ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

This is Issue No. 1, Volume 58 of *The Globe.* Meaghan Vander Schaaf, this year's chair of the International and Immigration Law Section Council provided the Chair's Column in this issue. She is the successor to 58 chairs, starting with Walter J. Cummings, Jr. in 1962-1963. As seemed to be more common in years past, Mr. Cummings served two consecutive terms in 1962-1963 and in 1963-1964. He was followed by Patrick J. Cain, who served 1964-1965 and 1965-1966. Two-year terms did not occur again until Professor Sherif Bassiouni was chair in 1973-1974 and again in 1974-1975. Two terms in a row was not then repeated until Anne Skallerup's appointment for 2011-2012 and 2012-2013.

This year's Section Council benefits from the presence of former section chairs Juliet Boyd, Cindy Buys, Patrick Kinnally,

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Message From the Chair

BY MEAGHAN E. VANDER SCHAAF

Welcome to a new year for the International & Immigration Section Counsel! I am very excited to chair this group of respected attorneys during what will certainly be a unique year. While meetings and other events remain virtual, we will continue working towards our goals.

As we recommit to these goals at the beginning of the year, it is worth reviewing the mission of ISBA International and Immigration Law Section:

- to improve the knowledge and skill of Illinois attorneys in the fields of international business law and immigration law and to inform the general public about these growing areas;
- to raise the awareness of section members about the legal and political issues of international law, both public and private;
- to raise the consciousness of Illinois lawyers representing the foreign born in general legal matters;
- to publish newsletters and sponsor seminars and conferences in furtherance of these goals.

In furtherance of this mission, we have some informative and engaging CLE programing on the agenda. The first program we will be offering this year is on the naturalization application process. The stakes are high in these applications as the information could be used to form a

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and Mark Wojcik.

The contribution of former chairs is demonstrated in this issue of *The Globe* when there are two articles by former chair, Patrick Kinnally, "A New Rule of Evidence: The Effect of Immigration Status in Illinois Civil Proceedings" and "Free Speech and Soliciting Aliens to Violate Immigration Law: *United States v. Sineneng Smith.*"

The Illinois State Bar Association's E-Clips have cited many cases involving immigration law. A list of cases pulled from the E-Clips over the last several months is included in this issue.

As always, thank you to our authors.■

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basis to deny citizenship, or worse, to revoke citizenship. Patrick M. Kinnally, partner Kinnally Flaherty Krentz Loran Hodge & Masur P.C., will explain the complicated naturalization application and identify potential pitfalls for the unsuspecting applicant.

International & Immigration Section Counsel will also be supporting the ISBA's Standing Committee on Women and the Law (WATL) in their upcoming CLE, the third and final part of their "Girls in Crisis" series. This year the CLE program will focus on girls in the immigration system and on trauma-informed lawyering. This program seeks to shine a spotlight on the thousands of girls who remain in immigration detention, foster care, and the juvenile justice system, many of whom are victims of trafficking, domestic abuse, and other forms of violence. Because many of these girls have experienced trauma, and the lawyers and judges that work with them suffer from secondary trauma, the WATL program will also cover effective advocacy for traumatized clients as well as how to cope with the emotional impact of such work. Additional details for this program are forthcoming.

In closing, I want express gratitude to my predecessor, David W. Aubrey, who did a wonderful job as chair of International & Immigration Section Counsel last year. I am looking forward to working with him along with our vice chair, Susan Goldberg, and our secretary, Tom Howard, and the rest of the section counsel on another productive year. Please reach out to me or any member of the section council leadership if we can help you learn more about the section and opportunities to participate throughout the year.■

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The Globe

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A New Rule of Evidence: The Effect of Immigration Status in Illinois Civil Proceedings

BY PATRICK M. KINNALLY

The Illinois General Assembly, following other states, has enacted a new rule of evidence that applies to civil proceedings. S.Ct. Washington, Evidence Rule 413 (2017); California Evidence Code, 351.3, 351.4 (2018) This law, which is not a Supreme Court Rule, announces, with some exceptions, that evidence related to a person's immigration status is not admissible in any civil proceeding with certain exceptions. 735 ILCS 5/18-2901. This statute, effective January 1, 2020, states:

Sec. 8-2901. Admissibility of evidence; immigration status.

(a) Except as provided in subsection (b), evidence related to a person's immigration status is not admissible in any civil proceeding.

(b) Evidence otherwise inadmissible under this Act is admissible if:

(1) it is essential to prove an element of a claim or an affirmative defense;

(2) it is offered to prove an interest or bias of a witness, if it does not cause confusion of the issues or mislead the trier of fact, and the probative value of the evidence outweighs its prejudicial nature; or

(3) a person or his or her attorney voluntarily reveals his or her immigration status to the court.

