■ **Fed. R. Civ. P. 12(f); motion to strike affirmative defenses granted in part.** Where the plaintiff was granted leave to file a supplemental complaint, the defendant then filed an answer asserting two new affirmative defenses, and the plaintiff moved to strike both of the new affirmative defenses pursuant to Fed. R. Civ. P. 12(f), Judge Wright applied the so-called "moderate approach" when considering the permissible scope of an answer to an amended pleading, which in turn allowed the defendant to amend its answer in response to the plaintiff's "expanded" complaint to assert one new affirmative defense. ***Target Corp. v. Seaman Corp.***, 2021 WL 2526550 (D. Minn. 6/21/2021).

■ **Action dismissed as a sanction for litigation conduct.** Where the plaintiff and counterclaim-defendant "withheld relevant discovery; ignored orders to provide that discovery and to pay related attorneys' fees; declined to appear for hearings or respond to motions; and participated only sporadically in the litigation," Judge Tostrud dismissed its claim with prejudice. ***Oxbow Solar Profs., Inc. v. Borrego Solar Sys., Inc.***, 2021 WL 2228112 (D. Minn. 6/2/2021).

■ **Challenge to award of costs following successful summary judgment motions rejected.** Where the defendants were awarded roughly $7,600 in costs in related actions following their successful motion for summary judgment, and the plaintiffs objected to the costs, arguing that the defendants had acted in bad faith by failing to seek to resolve the cases under Fed. R. Civ. P. 12 rather than Rule 56, Judge Nelson noted that the plaintiffs cited no authority in support of their argument, and finding no bad faith, affirmed the cost judgments in their entirety. ***Hockman v. Education Minn.***, 2021 WL 2621840 (D. Minn. 6/25/2021).

■ ***Pro se* litigants sanctioned in multiple cases.** Magistrate Judge Leung imposed modest economic sanctions against *pro se* plaintiffs in two recent cases. Where the plaintiff had refused to answer certain questions during her deposition, Magistrate Judge Leung granted the defendant's motion to re-depose the plaintiff and awarded the defendant $75 pursuant to Fed. R. Civ. P. 30(d)(2). ***Thomas v. Wells Fargo Bank, N.A.***, 2021 WL 2374863 (D. Minn. 6/10/2021).

Magistrate Judge Leung ordered a plaintiff to pay the defendant $75, which was said to represent "reasonable expenses caused by her failure to timely serve discovery responses." ***Breedlove v. Consol. Vision Grp., Inc.***, 2021 WL 2350048 (D. Minn. 6/9/2021).

JOSH JACOBSON
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

IMMIGRATION LAW

JUDICIAL LAW

■ **No bond hearings for those with reinstated orders of removal while seeking withholding of removal.** The U.S. Supreme Court held that INA §241 [8 U.S.C. §1231], not INA §236 [8 U.S.C. §1226], is the controlling authority for the detention of noncitizens subject to reinstated orders of removal, following unauthorized reentry after removal. Such individuals are consequently not entitled to a bond hearing while pursuing withholding of removal relief before an immigration judge. ***Johnson, et al. v. Guzman Chavez, et al.***, 594 U.S. ___, No. 19-897, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-897_c07d.pdf*

■ **Crime with a *mens rea* of "recklessness" is not a "violent felony."** The Supreme Court held that a crime with a *mens rea* of "recklessness" does not qualify as a "violent felony" under the Armed Career Criminal Act (ACCA) [18 U.S.C. §924]. ***Borden v. U.S.,*** 593 U.S. ___, No. 19-5410, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-5410_8nj9.pdf*

■ **TPS is not an admission for permanent residence (adjustment of status) purposes.** The Supreme Court issued a unanimous decision finding the recipient of temporary protected status (TPS), who unlawfully entered the United States, ineligible for lawful permanent residence (adjustment of status) under INA §245 [8 U.S.C. §1255], notwithstanding the fact that he now holds TPS, a form of legal status in the United States. ***Sanchez et ux. v. Mayorkas***, 593 U.S. ___, No. 20-315, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/20-315_q713.pdf*

