answered the complaint, participated in a mediation with the Michigan plaintiffs, and then moved to compel arbitration of the Iowa action eight months after that action was commenced, the 8th Circuit reversed the district court and found that the defendant had not waived its right to arbitrate because the "nature" of its motion to dismiss "did not address the merits of the dispute," and because the plaintiff had not been prejudiced by the delay.

Judge Colloton dissented, arguing that the motion to dismiss and the filing of an answer that "made no mention of arbitration" were both acts that were "inconsistent" with the right to arbitrate. ***Morgan v. Sundance, Inc.***, 992 F.3d 711 (8th Cir. 2021).

■ **Untimely *forum non conveniens* motion waives argument.** Where one defendant waited 18 months before bringing a motion to dismiss based on the doctrine of *forum non conveniens*, the 8th Circuit found that the district court had abused its discretion when it granted that motion because the 18-month delay was "sufficiently untimely." The 8th Circuit further commented that requiring that forum non motions be brought at an early stage in the litigation "promotes judicial economy" and "prevents defendants from engaging in impermissible gamesmanship." The court also noted that "when a party spends substantial time in a forum" before bringing a forum non motion, "it belies the claim that the forum is truly inconvenient." ***Estate of I.E.H. v. CKE Restaurants Holdings, Inc.***, ___ F.3d ___ (8th Cir. 2021).

■ **Motion to dissolve preliminary injunction provisionally granted; dissent.** Where a district court granted a preliminary injunction in November 2017, the defendant did not appeal from the entry of that injunction, the defendant moved to dissolve the injunction in March 2019, the motion was denied in May 2019, and the defendant appealed from the denial of that motion, an 8th Circuit panel found that changed circumstances—the passage of time—warranted a grant of the motion if the preliminary injunction was not replaced by a final order (either granting a permanent injunction or vacating the preliminary injunction) by 10/31/2021.

Judge Erickson dissented from the injunction ruling, asserting that the defendant's failure to identify "subsequent changes in law or fact" meant that the 8th Circuit lacked jurisdiction over that portion of the appeal. ***Ahmad v. City of St. Louis***, ___ F.3d ___ (8th Cir. 2021).

■ **Fed. R. Evid. 403; jury instructions; cumulative error; judgment reversed.** Determining that Judge Frank abused his discretion in admitting multiple pieces of evidence where the "minimally" probative value of that evidence was "substantially" or "unfairly" outweighed by the risk of unfair prejudice to the defendants, and that one jury instruction also constituted an abuse of discretion, the 8th Circuit found that the cumulative effect of these errors affected the defendants' "substantial rights," vacated the judgment, and remanded the case for a new trial. ***Krekelberg v. City of Minneapolis***, 991 F.3d 949 (8th Cir. 2021).

■ **Fed. R. Civ. P. 23(f); class certification reversed.** After granting the defendants leave to appeal a class certification order pursuant to Fed. R. Civ. P. 23(f), the 8th Circuit found that the district court had abused its discretion in certifying a plaintiff class pursuant to Fed. R. Civ. P. 23(b)(3) where a "prevalence of... individual inquiries" was required, and because it was an improper "fail-safe" class. ***Ford v. TD Ameritrade Holding Corp.***, ___ F.3d ___ (8th Cir. 2021).

■ **Mandamus; right to jury trial.** Where the district court struck the defendant's demand for a jury trial, the 8th Circuit granted her petition for a writ of mandamus and found that she had a "clear and indisputable right to a jury trial." The 8th Circuit also found that the defendant was not required to seek interlocutory review under 28 U.S.C. §1292(b) before seeking mandamus. ***In Re: Brazile***, 993 F.3d 593 (8th Cir. 2021).

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## IMMIGRATION LAW

### JUDICIAL LAW

■ **Supreme Court: Notice to appear must be a single document to trigger stop-time rule.** The U.S. Supreme Court held that a notice to appear (NTA) sufficient to trigger the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) stop-time rule (within the cancellation of removal context and its 10-year requirement of continuous presence in the United States) must be a single document containing all information about a removal hearing as specified under 8 U.S.C. §1229(a)(1). More specifically, it must include: 1) nature of the proceedings against foreign nationals; 2) legal authority under which the proceedings are conducted; 3) acts or conduct alleged to be in violation of law; 4) charges against them with statutory provisions alleged to have been violated; 5) advisory that they may be represented by counsel and given time to secure said counsel; 6) written record of address and telephone number with consequences for failing to provide such information; 7) time and place at which proceedings will be held with consequences for failing to appear at such proceedings.