(c) A party intending to offer evidence relating to a person's immigration status shall file a written motion at least 14 days before a hearing or a trial specifically describing the evidence and stating the purpose for which it is offered. A court, for good cause, may require a different time for filing or permit filing during trial.

Upon receipt of the motion and notice to all parties, the court shall conduct an in camera hearing, with counsel present, limited to review of the probative value of the person's immigration status to the case. If the court finds that the evidence relating to a person's immigration status meets the criteria set forth in paragraph (1), (2), or (3) of subsection (b), the court shall make findings of fact and conclusions of law regarding the permitted use of the evidence.

The motion, related papers, and the record of the hearing shall be sealed and remain under seal unless the court orders otherwise.

(d) A person may not, with the intent to deter any person or witness from testifying freely, fully, and truthfully to any matter before trial or in any court or before a grand jury, administrative agency, or any other State or local governmental unit, threaten to or actually disclose, directly or indirectly, a person's or witness's immigration status to any entity or any immigration or law enforcement agency. A person who violates this subsection commits a Class C misdemeanor.

Public Act 101-0550

The law does not apply to cases which:

- A person's immigration status is necessary to establish an element of a claim or affirmative defense;
- It is offered to prove an interest or bias of a witness, if it does not cause confusion on the issue or mislead the trier of fact; and the probative value of the evidence out weights its prejudicial nature.
- A person or his attorney voluntarily to reveals his or her immigration status to the court.

Clearly, the obligation to use such evidence of a person's immigration status is on the party seeking to employ it. A prehearing motion is required. See, Illinois Rules of Evidence 104(e). The proffer must describe the nature of the evidence as well as its purpose. It must be filed 14 days before the hearing or trial in which the evidence is sought to be used. The trial court is then to conduct an *in camera* hearing to determine the probative value of the person's immigration status. Apparently, this hearing is to be undertaken so no one other than counsel and the court are aware of it since the record of the proffer, related papers and the hearing are to "remain under seal" unless the trial court orders otherwise.

Of course, you can disclose your client's immigration status. Historically, my practice has been to do this in *voir dire* and opening statement. Why? Because it creates credibility and trust. For the most part, the immigrant experience is a positive attribution. A story of relocation, assimilation and hard work. These themes create resonance. Jurors, I believe, can identify with it: although, this law seems to decry that notion.

The final provision of the rule makes it a criminal misdemeanor for any person with the "intent to deter" any person or witness from testifying before a court, a unit of government or a grand jury to disclose a person's immigration status, including any law enforcement agency. This proviso has a great deal of ambiguity. The fact of

what amounts to a person's immigration status is a variable wrinkle which has confounded courts for my life as a lawyer and longer. Although this theory may be well intentioned, how one gauges a person's "intent to deter" seems an elusive overture. Another interesting underlying point of this statute is that, arguably, is does not just apply to parties or witnesses, but "persons." This creates a larger tent of inclusion. How that might be enforced is not stated in the statute. Perhaps creative advocates will provide ideas through declaratory judgment actions or similar remedies provided for in our Code of Civil Procedure, Supreme Court Rules, or common law causes of action.

The breadth of the rule casts a wide moat. Although it does not declare applicability to criminal cases, it apparently pertains to grand jury proceedings. Finally, it appears to apply to any law enforcement agency. Does this mean federal law enforcement departments, such as United States Citizenship and Immigration Services? The Kane County state's attorney or the attorney general? We will see.

In the family court context, how this will play out seems uncertain. An elementary example would be a child support proceeding and whether a person has ability to legally work in the United States. Of course, this cuts both ways. Obviously, the revelation of the fact a person is unauthorized to work denotes an obligor parent cannot pay support for his/her child. No one wants that. Yet, it may be an affirmative defense and could be used as a sword. And, a custody determination seems even more problematic if one parent is at risk for removal from the United States. I trust our judges to get it right.

In another civil context, such as personal injury, the issue is whether a plaintiff's unauthorized immigration status may be used as evidence to show decreased earning capacity as a measure of damages. *Noe Escamilla v. Shiel Sexton Company*, 73 N.E.3d 663 (S.Ct. Ind. 2017) ("*Escamilla*"). It seems well-settled that states like Illinois and Indiana have the ability to regulate employment of persons within their realms. *Arizona v. United States*, 567 U.S. 387 (2012), *Decanas v. Bica*, 424 U.S. 351 (1976).

