National Immigration Litigation Alliance
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CILA Children's Immigration Law Academy

Litigation for Unaccompanied Children: Updates and Foundational Cases

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Da Costa v. Immigrant Investor Program Office

80 F.4th 330 (D.C. Cir. 2023) (applying TRAC factors and holding that noncitizen did not warrant relief in challenge to USCIS' delay in adjudicating visa petition)

Facts & Procedural History:

In two consolidated appeals, noncitizens filed petitions for visas in the fifth employment-based visa category due to their significant investments in job-creating enterprises in the United States. After waiting several years for their petitions to be decided, the noncitizens sued USCIS under the Administrative Procedure Act (APA), alleging unreasonable delay. In each case, the district court dismissed the suit, holding that the delay was not unreasonable.

Notable Holdings & Rationale:

The Court of Appeals consolidated the two cases and affirmed both district court dismissal orders, finding that, under the six-factor test in Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (TRAC), the noncitizens failed to state a legally viable claim of unreasonable delay. The court found that the two most important factors in the case were the first—whether the agency's timing of adjudications follows a "rule of reason"—and the fourth—the effect that an order "expediting delayed action" would have on "agency activities of a higher or competing priority."

With respect to the first factor, the court found that USCIS' prioritizing of countries with available visas (as opposed to over-subscribed countries) and adjudicating petitions from those countries on a first-in, first-out basis complied with the statutory mandate in 8 U.S.C. § 1153(e)(1) in a reasonable and efficient manner and that the plaintiffs had not shown that USCIS failed to follow this stated approach. The court also rejected the allegation that a four-and-a-half-year delay was *per se* unreasonable, finding that the length of the delay is not alone sufficient to show unreasonableness. The court also relied heavily on the fourth factor, finding that a decision in favor of the plaintiffs here would allow them to jump in front of others who had been waiting longer. Significantly, the court also found that the alleged harm to plaintiffs—which was financial in one case and generalized harm suffered by the larger population in the second—was insufficient to tip the scale in favor of the plaintiffs.

Practice Pointers:

- Because there are few Court of Appeals decisions addressing immigration delays, USCIS likely will rely on *Da Costa* outside of the D.C. Circuit; thus, practitioners should be prepared to distinguish it factually by demonstrating that the considerations in the adjudication of EB-5 petitions are not present in other immigrant benefit contexts.
- Practitioners also should rely on precedent from other circuits that differs from that of the D.C. Circuit. *See* NILA advisory Mandamus and APA Delay Cases: Avoiding Dismissal and Proving the Case.
- Practitioners should explore harm to their clients as individualized, non-economic harm has been sufficient in other cases to outweigh *TRAC* factors favoring USCIS.

Matter of Morales-Morales

28 I. & N. Dec. 714 (BIA 2023) (holding that the 30-day deadline for filing an administrative appeal to the BIA is a non-jurisdictional, claim-processing rule subject to equitable tolling)

Facts & Procedural History:

The immigration judge (IJ) denied the noncitizens' applications for relief. Through counsel, the noncitizen filed an untimely appeal; the notice of appeal was due within 30 days of the IJ's decision and counsel mailed it via regular mail two days before the due date, but the Board of Immigration Appeals (BIA) did not timely receive it. Counsel then filed a motion to reconsider.

Notable Holdings & Rationale:

The BIA used the motion to reconsider as an opportunity to revisit its prior decision in *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), in which the BIA held that the 30-day deadline for filing an administrative appeal was effectively jurisdictional but also subject to self-certification by the agency upon a showing of "exceptional circumstances." The regulation setting forth the 30-day deadline is located at 8 C.F.R. § 1003.38(b).

The Board acknowledged that several courts of appeals, including the Second, Fifth, and Ninth Circuits, have rejected the BIA's classification of the deadline as jurisdictional. With little to no acknowledgment of the Supreme Court test for distinguishing between jurisdictional rules, which are not subject to exceptions, and claim-processing rules, which are, the BIA determined that the appeal deadline is a claim-processing rule. Interestingly, the BIA contrasted the regulatory appeal deadline from the statutory deadline for filing a petition for review, citing the latter as an example of a jurisdictional rule. (The Supreme Court thereafter called into question whether the petition for review deadline is jurisdictional and at least one circuit has found that it is not).