■ **Credibility rule deemed incompatible with INA §242(b)(4)(B).** The U.S. Supreme Court held that the 9th Circuit Court Appeals' rule on treatment of noncitizens' testimony as credible—namely, that in the absence of an explicit adverse credibility determination by an immigration judge or the BIA, a reviewing court should treat a noncitizen's testimony as credible and true—cannot be reconciled with the terms of the Immigration and Nationality Act. Instead, according to the Court, reviewing courts should accept the agency's findings of fact as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," pursuant to INA §242(b)(4)(B) [8 U.S.C. §1252(b)(4)(B)]. ***Garland v. Dai***, 593 U.S. ___, No. 19-1155, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-1155_1a7d.pdf*

■ **All three of INA §276(d)'s requirements are mandatory in collateral attacks on prior removal orders.** The U.S. Supreme Court held that each of the three statutory requirements under INA §276(d) [8 U.S.C. §1326(d)] for bringing a collateral attack on a prior removal order is mandatory and the respondent may not be excused from proving the first two requirements set forth in that provision. According to the Court, INA §276(d) is clear that defendants "may not" bring collateral attacks "unless" they "demonstrat[e]" that (1) they "exhausted any administrative remedies that may have been available to seek relief against the [removal] order," (2) the removal proceedings "improperly deprived [them] of the opportunity for judicial review," and (3) "entry of the order was fundamentally unfair." ***United States v. Palomar-Santiago***, 593 U.S. ___, No. 20-437, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/20-437_bqmc.pdf*

■ **Withholding of removal relief denied; no particular social group membership and relocation within Guatemala is viable option.** Upholding the denial of withholding of removal, the 8th Circuit Court of Appeals found the petitioner failed to establish membership in a particular social group ("tattooed Guatemalan youths" or "people who promised to remove their tattoos years ago but did not"). Furthermore, the Board of Immigration Appeals (BIA) did not err when it determined he could reasonably relocate within Guatemala to avoid a vigilante group. ***Bautista-Bautista v. Garland***, No. 20-1534, *slip op.* (8th Circuit, 7/6/2021). *https://ecf.ca8.uscourts.gov/opndir/21/07/201534P.pdf*

■ **Particular social group family membership is not a central reason for threats.** The 8th Circuit Court of Appeals held the Honduran petitioner did not face past persecution based on her membership in a particular social group (PSG) consisting of her family. Rather,

the court found she was targeted because she owned land that once belonged to her father, who was killed during a robbery in Guatemala. "The record shows that Pinto targeted Padilla-Franco because he assumed she owned the land that once belonged to her father—not because she was related to him." ***Padilla-Franco v. Garland***, No. 20-2415, *slip op.* (8th Circuit, 6/2/2021). *https://ecf.ca8.uscourts.gov/opndir/21/06/202415P.pdf*

■ **"Reason to believe" standard requires finding of probable cause.** Applying the "reason to believe" standard under INA §212(a)(2)(C) [8 U.S.C. §1182(a)(2)(C)], the 8th Circuit Court of Appeals held the language requires a finding of probable cause. Furthermore, substantial evidence in the record supported the Board of Immigration Appeals' conclusion there was probable cause to believe the petitioner was involved in illicit drug trafficking and thus inadmissible. ***Rojas v. Garland***, No. 19-1944, *slip op.* (8th Circuit, 5/27/2021). *https://ecf.ca8.uscourts.gov/opndir/21/05/191944P.pdf*

