant's or witness's account or (2) the consistency between the applicant's or witness's written and oral statements.

Rationale/Practitioner's Tips:

Inconsistencies: The BIA reasoned that "an inconsistency need not go to the heart of the claim" and "an [Immigration Judge] may rely on any inconsistency or omission in making an adverse credibility determination as long as the 'totality of the circumstances' establishes that an asylum applicant is not credible." Hong Fei Gao, 891 F.3d. at 77 (quoting Xiu Xia Lin v. Mukasey, 534 F.3d 162, 167 (2d Cir. 2008) (per curiam)). See p. 726. Further, "when inconsistencies in the record are obvious or have previously been identified by the applicant or the DHS, an Immigration Judge is not personally required to specify the discrepancies and solicit an explanation from the applicant prior to relying on them in making an adverse credibility finding." See p. 729 quoting Zhi Wei Pang, 448 F.3d at 110. An Immigration Judge is only required to identify an inconsistency and give the applicant a chance to answer when it is obvious and has not been addressed by the government. See ___. Any inconsistencies that an Immigration Judge relies upon must be "tethered to the evidentiary record." Gurung v. Barr, 929 F.3d 56, 61 (2d Cir. 2019). If the Immigration Judge does not find a proffered explanation for an inconsistency persuasive, he or she should state the reasons why on the record to allow for proper appellate review. But the Immigration Judge "need not engage in 'robotic incantations' to make clear that he has considered and rejected a petitioner's proffered explanation." Ming Shi Xue, 439 F.3d at 124 n.15 (citation omitted) (internal quotation mark omitted). P.727.

Where the applicant testified that he had received an alternative service assignment in 2007 and 2008 and had no rank, his military identification showed that he had been promoted to senior soldier. The BIA provided that the applicant did not directly address this "significant discrepancy on appeal" and when the DHS asked him to explain it, he said that he was unaware of the rank change. Additionally, where the applicant testified that he obtained medical treatment for about 2 months after his injury in August 2014, he changed his testimony to 5 weeks where his documents state that he was treated an additional month after that. Applicant tried to explain that he ended treatment when asked about this by the DHS attorney and on appeal, explained that the doctor "occasionally came to his home to treat him during the period covered by the medical document." The BIA here concluded that since this was an explanation they were given about the

inconsistency for the first time on appeal, they could not consider it per *Matter of F-P-R.* Thus, the applicants medical records were given minimal weight. See p.729. The Immigration Judge also found that the applicant's credibility was further undermined by the fact that his "written statement failed to mention his travel to Hungary to obtain a false passport, which he only acknowledged on cross-examination by the DHS. The BIA found that his explanation for this was vague. Even though the applicant argued that these inconsistencies were minor, the BIA provided that it did not matter since "even minor inconsistencies may be considered as part of an adverse credibility determination under the totality of circumstances." Further, the Judge did not have to identify the points of inconsistencies since this was already done by the DHS on cross-examination. As such, these inconsistencies made applicant unreliable.

Practitioners Tips: Practitioners should pay careful attention to the cross-examination of their client so as to check for even minor inconsistencies since these can work to discredit a client.

Not enough corroborating evidence to overcome lack of credibility:

"Regardless of whether an applicant is deemed credible, he has the burden to corroborate the material elements of the claim where the evidence is reasonably obtainable." See p. 731.

The Immigration Judge found that the applicant did not have "reasonable documentation" of his church attendance in Ukraine, his former permission for alternative service, or his complaint alleging he was beaten by officers. See p. 731-32. While he was given an opportunity to explain why he did not have reasonable documentation, the Immigration Judge did not "find his explanations to be persuasive." The BIA found that the Immigration Judge's "adverse credibility" finding was not clearly erroneous under section 208(b)(1)(iii) of the Act since the "finding related to both the applicant's claims of past persecution and fear of future harm, his testimony was not sufficient to establish eligibility for relief…" See p. 732.

Practitioner's Tips:

There is an extremely high standard from this case by which applicants are basically not allowed to be inconsistent at all. In addition, to override inconsistency it is important to have as much

documentation as possible relating to the applicant's persecution claim since testimony is not enough.