As a claim-processing rule, the BIA held that the deadline is subject to equitable tolling, citing the Second Circuit's holding in *Attipoe v. Barr*, 945 F.3d 76 (2d Cir. 2019). The BIA adopted the equitable tolling standard that the Second Circuit applied, which was based on Supreme Court case law. In order to merit tolling of the administrative appeal deadline, a noncitizen must show that they have been diligently pursuing their rights and that some extraordinary circumstance prevented timely filing.

On the merits, the BIA found that the noncitizens had not established either requirement for tolling. The BIA concluded that the documentation of due diligence was not sufficient because the noncitizens did not explain why they had not retained counsel to file the appeal sooner. The BIA also found that their counsel's claim that the appeal was inadvertently mailed via regular mail instead of next-day mail did not constitute an extraordinary circumstance.

Practice Pointers:

- Consider filing late appeals with well-documented tolling claims as appropriate in cases.
- Provide documentation of diligence for the entire period from the date of the IJ's decision to the date of filing the appeal.
- Explanations of extraordinary circumstances must be both detailed and well documented.

Garcia-Gonzalez v. Garland

76 F.4th 455 (5th Cir. 2023) (addressing particular social group based on nuclear family; asylum/withholding/CAT relief; motions to reopen based on ineffective assistance of counsel)

Facts & Procedural History:

Petitioner, a Honduran woman, entered the U.S. with her son, fleeing gang violence in Honduras—specifically, gang members who had kidnapped her nephew and attempted to recruit her son. She and her son were placed into removal proceedings.

Before the IJ, petitioner conceded removability but sought to apply for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). She asserted that she had been persecuted because she was a member of a particular social group (PSG), namely the nuclear family of her son. The IJ told petitioner she would need to submit biometrics to accompany her asylum application; due to an error by petitioner's counsel, however, she missed the deadline to submit the biometrics. As a result, the IJ found her claims abandoned and ordered her removed to Honduras, but informed her she might have a claim for ineffective assistance of counsel (IAC).

Petitioner then retained a second attorney, who appealed the IJ's decision to the BIA, arguing that the IJ failed to give petitioner adequate notice of the need to submit biometrics on time. The second attorney did not argue IAC on appeal. The BIA affirmed the IJ's opinion, finding that sufficient notice was given.

Petitioner then hired a third attorney to file a motion to reopen, asserting IAC by both prior attorneys. The BIA denied the motion, finding that (1) petitioner could not show prejudice (a requirement of the test for reopening based on IAC) based on her asylum and withholding claims, because her proposed PSG was not cognizable; (2) she also could not show prejudice based on her CAT claim, because she did not provide evidence that she would be tortured in Honduras; and (3) the case did not merit reopening based on the BIA's *sua sponte* authority.

Notable Holding & Rationale:

Affirming the BIA, the Fifth Circuit dismissed the petition for review in part for lack of jurisdiction and denied petitioner's remaining claims.

Particular social group based on nuclear family

The court opined that petitioner's "strongest argument" was that she was prima facie eligible for asylum and withholding based on her asserted PSG—her nuclear family. But the court nevertheless rejected this argument, finding that petitioner failed to prove that her proposed PSG was socially distinct. It acknowledged that a family can *sometimes* constitute a PSG (citing AG Garland's reinstatement of the standard established in *Matter of L-E-A-*, 27 I. & N. Dec. 40, 43 (BIA 2017) ("*L-E-A- I*")). But the Fifth Circuit held that, because petitioner did not offer any evidence of the "social distinction" of her family in Honduran society, the PSG was not cognizable in this case. In other words, noncitizens seeking asylum or withholding based on the PSG of their nuclear family must submit at least *some* evidence that their family is a socially distinct group in their country of origin.

The court disagreed with the First, Fourth, and Ninth Circuits, which have all held that a nuclear family is a classic example of a cognizable PSG, implying that no particularized evidence of social distinction is necessary.

Convention Against Torture (CAT) relief

Petitioner argued that she had made a prima facie case for CAT relief, citing her Form I-589, which included statements that the Honduran police had been infiltrated by gangs. She further asserted that the BIA should have taken judicial notice of additional country conditions evidence. The Fifth Circuit rejected these arguments, finding that petitioner did not submit any evidence (other than her own statements) that the local police in Honduras would acquiesce in her torture by gang members. It further held that, while the BIA *may* take judicial notice of official documents such as country conditions reports, it is not *obliged* to do so, and noted that the 2020 State Department report on Honduras states that the government is making attempts to combat gang violence.

