Practice Advisory

BOARD OF IMMIGRATION APPEALS ROUNDUP

September 2019

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

Practice Advisory Forward

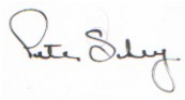
The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons**.**

This practice advisory reviews recent Board of Immigration Appeals (BIA) and Attorney General decisions affecting various areas of immigration law.

Manuals and advisories prepared by the Center are reviewed for improvements and updated to reflect current developments. Please feel free to email me if you have suggested updates or edits to portions of this practice advisory.

Sincerely,



Peter Schey

pschey@centerforhumanrights.org

President and Executive Director
Center for Human Rights and Constitutional Law

Pereira v. Sessions **Update**

1) Miranda-Cordiero, 27 I&N Dec. 551 (BIA 2019)

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

Issue: Whether the notice to appear was invalid because it did not contain a specific date and time for her initial removal hearing?

The Board of Immigration Appeals highlights the applicable regulations and specifically notes that 8 C.F.R. Section 1003.15(c) states that failure to provide any of the enumerated items (such as date and time of hearing) "shall not be construed as affording the alien any substantive or procedural rights."

The BIA notes "rescission of the respondent's in absentia order of removal is not mandated by *Pereira.*" Furthermore, the BIA asserts that an in absentia order of removal "may be entered if a written notice to appear containing the time and place of the hearing was provided EITHER in a notice to appear under section 239(a)(1) OR in a subsequent notice of the time and place of the hearing pursuant to section 239(a)(2).

Respondent in this case refused to provide the Immigration Court with her address and the BIA found that if "an alien failed to provide the address required under section 239(a)(1)(F)," no written notice of the hearing is necessary to order the alien removed.

2) Matter of Lourdes Suyapa Pena-Mejia, 27 I&N Dec. 54 (BIA 2019)

Summary: Neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien did not appear at a scheduled hearing after being served with a notice to appear that did not specify the time and place of the initial removal hearing, so long as a subsequent notice of hearing specifying that information was properly sent to the alien. Pereira v. Sessions, 138 S. Ct. 2105 (2018), distinguished.

Furthermore, rescission of the respondent's in absentia order of removal is not mandated by Pereira. In contrast to the provisions of the Act at issue in Pereira, the statute regarding the entry of an in absentia order provides that "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section" may be ordered removed in absentia. Section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A) (2012)

Because this statute uses the disjunctive term "or" rather than the conjunctive "and," an in absentia order of removal may be entered if a written notice containing the time and place of the hearing was provided either in a notice to appear under section 239(a)(1) or in a subsequent notice of the time and place of the hearing pursuant to section 239(a)(2).

Because the notice of hearing was sent to the respondent subsequent to the personal service of her notice to appear, her case falls within Matter of Bermudez-Cota as to the fundamental question of the Immigration Court's jurisdiction. Furthermore, it is distinguishable from Pereira because she did not apply for cancellation of removal and she was ordered removed by the Immigration Judge for reasons unrelated to the operation of the "stop-time" rule.

The respondent's arguments are thus analogous to those presented in Matter of Bermudez-Cota and fail for a similar reason—specific provisions of the Act that are distinct from the "stop-time" rule are at issue here and are dispositive in this case.

3) Matter of Mendoza-Hernandez and Capula-Cortez, 27 I&N Dec. 520 (BIA 2019)

Issue: The issue before us is whether the "stop-time" rule, which provides for termination of continuous residence and physical presence in the United States, is triggered when an alien who was served with a notice to appear that did not specify the time and place of the initial removal hearing is subsequently served with a notice of hearing that includes that essential information.

The respondents, a husband and wife from Mexico, had appealed the immigration judge's denial of cancellation of removal based on their failure to show 10 years of continuous physical presence before the NTA was served. The NTAs the Department of Homeland Security, or DHS, had issued Mr. Mendoza-Hernandez and Ms. Capula-Cortes lacked information about the hearing's time or place. While the appeal was pending, the Supreme Court issued *Pereira*, which held that a putative NTA that does not designate the time or place of the hearing is not a "notice to appear under [INA § 239(a)]" and thus does not trigger the cancellation of removal stop-time rule.