ADMINISTRATIVE ACTION

■ **TPS extension and redesignation for Yemen.** On 7/9/2021, U.S. Citizenship and Immigration Services (USCIS) published notice extending the designation of Yemen, while also redesignating it, for temporary protected status (TPS) for 18 months, 9/4/2021 - 3/3/2023. The extension applies to those who currently hold TPS and continue to meet the eligibility requirements. The redesignation allows those individuals continuously residing in the United States since 7/5/2021 to file an initial application, provided they meet the eligibility criteria outlined in the notice. **86 Fed. Register, 36295-302** (7/9/2021). *https://www.govinfo.gov/content/pkg/FR-2021-07-09/pdf/2021-14670.pdf*

■ **Social groups and domestic violence: AG Garland vacates *Matter of A-B-* and *Matter of A-B-II*.** On 6/16/2021, U.S. Attorney General Merrick Garland vacated *Matter of A-B-* and *Matter of A-B-II* (having to do with social groups and domestic violence), ordering immigration judges and the Board of Immigration Appeals (BIA) to cease following the decisions when adjudicating pending or future cases. In view of imminent rulemaking, Garland directed immigration judges and the BIA to follow pre-*A-B- I* precedent, including *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). ***Matter of A-B-,*** 28 I&N Dec. 307 (A.G. 2021). *https://www.justice.gov/eoir/page/file/1404796/download*

■ **Social groups and family memberships: A.G. Garland vacates *Matter of L-E-A II*.** On 6/16/2021, U.S. Attorney General Merrick Garland vacated *Matter of L-E-A- II* (having to do with social groups and family memberships), ordering both immigration judges and the Board of Immigration Appeals (BIA) to cease following *Matter of L-E-A- II* when adjudicating pending or future cases. Both should follow preexisting precedent until the ongoing rulemaking process is completed and a final rule addressing the definition of "particular social group" is issued. ***Matter of L-E-A-,*** 28 I&N Dec. 304 (A.G. 2021). *https://www.justice.gov/eoir/page/file/1404791/download*

■ **Temporary increase in H-2B nonimmigrant visas for FY 2021.** The Department of Homeland Security (DHS) and Department of Labor (DOL) jointly published a temporary final rule increasing the cap on H-2B nonimmigrant visas by up to 22,000 additional visas through the end of the second half of fiscal year 2021. According to DHS, these supplemental visas are available only to those U.S. businesses "likely to suffer irreparable harm, as attested by the employer on a new attestation form." **86 Fed. Register, 28198-234** (5/25/2021). *https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11048.pdf*

■ **TPS designation for Haiti.** In May Department of Homeland Secretary Alejandro N. Mayorkas announced a new 18-month designation of Haiti for temporary protected status (TPS), in view of that nation's "serious security concerns, social unrest, an increase in human rights abuses, crippling poverty, and lack of basic resources, which are exacerbated by the covid-19 pandemic." Individuals able to demonstrate continuous residence in the United States as of 5/21/2021 will be considered eligible for TPS under the designation. Additional eligibility criteria will be outlined in a forthcoming Federal Register notice. U.S. Department of Homeland Security, ***News Release*** (5/22/2021). *https://www.dhs.gov/news/2021/05/22/secretary-mayorkas-designates-haiti-temporary-protected-status-18-months*

R. MARK FREY
Frey Law Office
rmfrey@cs.com

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patents: PTAB decisions must be reviewable by the director.** The Supreme Court recently held that decisions issued by administrative patent judges (APJs) of the Patent Trial and Appeal Board (PTAB) must be reviewable by the director of the Patent and Trademark Office (PTO) to avoid a violation of the appointments clause of the Constitution. Arthrex, Inc. sued Smith & Nephew, Inc. and ArthroCare Corp. for infringement of its surgical device patent. Smith & Nephew filed an *inter partes* review, and the PTAB found Arthrex's patent unpatentable. On appeal to the Federal Circuit, Arthrex argued APJs were principal officers (requiring presidential appointment) and therefore that their appointment by the Secretary of Commerce was unconstitutional. The Federal Circuit agreed that, under the statute as written, the PTAB's APJs were principal officers. In an effort to preserve the constitutionality of the statute, the Federal Circuit judicially modified the statute to provide that "APJs [were] removable