Escamilla was injured while working at a construction site. He became permanently disabled. He could no longer work as a construction laborer. He filed a complaint for his injuries. He presented evidence to show his lost earning capacity was substantial.

Prior to trial, the defendant filed a motion arguing his immigration status, barred him from recovering since the fact he could be deported at any time meant future lost wages were unlikely. See *Hoffman Plastics Compounds, Inc. v. NLBR* 535 U.S. 137 (2002) ("*Hoffman*"). But *Hoffman* addressed a worker's immigration status in relation to a backpay award under the National Labor Relations Act. The issue was the interplay between two federal statutes: The Immigration Reform and Control Act and Federal labor law. It had nothing to do with the common law of any state, whether constitutional or evidentiary in nature.

Escamilla replied in limine the court should exclude any evidence of his immigration status. The Indiana trial and appellate court permitted evidence of Escamilla's immigration status and excluded his expert witnesses' testimony as to lost future earning capacity. It found such evidence inadmissible since Noe arguably was not legally permitted to work and the "experts" did not include that condition in their opinions.

One of the provisions relied upon by the Indiana Supreme Court to allow Noe Escamilla to pursue his tort action was the Indiana Constitution's "Open Courts" Clause. In Illinois we have a similar provision in our Bill of Rights. This precept declares, "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property. or reputation. He shall obtain justice by law freely, completely and promptly. Illinois Constitution § 12.

Like its Indiana counterpart, the Illinois constitution talks about persons. It does not discuss citizenship. It does not explore whether you have a visa, are an immigrant or have some paper issued by a Federal official which "authorizes" employment. It does not consider that a person loses a right to a remedy because he or she is a non-citizen. The concept of personhood is much more extensive than a status one might have based on classification by others. In my opinion, it is more far ranging than its Indiana parallel. Compare them.

The centerpiece of the *Escamilla* litigation was whether the injured plaintiff, Noe, could introduce into evidence the lost earning capacity he claimed, through expert testimony, was redress to which he was entitled. The defense, in limine, pretrial, made three arguments. Escamilla's immigration status, or lack thereof, should prohibit him from recovering for decreased earning capacity. Next, Escamilla's immigration status should be admissible in evidence since as an unauthorized immigrant he could be deported at any time. And, finally, Escamilla's expert's testimony as to the amount of lost earning capacity was unreliable because it failed to quantify or take into scrutiny the effect of Escamilla's immigration status in reaching their opinions. Escamilla's reply was a request the trial court exclude any mention of his immigration status as unfairly prejudicial and irrelevant. The trial court agreed with the defendant, finding Escamilla's immigration status was relevant to the issue of damages as to lost future income. It struck the expert witness testimony on the issue of decreased or lost earning capacity. The appellate court affirmed.

The Indiana Supreme Court reversed, finding the issue was an evidentiary one in consonance with Indiana constitutional provisions. The court found that immigration status is relevant to damages because one's immigration status may affect his deportation and ability to work in the United States over the time he might be employed. A fact finder could determine the probability of his lack of immigration status could lead to deportation and an inability work. Accordingly, it might reduce damages based on such contingencies. So, Noe's immigration status was relevant. However, relevant evidence is only a part of the calculus of whether such proof is admissible.

Having said that, like Illinois Rule of Evidence 403, the court looked to whether evidence of immigration status was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Illinois Rule of Evidence 403.

In this regard, the court found having collateral in depth mini trials on the likelihood of deportation was confusing as well as unduly prejudicial. It found immigration and the changing of immigration status to be commonplace. That most deportations occurred oftentimes with immigrants with criminal convictions. It found deportations often turned on shifting federal government policies which would prove troublesome for juries to understand and illegal immigration is a sensitive issue for many. It can evoke in some strong views both for and against. Such perspectives can interfere with reasoned deliberation. These are all objective, not subjective, reasons in assessing the probative value of such evidence.

The court concluded that a plaintiff's unauthorized immigration status is inadmissible unless the preponderance of the evidence shows that the plaintiff will be deported. It found the expert testimony as to decreased earnings could be introduced. And, it placed the burden of proof on the proponent of the immigration evidence to show that the probative value of the evidence substantially outweighs its prejudicial effect.