The BIA concluded that when the immigration court later mailed the respondents hearing notices that included the time and place of the hearing, several months after DHS served the NTAs, the hearing notices triggered the stop-time rule. The BIA repeatedly referred to *Pereira*'s holding as "narrow" and relied on pre-*Pereira* U.S. Court of Appeals decisions approving a "two-step" process whereby a defective NTA issued by DHS can be cured by a hearing notice issued by the immigration court. The BIA noted that *Pereira* involved a "distinct set of facts" in which the respondent had not received notice of the time and date of the hearing, had failed to appear, and was ordered removed *in absentia*. In contrast, Mr. Mendoza-Hernandez and Ms. Capula-Cortes were "properly served" with NTAs and hearing notices, had appeared at all of their hearings, and "had the opportunity to secure counsel and to adequately prepare." The BIA asserted that the Supreme Court's *Pereira* decision "did not address the propriety of the two-part notice process" and that the *Pereira* holding "does not preclude" a "perfected" NTA or a combination of documents from stopping time.

BIA issues decisions restricting eligibility for cancellation of removal and contradicting U.S. Supreme Court decision, Catholic Legal Immigration Network, Inc. (June 28, 2019)

What Practitioners Should Consider in Light of These Rulings:

- The Supreme Court's decision in *Pereira* is binding and holds that if a putative NTA does not specify the hearing time and/or place, it does not stop time for purposes of cancellation of removal. Thus, for example, if the NTA did not contain time and/or place information, and the client was not served a hearing notice until after he or she had 10 years of continuous physical presence, he or she should not have a stop-time problem, even after *Mendoza-Hernandez & Capula-Cortes.* Similarly, practitioners could argue that defective or improper service cannot stop time. *See* INA § 240A(d)(1)(A) (time stops when a noncitizen "is *served* a notice to appear" (emphasis added)).

- In cases outside the 9th Circuit, which has already rejected *Mendoza-Hernandez & Capula-Cortes*, practitioners should argue that the BIA decision was wrongly decided and preserve the challenge for appeal and an eventual petition for review. Practitioners could use the dissent as a guide for crafting arguments about the plain language of the statute and the Supreme Court's holding in *Pereira* to argue that clients should continue to accrue continuous physical presence until served with an NTA that meets the statutory requirements.

BIA issues decisions restricting eligibility for cancellation of removal and contradicting U.S. Supreme Court decision, Catholic Legal Immigration Network, Inc. (June 28, 2019)

Temporary Protected Status

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

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

Issue: Does an Immigration Judge have the authority to deny TPS in discretion?

The BIA notes '"[t]he plain language of section 244(a)(1)(A) of the Act provides that the Attorney General "may grant an alien" TPS if the alien meets the statutory eligibility requirements in section 244(c). "The word 'may' customarily connotes discretion."' Furthermore, "in other parts of the TPS statute, Congress used the word "shall," which "generally imposes a nondiscretionary duty."

According to the BIA federal regulations also promulgate discretionary denial of TPS. "The applicable regulations also provide that an applicant "may in the discretion of the director be granted Temporary Protected Status." 8 C.F.R. §§ 244.2, 1244.2 (2019)."

The BIA notes that although the regulation specifically uses the phrase "the director" the BIA has previously held that "an alien may renew an application for TPS in removal proceedings before an Immigration Judge, who has de novo review over such applications. See Matter of Figueroa, 25 I&N Dec. 596, 598 (BIA 2011)."

To further support their holding the BIA states "[t]he United States Court of Appeals for the Eleventh Circuit has specifically stated that "[t]he ultimate decision of whether to grant TPS to an alien is undisputedly within the discretion of the Secretary" of Homeland Security pursuant to section 244(a)(1)(A) of the Act. Mejia Rodriguez v. U.S. Dep't of Homeland Sec., 562 F.3d 1137, 1143 (11th Cir. 2009) (per curiam). We are unpersuaded that there are any valid reasons to read section 244(a)(1)(A) differently."

Asylum

1) Matter of L-E-A-, I&N Dec. 581 (A.G. 2019)

Summary: Generally, nuclear families do not constitute particular social groups because they are not inherently socially distinct.[1]

Facts: "The respondent contends that he was persecuted by a criminal gang on account of his membership in the "particular social group" defined as the "immediate family of his father," who owned a store targeted by a local drug cartel." (pg. 581)

Precedent: "At the same time, the Board has recognized that a clan or similar group bound together by common ancestry, cultural ties, or language may constitute a "particular social group." Matter of H-, 21 I&N Dec. 337, 343 (BIA 1996)." (pg. 582)

'But what qualifies certain clans or kinship groups as particular social groups is not merely the genetic ties among the members. Rather, it is that those ties or other salient factors establish the kinship group, on its own terms, as a "recognized component of the society in question."'

