

From: (b)(6);
To: OPLA HQ Personnel; OPLA Field Personnel
Subject: Broadcast Message: Implementing Matter of O-F-A-S-, 27 I&N Dec. 709 (BIA 2019)
Date: Tuesday, May 12, 2020 7:58:07 AM

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

On December 6, 2019, the Board of Immigration Appeals (Board), published its decision in *Matter of O-F-A-S-, 27 I&N Dec. 709 (BIA 2019)*, which held that, for purposes of the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture (CAT), 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18, torturous conduct committed by a public official who is acting “in an official capacity” equates to the “under color of law” legal framework from the civil rights context. The Board made clear that conduct by a “rogue official” who is not operating under the color of law does not fall within those regulations and that the key consideration in determining whether a public official is operating under the color of law is whether he was able to engage in torturous conduct because of his government position or if he could have done so without a connection to the government.

In *O-F-A-S-*, the respondent, a Guatemalan citizen and national, testified that in 2016, an individual called him to extort money from him, and two weeks later, several men wearing Guatemalan national police uniforms physically assaulted and threatened him at his home in an attempt to collect the money. The men caused the respondent’s left shoulder to dislocate, and they took a portion of money the respondent had stored in his car. After the men learned that a neighbor had called the police to report a disturbance, they threatened the respondent with further violence if he did not pay the balance of their demand or he reported them to the police.

The respondent entered the United States about one month later, in April 2016, and applied for asylum in September 2017. The immigration judge (IJ) pretermitted the asylum claim as time-barred and denied the respondent’s claims for statutory withholding of removal and CAT protection. On appeal, the Board determined that the IJ properly held that the respondent did not establish his eligibility for protection. In reaching this determination, the Board primarily addressed the issue of whether the men who harmed the respondent were acting “in an official capacity,” that is, “under color of law,” or were, instead, “rogue officials.”

Discussing the “public official” aspect of the CAT and the pertinent implementing regulation, 8 C.F.R. § 1208.18(a), the Board emphasized that “[t]he history and purpose of the [CAT] reflect that its protection was intended to apply only to torture that occurs in the context of governmental authority,” and that “[t]here is no indication that the Department of Justice intended to exceed the intent of the drafters of the [CAT] when the regulation was promulgated.” *O-F-A-S-, 27 I&N Dec. at 713*. Thus, the Board concluded that the regulation, like the CAT, does not cover acts committed by individuals in a personal capacity. *See id.* In support of this conclusion, the Board referenced the Senate ratification process for the CAT, during which the President’s transmittal message cited to a “color of law” standard. *See id.* at 712. Accordingly, the Board held that “torturous conduct committed by a public official who is acting ‘in an official capacity,’ that is, ‘under color of law’ is covered by the [CAT], but such conduct by an official who is not acting in an official capacity, also known as a ‘rogue official,’ is not covered[.]” *Id.* at 713. In doing so, the Board followed the Attorney General’s lead in *Matter of Y-L-, A-G- & R-S-R-, 23 I&N Dec. 270, 285 (A.G. 2002)*, where the Attorney General suggested that “acting in an official capacity” means “under color of law.” *O-F-A-S-, 27 I&N Dec. at 714*.

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should consider the following practice pointers:

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