The creation of new evidence laws by our General Assembly is not a new phenomenon. Whether this new fiat survives is unknown. Its intention is a welcome one. Justice Rush's opinion in *Escamilla* is a balanced view. She recognizes at the time Noe Escamilla was hired, whether his immigration status was material apparently was not that important to his Indiana employer as to whether he could simply do his job. He was a construction laborer. As such, he had the right to make his case like any person who worked in that trade. He was, like all of us, a person under the law.■

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Free Speech and Soliciting Aliens to Violate Immigration Law: *U.S. v. Sineneng Smith*

BY PATRICK M. KINNALLY

Provisions of the Immigration and Nationality Act allow a felony prosecution where any person Aencourages or induces an alien to come to, enter, or reside in the United States if the encourager Aknew or recklessly disregarded the fact that such coming to, entry, or residence is or will be in violation of the law. 8 USC 1324(a)(1)(A)(iv), 8 USC 1324 (a)(1)(B)(i) (the statute). The United States Supreme Court heard argument on the validity of this statute at the end of February 2020. Its task will be to determine whether the statute is constitutional because it is overbroad and violates the First Amendment. *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018) (Smith).

The facts of *Smith* possess little allure. Evelyn Sineneng-Smith (Evelyn) operated an immigration consulting business. It does not appear she was a lawyer. The focus of Evelyn's business was to assist individuals to obtain lawful permanent resident status or work authorization from federal immigration authorities. Purportedly, she did this by obtaining labor certifications for her clients as a predicate to obtaining lawful permanent resident status. The problem with Evelyn's representations were, in a word, a canard. The program she told her clients was the basis to help them no longer existed, and had not existed for over a decade. She knew that. But she still signed financial representation agreements with her clients based on the expired program. Essentially, she lied to her clients.

In July 2010, a grand jury indicted Evelyn in a ten-count filing. Among other things, she was charged with violating the statute in three counts. Prior to trial, she moved to dismiss the immigration counts since her conduct was Anot within the scope of the statute; that the statute was impermissibly vague under the 5th Amendment; and the statute violated the First Amendment because it was allegedly content-based restriction on her speech. The motion was denied.

After a 12-day trial, a jury found Evelyn guilty on all three of the immigration counts, as well as three counts of mail fraud. Later, the district court affirmed her convictions on two of the immigration counts and two of the mail fraud counts. Evelyn appealed, arguing her pretrial motion should have been granted. The 9th circuit court of appeals agreed, based on its view that no reasonable reading of the statute could not include speech. At the very least, it opined the statute potentially criminalizes the simple words spoken to a wife, a parent, friend, a neighbor, or co-worker ... I encourage you to stay here.

Under the 9th circuit's analysis of the statute, the following might be construed as criminal conduct under the statute:

- A loving grandparent who encourages her grandson to overstay his Visa by telling him, I encourage you to stay.
- A speech directed to undocumented individuals or perhaps on social media which states something like, I encourage all of you folks out there without legal statute to stay in the United States. We are in the process

of trying to change the immigration laws and the more we can show the potential hardship on people who have been in the country a long time, the better we can convince American citizens to fight for us and grant you a path to legalization.

- Or, an attorney tells her client that she should remain in the country while contesting removal because non-citizens within the Unites States have greater due process rights than those outside the United States, and as a practical matter, the government may not physically deport her until removal proceedings have been completed.

The United States argued the statute should be read narrowly; that its targets, like Evelyn, were unethical and unauthorized practitioners who prey on unknowing potential immigrants to stay unlawfully in the United States. And, in Evelyn's case, she did so for her own financial gain, without legal basis for her supposed representation. Furthermore, it argued that a solicitation exception exists as to the First Amendment, where speech is a centerpiece to the criminal conduct charged. *United States v. Williams*, 553 US 285 (2008) (*Williams*); *United States v. White*, 610 F.3d 956 (7th Cir. 2010) (White). And it indicated, in the scenarios listed by the 9th circuit, that no enforcement actions would occur. Unpersuaded by that concession, the 9th circuit found the statute unconstitutional.

Finally, it proffered that speech, which is integral to criminal conduct, such as fighting words, threats and solicitations, remain categorically outside First Amendment protection. *Williams*, *White*. In its argument, the United States argued that Evelyn's criminal conduct based on her solicitations to her clients was not only untrue, but had no legal foundation and resulted in her financial gain: it was sufficient for the solicitation count verdicts.

As the Williams court noted, offers to engage in illegal activity do not acquire 1st Amendment protection when the offeror is mistaken about the factual predicate of the offer. 553 U.S. at 302. And under the void for vagueness doctrine, Williams observes that a conviction fails to equate with due process if it does not provide a person of ordinary intelligence fair notice of what is proscribed, or lacks any standards so it authorizes discriminatory enforcement.

