



September, 2009

This eNewsletter contains selected recent developments in criminal immigration law occurring during September, 2009. For a complete report, see the September Report sent to Premium Members of [www.NortonTooby.com](http://www.NortonTooby.com).

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2008), with monthly updates online at [www.NortonTooby.com](http://www.NortonTooby.com).

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## Recent Case Decisions

### **BIA**

#### **MOTION TO REOPEN**

Matter of Bulnes, 25 I&N Dec. 57 (BIA 2009) (noncitizen's departure from the United States while under outstanding *in absentia* order does not deprive the Immigration Judge of jurisdiction to entertain a motion to reopen to rescind the order if the motion is premised upon lack of notice).

CD4:15.34;AF:6.30;CMT3:10.31;PCN:10.15

#### **RELIEF – WAIVERS – CANCELLATION OF REMOVAL FOR BATTERED SPOUSES APPLIES TO LPRS AS WELL AS NON-LPRS**

Matter of AM, 25 I. & N. Dec. 66 (BIA Sept. 21, 2009) (notwithstanding the heading of INA § 240A(b), 8 U.S.C. § 1229b(b) (2006), which only refers to nonpermanent residents, a lawful permanent resident who qualifies as a battered spouse may be eligible to apply for cancellation of removal under INA § 240A(b)(2)).

<http://www.usdoj.gov/eoir/vll/intdec/vol25/3653.pdf>  
CD4:24.26, 24.4;AF:2.38, 2.4;CMT3:3.37, 3.4

#### **RELIEF – WAIVERS – CANCELLATION OF REMOVAL FOR BATTERED SPOUSES – FACTORS TO BE CONSIDERED**

Matter of AM, 25 I. & N. Dec. 66 (BIA Sept. 21, 2009) (given the nature and purpose of the relief of cancellation of removal for battered spouses under INA § 240A(b)(2), such factors as a noncitizen's divorce from an abusive spouse, remarriage, and previous self-petition for relief based on the abusive marriage are relevant in determining whether an application for that relief should be granted in the exercise of discretion).

<http://www.usdoj.gov/eoir/vll/intdec/vol25/3653.pdf>  
CD4:24.26;AF:2.38;CMT3:3.37

### **Second Circuit**

#### **RELIEF – WAIVERS – 212(C) WAIVER**

Periello v. Napolitano, 579 F.3d 135 (2d Cir. Sept. 1, 2009) (noncitizen who was found guilty by jury of an aggravated felony prior to November, 1990, and served more than five years for the offense, is ineligible for relief under INA § 212(c), since the 5-year aggravated felony bar is expressly retroactive), citing IMMACT 90 § 511(a).

Note: the court expressly declined to address eligibility for a noncitizen who had entered a plea of guilty prior to November, 1990, in light of the current regulations allowing the relief. 8 C.F.R. § 1212.3(f)(4)(ii) (“An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before [the enactment of § 511(a)].”) CD4:24.28;AF:2.44;CMT3:3.43

### **Fifth Circuit**

#### **CONVICTION—NATURE OF CONVICTION – CATEGORICAL ANALYSIS – REALISTIC PROBABILITY**

United States v. Moreno-Florean, 542 F.3d 445, 456 (5<sup>th</sup> Cir. Sept. 8, 2008) (“Based on the California Supreme Court's statement in *Martinez*, there is a

'realistic probability' that California 'would apply' [§ 207(a)] to conduct that falls outside the generic definition' of kidnapping. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 815, 822, 166 L.Ed.2d 683 (2007); *see also United States v. Ramos-Sanchez*, 483 F.3d 400, 403-04 (5th Cir. 2007). A 'contextual factor,' which is part of a "totality of the circumstances" test and is not necessarily considered by the jury, is not the equivalent of an element for purposes of our enumerated offense analysis. Because the least culpable act constituting a violation of § 207(a) only requires proof of two elements discussed in *Gonzalez-Ramirez*, we conclude that § 207(a) sweeps more broadly than the generic, contemporary meaning of 'kidnapping.').  
CD4:16.8;AF:4.7;CMT3:6.6

