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CILA Children's Immigration Law Academy

Litigation for Unaccompanied Children: Updates and Foundational Cases

A webinar series presented by:

The ABA Children's Immigration Law Academy (CILA) and
The National Immigration Litigation Alliance (NILA)

Written Materials
Tuesday, April 11, 2023

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Matter of J-L-L-

28 I. & N. Dec. 684 (BIA 2023) (holding that Supreme Court case law regarding defective charging documents initiating removal proceedings is not applicable to defective charging documents initiating exclusion proceedings)

Facts & Procedural History:

In 1995, the former Immigration and Naturalization Service placed the noncitizen in exclusion proceedings through the issuance of Form I-122 (Notice to Applicant for Admission Detained for Hearing Before Immigration Judge). That form listed the date and place of the initial hearing as "to be calendared." In 2004, the Board of Immigration Appeals (BIA) affirmed an immigration judge (IJ)'s decision ordering the noncitizen excluded.

In 2021, the noncitizen filed a sua sponte motion to reopen based on a change in law and attached an application for cancellation of removal. The noncitizen argued that Form I-122 was defective because it lacked date and place information and, relying on the Supreme Court's decisions in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) and *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), asserted that he should be allowed to apply for cancellation of removal.

Notable Holdings & Rationale:

The BIA denied the motion, holding that neither *Pereira* nor *Niz-Chavez* are applicable to exclusion cases. The BIA first noted that those Supreme Court decisions were predicated on an interpretation of current § 239(a) of the Immigration and Nationality Act (INA), which was enacted through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), effective April 1, 1997, and requires time and place of hearing information to be listed on Notices to Appear initiating removal proceedings.

The BIA reasoned that, unlike current INA § 239, neither pre-IIRIRA statutes nor regulations required Form I-122 to include information regarding the time and place of the initial hearing. The BIA further noted that the Supreme Court specifically contrasted the absence of any statutory requirement to include this information in pre-IIRIRA law regarding Orders to Show Cause (OSCs), which were the charging documents used to initiate *deportation* proceedings. Finally, the BIA reasoned that, as the case arose within the jurisdiction of the Second Circuit, its conclusion is consistent with *Jiang v. Garland*, 18 F.4th 730, 734-35 (2d Cir. 2021), in which the court held that *Niz-Chavez* and *Pereira* were not controlling on the question of whether a defective OSC triggered the stop-time rule for cancellation of removal.

Practice Pointers:

- Exclusion cases are initiated by Form I-122. Deportation cases are initiated by OSCs. Different statutes and regulations apply to these cases, including for motions to reopen. It is important for newer practitioners to research the governing statutes and regulations and/or consult with attorneys who are familiar with pre-IIRIRA law when assessing the viability of a motion to reopen exclusion or deportation proceedings.
- While not applicable here, the Supreme Court's decisions in *Pereira* and *Niz-Chavez* continue to spark litigation. There is a circuit split regarding the impact of defective NTAs on motions to rescind in absentia orders based on the argument that a noncitizen who

received a defective NTA has not been afforded statutorily-required notice. At least four petitions for writs of certiorari are pending before the Supreme Court.

Saban-Cach v. Garland

58 F.4th 716 (3d Cir. 2023) (finding error in the agency's analysis of the evidence of past persecution, that petitioner raised a cognizable PSG based on his identity as an Indigenous Guatemalan, and that the BIA overlooked significant evidence related to the CAT claim)

Facts & Procedural History:

Petitioner, an Indigenous Guatemalan of Kaqchikel Mayan ethnicity, sought review of the denial of his applications for withholding of removal and CAT protection. Petitioner alleged that he and his family were the only Kaqchikel Mayans in his town, and the decision recognizes that "Kaqchikel Mayans stand out from the majority population because of their names, language, physical appearance, and dress."

The facts as recounted by the Second Circuit include that petitioner was targeted by MS-13 when growing up and suffered cuts and bruises. There was also a recruitment element to this attention that included death threats. Petitioner testified that he was scared to report these incidents to the police and fled to San Pedro, 90 minutes away, but he was still pursued by the gang and attacked when he returned home. One such attack involved gang members cutting him with a broken bottle, leaving scars.

