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HOW INTERPOL RED NOTICES ALLOW ABUSIVE FOREIGN GOVERNMENTS TO MANIPULATE AND UNDERMINE THE INTEGRITY OF IMMIGRATION PROCEEDINGS IN THE UNITED STATES

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The Board of Immigration Appeals in *Matter of W-E-R-B*-, 27 I&N Dec. 795 (BIA 2020) recently ruled that an Interpol Red Notice may constitute reliable evidence of criminality that serves as a bar for asylum and withholding of removal. Giving credence to a Red Notice without more undermines the integrity of our asylum system as it allows a foreign government to sway the outcome of an asylum case against an opponent who is in the US.

As a background, a Red Notice is a request to locate and provisionally arrest an individual pending extradition, which Interpol issues at the request of a member country or an international tribunal based on a valid national arrest warrant. A Red Notice does not establish that the person has been convicted of a crime. It is based on the word of the government that issued the arrest warrant, and does not add any further force or legitimacy to it. Unfortunately, the issuance of a Red Notice by a country whose government is corrupt or abusive can result in adverse consequences for persons applying for immigration benefits under US law. Many immigration benefits may not be granted based on the commission of a crime or if there is reason to believe that the person will commit a certain crime. For an excellent overview, please read Challenging a Red Notice – What Immigration Attorneys Need to Know About INTERPOL by Ted R. Bromund and Sandra A. Grossman, AILA Law Journal, April 2019.

In *W-E-R-B-* , the respondent, an El Salvadorian, was the subject of an Interpol Red Notice, reflecting an arrest warrant by the Magistrate Court of San

Salvador, for his arrest regarding a violation of article 345 of the Salvadoran Penal Code, which prohibits participation in an "illicit organization." The Red Notice indicated that the respondent was a "hit man" with the MS-13 gang. Under INA 208(b)(2)(A)(iii), a respondent is barred from obtaining asylum when "there are serious reasons for believing that the alien committed a serious nonpolitical crime." The companion bar to withholding of removal is at INA 241(b)(3)(B)(iii).

The BIA agreed with the Immigration Judge's finding that there were serious reasons to believe that the respondent had committed a serious nonpolitical crime prior to his entry in the US, and was thus barred from obtaining political asylum or withholding of removal. Although a Red Notice is not even a formal arrest warrant, the BIA still found that it constituted reliable evidence of a serious nonpolitical crime for triggering the bar to asylum. While the respondent can rebut the finding through a preponderance of evidence, his rebuttal was found to be unavailing in W-*E-R-B*. The respondent submitted a letter from an attorney in El Salvador indicating that the charges stemming from the incident were dismissed, but the BIA held that an attorney's letter standing alone was insufficient in the absence of official court documents.

The respondent could have also shown that his crime was political in nature, but he conceded that it was not. He was arrested in El Salvador following a melee in 2010 that resulted in injury to a police officer. The respondent was also shot and had a gun on this person. Although not applied in this case, the BIA has established a framework in *Matter of E-A*-, 26 I&N Dec. 1 (BIA 2012) to determine whether the bar applies or not. First, in *Matter of E-A*-, the BIA interpreted the "serious reasons for believing" standard as being equivalent to probable cause. Next, in determining the political nature of the crime, the BIA explained that the political nature of the crime must outweigh its common law character. If the criminal conduct was of "an atrocious nature" or grossly out of proportion to the political objective, then there is no question of the crime being political in nature. If the crime is not of "an atrocious nature" then the BIA balances the seriousness of the criminal acts against the political aspects of the conduct to determine whether the criminal nature of the applicant's acts outweighs their political character. Interestingly, in footnote 5 of the *W-W-R-B* decision, the BIA noted that where a respondent has put forth evidence of the political nature of the crime, the Immigration Judge should consider evidence in the record that the foreign country issuing Red Notices abuses them for

political reasons, and cites *Tatintsyan*, 2020 WL 709663, which held that a Red Notice from Russia may provide grounds for overcoming the bar if there is credible testimony that the Russian government persecuted the respondent.

As the only remaining issue was to determine whether the crime indicated in the Red Notice was serious or not, the BIA agreed that the Respondent's crime was serious in nature within the meanings of the bars in INA 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii) as it involved a substantial risk of violence and harm to persons.