#### IMMIGRATION OFFENSES – IMPORTING ALIEN INTO UNITED STATES FOR IMMORAL PURPOSES

*United States v. Clark*, 582 F.3d 607 (5<sup>th</sup> Cir. Sept. 10, 2009) (defendant's conduct in tricking Kenyan national to come to United States upon promise of funding her education, and then attempting to use fear of deportation in order to manipulate her into becoming a sexual plaything came squarely within scope of INA § 278, 8 U.S.C. § 1328, such that defendant could not complain that statute was impermissibly vague or overbroad).  
CD4:CHAPT13

#### Sixth Circuit

##### AGGRAVATED FELONY – CRIME OF VIOLENCE – SEXUAL BATTERY

*United States v. Wynn*, 579 F.3d 567 (6<sup>th</sup> Cir. Sept. 2, 2009) (Ohio conviction for violation of Ohio R.C. § 2907.03, sexual battery, is not categorically a "crime of violence" for career offender sentencing purposes, since some subsections of the statute do not necessarily require the use of violent force, but only lack of consent, which may only require lack of lawful ability to consent).  
CD4:19.38, 19.44;AF:5.20, 5.26, A.14, B.77

##### REMOVAL PROCEEDINGS – BOARD OF IMMIGRATION APPEALS – REMAND FROM COURT OF APPEALS – WHETHER BIA ACTION EXCEEDED SCOPE OF REMAND ORDER

*Sagr v. Holder*, 580 F.3d 414 (6<sup>th</sup> Cir. Sept. 9, 2009) (BIA did not improperly exceed the scope of the remand order from the court of appeal by considering issues other than the one for which remand was

granted: "In this circuit, an agency has inherent authority to reconsider a prior decision, provided that such reconsideration occurs within a reasonable time after the first decision. . . . However, where a court has considered the merits and remanded on certain issues, an agency or lower court is not permitted to review anew those issues already addressed by the reviewing court if they are not part of the remand because issues addressed on the merits and not within the scope of remand become the law of the case. *See United States v. Campbell*, 168 F.3d 263, 265 (6<sup>th</sup> Cir.1999); *United States v. Moore*, 131 F.3d 595, 598 (6<sup>th</sup> Cir.1997). [Para.] Here, this Court granted remand on a particular issue, which it identified in its June 28, 2006 remand order. However, at the time of remand, this Court had not considered the merits of any of the issues then before it. Therefore, the BIA properly clarified its position on certain issues.).  
CD4:15.35

### **New Edition of Norton Tooby's California Post-Conviction Relief for Immigrants! Available Now!**

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#### Ninth Circuit

##### AGGRAVATED FELONY – CRIME OF VIOLENCE – ASSAULT WITH A DEADLY WEAPON – REQUIREMENT OF SUFFICIENT FORCE

*United States v. Grajeda*, 581 F.3d 1186 (9<sup>th</sup> Cir. Sept. 21, 2009) (California conviction of assault with a deadly weapon or by means likely to produce great bodily injury, under Penal Code § 245(a)(1), categorically constituted a "crime of violence" for purposes of application of a sixteen-level enhancement to the base offense level under the "element" prong of U.S.S.G. § 2L1.2(b)(1)(A)(ii), to a sentence for illegal reentry after deportation, since the offense requires sufficient violence because "even the

least touching with a deadly weapon or instrument is violent in nature”); accord, *United States v. Treto-Martinez*, 421 F.3d 1156, 1160 (10th Cir. 2005) (holding that a person who touches another with a deadly weapon in a rude, insulting, or angry manner has threatened use of physical force for purposes of the sentencing enhancement); *United States v. Dominguez*, 479 F.3d 345, 348-49 (5th Cir. 2007) (holding that the touching of an individual with a deadly weapon creates a sufficient threat of force to qualify as a COV).  
CD4:19.38;AF:5.19, A.14, B.9