In 2014, petitioner fled Guatemala twice. His first attempt to enter the United States resulted in an expedited removal order; his second, a reinstated order. In 2015, he successfully entered. Petitioner testified that during this period, his entire family suffered gang violence including rape of his 16-year-old sister. They all fled except for a younger brother who went into hiding.

In 2020, in withholding-only proceedings, an IJ found petitioner to be credible, but denied his claims on the merits. The IJ concluded that he failed to demonstrate past persecution and, alternatively, there was no nexus to a protected ground because petitioner failed to establish a particular social group. Importantly, the IJ held that "'while the gang may have sought the respondent's race as being useful to their agenda, the gang only harmed [him] when [he] refused to succumb to those recruitment efforts.'" (Original alterations.) Additionally, because he was not physically harmed in San Pedro and given his brother's continued presence in Guatemala, the IJ also concluded that internal relocation was reasonable. On CAT, the IJ concluded that petitioner failed to demonstrate governmental acquiescence, highlighting his failure to request police assistance, and that generalized discrimination against the Indigenous population did not rise to the level of torture.

The BIA affirmed on past persecution, internal relocation, and CAT relief. The BIA explained that "because most of the incidents did not involve physical injuries, and because the worst attack did not require him to seek professional medical care for his physical injuries, the applicant did not establish harm rising to the level of past persecution."

Notable Holdings & Rationale:

The panel began its opinion by summarizing: "Although the BIA need not write an overly detailed explanation of its review of an IJ's decision, it must provide an adequate explanation of its ruling and afford us an opportunity to review it. Here, the BIA did neither. At times, the IJ's decision completely conflicts with the record. Yet, for reasons that are not at all apparent, the BIA affirmed the IJ's decision in its entirety."

Past Persecution:

Medical Treatment: Based on *Doe v. Attorney General*, 956 F.3d 135 (3d Cir. 2020), the court concludes that the BIA erred in its past persecution analysis. The *Doe* standard is that: "a finding of past persecution cannot be conditioned 'on whether the victim required medical attention . . . or even whether the victim was physically harmed at all.' Instead, there must be a case-by-case, fact-specific inquiry into 'whether a petitioner's cumulative experience amounts to a severe affront[ ] to [that petitioner's] life or freedom.'"

Here, the court found that the BIA speculated that "after being stabbed with a broken bottle, [petitioner] 'did not need sutures or surgeries or any further medical treatment,'" without awareness of whether the medical services available covered such treatment. Moreover, the court's review of evidence revealed that the BIA conflated not seeking (unavailable) treatment with not needing such attention. Importantly, the record showed that the only hospital was "far away . . .[and] it seems unlikely that [petitioner] could have called an Uber."

Multiple Attacks: Based on the severity of the injuries and multiple attacks, the court concluded that its past persecution analysis should follow *Doe* rather than the government's citation of *Thayalan v. Attorney General*, 997 F.3d 132 (3d Cir. 2021), where the injuries were not as grave and the attack was a "one-off." The court emphasized, though that a single incident can establish past persecution.

Cumulative Effect of Age, Family Suffering, and Threats: Finally on past persecution, the court noted that, unlike other circuits, "[w]e have never addressed the degree to which the BIA and IJ are required to consider incidents of claimed past persecution in light of the petitioner's age, and we need not provide a definitive answer here." Nevertheless, "the BIA should have explicitly considered what effect, if any, these experiences had on [petitioner] given his youth," as well as the impact of his family's suffering on his "emotional or psychological harm." In addition, the BIA erred by ignoring the threats petitioner testified about, and the government's downplaying of these threats as "vague is both puzzling and disappointing given the beating and stabbing that left [petitioner] unconscious and could have partially blinded him."

Particular Social Group:

Even though the BIA considered it unnecessary to address the PSG issue, the court concluded that petitioner had "clearly established membership in a particular social group as an indigenous person in Guatemala." It further found that the IJ erred as petitioner "established membership in a particularized group as evidenced from the gang's persecution of him for refusing recruitment that was attempted *because* he was of Kaqchikel Mayan indigenous ethnicity." That identity is immutable and socially distinct.