Finally, Williams said that a statute is vague not due to the difficulty of determining whether the incriminating fact has been proved, but the indeterminacy of what exactly that fact is. Put another way, if criminal culpability is based on the statute's subjective text without any precise definition or settled legal denotations, it fails. *Williams*, 553 U.S. at 305, citing, *Coates v. Cincinnati*, 402 U.S. 611 (1971).

William White created a website. A frequent topic on his website was Matthew Hale, the leader of a white supremacist organization known as the World Church of the Creator. Hale was charged in 2003 and later convicted of solicitation and two counts of obstruction of justice in connection with the alleged murder of a federal court judge. He received a 40-year term of incarceration. *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006)

In 2008, White posted on his website the following information about Juror A who was on the panel in Hale's criminal case. It read:

Gay anti-racist (Juror A) was a juror who played a key role in convicting Matt Hale. Born [date] [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/her] phone number is [phone number], cell phone [phone number] and [his/her] office is [phone number].

Previously, White had posted personal information about the foreperson or Juror A at Hale's trial. On that website, White posted calls for violence against anti-racists. Based on this information, a grand jury returned an indictment charging White with soliciting a crime of violence against Juror A.

Prior to trial, White moved to dismiss the indictment since his internet posting was speech protected by the First Amendment. Basically, his argument was the posting was not a solicitation, and because it was not, it is speech deserving of First Amendment protection. The trial court granted the motion. The 7th Circuit Court of Appeals reversed. It held that the indictment alleged a solicitation offense, even if the solicitation was not explicit. Furthermore, it found that whether the First Amendment protected White's right to post the personal information of Juror A is based on his intent in posting Juror A's personal information. If White's intent in posting that information was to request one of his readers harm Juror A, then the crime of solicitation is complete, regardless if no act occurred or whether Juror A was harmed. *Williams.* For many, this may seem too broad a proscription. But let's not forget this case came to the court on the pleadings, not like a jury's verdict, as was the situation in Smith. Contrariwise, if White's posting was to make a political statement about sexual orientation, then no solicitation would occur, since the requisite intent required for the crime is absent. The court left the question up to the jury to decide, and the court to determine what instructions should be given either under First Amendment or not. *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985) (Freeman).

In Freeman, the issue was whether jury instructions should have been given since much of the speech concerned abstract advocacy, which is protected under the First Amendment. On the other hand, solicitation turns on purposefully encouraging another to commit a particular crime. It may be that if the statute is read as being confined to the solicitation of specific criminal conduct it should pass muster under the First Amendment.

The concerns raised by the 9th Circuit revolve around abstract advocacy. Lawyers, as have I, advocate for their clients not to leave the United States because they have better access to courts and for the very reason that immigration authorities have a hard time of removing individuals (i.e., lack of passport from native country). There is nothing criminal about that. It is true: and pure advocacy. On the other hand, what was the precise solicitation made by Evelyn to her clients? Residing in the United States when she objectively knew that was an impossibility under the supposed law she claimed still existed? Perhaps. I do not know. A jury of her peers said it was.

The facts in Smith are not sympathetic.

A jury's verdict, and largely a judge's confirmation of those findings, should not be disregarded lightly. Although in today's world it may seem otherwise, opinions matter. And, because they may be different does not denote they are unprincipled. There is no doubt the statute the 9th Circuit invalidated casts a wide net. So does the 9th Circuit's view. It seems to me that what is lacking is what the contours of a solicitation embrace in a criminal trial. In this context, what amounts to a solicitation requires some specific delineation. If that is a matter of law, then the Supreme Court needs to explain what that is. Its guidance as to what the First Amendment proscribes in a criminal solicitation case is important to all our citizenry. Regardless of personal perspectives, I think we can all agree on that proposition. A reconciliation of *Williams*, *White*, and S*mith* seem to be the result expected. ■

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Recent Immigration Case Decisions

The following case summaries involving immigration law have recently appeared in the ISBA E-Clips:

Odei v. U.S. Dept. of Homeland Security, No. 18-3105 (September 10, 2019) N.D. Ill., E. Div. Affirmed Dist. Ct. did not err in dismissing plaintiff-alien's action under Immigration and Nationality Act, Administrative Procedure Act and Religious Freedom Restoration Act that challenged defendant's decision that found that plaintiff was inadmissible on B-1/B-2 visa under 8 USC section 1182(a)(7), where plaintiff entered U.S. for purposes of speaking at churches and youth groups, performing missionary work and meeting with his academic advisors at plaintiff's U.S. university. Section 1252(a)(2)(A bars judicial review of any order of removal pursuant to instant expedited removal procedure set forth in 8 USC section 1225(b)(1)(A)(i), and instant lawsuit was challenge to defendant's determination that plaintiff was removable for lack of proper visa that fit definition of "order of removal" for purposes of section 1225(b)(1)(A)(i). Fact that plaintiff eventually withdrew his application for admission to U.S. and voluntarily left U.S. did not require different result.