## **Tooby’s Guide to Criminal Immigration Law**

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**CRIMES OF MORAL TURPITUDE – THEFT – RECEIPT OF STOLEN PROPERTY**  
*Castillo-Cruz v. Holder*, 581 F.3d 1154 (9<sup>th</sup> Cir. Sept. 17, 2009) (California "conviction for receipt of stolen property under [Penal Code] § 496(a) is not categorically a crime of moral turpitude because it does not require an intent to permanently deprive the owner of property. Castillo-Cruz's conviction is not a crime of moral turpitude under the modified categorical analysis, as the government conceded at oral argument that there is no evidence in the record establishing that his offense involved an intent to deprive the owner of possession permanently.").  
CD4:20.5;CMT3:8.5, CHART;SH:7.121

**AGGRAVATED FELONY – ACCESSORY AFTER THE FACT**  
*Verdugo-Gonzalez v. Holder*, 581 F.3d 1059 (9<sup>th</sup> Cir. Sept. 14, 2009) (California conviction for receiving stolen property, under Penal Code § 496(a), categorically qualified as a theft offense aggravated felony under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), rejecting argument that the statutory use of the term "aids" includes accessory after the fact, which would not constitute an aggravated felony; the court reasoned that the statute does not mention accessory, only aiding, and no case was identified applying the statute to accessories after the fact).  
CD4:19.15;SH:7.30;AF:5.2, A.2, B.62

**AGGRAVATED FELONY – CRIME OF VIOLENCE – KIDNAPPING**  
*Delgado-Hernandez v. Holder*, 581 F.3d 1059 (9<sup>th</sup> Cir. Sept. 9, 2009) (California conviction of kidnapping, in violation of California Penal Code § 207(a), constitutes a crime of violence under 18 U.S.C. § 16(b), and is thus an aggravated felony under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); kidnapping inherently involves a direct confrontation with a victim who is forced or frightened into being moved involuntarily, which creates a substantial risk of the use of force).

NOTE: This decision seems to ignore a form of kidnapping, explicit in the statute, that would not involve a risk of force: "For purposes of those types of kidnapping requiring force, the amount of force required to kidnap a resisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or intent." California Penal Code § 207(e).  
CD4:19.22, 19.76, 19.44;AF:5.58, 5.26, A.14, B.12

**RELIEF – LPR CANCELLATION OF REMOVAL – RESIDENCE REQUIREMENT – IMPUTATION OF PARENT'S RESIDENCE TO CHILD**  
*Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9<sup>th</sup> Cir. Sept. 8, 2009) (a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent for purposes of eligibility for cancellation of removal. INA § 240A(a)(1)), applying reasoning of *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9<sup>th</sup> Cir. 2005) (7 years presence of parents should be imputed to unemancipated minor children for LPR cancellation purposes).  
CD4:24.4;AF:2.4;CMT3:3.4

JUDICIAL REVIEW – RETROACTIVE  
APPLICATION OF NEW REGULATIONS

*Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007) (*Matter of Y-L-*, 23 I. & N. Dec. 270 (Op. Att'y Gen.2002), disapproved of on other grounds by *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir.2003), creating a presumption that a drug trafficking offense is a particularly serious crime was impermissibly retroactive as applied to noncitizen with conviction pre-dating that decision).

CD4:15.37;AF:2.19;CMT3:3.18

**Article/ Other**

JUDICIAL REVIEW – BRAND-X

AILA Amicus Brief Sets Forth Principles Underlying Brand X and Chevron

July 20, 2009: "AILA submitted an amicus brief in *Matter of Gomez-Barajas* before the BIA, addressing Chevron deference and the holding in Brand X that in limited circumstances, an agency may disagree with a circuit court decision and offer a different interpretation of a statute." AILA Doc. No. 09072260. CD4:15.37;AF:2.19;CMT3:3.18

DETENTION – LOCALE

Transfers of Immigration Detainees Violate Human Rights

"Transfers from Massachusetts to remote immigration detention centers in other states interfere with detainees' legal rights, and have a devastating impact on immigrants and the families they leave behind. That is what the ACLU of Massachusetts has told the Inter-American Commission on Human Rights (IACHR) in testimony submitted during the agency's visit this week to the United States." ACLU, July 21, 2009.