Sua sponte reopening

Finally, the court rejected petitioner's argument that the BIA erred by declining to reopen her case *sua sponte*. The Fifth Circuit held that under its precedents, particularly *Eneugwu v. Garland*, 54 F.4th 315 (5th Cir. 2022), the court lacks jurisdiction to consider the BIA's refusal to reopen proceedings *sua sponte*. Although petitioner sought to distinguish prior cases by arguing that her IAC challenge raised a due process issue, the court found that this was not enough to give it jurisdiction over the denial of *sua sponte* reopening.

Practice Pointers:

- Practitioners can and should continue to argue, relying on *L-E-A- I*, that clients merit a grant of asylum or withholding of removal based on the PSG of the client's nuclear family. In the Fifth Circuit, however, it is crucial to submit supporting evidence that shows the family-based PSG is socially distinct in the client's country of origin. The Court did not provide any specific guidance as to what types of evidence would suffice, but it did explain that petitioner needed to submit evidence showing either "the social distinction of her family in Honduran society or . . . the social saliency of the nuclear family unit in Honduran society generally."
- When applying for CAT relief on behalf of a client in the Fifth Circuit, it is critical to submit evidence that shows the client would likely be tortured if deported, such as relevant country conditions reports. The client's own statements, e.g., on Form I-589, will not be considered sufficient evidence for this purpose.
- The Fifth Circuit will not consider appeals of denials of motions to reopen *sua sponte*. However, practitioners may continue to appeal denials of motion to reopen, even if the motion was clearly past the filing deadline or was not the client's first motion, by identifying the motion as a *statutory* motion to reopen and arguing for equitable tolling of the time and/or number bars. *See Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016).

Matter of C-G-T-

28 I. & N. Dec. 740 (BIA 2023) (addressing asylum and withholding of removal based on sexual orientation; effect of failure to report harm to government authorities)

Facts & Procedural History:

Respondent, a gay, HIV-positive man from the Dominican Republic, applied for asylum and withholding of removal based on his fear of persecution due to his sexual orientation and HIV status. He testified that, during his childhood in the Dominican Republic, his father called him a "girl" and repeatedly beat him because he thought he was gay. Respondent did not report this abuse to the authorities at the time. Later, after respondent came to the United States, his mother told his father that respondent was, in fact, gay.

The IJ found that respondent was a member of two cognizable PSGs ("homosexual Dominican males" and "Dominicans who are HIV-positive"), but denied asylum and withholding. The IJ reasoned that (1) respondent failed to establish past persecution because his father did not know he was gay at the time of the mistreatment; (2) respondent failed to establish past persecution because he did not show the Dominican government was unable or unwilling to protect him; and (3) respondent was unlikely to suffer future persecution because no one in the Dominican Republic, other than his father, knew he was gay.

Notable Holdings & Rationale:

The BIA affirmed the denial of asylum (based on the one-year bar), but reversed and remanded the case to the IJ for further consideration of respondent's withholding claim.

With respect to past persecution, the BIA first found that the IJ failed to consider all the relevant evidence relating to why respondent's father harmed him, such as declarations from respondent and family members describing how respondent's father called him a "girl" and expressed homophobic sentiments. The BIA directed the IJ to consider this evidence on remand.

Second, the BIA vacated the IJ's findings on the Dominican government's inability and/or unwillingness to protect respondent from harm. As the BIA noted, this inquiry must be "fact-specific" and based on the "record as a whole." The BIA held that failure to report mistreatment to the authorities is not determinative: noncitizens may be able to show past persecution despite failing to report the harm if they can show that reporting would have been futile or dangerous.

In this case, respondent had not reported the harm to the Dominican authorities, but he explained in his testimony before the IJ that doing so would have been futile and could have subjected him to more abuse. The BIA thus directed the IJ to reconsider the "reasonableness" of respondent's failure to report the harm. On remand, the IJ was instructed to examine all the relevant evidence in the record, such as country conditions reports and respondent's testimony explaining why he could not report his father to the authorities.

Finally, the BIA reversed the IJ's conclusion that respondent failed to show future persecution because no one in the Dominican Republic knew he was gay. It noted that noncitizens cannot be required to hide their sexual orientation in order to escape future harm. Citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), the BIA stated that "[s]exual orientation, like other protected grounds, is . . . either is beyond the power of an individual to change or is so fundamental to

individual identity or conscience that it ought not be required to be changed." Thus, the IJ erred by finding no future harm on the grounds that no one in the Dominican Republic knew respondent was gay.