Matter of O-F-A-S

December 6, 2019

Facts:

Respondent, a native and citizen of Guatemala entered the United States in 2016 without valid legal documents, seeking asylum. He was then placed in removal proceedings. In Guatemala, respondent had received a severance package in the amount of approximately $21,500.00 in 2015. Later that year, a family member warned respondent to be careful because a number of police cars had been seen around his house. Respondent received a call in 2016 from an unknown person asking him for a significant portion of his severance package and threatened to kill his family if he did pay the caller and his associates. A couple of weeks later, men wearing shirts with Policia Nacional Civil (PNC) insignia arrived to respondents door armed with high caliber firearms. When respondent slightly opened the front door, the men pushed the door open and hit the respondent's shoulder with a gun, causing it to dislocate. They also handcuffed him and began trashing the house, looking for money. They further threatened to cut off the respondent's fingers if he did not pay them. After respondent told them that he had some money in the car which one of them retrieved, the men were notified of a neighbor who had called the police. The men then removed respondent's handcuffs and told him he had 10 days to pay the balance or he would be killed. He was additionally threatened to have his "good eye" taken out if he reported the incident to the police. As such, respondent did see a doctor for his shoulder and did not report the incident to the police.

After entering the United States, responded attended an individual hearing where the Immigration Judge issued his case as time-barred and further found that he failed to "establish that it was more likely than not that he would face persecution on the account of a protected ground and that the Government of Guatemala was unwilling or unable to protect him from his attackers." Further under the Convention Against Torture, the Immigration Judge found that the respondent "did nto establish that the five men who beat, robbed, and threatened him were bona

fide police officers." Also, even if they were, the respondent did "establish that they had acted in an official capacity, as opposed to acting for personal gain, or that they acted with the consent or acquiescence of a public official or other person acting in an official capacity. See 711.

Rules:

(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.

Holding:

The BIA affirmed the Immigration Judge's holding to support his denial of the respondent's claim for protection under the Convention Against Torture. "First, he held that the respondent did not meet his burden of proving that the five men who beat, robbed, and threatened him were police officers. A private person who has no actual political or government affiliation is not a Cite as 27 I&N Dec. 709 (BIA 2019) Interim Decision #3970 719 "rogue official," even if he purports to be a government official. For example, an individual who impersonates a police officer by flashing a fake badge is not a rogue official because that person is not a "public official" in the first place, let alone one acting under color of law, as required by the Convention and 8 C.F.R. § 1208.18(a)(1)."

Rationale/Tips:

Under Color of Law

"The dispositive question is whether the [official] was exercising the power [he or] she possessed based on state authority or was acting only as a private individual." Butler v. Sheriff of Palm Beach County, 685 F.3d 1261, 1265 (11th Cir. 2012). In other words, in determining if a public official who engaged in torture was "acting in an official capacity," it is key to consider if he was only able to accomplish the acts of torture by virtue of his official status. See United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991). The use of "an official uniform or service weapon is not dispositive of the issue, because those items can be obtained outside the normal channels of government operations, and they may not be necessary to the official's ability to engage in the torturous conduct." See Barna v. City of Perth Amboy, 42 F.3d 809, 816–19. See p. 716.

The BIA supported the Immigration Judge in finding that even though the men wore bearing the insignia of a government law enforcement agency and carried high-caliber weapons and handcuffs did not prove that they were actually police officers. As the Immigration Judge noted, "the shirts could have been fake, and it is not unusual to expect a criminal to carry a weapon. Further, the men did not arrive at the respondent's home in police vehicles, and their immediate departure after learning that an official police car was en route to investigate the disturbance is a further indication that they were not bona fide police officers." In the alternative, the BIA found the Immigration Judge's view that even if they were officers, respondent did not establish they were acting in "official capacity" and were instead acting as rogue officials for personal gain.