In view of the Court's decision in *Pereira v. Sessions*, 585 U.S. ___ (2018), finding inadequate a notice to appear lacking the hearing time and place, the government in the instant case argued its acts of sending two NTAs over the span of two months (with the second one containing information about the time and place for the hearing) collectively met the requirements under 8 U.S.C. §1229(a)(1). The Court agreed to hear the case after some circuits had accepted the government's "notice by installment theory," while others did not, arguing that a single NTA must be issued in



order to trigger the stop-time rule. The Court agreed with the latter and opined that "words are how the law constrains power. In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him." ***Niz-Chavez v. Garland***, 593 U.S. ___, No. 19-863, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-863_6jgm.pdf*

■ **Supreme Court: Convictions, burden of proof, and eligibility for cancellation of removal.** The U.S. Supreme Court affirmed the 8th Circuit, finding that, under the Immigration and Nationality Act, certain nonpermanent residents seeking cancellation of removal bear the burden of proving they have not been convicted of certain criminal offenses (e.g., crime of moral turpitude) barring their eligibility for such relief. Here, the foreign national had "not carried that burden when the record shows he has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction." ***Pereida v. Wilkinson***, 592 U.S. ___, No. 19-438, *slip op.* (2021). *https://www.supremecourt.gov/opinions/20pdf/19-438_j4el.pdf*

■ **Temporary protected status (TPS) is not an "admission" for cancellation of removal purposes.** The 8th Circuit Court of Appeals held that the petitioner's grant of temporary protected status (TPS) pursuant to INA §244(e) did not eliminate the requirement that he provide evidence he was "admitted" (i.e., "lawful entry… into the United States after inspection and authorization by an immigration officer") in order to establish eligibility for cancellation of removal under INA §240A(a). The court noted that its decision in *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020), dealing with TPS and "admission" in the adjustment of status context, was distinguishable given Congress's intent to create a legal fiction by its express stipulation that TPS status be considered an "admission" for adjustment of status and change of status purposes under 8 U.S.C. §1254a(f)(4). Consequently, the petitioner's grant of TPS in the instant case was not an "admission" for cancellation of removal purposes. ***Artola v. Garland***, 19-1286, *slip op.* (8th Cir. 5/5/2021). *https://www.ca8.uscourts.gov/content/19-1286-fredis-artola-v-merrick-b-garland*

■ **Khat, federal controlled substances, and asylum.** The 8th Circuit Court of Appeals held that the petitioner was removable because of his Minnesota conviction for possession of khat, which contains at least one of two substances listed in the federal schedules, related to federal controlled substances under INA §237(a)(2)(B)(i). The court further affirmed the Board of Immigration Appeals' conclusion that the petitioner's claimed membership in a "particular social group consisting of those suffering from mental health illnesses, specifically [post-traumatic stress disorder]" failed to comprise a socially distinct group. That is, Somali society does not make "meaningful distinctions based on the common immutable characteristics defining the group." ***Ahmed v. Garland***, 19-3480, *slip op.* (8th Cir. 4/8/2021). *https://ecf.ca8.uscourts.gov/opndir/21/04/193480P.pdf*

■ **Particularly serious crime analysis: Consider all reliable information, including mental health conditions.** The 8th Circuit Court of Appeals held that the immigration judge and Board of Immigration Appeals (BIA) had impermissibly refused to consider the Iraqi petitioner's mental illness as a factor in determining whether he was barred from the relief of withholding of removal based on a conviction for a particularly serious crime. The court concluded the BIA's categorical bar on considering the petitioner's mental health evidence was an arbitrary and capricious construction of INA §241, reaffirming its position in *Marambo v. Barr* that "all reliable information" pertaining to the nature of the crime, including evidence of mental health conditions, may be considered in a particularly serious crime analysis. ***Shazi v. Wilkinson***, 19-2842, *slip op.* (8th Cir. 2/11/2021). *https://ecf.ca8.uscourts.gov/opndir/21/02/192842P.pdf*

## ADMINISTRATIVE ACTION

■ **DHS announces 22,000 additional H-2B temporary non-agricultural worker visas.** In April the Department of Homeland Security announced a supplemental increase of 22,000 visas for the H-2B temporary non-agricultural worker program as the economy reopens with an increased need for temporary seasonal workers. The H-2B visa program "is designed to help U.S. employers fill temporary seasonal jobs, while safeguarding the livelihoods of American workers" by requiring those employers to test the U.S. labor market and certify there are insufficient workers who are "able, willing, qualified, and available" to do the work. At the same time, 6,000 of those visas will be reserved for nationals of the Northern Triangle countries of Honduras, El Salvador, and Guatemala in order to expand "lawful pathways for opportunity in the United States" consistent with the President's Executive Order 14010 on "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." The 22,000 visas will be made available in the coming months by way of a temporary final rule to be published in the *Federal Register*. U.S. Department of Homeland Security, *News Release* (4/20/2021). *https://www.dhs.gov/news/2021/04/20/dhs-make-additional-22000-temporary-non-agricultural-worker-visas-available*

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