

# Immigration Practice Tips

## Defense-Relevant Immigration News

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### **DMV Policy Results in Criminal Charges Lodged Against Noncitizens—How to Defend Against Charges to Minimize Immigration Consequences**

In early 2004, the New York State Department of Motor Vehicles (DMV) began sending out hundreds of thousands of letters threatening to revoke the driver's licenses of residents whose recorded Social Security numbers did not match their names. The overwhelming majority of affected residents are noncitizens who have not yet legalized their immigration status in this country and therefore did not have valid social security numbers to submit when they registered with the DMV.

Many of these noncitizens are now facing criminal prosecution in connection with their alleged submission to the DMV of false social security numbers or possession of false social security cards. In many cases, these New York residents are already in the process of legalizing their immigration status, or may have a basis to do so in the future. Because certain criminal dispositions may permanently bar noncitizen defendants from legalizing their immigration status and increase the risk of their deportation, defense attorneys should be aware of which criminal dispositions may trigger such a bar, advise their noncitizen defendants accordingly, and, if dismissal is not an option, craft a plea result that will avoid or minimize such a consequence.

In most cases reported to NYSDA, the criminal charges people are facing as a result of the DMV policies are misdemeanor and felony Criminal Possession of a Forged Instrument (Penal Law 170.20, 170.25) and Offering a False Instrument for Filing (PL 175.30, 175.35). The following are some tips practitioners may follow in defending noncitizen clients against these charges:

- **Avoid a disposition for a “crime involving moral turpitude.”** In general, “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime” is barred from adjusting her immigration status to that of lawful permanent resi-

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dent or otherwise becoming lawfully “admitted” to the United States. Under immigration laws, any crime that has as an essential element the intent to deceive or defraud will almost certainly be deemed a crime involving moral turpitude. Offenses related to forgery have also generally been held to be crimes involving moral turpitude. Practitioners should therefore avoid guilty convictions for the New York Criminal Possession of a Forged Instrument offenses, whether misdemeanor or felony (both PL 170.20 and 170.25 include an element of intent to “defraud, deceive or injure”), and for the felony Offering a False Instrument for Filing, 1st Degree (PL 175.35 includes an element of intent to defraud). A conviction for the misdemeanor Offering a False Instrument for Filing, 2d Degree (PL 175.30), the misdemeanor Making a Punishable False Written Statement (PL 210.45), or the misdemeanor Tampering with Public Records, 2d Degree (PL 175.20) might also be deemed a “crime involving moral turpitude.” Some caselaw exists, however, to support the argument that such a conviction is not a crime involving moral turpitude because fraudulent intent is not an element of either offense.<sup>1</sup> Some alternative dispositions that would not be crimes involving moral turpitude include New York's Disorderly Conduct (PL 220.40) and New York's Adjudgment in Contemplation of Dismissal. One public defender reported successfully negotiating a plea to the Class A misdemeanor Criminal Trespass (PL 140.15), also not likely to be a crime involving moral turpitude.

- **If you can't avoid a disposition for a “crime involving moral turpitude”, avoid a felony disposition and avoid an actual sentence imposed of more than six months.** An automatic exception to the “crime involving moral turpitude” bar to adjustment of status exists for one crime involving moral turpitude that is not punishable by more than one year (*i.e.* that is not a New York felony) and for which an actual sentence of imprisonment imposed is six months or less. If your client does not have any prior conviction for a crime involving moral turpitude, then a conviction for the misdemeanor Criminal Possession of a Forged

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<sup>1</sup> See *Matter of Di Filippo*, 10 I&N Dec. 76 (BIA 1962)(conviction under Canadian statute for making false statement is not a crime involving moral turpitude where conviction can be obtained without proof that the false statement was made for the purpose of obtaining benefits); *Matter of BM*, 6 I&N Dec. 806 (BIA 1955)(8 USC 1001 offense of making a “false, fictitious, or fraudulent statement” did not necessarily involve fraud because the statute is written in the disjunctive and only required a willful and knowingly false statement, not one done with evil intent); but see *Matter of Correa-Garces*, 20 I&N Dec. 451 (BIA 1992)(citing *Kabongo v. INS*, 837 F2d 753 (6<sup>th</sup> Cir. 1988) for the proposition that convictions for making false statements have been found to involve moral turpitude, and finding that conviction for making a false statement in an application for a passport is crime involving moral turpitude because was done in order to obtain the passport fraudulently).

Instrument or for the misdemeanor of Attempted Offering a False Instrument for Filing, 1st Degree, in each case with a sentence imposed of six months or less, would fall under this “petty offense” exception. Because a conviction for the misdemeanor Offering a False Instrument for Filing, 2d Degree (PL 175.30), the misdemeanor Making a Punishable False Written Statement (PL 210.45), and the misdemeanor Tampering with Public Records, 2d Degree (PL 175.20) carry some risk of also being deemed a crime involving moral turpitude as explained above, avoiding a sentence of more than six months for these offenses as well would preserve the benefit of the petty offense exception.