Internal Relocation:

Reviewing for substantial evidence, the court concluded that the agency's conclusion on internal relocation was not adequately supported. For example, the agency gave insufficient weight to "the expert's report that 'it is exceedingly difficult for individuals—particularly indigenous individuals previously targeted by gangs—to move from the area in which they have grown up and find a safe, secure place to live.'" With respect to petitioner's brother's continuing need to hide in Guatemala, the court noted that another intervening opinion, *Nsimba v. Attorney General*, 21 F.4th 244, 255 (3d Cir. 2021), held that "'[w]e know of no authority that interprets 'safely relocate' as a synonym for 'relocate,' and we refuse the BIA's invitation to ignore that important condition." In *Nsimba*, the court joined several other circuit courts of appeals in concluding that the ability of a petitioner to relocate cannot require him or her to live in hiding to avoid persecution. Implicit is the court's rejection of any argument that, because petitioner was not physically harmed in San Pedro as opposed to his hometown, that relocation was safe.

Convention Against Torture:

On potential torture and willful acquiescence by the Guatemalan government, the court applied *Myrie v. Attorney General*, 855 F.3d 509 (3d Cir. 2017). Here, the agency erred in two respects: (1) neither the BIA nor the IJ considered "what is likely to happen if [petitioner] is removed, and "instead reviewed the harm that he already suffered and asked whether that harm alone constituted torture"; and (2) "[i]n adopting the IJ's analysis, the BIA overlooked significant evidence that [petitioner] is likely to face torture if removed to Guatemala." The court noted that the government acknowledged during oral argument that "the relevant objective evidence was more than a thousand pages." Significantly, the court went behind the agency's claim to have sifted through the record: "merely using the words 'objective evidence' does not establish that the IJ actually considered this evidence, given the flaws in the IJ's analysis here."

The court also held that the BIA erred in assessing the Guatemalan government's reaction to petitioner's potential torture, *Myrie*'s second prong. The court reasoned that, "Instead of first evaluating all of the evidence to determine the government officials' likely response, and *then* asking whether that response constitutes acquiescence, the BIA looked to some of the evidence to determine whether it suggests the officials would acquiesce." This distinction is vital, according to the court, because different standards of review apply (clear error for the IJ's factual findings, de novo for the application of those facts to the legal standard of acquiescence). The court noted that this record supports a finding of acquiescence based on, inter alia, "willful blindness" and the Guatemalan government's failure to react to petitioner's sister's rape after his father complained.

Practice Pointers:

- Several passages are broadly applicable, such as the court's concern about agency assumptions about other cultures and societies.
- The Third Circuit appears to invite argumentation to align it with other circuits that have rules about analyzing persecution experienced as a child.
- If an intervening decision like *Doe* comes out while a PFR is pending, consider asking the government for a remand for reconsideration by the agency.

- Use the court's refusal to take the agency's claim to have reviewed evidence at face value where its analysis did not demonstrate such thoroughness.

Matter of Duarte-Gonzalez

28 I. & N. Dec. 688 (BIA 2023) *(holding that noncitizens who are inadmissible for three or ten years under INA § 212(a)(9)(B)(i) for having unlawful presence can overcome this ground of inadmissibility even if they reside within the United States during the relevant period of inadmissibility)*

Facts & Procedural History:

This case concerns the grounds of inadmissibility under INA § 212(a)(9)(B)(i)(I) and (II), which render a noncitizen inadmissible for three years if they accrued less than 1 year of unlawful presence and for ten years if they accrued one year or more of unlawful presence, respectively.

In June 2000, respondent was admitted to the United States for a temporary period not to exceed 30 days. Over a year later, in August 2001, respondent departed the country. Shortly thereafter, he was admitted on a nonimmigrant visa for another 30 days. He did not depart nor obtain authorization to remain.

In removal proceedings, respondent conceded removability and applied for adjustment of status under INA § 245(a). The IJ found that respondent was not eligible for adjustment of status because he was inadmissible for ten years under INA § 212(a)(9)(B)(i)(II) for having over one year of unlawful presence and failed to remain outside the country during the entire ten year period. In addition, the IJ found that respondent did not have a relative that would qualify him for a waiver of this ground of inadmissibility under INA § 212(a)(9)(B)(v).

