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BIA and Federal Court Update

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BIA CASES

Matter of V-A-K-, 28 I&N Dec. 630 (BIA 2022)

A conviction for second degree burglary of a dwelling under section 140.25(2) of the New York Penal Law is categorically a conviction for generic burglary under section 101(a)(43)(G) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(43)(G) (2018), because the statute requires burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. *United States v. Stitt*, 139 S. Ct. 399 (2018), *followed*.

Matter of FERNANDES, 28 I&N Dec. 605 (BIA 2022)

(1) The time and place requirement in section 239(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1) (2018), is a claim-processing rule, not a jurisdictional requirement.

(2) An objection to a noncompliant notice to appear will generally be considered timely if it is raised prior to the closing of pleadings before the Immigration Judge.

(3) A respondent who has made a timely objection to a noncompliant notice to appear is not generally required to show he or she was prejudiced by missing time or place information.

(4) An Immigration Judge may allow the Department Homeland Security to remedy a noncompliant notice to appear without ordering the termination of removal proceedings.

Matter of ORTEGA-QUEZADA, 28 I&N Dec. 598 (BIA 2022)

The respondent’s conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of 18 U.S.C. § 922(d) (2018) does not render him removable as charged under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (2018), because § 922(d) is categorically overbroad and indivisible relative to the definition of a firearms offense.

Matter of E-F-N-, 28 I&N Dec. 591 (BIA 2022)

An Immigration Judge may rely on impeachment evidence as part of a credibility determination where the evidence is probative and its admission is not fundamentally unfair, and the witness is given an opportunity to respond to that evidence during the proceedings.

Matter of NCHIFOR, 28 I&N Dec. 585 (BIA 2022)

A respondent who raises an objection to missing time or place information in a notice to appear for the first time in a motion to reopen has forfeited that objection.

Matter of D-L-S-, 28 I&N Dec. 568 (BIA 2022)

A respondent who is subject to a deferred adjudication that satisfies the elements of sections 101(a)(48)(A)(i) and (ii) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(48)(A)(i) and (ii) (2018), has been “convicted by a final judgment” within the meaning of the particularly serious crime bar under section 241(b)(3)(B)(ii) of the INA, 8 U.S.C. § 1231(b)(3)(B)(ii) (2018).

Matter of B-Z-R-, 28 I&N Dec. 563 (A.G. 2022)

(1) *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), is overruled.

(2) Immigration adjudicators may consider a respondent’s mental health in determining whether an individual, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.” 8 U.S.C. § 1158(b)(2)(A)(ii); see *id.* § 1231(b)(3)(B)(ii).

Matter of GERMAN SANTOS, 28 I&N Dec. 552 (BIA 2022)

(1) Any fact that establishes or increases the permissible range of punishment for a criminal offense is an “element” for purposes of the categorical approach, even if the term “element” is defined differently under State law. *Matter of Laguerre*, 28 I&N Dec. 437 (BIA 2022), *followed*.

(2) Title 35, section 780-113(a)(30) of the Pennsylvania Consolidated Statutes, which punishes possession with intent to deliver a controlled substance, is divisible with respect to the identity of the controlled substance possessed, and the respondent’s conviction under this statute is one for a controlled substance violation under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2018), under the modified categorical approach.

Matter of DANG, 28 I&N Dec. 541 (BIA 2022)

(1) The Supreme Court’s construction of “physical force” in *Johnson v. United States*, 559 U.S. 133 (2010), and *Stokeling v. United States*, 139 S. Ct. 544 (2019), controls our interpretation of 18 U.S.C. § 16(a) (2018), which is incorporated by reference into section 237(a)(2)(E)(i) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1227(a)(2)(E)(i) (2018); the Court’s construction of “physical force” in *United States v. Castleman*, 572 U.S. 157 (2014), is inapplicable in this context. (cont.)

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