Malukas v. Barr, No. 19-1633 (October 15, 2019) Petition for Review, Board of Immigration Appeals Petition denied and dismissed in part Board did not err in denying alien's motion to reopen his removal proceedings under circumstances where: (1) original removal proceedings ended in 2003; (2) alien filed first motion to reconsider in 2003, which was ultimately denied; and (3) instant second motion to reconsider, which was filed in 2018, was denied on grounds that said motion was time and number barred, since aliens are allowed only one motion to reconsider that must be filed within 90 days of removal order. Moreover, while Board had discretion to reopen removal proceedings sua sponte, alien's request to Board to reopen his removal proceedings sua sponte is subject to same time and number limitations. Also, Board's decision to deny reopening case sua sponte is not subject to judicial review.

Ramos v. Barr, No. 19-1728 (November 7, 2019) Petition for Review, Order of Board of Immigration Appeals Petition denied Record contained sufficient evidence to support I.J.'s removal order based on fact that alien was native and citizen of Mexico, and fact that alien had been convicted of two drug distribution counts. While alien asserted that he should have been deemed U.S. citizen due to fact that his mother was U.S. citizen at time of his birth, relevant section of INA prevented him from automatically deriving citizenship because his mother had not resided in U.S. for 10 years prior to his birth in Mexico. Moreover, although plaintiff asserted that said INA provision violated Equal Protection Clause, because other children born abroad could obtain automatic citizenship under different circumstances, Ct. found no equal protection violation, since governmental had rational basis for imposing 10-year physical presence requirement to ensure that children born abroad who became citizens had ties to United States.

Garcia-Arce v. Barr, Nos. 19-1453 and 19-2312 Cons. (December 30, 2019) Petition for Review, Board of Immigration Appeals Petition denied Board did not err in affirming IJ's denial of alien's applications for withholding of removal to Mexico under 8 USC section 1231(b)(3) and CAT relief based on her fear of persecution and torture if forced to return to Mexico, even though alien alleged that she feared physical and sexual assaults by her brother and uncle located in Mexico, as well as feared that third individual would sell her to gang to repay drug debt. Board could properly find that alien could relocate to other part of Mexico to avoid any threat of future persecution, where alien had previously lived in different part of Mexico away from her hometown for four years without incident. Moreover, alien waived any CAT claim due to her failure to raise any substantive argument supporting such claim, and alien's ability to live in different part of Mexico effectively defeated such claim. Also, Board did not err in denying alien's request to reopen removal proceedings based on her claim of ineffective

assistance of counsel, where: (1) alien had failed to present evidence in motion to support her proposed claim (that was not was advanced by counsel), i.e., that she had been persecuted in Mexico on account of her mental condition; and (2) alien had failed to provide evidence to call into question counsel's professional judgment not to pursue CAT claim on appeal.

Simental-Galarza v. Barr, No. 19-2126 (January 2, 2020) Petition for Review, Order of Board of Immigration Appeals Petition denied Board did not commit legal error when finding that alien did not qualify for relief from removal, where Board found that alien failed to establish requisite hardship arising out of any removal to Mexico. Ct. of Appeals lacked jurisdiction to consider merits of Board's discretionary decision to deny alien's claim that he was entitled to said relief as battered spouse under 8 USC section 1229b(b)(2). Ct. of Appeals, though, had jurisdiction to consider alien's claim that Board and IJ failed to address his claim that removal to Mexico was not warranted given his alleged post-traumatic stress disorder, dependent personality disorder and lack of treatment options in Mexico. However, alien's claim of legal error was without merit, where record showed that IJ actually considered such claim via alien's documentary evidence regarding alien's mental state and decided that it did not establish extreme hardship, since alien failed to show that he would be unable to obtain either employment or treatment of his mental issues in Mexico.

Baez-Sanchez v. Barr, No. 19-1642 (January 23, 2020) Petition for Review, Order of Board of Immigration Appeals Petition granted Bd. erred in failing to comply with Ct. of Appeals' remand order directing it to consider: (1) in context of alien's request for waiver of inadmissibility for purposes of seeking U visa, whether any statute transferred to Secretary of Homeland Security Attorney General's power to waive alien's inadmissibility; and (2) whether power to waive inadmissibility may be exercised only in favor of aliens who apply from outside U.S. Record showed that IJ had previously granted alien's request for said waiver, and Ct. of Appeals, in affirming IJ's order, found that Attorney General in this case had retained his power to grant waiver of admissibility, and that instant IJ could exercise said power on Attorney General's behalf. Ct. further noted that Attorney General did not ask for remand on propriety of IJ's granting of waiver in this case.