Notable Holding & Rationale:

On appeal, over DHS' opposition, the BIA reversed the IJ's inadmissibility determination. Key to the BIA's analysis was the plain language of INA § 212(a)(9)(B)(i)(II), which reads:

> (B) [Noncitizens] unlawfully present
> (i) In general
> Any [noncitizen] (other than [a noncitizen] lawfully admitted for permanent residence) who—
> . . ., or
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such [noncitizen's] departure or removal from the United States, is inadmissible.

The BIA began by noting that its previous interpretation of Section (a)(2)(B) in *Matter of Rodarte*, 23 I. & N. 905 (BIA 2006), left open the question of whether a noncitizen must reside abroad during the three and ten year periods of inadmissibly. Relying on the plain language of Section (a)(2)(B)(i)(II), the BIA then concluded that the statute did not require the noncitizen to reside abroad, and that inadmissibility runs from the date of departure. The BIA contrasted Section (a)(2)(B) with its neighboring provision, Section (a)(2)(C)(ii), which specifies that the noncitizen must spend time "outside the United States."

Furthermore, the BIA noted that its interpretation is the same as USCIS' recent policy guidance interpretating the statute in the same way.

The BIA remanded the case to the IJ to assess the respondent's adjustment eligibility in the first instance based on a recently approved immediate relative visa petition.

Practice Pointers:

- Although this decision addresses the ten-year bar under INA § 212(a)(2)(B)(i)(II), the BIA's rationale should apply with equal force to the three-year bar under INA § 212(a)(2)(B)(i)(I) as that statue contains substantively identical language.
- If this decision renders a noncitizen eligible for adjustment of status in removal proceedings, practitioners should present their client's adjustment eligibility as soon as practicable through the appropriate procedural mechanism, e.g., motion/application to the immigration judge, motion to remand if the case is on appeal, or a motion to reopen where proceedings are concluded.

Mohndamenang v. Garland

59 F.4th 211 (5th Cir. 2023) (corroborating evidence: procedures and substance; CAT relief)

Facts & Procedural History:

Petitioner from Cameroon applied defensively for asylum in November 2019 as an English-speaking Cameroonian. He claimed to have been arrested and tortured in prolonged detention, and also participated in a peaceful protest where the military appeared and killed some demonstrators. The initial IJ found petitioner's testimony too vague to be credible, and also uncorroborated. As "reasonably available documents," the IJ identified: "a letter from a family member or a friend, or someone who can comport this story."

On appeal to the BIA, petitioner submitted, inter alia, several affidavits and secured a remand. Proceeding pro se, a different IJ found petitioner to be credible but again faulted him for lack of corroboration: "none of the affiants 'actually have any personal knowledge of the[] events' described in [petitioner's] testimony[;] [petitioner] 'provided no other evidence of any injuries he stated he suffers.'" Alternatively, the IJ concluded that petitioner had not demonstrated past persecution or a well-founded fear and denied asylum, withholding of removal, and protection under the Convention Against Torture. The BIA affirmed the IJ's determinations.

Notable Holdings & Rationale:

Corroboration Procedures: In denying the petition for review, the panel majority began by discussing the corroboration procedures set out in *Matter of L-A-C-*, 26 I. & N. Dec. 516 (BIA 2015). In response to petitioner's contention that he was not provided notice and an opportunity to explain the absent corroboration, the majority held that "the BIA's procedures do not apply" where the agency rules based on the absence of corroboration as a whole, rather than "specific corroborating evidence" as covered by *Matter of L-A-C*.

Judge Graves concurred only in the judgment, as he "would find that the procedures may still apply even if there are multiple pieces of missing evidence." Judge Graves identified a separate

scenario discussed in *Matter of L-A-C-*, however: "circumstances in which the absence of corroborating evidence may be so glaring that no explicit opportunity to explain its absence needs to be given." In tension with this observation, Judge Graves then added that "[t]he IJ gave [petitioner] multiple opportunities to explain why several parts of his story remained uncorroborated. His answers were insufficient." Judge Graves' concurrence did not address petitioner's other arguments.

Insufficiency of Corroboration: The panel majority also addressed petitioner's argument that he did provide sufficient corroborating evidence, contrary to the IJ's ruling. In an odd characterization, the opinion calls "[s]uch a decision … highly discretionary." On petitioner's country and newspaper reports, "while [they] mak[e] it possible that [petitioner] suffered what he claimed to suffer, [they] offer only circumstantial evidence."

