

**RECENT DEVELOPMENTS**

This Newsletter contains selected recent developments in criminal immigration law occurring during August, 2016. The full version, which includes *all* monthly updates, is available [here](#).

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 (2007), with monthly updates online at [NortonTooby.com](http://NortonTooby.com).

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**Resources**

**DETENTION – IMMIGRATION DETENTION --  
 PREGNANT WOMEN**

ICE policy memo on “Identification and Monitoring of Pregnant Detainees”

[https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2\\_IdentificationMonitoringPregnantDetainees.pdf](https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf)

CD4:6.35

**BIA**

**DETENTION – IMMIGRATION DETENTION –  
 DANGER TO THE COMMUNITY**

*Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016) (Immigration Judge should consider both direct and circumstantial evidence of dangerousness, including whether the facts and circumstances present national security considerations, in determining whether noncitizen presents a danger to the community).

CD4:6.44;AF:2.11;CMT3;3.11

THE LAW OFFICES OF

NORTON  
TOOBY

# Consultations

Since 1989, the Law Offices of Norton Tooby have offered expert advice and highly successful services to immigration attorneys, criminal attorneys, and clients. Our nationwide law practice assists foreign nationals in avoiding adverse immigration consequences of crimes anywhere in the country.



## **Immigration Lawyers**

We investigate criminal histories nationwide, and analyze them to provide (a) cutting-edge immigration-court arguments why a given conviction does not trigger removal, and (b) post-conviction efforts to vacate criminal convictions to avoid immigration consequences.

## **Criminal Lawyers**

We investigate criminal and immigration histories nationwide and offer strategies for obtaining (a) immigration-safe dispositions, and (b) post-conviction relief to eliminate immigration damage.

## **Individuals**

We investigate your situation to (a) advise your criminal lawyer what plea will avoid deportation, (b) advise your immigration lawyer on new immigration-court arguments to avoid removal, and (c) erase convictions in criminal court to avoid immigration damage.

## **Testimonials:**

*"If you are an immigration lawyer with a defendant who has criminal issues, you only need to know two words: Norton Tooby." - Dan Kowalski*

*"Brilliant legal strategies."*

-Ann Benson, Directing Attorney, Washington Defender Association's Immigration Project

For Mr. Tooby's biography [click here](#).

**Interested in our services?** Contact our office at (510) 601-1300 or submit our Intake Form to begin the preliminary review process. Once we receive your Intake Form, we will contact you and let you know if we feel we can help. Consultations can be in person or by phone. Visit [www.NortonTooby.com](http://www.NortonTooby.com) to download the Intake Form.

### **Third Circuit**

#### **MORAL TURPITUDE – THREATS – TERRORISTIC THREATS**

*Javier v. Atty' Gen.*, \_\_ F.3d \_\_ (3d Cir. Aug. 3, 2016) (Pennsylvania conviction for terroristic threats, in violation of 18 Pa. Cons. Stat. § 2706(a)(1), is categorically a crime involving moral turpitude because a threat to commit a crime of violence, communicated with intent to terrorize, is an act “accompanied by a vicious motive or corrupt mind,” even where the threatened crime is simple assault which is not a CMT).

CD4:20.7;CMT3:8.7, 9.29, CHART

#### **JUDICIAL REVIEW – WAIVER OF INADMISSIBILITY NON-IMMIGRANT VISAS -- U-VISA APPLICATION**

#### **RELIEF – WAIVERS – INA §212(h)**

*Sunday v. Atty'y Gen.*, \_\_ F.3d \_\_ (3d Cir. Aug. 1, 2016) (Immigration Judge lacks jurisdiction to consider waiver of inadmissibility related to U-Visa application).

CD4:24.17;AF:2.28;CMT3:3.27

### **Fourth Circuit**

#### **IMMIGRATION OFFENSES – EVIDENCE – ADMISSION OF EVIDENCE OF IMMIGRATION STATUS**

*United States v. Garcia-Lagunas*, \_\_ F.3d \_\_, \_\_, 2016 WL 4547206 (4<sup>th</sup> Cir. Sept. 1, 2016) (immigration status is not relevant to identity: “We reject the notion that an individual's status as an illegal alien, without

more, creates an inference of Mexican nationality. And, importantly, the government could easily have shown that Garcia-Lagunas was from Mexico without highlighting his immigration status.”; the error was not, however, reversible plain error, because it did not affect the outcome of the trial).

CD4:CHAPT13

### **Fifth Circuit**

#### **INADMISSIBILITY – UNLAWFUL PRESENCE AT ADMISSION -- 8 U.S.C. § 1182(a)(7)(A) APPLIES ONLY TO APPLICANTS FOR ADMISSION, NOT NONCITIZENS SEEKING POST-ADMISSION ADJUSTMENT OF STATUS**

*Marques v. Lynch*, \_\_ F.3d \_\_, \_\_, 2016 WL 4427120 (5<sup>th</sup> Cir. Aug. 19, 2016) (while leaving open the question of whether a noncitizen must have a “unexpired visa” when applying to adjust status within the United States, the court found that the unlawful presence at admission ground of inadmissibility, INA § 212(a)(7)(A), 8 U.S.C. § 1182(a)(7)(A), cannot be applied to an applicant for adjustment of status who has *already* been properly admitted to the U.S. with a valid visa, since that ground of inadmissibility only applies to noncitizens seeking admission to the U.S., and not noncitizens seeking post-admission adjustment of status).

