

**Eighth Circuit Court**

**Case:** *Baker White v. Wilkinson*, 990 F.3d 600 (8th Cir. 2021)

**Date:** March 4, 2021

**Panel:** Smith, Loken, Gruender

**Opinion:** Smith

**Tags:** Immigration, visa overstay, UK, cancellation of removal

**Question(s) Presented:** Did BIA violate petitioner's due process rights?

- Was her evidence new and material?
- Did the Board improperly use its discretion to deny her motion?

**Holdings:** Petition denied.

**Rationale:** IJ's character determination was based on respondent's demeanor and consistency during testimony, NOT on her arrest records—so the fact that they were dismissed is **immaterial**.

**Facts:** Swiss native and citizen of U.K. moved to U.S. as a child in 2006. She overstayed her F-1 student visa in 2014. Married USC son's father, who was abusive. Obtained PFAs which were violated. Petitioner arrested for possession of marijuana, shoplifting, arson, theft of a motor vehicle. Charges were dismissed after first appeal.

**Procedural History:**

- **2017: NTA**
- **2018: IJ:** denied application for cancellation of removal: moral character, credibility, bad parenting
- **BIA:** upheld denial of application
- **2019: MTR:** change in circumstances that warranted reopening: charges dismissed
- **BIA:** denied MTR because was untimely; **8th Circuit** remanded because of provision for battered spouses that extends deadline to one year.
- **BIA:** denied because respondent did not provide **new and material evidence** showing that a different outcome would be reached regarding her removal. Also: not entitled to discretionary relief because of her moral character.

**Appeals to Statute & Precedent:**

- ***Sanchez-Velasco v. Holder*, 593 F.3d 733, 737 (8th Cir. 2010):** "Aliens have no right to due process in the purely discretionary remedy of cancellation of removal because no constitutionally cognizable liberty interest arises from it. That is because cancellation of removal is roughly equivalent to executive clemency, over which the executive branch has unfettered discretion." (cleaned up) 605
- ***Guled v. Mukasey*, 515 F.3d 872, 880 (8th Cir. 2008):** "Because adjustment of status amounts to a power to dispense mercy, an alien can have no constitutionally protected liberty interest in such speculative relief and cannot state a claim for a violation of due process rights." 605

**Discussion:**Materiality of evidence:

- “upon its review, the Board found that her newly submitted evidence was not material; that is, it would not have changed the outcome of the cancellation-of-removal proceedings.” 604
- The reason the IJ made the adverse moral character finding was not based on her arrest records but on her inconsistent testimony. So the dismissal of the remaining charges were immaterial.
  - “Because the arrests and charges did not form the gravamen of the IJ's decision, the Board did not abuse its discretion by finding the charges’ dismissals were not material.” 606
- “Baker White's regained custody is not enough to overcome the agency's broad discretion because \*607 Baker White's regained custody was premised on her repatriation and moving with her son to England, not on correcting her moral trajectory.”

**Commentary:**

- No RIGHT to a protected interest in a SECOND cancellation of removal proceeding: the grant of relief would be DISCRETIONARY. 605