The IJ had also held that petitioner "provided no evidence of any injuries." The panel majority recounts that:

> At trial, [petitioner] tried to show the I.J. the injured foot at the hearing, but the I.J. stopped him, saying "stop, stop, stop." It is unclear from the record whether [petitioner] actually showed the I.J. his injured foot or whether the I.J. erred in stating that there was no evidence of injuries.

Rather than remanding because of the clearly erroneous IJ finding, the panel majority concludes with reference to its deferential substantial-evidence standard of review (and making its own independent assessment) that "[w]ithout more, the fact of injury cannot show that it was sustained in the alleged manner."

Convention Against Torture (CAT): Petitioner raised three arguments disputing the agency's treatment of his CAT claim. In cursory fashion, the panel majority allowed the agency's corroboration holding to sweep over the CAT determination as well, because the IJ had stated on CAT that "the record does not contain [sufficient] independent evidence."

Practice Pointers:

- In March 2022, petitioner filed an opposed motion to stay removal, which was not decided (denied as moot) until the opinion issued. In September 2022, the court had assigned this motion to the panel.
- The Fifth Circuit's understanding of *Matter of L-A-C-* may not be the BIA's opinion. It is important to raise notice/opportunity to explain arguments to the BIA in missing-corroboration cases, regardless of whether specific absent documentation is identified by the IJ.
- For issues like the IJ's error on whether petitioner had a foot injury, motions to reconsider/reopen are even more important to evaluate in light of some refusals to remand in such situations.

Cristobal Antonio v. Garland

58 F.4th 1067 (9th Cir. 2023) (remanding for consideration of the proposed particular social group based on perceived or imputed sexual orientation and issues raised related to governmental persecution and their ability to control the persecutors)

Facts & Procedural History:

In 2014, petitioner passed a credible fear interview based on her dressing in men's clothing and being perceived as a lesbian in Guatemala. She was threatened with death by neighboring villagers and whipped by her uncles. The asylum officer recorded that she said that her family and villagers were motivated to harm her "with at least one central reason being that they believe that [she is] a member of the particular social group that is lesbian women in Guatemala." To the asylum officer, petitioner also recounted that the police did not act on her reports and that the village's mayor was aligned with others' hostility toward her.

Petitioner did not testify at her individual hearing but submitted a consistent declaration. It included such additional details as that her neighbors tried to turn her into the police and that she married but that did not end the harassment (in fact, her neighbors spoke disparagingly to her husband and grandparents). Petitioner produced a complaint she filed against her assailants with a Justice of the Peace. It was unclear whether any action was taken in response. In December 2013, "members of the community waited for her at her place of work and attempted to lynch her. They demanded that she remove the men's clothing, or else she 'was going to burn.'"

The immigration judge (IJ) found petitioner credible, but denied relief, finding the abuse did not rise to persecution. On her particular social group, the IJ concluded that she could change her style of dress, so the characteristic is not immutable, and that the proposed group was "too amorphous." Because petitioner testified that she was not a lesbian, the IJ also found that she did not present a "sexual orientation issue."

On governmental involvement or acquiescence, the IJ relied on the municipal court's response to petitioner's complaint to conclude that she had not been persecuted by the government or forces the government was unable or unwilling to control. The BIA affirmed without opinion.

Notable Holdings & Rationale:

On petition for review, petitioner challenged the IJ's findings that: (1) her treatment did not amount to persecution, (2) the relevant social group for asylum/withholding purposes is based on "manner of dress," and (3) no persecution was committed by the Guatemalan government or by forces that the government was unwilling or unable to control.

The court characterized the petition as being about "much more than threats alone." It found a close analogy in *Ruano v. Ashcroft*, 301 F.3d 1155, 1160–61 (9th Cir. 2002), where the court held that "the frequency, escalation, and seriousness of threats, as well as the fact that persecutors threatened a petitioner in close confrontations and confronted petitioner's family, can be sufficient to compel the conclusion that the threats rise to the level of persecution." The court recognized that petitioner recounted "actual violent attacks."