Practice Pointers:

- On appeal, it may be useful to cite *Matter of C-G-T-* when arguing that the IJ failed to consider evidence in the record relating to past persecution, particularly when the IJ's finding is based on an asserted lack of nexus between the harm and a protected ground.
- *Matter of C-G-T-* also establishes that noncitizens do not necessarily need to show that they reported the harm to government authorities in order to show that the government in their country of origin was unable or unwilling to protect them. Rather, the IJ must conduct a "fact-specific" analysis and properly weigh all the evidence, including respondent's own testimony and relevant country conditions reports.
- Finally, *Matter of C-G-T-* makes clear that a noncitizen's fear of future harm cannot be dismissed because the noncitizen could hypothetically avoid the harm by hiding a critical part of their identity, such as their sexual orientation.

Casa Libre/Freedom House v. Mayorkas

No. 2:22-CV-01510-ODW (JPRx) (C.D. Cal. filed Mar. 7, 2022) (class action challenging USCIS' failure to meet the statutory 180-day deadline for adjudicating SIJ petitions)

Facts & Procedural History:

Individuals and organizations filed a putative class action under the Administrative Procedure Act (APA) challenging (1) USCIS' policy and practice of failing to adjudicate SIJ petitions within 180 days as required by 8 U.S.C. § 1232(d)(2) (referred to as the "missed deadline" or "routine delay" claim), and (2) USCIS' 2022 regulation, 8 C.F.R. § 204.11(g), which permits USCIS to (a) restart the 180-day clock following receipt of *initial evidence* which the agency requests in an RFE; and (b) suspend the running of the clock until USCIS receives *additional evidence* it requests in an RFE or NOID (referred to as the Tolling Provisions claim). The statutory deadline states that all SIJ petitions "shall be adjudicated …. not later than 180 days after the date on which the application is filed." 8 U.S.C. § 1232(d)(2).

The district court denied USCIS' motion to dismiss with respect to its APA claims. *Casa Libre/Freedom House v. Mayorkas*, 637 F.3d 805 (C.D. Cal. 2022). Subsequently, in separate decisions, the court granted in part plaintiffs' motion for class certification and motion for summary judgment.

Notable Holdings & Rationale:

1. *Casa Libre/Freedom House v. Mayorkas*, No. 2:22-CV-01510-ODW (JPRx), 2023 WL 3649589 (C.D. Cal. May 25, 2023) (class certification decision)

The court first found that the claims of the two named plaintiffs who sought to serve as class representatives were not moot even though both had been granted SIJ status, because their claims fell within the mootness exception for inherently transitory claims. Reviewing the timing of both SIJ decisions, the court found that it would be unrealistic to expect counsel to get a class

certified prior to their petitions being adjudicated and that the petitions of similarly situated juveniles would similarly be adjudicated before a class could be certified.

The court denied class certification with respect to the missed deadline claim, finding that this claim was an "unreasonable delay" claim under 5 U.S.C. § 706(1) which required individual evaluation of each case under the factors specified in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*). As such, the court held that plaintiffs failed to meet the commonality requirement of Rule 23(a) of the Federal Rule of Civil Procedure and also failed to satisfy either Rule 23(b)(2) or (b)(3).

Significantly, however, the court granted class certification on the Tolling Provision claim, finding that the plaintiffs satisfied 23(a) and (b)(2); it thus certified the following class:

> All Special Immigrant Juvenile petitioners, except as to members of the certified class in the case entitled *Moreno-Galvez v. Cuccinelli*, Case No. C19-0321RSL (U.S. District Court for the Western District of Washington), who have submitted or will submit Petitions for Amerasian, Widow(er), or Special Immigrant (Form I-360) ("SIJ Petitions") with the USCIS, and whose SIJ Petitions were not or in the future are not adjudicated within 180 days of being filed, including but not limited to petitioners who were issued a Request for Evidence or a Notice of Intent to Deny causing delay in the processing of their SIJ Petitions pursuant to 8 C.F.R. § 204.11(g)(1).

2. *Casa Libre/Freedom House v. Mayorkas*, No. 2:22-CV-01510-ODW (JPRx), 2023 WL 4872892 (C.D. Cal. July 31, 2023) (summary judgment decision)

The certified class of individual SIJ petitioners sought summary judgment on the claim that the Tolling Provisions violated both the 180-day statutory deadline and the APA; the organizational plaintiffs sought summary judgment on the claim that USCIS' routine delay in adjudicating SIJ petitions beyond 180 days violates both the statute and the APA.