U.S. v. Hernandez-Perdomo, Nos. 19-1964 & 19-2113 Cons. (January 23, 2020) N.D. Ill., E. Div. Affirmed Dist. Ct. did not err in denying defendants' motions to dismiss their indictments for illegal reentry into U.S. after having been removed in violation of 8 USC section 1326(a), even though both defendants had attacked their prior in absentia removals under 8 USC section 1326(d) based on defective notices to appear (NTA) for removal proceedings that had failed to set forth time for said removal proceedings. Defendants failed to exhaust their administrative remedies as required under section 1326(d), where defendants failed to move to reopen their removal proceedings as soon as they had become aware of their removal orders. Ct. rejected defendants' claims that immigration judge had duty to inform them of motion to reopen remedy, or that their brief detentions in ICE prior to their removal made filing of motion to reopen not feasible. Ct. further noted that catching of errors in deficient NTAs would not have led to non-discretionary relief from removal, where officials could have issued new compliant NTA if either defendant had alerted them to deficient NTA.

Meriyu v. Barr, No. 19-1892 (February 26, 2020) Petition for Review, Order of Board of Immigration Appeals Petition denied Board did not abuse its discretion in denying alien's motion to reopen removal proceedings that had ended in IJ entering removal order in absentia, where instant motion was filed 14 years after removal order had been entered. Board could properly find that motion to reopen was untimely, where it had been filed after expiration of relevant 90-day period after removal order had been entered. Moreover, while instant period does not apply if alien could show that conditions in Indonesia had materially changed since time of removal order, record supported IJ's finding that any evidence of ongoing discrimination and mistreatment of some segments of Indonesian society was similar and not materially different from conditions alleged in alien's asylum application. As such, instant motion was untimely.

Kansas v. Garcia, No. 17-834 (March 4, 2020) The Kansas statutes under which respondents, three unauthorized aliens, were convicted—for fraudulently using another person's Social Security number on state and federal tax-withholding forms submitted to their employers—are not expressly preempted by the Immigration Reform and Control Act of 1986; and respondents' argument that those laws are preempted by implication is rejected.

Guerra Rocha v. Barr, No. 18-3471 (March 4, 2020) Petition for Review, Order of Board of Immigration Appeals Petition granted Remand of removal proceedings was required, where Board failed to provide reasoned decision when affirming IJ's order finding that alien and her sons were removable despite fact that alien made prima facie showing of eligibility for nonimmigrant U-visa arising out of her assistance to police officials. Record showed that: (1) U-visa application typically takes 52 months to process; (2) alien filed her U-visa application on October 10, 2017; (3) hearing on alien's asylum application was unexpectedly moved up to October 20, 2017; and (4) alien's counsel had failed to mention U-visa application at October 20, 2017 hearing. While alien sought remand so that IJ could consider request to continue removal proceedings in light of her eligibility for U-visa status, Board failed to adequately consider said request and failed to apply its own precedent in denying continuance request, where: (1) Sosa, I. & N. Dec. 807, requires, among other things, IJ to consider likelihood of success on alien's U-visa application; and (2) Attorney General did not dispute that alien was prima facie eligible for U-visa. Moreover, Board provided only cursory, single-sentence disposition of continuance request that failed to address alien's prima facie eligibility for U-visa.

Alvarez-Espino v. Barr, No. 19-2289 (March 6, 2020) Petition for Review, Order of Board of Immigration Appeals Petition denied Board did not abuse its discretion in denying alien's motion for continuance of

his appeal of IJ's removal order so that alien could pursue pending U-visa application that would allow him to remain in U.S., even though alien argued that his initial legal counsel was ineffective for failing to ask him whether he was crime victim that formed premise of U-visa application. While Board should not have faulted alien for failing to inform his legal counsel about alien's status as crime victim, since it was up to legal counsel to ask alien about all potential grounds to prevent removal, alien could not show any prejudice arising out of any ineffective assistance of counsel, because: (1) alien remained able to continue pursuit of U-visa or any other potential immigration relief from Mexico; and (2) mere delay in filing instant application seeking U-visa relief on behalf of alien does not constitute prejudice to alien.