Conclusion: "that 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." (pg. 582)

The Attorney General noted "[t]he Board here did not perform the required fact-based inquiry to determine whether the respondent had satisfied his burden of establishing the existence of a particular social group within the legal requirements of the statute." (pg. 586)

"[T]he attorney general in L-E-A-did not decide that the type of PSG proposed in the case cannot constitute a cognizable PSG. In fact, the attorney general's L-E-A- opinion expressly states that it "does not bar all family-based social groups from qualifying for asylum."10 Instead the attorney general overruled the BIA decision's PSG cognizability holding because,

[1] A.G. Barr Rejects Challenged to Authority to Review BIA Decisions (Matter of L-E-A-2019), My Attorney USA, available at: http://myattorneyusa.com/ag-barr-rejects-challenges-to-authority-to-review-bia-decisions-matter-of-l-e-a-2019

according to the attorney general, the BIA had not conducted the required analysis in issuing its precedent decision."[2]

Dicta of *Matter of L-E-A-*:

- "[U]nless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Immigration and Nationality Act (INA)] for purposes of asylum."

- "The fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a specific nuclear family would be 'recognizable by society at large'. . . . The average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be so recognized."

- "[M]any family-based social groups will have trouble qualifying as 'socially distinct,' a requirement that contemplates that the applicant's proposed group be 'set apart, or distinct, from other persons within the society in some significant way.'"

- "[I]n the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct." 15

Practitioners should argue that such statements are dicta and cannot be the basis for denying claims, particularly as the attorney general emphasizes the need for case-by-case analysis in asylum claims.

Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019), Catholic Legal Immigration Network, Inc. (Aug. 2, 2019) available at: https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf

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

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

Issue:"[W]hether, under the Act, aliens transferred after establishing a credible fear are eligible for release on bond."

The Act provides that, if an alien in expedited proceedings establishes a credible fear, he "shall be detained for further consideration of the application for asylum." INA § 235(b)(1)(B)(ii).

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[2] *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), Catholic Legal Immigration Network, Inc. (Aug. 2, 2019) available at: https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf

The Act further provides that such an alien may be "parole[d] into the United States . . . for urgent humanitarian reasons or significant public benefit." Id. § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). There is no way to apply those provisions except as they were written—unless paroled, an alien must be detained until his asylum claim is adjudicated.

[I]f the alien does establish such a fear, he is entitled to "further consideration of the application for asylum." Id. § 235(b)(1)(B)(ii). By regulation, that "further consideration" takes the form of full removal proceedings under section 240 of the Act. 8 C.F.R. §§ 208.30(f), 1208.30(g)(2)(iv)(B).

Thus, if an alien originally placed in expedited removal establishes a credible fear, he receives a full hearing before an immigration judge.

Accordingly, the Act's implementing regulations assume that aliens in expedited proceedings will be detained, but provide that, if an alien establishes a credible fear, "[p]arole . . . may be considered . . . in accordance with section 212(d)(5) of the Act and [8 C.F.R.] § 212.5." 8 C.F.R. § 208.30(f).

[W]hen reviewing an "initial custody determination" made by DHS, an "immigration judge is authorized to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in [8 C.F.R.] § 1003.19." 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). Section 1003.19, in turn, expressly limits the availability of bond for certain enumerated classes of aliens. Id. § 1003.19(h)(2)(i). One of those classes is "[a]rriving aliens," id. § 1003.19(h)(2)(i)(B), which includes aliens "attempting to come into the United States at a port-of-entry," id. § 1001.1(q). But section 1003.19 does not mention the classes of aliens that have been designated for expedited removal.

Section 235(b)(1)(B)(ii) provides that, if an alien in expedited proceedings establishes a credible fear, he "shall be detained for further consideration of the application for asylum."

What Did the Attorney General Hold?

- The Attorney General held that asylum seekers who enter the United States between ports of entry and subsequently pass the threshold test for asylum eligibility (referred to as a "credible fear interview") cannot seek release on bond from an immigration judge.

- In a footnote, the Attorney General delayed implementation of the decision for 90 days "so that DHS may conduct the necessary operational planning for additional detention and parole decisions." This footnote ominously suggests that DHS is already planning to use this decision as justification to expand its detention system--already at historically unprecedented highs, with overcrowding and health concerns resulting.

- Technically, nothing in the Attorney General's decision limits or impacts DHS's continued ability to release asylum seekers on parole. If this option were utilized, it would mean that asylum seekers could remain in the community with their families and have a far greater opportunity to obtain legal representation during their asylum proceedings.