Acquiescence

Additionally, the BIA supported that there was insufficient evidence to show that the officers were acting "under the color of law" to trigger the Convention Against Torture at the time of attack. "Even if a public official has engaged in torture in a private capacity, and therefore not under color of law, an alien may nevertheless qualify for protection under the Convention Against Torture if he demonstrates that a public official or other person acting in an official capacity consented to or acquiesced in the torture". Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004). Acquiescence requires that "the public official, prior to the activity

constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." See p. 718.

While respondent claimed that the facts "strongly suggest" his attackers had access to him by police channels since they were able to find out private information (he had cash at his house), they immediately left once they heard the police were coming. They additionally threatened to take his eye out if he did report to the police weakening the potential relation his attackers would have to the Guatemalan government if they did not fear impunity. See p. 719-20.

Moreover, the BIA found it significant that the respondent did not report to the police because there was no way to see if the police would have investigated the incident and taken action against respondent's attackers to see if there was a relation there. As such, the BIA the Immigration Judge's view of the evidence was permissible.

Practitioners Tips: It is important to note that the BIA agreed that the Immigration's Judge was not clearly erroneous. So stressing why it could be futile for an asylum seeker to report to the police even if there is seemingly no connection to the police on the evidence presented could help provide why there was no police report done.

Asylum and Withholding of Removal Under the Act

The BIA agreed with the Immigration Judge that "the respondent did not establish eligibility for withholding of removal under the Act because he failed to prove that he was persecuted in the past or that he faces a clear probability of persecution upon his return to Guatemala."

Persecution is "an 'extreme concept,' requiring 'more than a few isolated incidents of verbal harassment or intimidation.'" Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1231 (11th Cir. 2005) (citation omitted). To rise to the level of persecution, the claimed physical harm generally must involve severe mistreatment. See Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1353 (11th Cir. 2009) (finding no persecution where the applicant was detained for 4 days, interrogated and beaten for 5 hours, and subsequently monitored by authorities, but he suffered no physical harm). See Martin v. Sessions, 723 F. App'x. 35, 37–38 (11th Cir. 2018) ("stating that an alien who did not testify that he suffered any injuries or sought medical treatment did not

establish that the harm he alleged rose to the level of past persecution"); Jian Qiu Liu v. Holder, 632 F.3d 820, 822 (2d Cir. 2011) (per curiam) (finding that an alien who "suffered only minor bruising from an altercation . . . , which required no formal medical attention and had no lasting physical effect" had not experienced past persecution).

The BIA found that respondent had not established past persecutions and the one incident with his attackers was not severe enough to rise to persecution. His physical injuries also did not rise to the extent to where he had to see a doctor and he was instead treated by a lay person. The BIA furthered, "In the absence of past persecution, the respondent is not entitled to a presumption of a clear probability of future persecution. See 8 C.F.R. § 1208.16(b)(1). Respondent also did not provide evidence that anyone was looking for him so there was not enough to establish a past persecution or "clear probability of future persecution to meet the high burden of proof to qualify for withholding of removal." See p. 722. Thus, the BIA concluded that the Immigration Judge properly denied the respondent's application for withholding of removal.

Practitioner's Tips:

Important factors to show threat of persecution seem to be record of past persecution (more than few isolated incidents) and record of permanent injuries where possible.

Matter of R-A-V-P (March 2020)

Trump administration has randomly stopped releasing asylum seekers on humanitarian parole, leading to the indefinite detention of thousands across the country. Some asylum seekers have remained eligible to seek release on a monetary bond. To adjudicate bond requests, immigration judges assess whether the asylum seeker poses any danger to others or national security, or is likely to become a "flight risk"—i.e., fail to appear at subsequent hearings. On March 18, 2020, the Board of Immigration Appeals issued a precedential decision further restricting the opportunity for this already limited category of asylum seekers to seek bond, reasoning that those who do not have ties in the United States, are not currently employed, or may lose their asylum case pose a flight risk. Status: The decision is in place and operational and certain to justify the indefinite detention of countless asylum seekers."

