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Federal Court and BIA Update

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SCOTUS

Department of Homeland Security v. Regents of the University of California, 140 S. Ct. 1891 (2020)

The U.S. Supreme Court held that DHS failed to provide a reasoned analysis behind its termination of the Deferred Action for Childhood Arrivals (DACA) program in 2017, and therefore, the rescission of the DACA program was arbitrary and capricious under the Administrative Procedure Act.

Nasrallah v. Barr, 140 S. Ct. 1683 (2020)

The U.S. Supreme Court held that factual challenges of orders denying CAT relief are not barred for review by 8 U.S.C. § 1252(a)(2)(C) and (D). Noncitizens with removal orders may nevertheless seek judicial review of factual findings concerning CAT relief under a deferential standard.

Barton v. Barr, 140 S. Ct. 1442 (2020)

Resolving a circuit court split, the Supreme Court held that the "stop-time" rule, for purposes of cancellation of removal, was triggered by the commission of an offense in 8 U.S.C. § 1182 rendering a noncitizen inadmissible, even though the offense was not the basis for removal. Interpreting the word "render" in 8 U.S.C. § 1229b(d)(1)(B), the Court ruled that cancellation of removal was precluded where a lawful permanent resident (LPR) commits an "inadmissible" crime during the requisite 7-year period for which he is later convicted (or admits to the crime). It mattered not that the LPR was not charged and ordered removed based on a criminal ground of inadmissibility under § 1182.

Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020)

Vacating a Fifth Circuit decision, the U.S. Supreme Court ruled that the application of a legal standard to undisputed or established facts is a "question of law" under 8 U.S.C. § 1252(a)(2)(D), for purposes of reviewing due diligence claims relating to the equitable tolling of an untimely motion to reopen. Accordingly, the Court found that petitioners' due diligence arguments in support of equitable tolling were reviewable as the underlying facts were not in dispute.

Department of Homeland Security v. Thuraissigiam, 140 S.Ct 1959 (2020)

The Supreme Court held that asylum seekers could not challenge asylum denials and seek judicial review of expedited removal orders through federal habeas proceedings.

Hernandez v. Mesa, 140 S. Ct. 173 (2020)

Citing foreign relations and national security interests, the Supreme Court refused to recognize a *Bivens* claim to a case involving the cross-border shooting of an immigrant by a Border patrol agent.

FIFTH CIRCUIT

Flores-Moreno v. Barr, 971 F.3d 541 (5th Cir. 2020)

The court held that the petitioner was not entitled to equitable tolling of his untimely motion to reopen based on ineffective assistance of counsel. The petitioner asserted that the 90-day deadline should be equitably tolled because he exercised due diligence in light of his extraordinary circumstances. He consulted twice about his options from which he was told nothing could be done. The court noted, however, that for a period of three years after his removal and a second legal consultation about his

options, the petitioner failed to act with reasonable diligence before submitting his motion based on new legal advice. Furthermore, petitioner waited 97 days to file his motion since his last attorney spoke to him about his ineffective assistance claim. The court therefore concluded that the BIA did not abuse its discretion in denying petitioner's motion.

Garcia v. Barr, 969 F.3d 129 (5th Cir. 2020)

Applying the categorical approach, the court found that sexual assault of a child under Texas law is a categorical match to the removable offense of a "crime of child abuse" in 8 U.S.C. § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

Avelar-Oliva v. Barr, 954 F.3d 757 (5th Cir. 2020)

Joining the Second, Sixth, Seventh, and Eighth Circuits, the court held that an immigration judge is not required to provide a respondent with special advance notice of corroborating evidence needed to support an asylum claim prior to entering a credibility finding. Nor is an immigration judge required to automatically grant a continuance to that end.

Chavez-Mercado v. Barr, 946 F.3d 272 (5th Cir. 2020)

The court ruled that DHS was not barred by *res judicata* from presenting a subsequent removal charge because the new and old charges—while stemming from the same ground of removability—were based on convictions that did not deal with the "same nucleus of operative facts."

Alexis v. Barr, 960 F.3d 722 (5th Cir. 2020)

Although the Texas controlled substance statute was facially broader than its federal counterpart, petitioner failed to show a "realistic probability" that Texas will prosecute conduct outside the federal definition of "controlled substances." Here, Texas proscribes the possession of cocaine including the drug's "position" isomers, which are not specifically referenced in the federal definition. Because the petitioner did not point to a specific Texas criminal case involving the prosecution of position isomers, the court upheld the removal order under 8 U.S.C. § 1227(a)(2)(B), INA § 237(a)(2)(B).

Regarding petitioner's persecution claim based on particular social group, the court held that it could not review the matter because the claims rested on disputed or unestablished facts.

Inestroza-Antonelli v. Barr, 954 F.3d 813 (5th Cir. 2020)

The BIA abused its discretion by denying petitioner's motion to reopen based on changed country conditions in Honduras. Specifically, the BIA erred by finding only "incremental" changes in light of uncontroverted evidence showing a dramatic increase in violent deaths and reduction in protections for Honduran women following a government coup.

Vetcher v. Barr, 953 F.3d 361 (5th Cir. 2020)

Although the list of controlled substances under a Texas drug law was facially broader than the federal schedule of controlled substances, there was no "realistic probability" that Texas would prosecute such drugs falling outside the federal definition. The penalty group list referenced in Tex. Health & Safety Code Ann. § 481.113(a) contains at least six substances that do not appear on any federal schedule. However, despite there being no facial categorical match, the court upheld the removal order because

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