The court rejected any notion that petitioner's lack of physical harm reduced the weight of her experiences in the past persecution analysis, concluding that it is the persecutor's perspective that

matters, not the actions' consequences and noting that the court does "not require severe injuries to meet the serious-harm prong of the past-persecution analysis."

The court also found that the IJ erred in using petitioner's self-identification as not being a lesbian to defeat her particular social group because it involved only "manner of dress." The court concluded that petitioner "sufficiently proposed the social group of women in Guatemala that are perceived as lesbian," and that it should apply the "ordinary remand rule" to allow the BIA to evaluate this social group in the first instance.

Finally, the court concluded that it would remand the governmental acquiescence question because the record did not reveal any follow-up on petitioner's complaint (indeed, the mayor was in the camp of her adversaries); the police did not act to stop her harassment; the IJ failed to address her uncles' whipping; and the country conditions report in the record "notes that Guatemala's antidiscrimination laws do not apply to LGBTI individuals who often face police abuse" and that the "government's efforts to address widespread discrimination against LGBTI people have been 'minimal.'"

Practice Pointers:

- Judge Sanchez's concurrence provides a roadmap for the BIA to conclude that "perceived or imputed sexual orientation" can support a particular social group.
- Although the uncles' beatings were not brought up before the IJ, the court relied on them because they were in the asylum interview record.
- The decision notes that petitioner's proposed particular social group has evolved and was not a model of clarity. But it concluded that it was "clear enough to allow the agency to conduct the required social group inquiry."
- Petitioner waived her challenge to the Guatemalan government's acquiescence, despite the issue having been exhausted, but the court exercised its discretion to review based on Office of Immigration Litigation (OIL)'s briefing of the issue.

Practice Alert[1]

Garcia Perez v. USCIS and the Asylum EAD Clock

March 7, 2023

What is the _Garcia Perez v. USCIS_ lawsuit and what policies are challenged?

Garcia Perez is a lawsuit filed in federal district court by five asylum applicants on behalf of a national class challenging the policies and practices of U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) preventing them from obtaining authorization to work while their asylum claims are pending. *See* Complaint, *Garcia Perez v. USCIS*, No. 2:22-cv-00806 (W.D. Wash., filed June 9, 2022).

Although Congress directed USCIS and EOIR to adjudicate asylum applications within six months after they are filed, *see* 8 U.S.C. § 1158(d)(5)(A)(iii), the agencies rarely meet this deadline. If an asylum application is not adjudicated within 180 days, an applicant may be provided employment authorization. 8 U.S.C. § 1158(d)(2). However, the running of this six-month waiting period, known as "the asylum EAD clock," is suspended for any applicant-caused delay. 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2),

Garcia Perez challenges EOIR's and USCIS' failure to provide adequate notice of adverse asylum EAD clock determinations or a viable mechanism for asylum and withholding applicants to challenge these determinations. In addition, it challenges three specific policies and practices that impermissibly prevent asylum and withholding of removal applicants from accruing 180 days on the asylum EAD clock, namely:

> (1) failing to restart the asylum EAD clock and to credit time accrued where an immigration judge denies an asylum or withholding of removal application, but the applicant then prevails on appeal to the Board of Immigration Appeals or a federal court of appeals (the Remand Subclass),
>
> (2) stopping the asylum EAD clock where the asylum or withholding applicant seeks a change of venue to another immigration court, including after being

[1]

> released from custody or otherwise permitted to enter the country and relocate to a new residence seeks to change the location of their immigration court proceedings (the Venue Subclass); and
>
> (3) for unaccompanied child applicants, stopping the asylum EAD clock where the application is transferred from the immigration court to USCIS or filed with USCIS in the first instance pursuant to the statutory directive at 8 U.S.C. § 1158(b)(3)(C) that USCIS be the first agency to adjudicate an unaccompanied child's asylum application (Unaccompanied Children Subclass).

What are the next steps in the lawsuit?

Shortly after the lawsuit was filed, the parties entered settlement negotiations. Pursuant to Federal Rule of Civil Procedure 408 and local district court rules governing settlement discussion, counsel are not at liberty to share information about settlement negotiations. However, Plaintiffs' counsel are optimistic about the parties' progress and hopeful that the parties will reach a settlement. Plaintiffs' counsel will provide a further update if a settlement is reached.