Attorney General Garland's June 2020 Memorandum

On June 16, 2021, Attorney General Garland issued a memorandum "vacat[ing] the previous Attorney General decisions in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) ('L-E-A- 11'), *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ('A-B- I'), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) ('A-B- II'). USDOJ, IMPACT OF ATTORNEY GENERAL DECISIONS IN MATTER OF L-E-A- AND MATTER OF A-B (June 16, 2021), https://www.justice.gov/asg/page/file/1404826/download ("June Memo"). "A-B- I broadly stated that 'victims of private criminal activity'--such as domestic violence or gang violence--will not qualify for asylum except perhaps in 'exceptional circumstances.' 27 I&N Dec. at 317." *Id.*

Attorney General Garland's memo came in response to President Biden's Executive Order No. 14010, which directed the Attorney General and DHS Secretary to "promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a 'particular social group,' as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol." Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021), available at https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-toaddress-the-causes-of-migration-to-manage-migration. The June memo explains that Attorney General Garland is "vacating L-E-A- II, A-B- I, and A-B- II to return the law to its preexisting status pending the rulemaking process, which will allow these complex and important questions to be resolved with the benefit of full public comment. When the final rule is promulgated, it will govern these issues going forward." DOJ, JUNE MEMO at 1.

As a result of Attorney General Garland's memo, immigration judges once again have the authority to grant asylum to individuals based on threats of domestic abuse or violence from drug gangs.

a. Victims of Domestic Violence

In lieu of Attorney General Garland's memo, "[p]ending rulemaking, adjudicators are directed to follow pre-A-B- I precedent, including *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which had been overruled by the Attorney General in *A-B- I.*" USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE at 9.

In *Matter of A-R-C-G-*, the issue before the BIA was "whether domestic violence can, in some instances, form the basis for a claim of asylum." *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014). The asylum applicant married at 17 and suffered physical and sexual abuse by her husband. The BIA held: "[d]epending on the facts and evidence in an individual case, 'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) and 1231(b)(3) (2012)." USDOJ, BIA PRECEDENT CHART AI-CA, https://www.justice.gov/eoir/bia-precedent-chart-ai-ca (last updated July 21, 2020).

The BIA concluded that the proposed group -- articulated as "married women in Guatemala who are unable to leave their relationship" -- satisfied the three PSG elements. "It was immutable because it involved gender and a marital status that the applicant could not change…[T]he group was defined with particularity, as the terms 'married,' 'women,' and 'unable to leave the relationship' have commonly accepted definitions within Guatemalan society. [] [E]vidence of social distinction for women in marriages they cannot leave would include 'whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.'" USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE at 30.

In a separate case, *Matter of L-R-*, which USCIS said "adjudicators also should follow" pending rulemaking, DHS's brief "noted that the groups of women unable to leave a domestic relationship or women who are viewed as property by virtue of their positions within a domestic

relationship could be cognizable particular social groups." DHS's Supplemental Brief in Matter of L-R-, April 13, 2009; USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE at 30.

b. Victims of Gang Violence

In *Matter of S-E-G-*, the BIA rejected a proposed PSG defined as "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," because it lacked "well-defined boundaries" that make a group particular and, therefore, lacked social visibility. *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

Likewise, in *Matter of E-A-G-*, the BIA held that the applicant, "a young Honduran male, failed to establish that he was a member of a particular social group of 'persons resistant to gang membership,' as the evidence failed to establish that members of Honduran society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group." *Matter of E-A-G-*, 24 I&N Dec. 591, 594-95 (BIA 2008).

In *Matter of M-E-V-G-*, a Honduran gang "threatened to kill [the applicant] if he did not join the gang." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 228 (BIA 2014). The applicant claimed that he was persecuted ""on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs." *Id.* Though the case was remanded for further fact-finding, the BIA held that their prior "holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs." *Id.* at 251.

Following the BIA's decision in *M-E-V-G-*, the Ninth Circuit, in *Pirir-Boc v. Holder*, held that a group characterized as individuals "taking concrete steps to oppose gang membership and gang authority" may be cognizable. *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

In the now-vacated *Matter of A-B-*, then-Attorney General Sessions held: "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (A-B- I).