Though *legally* the Administration maintains clear discretion to release asylum seekers under INA 212(d)(5)(A), *in practice*, DHS regularly refuses to do so, unlawfully creating categories of de facto mandatory detention that should not exist by law. The decision effectively leaves DHS as the sole arbiter of release for asylum seekers, a deeply problematic shift that will result in even more unnecessarily prolonged jailing of asylum seekers given the Administration's record of denying access to parole (which resulted in the *Damus* litigation, described in greater detail below).

Attorney General Barr Strips Bond Elibility for Asylum Seekers: Matter of M-S- Analysis and Q&A, National Immigrant Justice Center (April 17, 2019)

Who is affected by this ruling?

- The decision will impact asylum seekers who enter the United States between ports of entry and then either present themselves to an immigration officer or agent or are apprehended within 14 days of their entry and within 100 miles of the border. This is the class of individuals considered to be subject to expedited removal proceedings under section 235 of the Immigration and Nationality Act. Upon passing their credible fear interview, these individuals will now be forced to remain in immigration jail for the duration of their asylum proceedings unless DHS exercises its authority to consider release on parole. Detained individuals are far less likely to be represented by counsel and, therefore, far less likely to successfully present their claims for asylum or other types of relief

Attorney General Barr Strips Bond Elibility for Asylum Seekers: Matter of M-S- Analysis and Q&A, National Immigrant Justice Center (April 17, 2019)

Who is not affected by this ruling?

- Asylum seekers who present themselves at ports of entry are already precluded from seeking bond from an immigration judge.

- Unaccompanied children who seek asylum in the United States must be transferred from DHS custody to the custody of the Office of Refugee Resettlement within the Department of Health and Human Services (HHS). There, HHS is lawfully required to release and reunify children with loved ones in the community as expeditiously as possible.
- Families detained by DHS remain subject to the requirements of the Flores settlement, which provides critical and fundamental restrictions on the detention of children. Given President Trump's fixation on reconstituting the harmful family separation policy, it is possible DHS will attempt to implement a policy it refers to as "binary choice," which would force parents under duress to choose between separating from their children or prolonged family detention in violation of the Flores settlement.

Attorney General Barr Strips Bond Elibility for Asylum Seekers: Matter of M-S- Analysis and Q&A, National Immigrant Justice Center (April 17, 2019)

Deportation

1) *Matter of Zhang*, 27 I&N Dec, 569 (BIA 2019)

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

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

Respondent's argument: 'He contends that to find him removable under section 237(a)(3)(D) of the Act, it must be shown that he made a false claim to citizenship that was "willful" or "knowing."'

DHS argument: [T]he statutory language of section 237(a)(3)(D) does not require intent or a culpable mental state.

Issue: [I]s whether an alien's false claim to United States citizenship must be made knowingly to render him or her removable.

Section 237(a)(3)(D)(i) of the Act provides that an alien is deportable if he "falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit."

Holding: The plain language of this section does not require an intent to falsely represent citizenship status.

Significantly, Congress carved out a narrow exception to this provision for those aliens whose parents are or were United States citizens; who permanently resided in the United States prior to the age of 16 years; and who reasonably believed that they were United States citizens when they made such a claim.4 Section 237(a)(3)(D)(ii) of the Act; see also section 212(a)(6)(C)(ii)(II) of the Act.

This exception indicates that an alien is not required to know that a claim to citizenship is false, because if Congress had intended to include a knowledge or willfulness requirement in section 237(a)(3)(D)(i), there would be no need for a good faith exception.

Removal Proceedings

1) *Matter of Andrade Jaso and Carbajal Ayalai,* 27 I&N Dec. 557 (BIA 2019)

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

An Immigration Judge has the authority to grant a DHS motion to dismiss removal proceedings pursuant to 8 C.F.R. § 239.2(a)(7) upon a finding that it is an abuse of the asylum process to file a meritless asylum application with the USCIS for the sole purpose of seeking cancellation of removal in the Immigration Court. See Matter of Sanchez-Herbert, 26 I&N Dec. 43, 45 (BIA 2012)

The record supports the Immigration Judge's finding that the respondents' conduct constituted such an abuse. The asylum applications they submitted to the USCIS lacked merit, were filed for the sole purpose of securing a hearing on their cancellation applications before an Immigration Judge, and were withdrawn after the DHS commenced removal proceedings.

Respondent's argument: DHS has not demonstrated any change in circumstances that occurred after their notices to appear were issued, noting that their failure to appear for the asylum interview occurred before the DHS issued the notices to appear.

However, the respondents' withdrawal of their asylum applications at the first master calendar hearing constitutes a change in circumstances that occurred after the issuance of the notices to appear.