Have Defendants changed any asylum EAD clock policies since the lawsuit was filed?

Yes, with respect to the remand issue, Defendant USCIS amended its notice entitled The 180-Day Asylum EAD Clock Notice in September 2022, by adding the following language:

> If the [asylum denial] decision is appealed to the BIA or a U.S. Court of Appeals and the BIA or U.S. Court of Appeals remands it (sends it back) to an immigration judge or BIA for continued adjudication of your asylum claim, your 180-day Asylum EAD Clock will be credited with the total number of days on appeal (e.g. the time between the immigration judge's decision and the date of the BIA's remand order or between the BIA's decision and the date of the U.S. Court of Appeals remand order). You will continue to accumulate time on the180-day Asylum EAD Clock while your asylum claim is pending after the remand order, excluding any additional delays you request or cause.

As this Notice makes clear, an applicant's EAD clock will restart upon a remand from *either* a Court of Appeals to the Board of Immigration Appeals (BIA) *or* the BIA to an Immigration Judge (IJ). The applicant's clock will be credited with all the time that the case pended on appeal. Since appeals generally take months or longer to resolve, most—if not all—asylum and withholding applicants will satisfy the 180-day waiting period for EAD eligibility once this time is credited to their clock. Where an appeal was pending for less than 180 days, the applicant will again begin to accrue time on the clock following the remand.

The amended Notice is posted on USCIS' Asylum page under the heading "Permission to Work in the United States."

As a practical matter, NWIRP and NILA advise that applicants should submit a copy of the remand order from the BIA or Court of Appeals with Form I-765.

FOR IMMEDIATE RELEASE

March 9, 2023

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Class Action Lawsuit Challenges Immigration Agency's Denial of the Right to Work to Temporary Protected Status Applicants

Seattle, WA – Today, four applicants who qualify for Temporary Protected Status (TPS), filed a national class action against U.S. Citizenship and Immigration Services (USCIS) in federal district court in Seattle, Washington. The lawsuit challenges the agency's denial of the right to work to TPS applicants while their applications are pending before the agency. Federal law requires that eligible TPS applicants be provided employment authorization documentation so they can obtain work to support themselves and their families while they wait for the agency to complete the lengthy adjudication process, which can take several months and, in some cases, even years. The lawsuit alleges that despite the statutory guarantee of such interim work authorization, USCIS waits to provide employment authorization documentation until after the TPS applications are approved.

The four plaintiffs, who are from Afghanistan, Haiti, and Somalia, seek to represent a nationwide class of TPS applicants. TPS is a form of humanitarian relief that provides temporary lawful immigration status to foreign nationals from war-ravaged or disaster-stricken countries. The Secretary of Homeland Security recently designated nationals of Afghanistan, Cameroon, Ethiopia, Haiti, Myanmar, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, and Yemen as eligible to apply for TPS protections. USCIS publishes processing times which demonstrate that most applicants for TPS wait for close to a year, and sometimes much longer, before their applications are approved. Congress sought to ensure that eligible TPS applicants are immediately provided employment authorization documentation while they go through this lengthy process, yet USCIS ignores Congress' mandate and refuses to provide this

documentation. The lawsuit seeks to alleviate the harm these families suffer, requesting the Court to declare that federal law requires USCIS to provide interim employment authorization documentation immediately upon receipt of a qualifying TPS application.

Plaintiffs are represented by Northwest Immigrant Rights Project (NWIRP), National Immigration Litigation Alliance (NILA), and the law firm of Kurzban, Kurzban, Tetzeli & Pratt.

“The agency violates the law when it forces TPS applicants to suffer for prolonged periods without employment authorization documents,” said Matt Adams, Legal Director for NWIRP.

“TPS applicants who are unable to work cannot pay rent, buy food, or otherwise support their families. Not having work authorization during the TPS application process defeats the humanitarian purpose of the law,” said Mary Kenney, Deputy Director for NILA.

“For more than three decades, federal law has guaranteed TPS applicants the right to work while they wait for the government to process their applications. The government is ignoring that guarantee, and this lawsuit seeks to vindicate that right on behalf of TPS applicants,” said Ira Kurzban of Kurzban Kurzban Tetzeli & Pratt.

The complaint can be viewed here.

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