U.S. v. Manriquez-Alvarado, No. 19-2521 (March 24, 2020) C.D. Ill. Affirmed in prosecution on charge of defendant-alien being in U.S. illegally after having been removed in 2008, Dist. Ct. did not err in denying defendant's motion to dismiss his indictment on said charge based on defendant's claim that immigration officials never had jurisdiction to remove him in 2008 because his Notice to Appear lacked date for removal hearing. Ortiz-Santiago, 924 F.3d 956, found that failure to include hearing date in Notice to Appear was only claims-processing statutory error, as opposed to jurisdictional error, and thus Dist. Ct. could properly deny defendant's motion to dismiss instant charge. Ct. further noted that: (1) defendant had stipulated to his 2008 removal and had waived his rights to hearing or to judicial review; (2) had defendant made timely challenge to his 2008 Notice to Appear, he would have been issued new Notice that contained hearing date; and (3) defendant did not contend that he had any substantive defense to his 2008 removal.

Barton v. Barr, No. 18-725 (April 24, 2020) In determining eligibility for cancellation of removal of a lawful permanent resident who commits a serious crime, an offense listed in 8 U. S. C. §1182(a)(2) committed during the initial seven years of residence need not be one of the offenses of removal.

Chen v. Barr, No. 19-2375 (May 29, 2020) Petition for Review, Order of Board of Immigration Appeals Petition denied Board did not err in denying alien's request to reopen asylum proceedings so that she could seek cancellation of removal relief based upon her 10-year presence in U.S. Record showed that: (1) instant motion to reopen was filed beyond 90-day period following Board's adverse decision in original removal proceeding; and (2) alien had not sought cancellation of removal relief during her original removal proceeding, even though 10th anniversary of her presence in U.S. had occurred during original proceedings. While alien argued that she was entitled to seek cancellation of removal relief via instant motion to reopen because her Notice to Appear at original removal proceeding did not contain time and place notification, which allowed her 10-year presence in U.S. period to continue to run, and because she did not know that she had defective Notice until after Pereira, 138 S.Ct. 2105, which occurred years later in 2018, alien was not entitled to any relief, where: (1) time and place defect in Notice is not jurisdictional defect; and (2) alien failed to make timely objection to said defect, where she waited until after Pereira to raise issue. Moreover, alien otherwise failed to establish any prejudice arising out of defective Notice, where she appeared at all scheduled hearings in her original removal proceeding. As such, alien could not allow instant procedural error associated with defective Notice to lurk in record until 10-year presence in U.S. period has passed and then assert said error to support request for cancellation of removal.

Nasrallah v. Barr, No. 18-1432 (June 2, 2020) Title 8 U. S. C. §§1252(a)(2)(C) and (D) do not preclude judicial review of a removable noncitizen's factual challenges to an order denying relief under the international Convention Against Torture, which protects noncitizens from removal to a country where they would likely face torture.

Morales v. Barr, No. 19-1999 (June 28, 2020) Petition for Review, Order of Board of Immigration Appeals Petition granted during pendency of alien's U visa petition, alien was charged as removable based upon two grounds of inadmissibility. IJ eventually agreed to waive both grounds of inadmissibility so that alien could pursue U visa petition, but later ordered alien removed as charged. While alien contended on appeal that IJ could not use either ground to support removal order once IJ had waived both grounds of inadmissibility, Ct. of Appeals found that IJ could enter removal order, since waivers were not tantamount to making alien unremovable. However, remand was required with respect to alien's requests to continue removal proceedings to seek U visa relief or to administratively close case instead of ordering removal, where: (1) Bd. should consider holdings in two new cases, i.e., Mayen, 27 I. & N. Dec. 755, and Guerra Rocha, 951 F.3d 848, which set forth appropriate factors for determining whether alien's request for continuance was proper; and (2) IJ held improper belief that immigration judges are precluded from administratively closing cases temporarily when appropriate.

Marquez v. Barr, No. 19-1025 (July 13, 2020) Petition for Review, Order of Board of Immigration Appeals Petition denied Record supported IJ's denial of alien's applications for asylum and withholding of removal, even though alien alleged that she had been victim of threats based on her sexual orientation, and that she could not live as openly gay woman in Mexico without being persecuted. IJ could properly find that threats alien received regarding cuts to her skin and statement that something "bad" would happen to her children if alien kept seeing another female were not so extreme to constitute persecution, since said threats did not involve grave harm, and alien remained in Mexico without incident for four months following threats. Also, alien did not provide evidence that state actors in Mexico tolerated systematic effort to kill or seriously injure gay persons, where Mexico legalized gay marriage and prohibited discrimination based on sexual orientation. Moreover, alien's claims of economic hardship if forced to return to Mexico were generally shared by all segments of population in Mexico.■