CD4:6.36

DETENTION – ICE HOLDS

Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, William Mitchell Law Review, Vol. 35, No. 1, 2008

This Article surveys the recent history of immigration enforcement efforts targeting so-called "criminal aliens," and then focuses more narrowly on the Executive's current detainer practices.

Acting pursuant to these regulations, DHS routinely exceeds Congress's explicit grant of authority in two ways-by lodging immigration detainers without an initiating request from local law enforcement officials, and by placing detainers on persons who have not been arrested for controlled substance offenses.

The article concludes with a brief consideration of the various procedural avenues by which DHS's abusive detainer practices may be challenged.

CD4:6.11

RELIEF – NATURALIZATION

AILF Practice Advisory: Terminating Removal Proceedings to Pursue Naturalization before DHS: Strategies for Challenging *Matter of Acosta Hidalgo*

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The new edition of this book has been completely rewritten since the First Edition in June and reflects the Supreme Court's new analysis in *Nijhawan v. Holder*, decided June 15, 2009. It contains a snap-shot of the current state of the law concerning categorical analysis, with many suggestions for arguments in favor of preserving it as well as taking advantage of the silver lining of some of the new rules. It also contains many cutting edge arguments that can be used to win cases, even under the new rules.

The categorical analysis has traditionally been used to examine whether a given conviction falls within a conviction-based ground of deportation or inadmissibility. The two critical limitations of the categorical analysis are (1) the limitation to the elements of the criminal offense, and (2) the limitation to the record of conviction in the criminal case. The reasons for using the categorical analysis of the elements of an offense, rather than an examination of the underlying facts, include avoidance of expensive relitigation of the facts of the criminal case, and uniformity of decision concerning removability.

The Supreme Court's decision in *Nijhawan* provides strong arguments to counter the BIA, Attorney General, and some circuit courts of appeal, which have recently been relaxing one or both of these requirements with respect to certain conviction-based grounds of removal.

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September 18, 2009: "This new AILF Practice Advisory sets out arguments to challenge Matter of Acosta Hidalgo, a recent BIA decision holding that IJ and BIA lack jurisdiction to determine prima facie eligibility for naturalization in order to terminate removal proceedings."

[http://www.ailf.org/lac/pa/Acosta\\_Hidalgo\\_lac\\_pa\\_031808.pdf](http://www.ailf.org/lac/pa/Acosta_Hidalgo_lac_pa_031808.pdf)

CD4:24.13;AF:2.24;CMT3:3.23

#### INVESTIGATION – FOIA

DOJ publishes new FOIA guidelines: Federal Register / Vol. 74, No. 187 / Tuesday, September 29, 2009

<http://edocket.access.gpo.gov/2009/pdf/E9-23375.pdf>

CD4:3.32;SH:5.11;PCN:3.15

#### ARTICLE – SUPREME COURT HEARS ARGUMENT RELATING TO INEFFECTIVE ASSISTANCE OF COUNSEL FOR AFFIRMATIVELY MISADVISING A FOREIGN NATIONAL DEFENDANT CONCERNING THE ACTUAL IMMIGRATION CONSEQUENCES OF A PLEA

On October 13, 2009, the United States Supreme Court heard oral argument as to whether a criminal defense attorney has the obligation to provide foreign-born defendants with accurate advice about the actual immigration consequences of their criminal case, and whether defendants have a remedy when defense attorneys provide incorrect advice.

The briefing and other official documents in the case can be found online.

[http://www.scotuswiki.com/index.php?title=Padilla\\_v.\\_Commonwealth\\_of\\_Kentucky](http://www.scotuswiki.com/index.php?title=Padilla_v._Commonwealth_of_Kentucky)

<http://topics.law.cornell.edu/supct/cert/08-651>  
PCN:6.18

#### EVIDENCE – BIAS – UNDOCUMENTED STATUS INADMISSIBLE TO IMPEACH WITNESS IN CIVIL TRIAL

Colin Miller, Crossing Over: Why Attorneys (and Judges) Should Not be Able to Cross-Examine Witnesses Regarding Their Immigration Statuses for Impeachment Purposes.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474308](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474308)

CD4:2.2

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