CD4:18.10

## Seventh Circuit

### RELIEF – WAIVERS – INA § 212(h) WAIVER – VIOLENT OR DANGEROUS CRIMES

*Cisneros v. Lynch*, \_\_\_ F.3d \_\_\_, 2016 WL 4474726 (7<sup>th</sup> Cir. Aug. 25, 2016) (8 C.F.R. § 1212.7(d), a regulation narrowing scope of Attorney General's discretion to grant extreme hardship waiver of inadmissibility for aliens who have committed violent or dangerous crimes, permissibly limited the executive branch's own authority, and BIA properly applied regulation to alien).

CD4:24.29;AF:2.45;CMT3:3.44

### JUDICIAL REVIEW – WAIVER AND PRESERVATION OF ISSUES

*Cisneros v. Lynch*, \_\_\_ F.3d \_\_\_, \_\_\_, 2016 WL 4474726 (7<sup>th</sup> Cir. Aug. 25, 2016) (respondent did not waive the argument that regulation was impermissible by failing to ask the Board to set aside the regulation: “Such an action would lie beyond the Board's power. See *Matter of Anselmo*, 20 I. & N. Dec. 25, 30 (BIA 1989) (“Neither this Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination[.]”). He thus had no duty to present this argument to the Board. *Isaaq v. Holder*, 617 F.3d 962, 968 (7<sup>th</sup> Cir. 2010).”).

CD4:15.37;AF:2.19;CMT3:3.18

## Eighth Circuit

### AGGRAVATED FELONY – FRAUD OFFENSES – LOSS TO VICTIM

### AGGRAVATED FELONY – FRAUD OFFENSES – MEDICAL ASSISTANCE FRAUD

*Sokpa-Anku v. Lynch*, \_\_\_ F.3d \_\_\_, 2016 WL 4488004 (8<sup>th</sup> Cir. Aug. 26, 2016) (Minnesota conviction of three counts of medical assistance fraud was a fraud aggravated felony, under INA § 101 (a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), even though each count of conviction involved a loss under \$10,000, since *Nijhawan* uses the terms “offense” and “conviction” interchangeably, and the court ordered the defendant to pay \$20,791 in restitution *on each count*; the court considered the three related counts to be one “conviction” with a loss over \$10,000, and thus a fraud aggravated felony); see *Nijhawan*, 557 U.S. at 43, 129 S.Ct. 2294 (restitution order indicative of loss amount); *Munroe v. Ashcroft*, 353 F.3d 225, 227–28 (3d Cir. 2003) (same); *In re Babaisakov*, 24 I. & N. Dec. 306, 319 (2007) (same); cf. *Eversley-MacClaren v. Holder*, 578 Fed.Appx. 664, 665–66 (9<sup>th</sup> Cir. 2014) (nine fraud counts of conviction aggregated where criminal information alleged that each was “connected in its commission” with another).

NOTE: The reasoning of this decision seems very weak and perfunctory. The language quoted from *Nijhawan* also does not necessarily stand for what it is cited to mean. Everywhere else in immigration law, the four corners of the specific conviction govern.

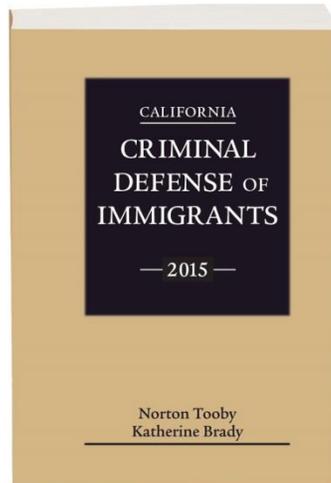
CD4:19.74;AF:5.56, A.24, B.39



## *Publication Announcement*

### California Criminal Defense of Immigrants (CEB 2016)

By Norton Tooby & Katherine Brady



[Details](#)

We are happy to announce the publication of the new 600-page CEB book, California Crimes and Immigration, written by Norton Tooby and Katherine Brady.

This new practice manual was written specifically for California criminal defense attorneys, to assist them in representing foreign national defendants by (1) preventing the criminal disposition from triggering an immigration disaster, and (2) preventing the immigration status, and an immigration hold, from sabotaging all criminal dispositions that depend on the client actually emerging into freedom.

The heart of the book consists of nine chapters outlining "safe haven" pleas and sentences in general, and in specific areas such as Assault and Battery Offenses and Burglary Offenses. These chapters describe the specific immigration threats and their antidotes, making it easier for counsel to comply with the *Padilla* requirement of giving accurate immigration advice at plea, for a wide range of California offenses. In addition, safer alternate pleas are offered, that give equivalent convictions and sentences, but avoid damaging immigration consequences.

## Ninth Circuit

### RELIEF – POLITICAL ASYLUM – REINSTATEMENT

*Perez-Guzman v. Lynch*, \_\_\_ F.3d \_\_\_, 2016 WL 4536572 (9<sup>th</sup> Cir. Aug. 31, 2016) (regulation barring noncitizens in reinstatement proceedings from applying for asylum, 8 C.F.R. § 1208.31, was reasonable interpretation of apparently conflicting provisions of the INA, and entitled to *Chevron* deference).

CD4:15.40, 24.18;CMT3:3.34, 3.29;AF:2.35,  
2.30

### CONVICTION – PROBATION AS PUNISHMENT OR PENALTY

*Reyes v. Lynch*, \_\_\_ F.3d \_\_\_, 2016 WL 4487993 (9<sup>th</sup> Cir. Aug. 26, 2016) (plea of guilty or no contest followed by probation constitutes a conviction under INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), since the probation conditions themselves are restraints on liberty not shared by the public generally).

CD4:7.11;AF:3.32;CMT3:2.4;SH:4.14