

From: (b)(6)
To: OPLA HO Personnel; OPLA Field Personnel
Subject: Broadcast Message: Implementing Barton v. Barr, 140 S. Ct. 1442 (2020)
Date: Friday, June 19, 2020 9:12:30 AM

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Disseminated on behalf of Ken Padilla and Adam V. Loiacono. . .

On April 23, 2020, the Supreme Court issued *Barton v. Barr*, 140 S. Ct. 1442 (2020), holding that the stop-time rule of section 240A(d)(1) of the Immigration and Nationality Act (INA), which terminates an alien’s continuous residence or physical presence for purposes of cancellation of removal and voluntary departure, is triggered by the commission of a criminal offense that renders an alien removable, regardless of whether the alien is charged in removal proceedings with the corresponding ground of removal. The Court premised its holding on, among other reasons, the language of the stop-time rule, which identifies offenses “referred to in section 212(a)(2)” of the INA and thus does not depend on the actual “offense of removal,” *see* 140 S. Ct. at 1451, which the Court defined as “the offense that was the ground on which the immigration judge, at the removal proceeding, found the noncitizen removable,” *id.* at 447 n.4.

The Court contrasted this aspect of the stop-time rule with the INA provisions governing mandatory pre-order detention, section 236(c)(1), and jurisdiction for judicial review of removal orders, section 242(a)(2)(C). *See* 140 S. Ct. at 1451. Specifically, the Court reasoned in apparent dicta that, unlike the stop-time rule, these “provisions make contextual sense *only if the offense justifying detention or denying jurisdiction is one of the offenses of removal.*” *Id.* (emphasis added). In short, the Court read section 236(c)(1) as requiring that an alien be charged with removal based on the offense justifying mandatory detention. (b)(5)

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(b)(5) In briefing and at oral argument, the Government argued – consistent with *Kotliar* – that an alien is subject to mandatory detention based on potential grounds for removal, *see* Brief for the Respondent at 30, *Barton*, 140 S. Ct. 1442 (No. 18-725), 2019 WL 3987631, at *30, or removal charges that are capable of being lodged against the alien, *see* 140 S. Ct. at 1459 (Sotomayor, J., dissenting).

In light of this decision, (b)(5)

(b)(5) but should consider the following additional practice pointers:

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This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance. If there are any questions about this guidance, *Barton*, or pre-order custody, please do hesitate to reach out to ILPD (ILPD-E or ILPD-W), as appropriate.

Thank you,

Ken Padilla

Deputy Principal Legal Advisor for Field Legal Operations

Office of the Principal Legal Advisor

U.S. Immigration and Customs Enforcement

U.S. Department of Homeland Security

Adam V. Loiacono

Deputy Principal Legal Advisor for Enforcement and Litigation

Office of the Principal Legal Advisor

U.S. Immigration and Customs Enforcement

U.S. Department of Homeland Security

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