- **In any event, avoid any admissions on the record of an intent to deceive or defraud.** This might preserve an argument that your client’s offense is not a crime involving moral turpitude.

The above practice tips assume that your client is not a lawful permanent resident (greencard holder), but is otherwise a noncitizen who may want to avoid the bars to becoming a lawful permanent resident. If your client is a lawful permanent resident, or for any other additional advice on how to defend against these DMV-related criminal charges, defense counsel may call the IDP hotline Tuesdays and Thursdays, from 1:30pm to 4:30pm, at 212-898-4132.

### ***2nd Circuit Holds that an Individual with a pre-1996 Trial Conviction May Be Able to Pursue Waiver of Deportation Existing under pre-1996 Law***

The Court of Appeals for the 2nd Circuit held that an individual convicted after trial, before the 1996 repeal of an immigration provision giving the government discretion to waive deportation based on such a conviction, may be able to challenge the retroactive application of the 1996 repeal. *Restrepo v McElroy*, 369 F3d 627 (2d Cir. 2004).

Prior to its decision in *Restrepo*, the 2nd Circuit had ruled against retroactive application of the 1996 waiver repeal only in cases involving guilty plea convictions, based on a narrow reading of the 2001 US Supreme Court decision in *INS v St. Cyr*, which held that lawful permanent resident immigrants who pled guilty prior to 1996 could not be retroactively barred from applying for such relief. *INS v St. Cyr*, 533 U.S. 289 (2001). The Second Circuit refused to extend *St. Cyr* to cases involving trial convictions. See *Rankine v Reno*, 319 F3d 93 (2d Cir. 2003); *Theodoropoulos v INS*, 313 F3d 732 (2d Cir. 2003) (finding that “a petitioner convicted after a trial rather than on a guilty plea has not faced a substantial change in expectations... [because a] jury’s verdict, not the potential of discretionary waiver or the IIRIRA’s removal thereof, deter-

mined the legal consequence of the decision to seek trial.”).

In *Restrepo*, the 2nd Circuit did not retreat from its prior precedents rejecting challenges to retroactive application of the waiver repeal in trial conviction cases. The Court found, however, that, regardless of whether petitioner Restrepo’s conviction was based on plea or trial, he may have subsequently foregone his right to apply for 212(c) relief “affirmatively”—that is, before being placed in deportation proceedings—in reliance on his ability to apply for 212(c) relief later when he was placed in such proceedings. The Court then remanded to the district court “to determine whether Petitioner can himself claim the benefit of this argument.” The Court stated: “We do so because we deem it wise to let the district court decide, in the first instance, whether an alien such as Petitioner must make an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date (and, if he must, whether Petitioner can do so), or whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate.” Petition by the government for rehearing was denied, and the case is now pending on remand before US District Judge Jack Weinstein in the Eastern District of New York.<sup>2</sup>

In a related positive development for New York and other immigrants who are detained by federal immigration authorities in New Jersey and Pennsylvania and whose cases are heard in immigration courts in those states, the 3rd Circuit rejected the reasoning of the 2nd Circuit in *Rankine* in a case involving a New York immigrant detained in Pennsylvania. *Ponnapula v Ashcroft*, 373 F3d 480 (3rd Cir. 2004) (*amicus* brief filed by NYSDA and the National Association of Criminal Defense Lawyers). The 3rd Circuit stated: “Our disagreement with the courts that have held that IIRIRA’s repeal of § 212(c) relief is not impermissibly retroactive with respect to aliens who went to trial is that those courts have erected too high a barrier to triggering the presumption against retroactivity.” The Court then applied the presumption, holding that individuals such as Ponnappula “who affirmatively turned

<sup>2</sup> In a subsequent 2nd Circuit decision, the author of the *Restrepo* decision, Judge Guido Calabresi, clarified: “One can imagine a case in which the INS has for years declined to bring deportation proceedings against an alien, despite his conviction for a deportable crime, because, in the INS’s estimation, the alien would be a very strong candidate for 212(c) relief. . . . Such an alien might reasonably rely on the INS’s inaction and decide on that basis to make important commitments to his residency in the United States (such as by marrying, establishing a business, and losing ties with his home country) only later to find that, after Congress had eliminated 212(c) relief, the INS seeks to deport him. Under these circumstances—and where Congress’s intent as to the retroactivity of the elimination of 212(c) relief is unclear—an alien might argue with some force that he has demonstrated the kind of reasonable reliance and settled expectations . . . that would render the elimination of 212(c) relief impermissibly retroactive if applied to him.” *Thom v. Ashcroft*, 369 F3d 158 (2d Cir. 2004)(citations omitted).

down a plea agreement had a reliance interest in the potential availability of § 212(c) relief.”

***Updated Removal Defense Checklist in Criminal Charge Cases Available***

The IDP’s valuable resource, “Removal Defense Checklist in Criminal Charge Cases,” was recently updated to reflect legal developments through July 1, 2004. Find it on the NYSDA web site, [www.nysda.org](http://www.nysda.org) and look under NYSDA Resources for the Immigrant Defense Project page, where the checklist and other materials can also be found. ↻