The court granted summary judgment for the plaintiff class on the Tolling Provisions claim, finding that these provisions violate both the statutory deadline and the APA, 5 U.S.C. § 706(a)(2). The court relied on the plain language of 8 U.S.C. § 1232(d)(2), finding that it provided no mechanism for tolling. In so ruling, the court rejected the government's arguments that (1) under the *TRAC* factors, USCIS has not unreasonably delayed adjudication, finding that the *TRAC* factors were inapplicable; and (2) that deference was due to the agency's interpretation because the statute—including its use of the terms "adjudicated" and "filed"—was plain.

However, the court declined to grant an injunction, instead granting only declaratory relief. The court noted that an injunction was an extraordinary remedy which a court is not obligated to award in all instances in which there is a violation of the law. Applying the traditional test for injunctions, the court in particular found that there was no "systematically severe" injury to class members, since USCIS was adjudicating the petitions, on average, in 205 days, including the time a case was tolled. It further noted that there was little risk of deportation for class members and that, to at least some extent, they were in control of the timing in that they controlled how long they took to respond to RFEs or NOIDs.

Finally, the court denied summary judgment to the organizational plaintiffs on the routine delay claim, instead granting it to the defendants. The court found that a systemwide injunction to stop generalized delays is not a remedy that the APA makes available to the plaintiffs.

Practice Pointers:

- While there is no injunction in place, the court's declaratory order applies to the class as a whole and individual class members can use this order to seek individual relief for unreasonable delay.
- The summary judgment decision provides pointers as to what a court might look at in considering unreasonable delay in this context.

United States v. Texas

No. 22-58, 599 U.S. 670, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (holding that Texas and Louisiana lacked standing to challenge DHS' civil enforcement priorities)

Facts & Procedural History:

Texas and Louisiana sued to block DHS Secretary Mayorkas's September 30, 2021, enforcement-priorities guidelines (Civil Immigration Enforcement Priorities), arguing that the immigration laws require more arrests. This argument was based on mandatory language in 8 U.S.C. §§ 1226(c) ("The Attorney General shall take into custody . . . .") and 1231(a)(2) ("During the removal period, the Attorney General shall detain . . . ."). The States' standing claim rested on costs: Texas and Louisiana must "incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government." Slip Op. at 2.

Notable Holdings & Rationale:

The Supreme Court found that the states lacked standing and thus reversed the district court's judgment which had vacated the guidelines. There was no Court of Appeals opinion to review, as the Supreme Court granted certiorari before judgment after the Fifth Circuit declined to stay the district court's ruling.

The Court acknowledged that monetary costs can constitute injury but concluded that the States' claims were not properly redressable. The category of lawsuits challenging "the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute," Slip Op. at 5, has not traditionally been entertained by federal courts. A decision to refrain from arresting certain immigrants does not injure the Plaintiff States in a manner analogous to action with direct impacts on a plaintiff. In addition, the Take Care Clause of the Constitution assigns to the Executive Branch discretion to define faithful execution of the laws, especially given the foreign-policy implications of immigration enforcement.

Importantly, the two statutory provisions at issue here were found by the District Court to be inadequately resourced, thereby making full enforcement impossible: "For the last 27 years since §1226(c) and §1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration

arrests." Slip Op. at 8. This context adds to the lack of "meaningful standards" against which to review the Executive Branch's policy choices on immigration enforcement, an administrative-law consideration foregrounded by *Heckler v. Chaney*, 470 U. S. 821 (1985).

Finally, the Court stressed a slippery slope; to rule otherwise "we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path." Slip Op. at 9.

The Court distinguished areas where it was not ruling out future standing: selective prosecution claims; claims specifically authorized by Congress; complete abandonment of enforcement by the Executive Branch; detention policies; and, troublingly for DACA:

> a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. *Cf. Department of Homeland Security v. Regents of Univ. of Cal.*, 591 U. S. ___, ___–___ (2020) (slip op., at 11–12) (benefits such as work authorization and Medicare eligibility accompanied by nonenforcement meant that the policy was 'more than simply a non-enforcement policy').

Slip Op. at 11.

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:

  According to an August 15, 2023, stakeholder update from the ICE Office of Partnership and Engagement (OPE), the Department's Civil Immigration Enforcement Priorities were reinstituted on July 28, 2023, following the Supreme Court's decision in *United States v. Texas*. The OPE update further states that the ICE Office of the Principal Legal Advisor (OPLA) reinstated Principal Legal Advisor Kerry Doyle's memorandum from April 2022 which provides OPLA attorneys with guidance for appropriately executing DHS's enforcement priorities and exercising prosecutorial discretion.