Convictions

1) *Matter of Vasquez*, 27 I&N Dec. 503 (BIA 2019)

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

Facts: The respondent is a native and citizen of Mexico who was admitted to the United States as a conditional permanent resident on April 16, 1998, and adjusted his status to that of a lawful permanent resident on March 10, 2001. On July 29, 2009, the respondent was convicted in the Northern District of Illinois of kidnapping in violation of 18 U.S.C. § 1201(a)(1) and (2) (2006), for which he was sentenced to a term of imprisonment of 139 months … DHS issued a notice to appear charging that the respondent's conviction was for an aggravated felony under section 101(a)(43)(H) of the Act.

DHS argument: Section 101(a)(43)(H) of the Act defines an aggravated felony as "an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom)." Although 18 U.S.C. § 1201 is not included in this list, the DHS contends that we should interpret kidnapping in violation of that statute to be an aggravated felony because it is "described in" the other statutes listed in section 101(a)(43)(H).

The DHS asserts that the phrase "described in" in section 101(a)(43)(H) of the Act indicates congressional intent to give the statute a broad reach. We recognize that the term "described in" is less specific than the phrase "defined in," which is employed elsewhere in section 101(a)(43).

Holding: However, we cannot agree that Congress' use of the phrase "described in" allows us to interpret section 101(a)(43)(H) as including an offense under a Federal statute that is not enumerated there.

Issue: [O]ur concern is with the question whether the Federal crime of kidnapping under 18 U.S.C. § 1201, which is not a statute listed in section 101(a)(43)(H) of the Act, can be interpreted to be an aggravated felony because it is similarly "described in" the statutes that Congress did enumerate there.

the DHS argues that because the "central theme" of the statutes listed in section 101(a)(43)(H) is "threatening to kidnap," the Federal offense of "kidnapping" should be considered to be "described in" those statutes

The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, agreed, stating that a conviction for "violating [section 275(a) of the Act] is outside the ambit of [section 101(a)(43)(N)], which is explicitly confined to convictions under [section 274(a)]." Rivera-Sanchez v. Reno, 198 F.3d 545, 547 (5th Cir. 1999) (per curiam) (emphasis added)).

2) *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019)

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

Facts: In 2005 and 2010, [Respondent] was convicted of possession of less than 20 grams of marijuana in violation of section 893.13(6)(b) of the Florida Statutes. On the basis of these two convictions, the Immigration Judge found that the respondent is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Because the respondent was convicted of more than a "single offense of simple possession of 30 grams or less of marijuana," the Immigration Judge determined that he is ineligible for a section 212(h) waiver and, consequently, for adjustment of status.

Respondents Argument: The respondent argues that he is not inadmissible under section 212(a)(2)(A)(i)(II) because the definition of cannabis (commonly referred to as marijuana) under Florida law is broader than the Federal definition.

Like the Federal statute, Florida once defined "cannabis" to exclude "the mature stalks of the plant."

[T]he Florida Legislature amended its laws to redefine the term "cannabis" in section 893.02(3) as all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.

Arguing that Florida law defines cannabis more broadly than 21 U.S.C. § 802(16), the respondent asserts that the statutes are not a categorical match and, therefore, that he has not been convicted of a controlled substance violation within the meaning of section 212(a)(2)(A)(i)(II) of the Act. However, the fact that some incongruity exists between the Federal and Florida laws is not dispositive.

We have held that "even where a State statute on its face covers a . . . [controlled] substance not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime in order to defeat a charge of removability."

We are therefore unpersuaded that there is a realistic probability that Florida would prosecute a person under section 893.13(6)(b) for possession of less than 20 grams of a form of marijuana that is not federally controlled.

Thus, according to Moncrieffe, the realistic probability test is required, even where a State statute is facially broader than its Federal counterpart. Id. at 206.

In this case, the respondent has two convictions for possession of less than 20 grams of marijuana in violation of section 893.13(6)(b) of the Florida Statutes. These convictions are for violations of a State law relating to a controlled substance, as defined in 21 U.S.C. § 802. It is theoretically possible that Florida might apply its statute to conduct that only involves forms of marijuana (such as stalks or sterilized seeds) that are not included in the Federal definition of marijuana at 21 U.S.C. § 802(16). However, the respondent has not established a realistic probability that the State of Florida would prosecute such conduct, and there is no indication that it has successfully done so. The actual examples of Florida's prosecution of possession of less than 20 grams of marijuana all appear to involve controlled substances contained in the Federal definition of marijuana.