W-E-R-B unfortunately gives leeway for a foreign government persecuting the asylum claimant to issue an arrest warrant based on a false charge, and then inform Interpol to issue a Red Notice. If the charges remain outstanding, an IJ can potentially take for true the accusations in the charge even though there has not been a conviction. The burden of establishing the nonpolitical nature of the accusation is high under *Matter of E-A* as well as the nonseriousness of the crime. It has long been established that fear of prosecution under laws that are fairly administered does not qualify an individual as a refugee, although prosecution can amount to persecution where the prosecution is arbitrary or excessive, indicating that the motive, *in part*, may be on account of one of the five enumerated grounds*. See, e.g., Singh v. Holder,* 764 F.3d 1153, 1162 (9th Cir. 2014) ("If a petitioner has presented evidence that … political opinion was a *central* reason for the persecution…then the fact that the persecution occurred during the course of a legitimate criminal investigation would not preclude eligibility for asylum" (emphasis added)); *Osorio v. INS*, 18 F.3d 1017, 1032 (2d Cir. 1994) (finding that prosecution became persecution when the Respondent established a pattern of the Guatemalan government targeting similarly situated union leaders); *Tagaga v. INS*, 228 F.3d 1030, 1034-35 (9th Cir. 2000) (finding that prosecution for treason for refusal to participate in persecution of Indo-Fijians constitutes persecution); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (finding that while the police's initial stop may have been for law enforcement, subsequent beatings were on account religion); *Singh v. Ilchert,* 63 F.3d 1501, 1509 (9th Cir. 1995) ("f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person… there arises a presumption that the motive for harassment is political"); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); *El Balguiti v. INS*, 5 F.3d 1135, 1136 (8th Cir. 1993) (finding prosecution becomes persecution where prosecutorial conduct seeks to disguise a government's intent to persecute with the veneer of legitimacy – where an alien fears punishment "that is not legitimate, but instead masks an

invidious motive" to prosecute the alien on account of an enumerated ground). *W-E-R-B* could undermine these decisions by nixing asylum claims via a Red Notice when the asylum claimant is escaping a politically motivated criminal prosecution and the foreign government maliciously causes the issuance of a Red Notice through Interpol.

The issuance of a Red Notice can also potentially roil other applications for immigration benefits such as when one files an I-485 application for adjustment of status. Although *W-E-R-B* applies to the bars set forth in INA 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii), which require at a minimum only the commission of a crime and not a conviction, the criminal grounds of inadmissibility also similarly only require at a minimum a commission of a crime. Thus, under INA 212(a)(2)(A)(i)(1), a person who has admitted to the essential elements to the commission of a crime involving moral turpitude, and who does not fall under the petty offense exemption, is inadmissible. INA 212(a)(2)(A)(i)(1) does have an exception for a "purely political offense," but unlike the bar to asylum, there is no balancing test. The offense must be purely political, and thus this stricter standard has been set forth in *Matter of O'Cealleagh*, 23 I&N Dec. 976 (BIA 2006). In practice, though, it would be difficult for the government to find a person inadmissible under INA 212(a)(2)(A)(i)(1) based on an admission as it is generally difficult to extract an admission that meets the standard under *Matter of K*, and a conviction is thus generally required. There are other grounds of inadmissibility that do not require either a conviction or admission, such as under INA 212(a)(2)(C)(i), where a noncitizen can be found inadmissible if the government has reason to believe that the applicant is or has been an illicit trafficker in a controlled substance.

While the *W-E-R-B* standard is not applicable in a non-asylum context, the applicant subject to bogus charges must be prepared to strenuously contest that the underlying charges of a Red Notice are without merit, the applicant never committed the crime and provide evidence that the country abused the process in having Interpol issue the Red Notice to target him or her. Bromund and Grossman's article in the AILA Law Journal provide invaluable advice on how to challenge a Red Notice if it violates Interpol rules or indicates a bias on the part of the requesting authorities. More often than not, the charges against a non-citizen who is already in the US applying for a benefit will likely remain outstanding indefinitely in the foreign country. The Department of Justice infrequently extradites people subject to a Red Notice. If the DOJ has not taken

any action, this too could be pointed out that the US has not taken the Red Notice seriously. One should try to convince the adjudicating official that the accusation, apart from not constituting a conviction, does not necessarily prove that the applicant even committed the crimes and do not render him or her inadmissible. Even if the applicant is granted permanent residence, it can further be asserted that the government can always hypothetically commence removal proceedings if there is a conviction that would render the applicant deportable. Interpol Red Notices are being erroneously viewed by the US immigration authorities as conclusive proof of criminality against non-citizens living in the US. Every effort must therefore be made to push back against this assumption. Otherwise, the US becomes complicit in the abuse by foreign governments to manipulate and undermine the integrity of immigration proceedings, including asylum claims, that otherwise ought to assure fairness and due process to non-citizens under the law.