

Immigration Practice Tips

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Board of Immigration Appeals Holds that a Conviction under the First Subsection of the New York Misdemeanor Assault Statute Is a Conviction of a Crime Involving Moral Turpitude

On July 25, 2007, the Board of Immigration Appeals held that the New York offense of misdemeanor assault is a crime involving moral turpitude triggering deportability and other adverse immigration consequences. See *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

The Board began its analysis by noting that the Immigration and Nationality Act does not define the term "crime involving moral turpitude." However, it stated that the Board has held that the term "encompasses conduct that shocks the public conscience as being 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Id.* at 240 (quoting *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999)).

After commenting that crimes committed intentionally or knowingly have historically been found to involve moral turpitude, and that crimes committed recklessly "may" also be so found, the Board reviewed its case law on assault offenses, which the Board has said may or may not involve moral turpitude.

After reviewing its case law, the Board stated:

The reasoning from these decisions reflects that at least in the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. This body of law, then, deems intent to be a crucial element in determining whether a crime involves moral turpitude.

Id. at 242.

*The IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For backup assistance on individual cases, call the IDP at (212) 725-6422. We return messages. IDP is located at 3 West 29th Street, Suite 803, New York, NY 10001.

The Board then applied its case law to the assault conviction at issue in *Matter of Solon*, a 2002 conviction under Penal Law 120.00(1). Section 120.00(1) provides that "[a] person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person." The Board found that an offense under this subsection of the New York misdemeanor assault statute requires both specific intent to cause physical injury and actual physical injury. It thus distinguished a 120.00(1) offense that requires specific intent to cause physical injury from general intent simple assault offenses, which are not considered to involve moral turpitude. It also found that a section 120.00(1) offense requires more than a mere offensive touching since "physical injury," as set forth in Penal Law 10.00(9), states that the physical injury required must involve "impairment of physical condition or substantial pain," as opposed to mere "pain."

The Board concluded:

In summary, as we understand New York law, a conviction for assault in the third degree under section 120.00(1) of the New York Penal Law requires, at a minimum, (1) that the offender acts with the conscious objective to cause another person impairment of physical condition or substantial pain of a kind meaningfully greater than mere offensive touching, and (2) that such impairment of physical condition or substantial pain actually results. Thus, a conviction under this statute requires, at a minimum, intentionally injurious conduct that reflects a level of depravity or immorality appreciably greater than that associated with the crime at issue in *Matter of Sanudo*, [23 I&N Dec. 968], 971-72 (stating that the minimal conduct necessary for a battery conviction under section 242 of the California Penal Code was in the nature of a simple battery). Accordingly, we conclude that a conviction under section 120.00(1) of the New York Penal Law is a conviction for a crime involving moral turpitude.

Matter of Solon, 24 I&N Dec. at 245.

Practice Tip

Conviction of a crime involving moral turpitude (CIMT) may trigger deportability, inadmissibility, or ineligibility for citizenship. See Chapter 3, *Representing Immigrant Defendants in New York*. As the Board of Immigration Appeals makes clear in *Matter of Solon*, federal immigration authorities will deem a conviction under subsection 1 of Penal Law 120.00 a CIMT and thus, such a conviction may trigger these adverse consequences.

Nevertheless, *Matter of Solon* provides further support for the conclusion that convictions under subsections 2 and 3 of Penal Law 120.00 will not be deemed CIMTs. For example, the Board cited its prior decision in *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), which held that if an

assault offense requires only reckless conduct, it must require a showing of “serious bodily injury” in order to be considered to involve moral turpitude. See *Matter of Solon*, 24 I&N Dec. at 242. Therefore, a conviction under Penal Law 120.00(2) should not be considered a CIMT. It also suggests that there may be alternative Penal Law dispositions covering lesser conduct that will not be deemed CIMTs. For example, the Board noted that Penal Law 120.15 (menacing in the third degree) continues to “prohibit some of the lesser conduct traditionally encompassed within common-law assault,” which has not been considered to be a CIMT. *Id.* at 244 n.5.

Thus, a New York defense practitioner should try to negotiate a plea to a subsection of the misdemeanor assault statute or a lesser or alternative offense that would not necessarily be considered a CIMT. Where a criminal statute, such as Penal Law 120.00, is divisible or ambiguous as to whether the offense involves moral turpitude, the Board will look beyond the statute only to the record of conviction in order to determine whether the offense is a CIMT. The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings. If you can keep out of the record of conviction information that establishes that your client was convicted of the portion of the statute that covers conduct that involves moral turpitude (*i.e.*, subsection 1), you may help your noncitizen client avoid removal or other negative immigration consequences. See Section 4.3 (Immigration Consequences Of Dispositions Involving Broadly Defined State Offenses—Categorical Approach And Divisibility Analysis), in *Representing Immigrant Defendants in New York*.

In a Recent Unpublished Decision, the Board of Immigration Appeals Considers Whether a New York State 2nd Degree Harassment Conviction May Constitute a Charge of Deportability as a “Crime of Domestic Violence”

In a recent unpublished, non-precedential decision, the Board of Immigration Appeals considered whether an individual convicted of harassment in the second degree under Penal Law 240.26 would be deportable as an immigrant convicted of a “crime of domestic violence” under the Immigration and Nationality Act 237(a)(2)(E)(i), 8 U.S.C. 1227(a)(2)(E)(i). See *In re Lee*, A 47926006 (BIA June 11, 2007). In *Lee*, the Board concluded that Penal Law 240.26 is a “divisible” statute for deportability purposes, meaning that it encompasses some offenses that would be considered a “crime of domestic violence” and some that would not. The Board did not specify which sections of Penal Law 240.26 would constitute a “crime of domestic violence.” However, applying a categorical approach and examining the respondent’s record of conviction, the Board explained that it could not determine the threshold

question of which parts of the statute were implicated by the respondent’s conviction, and thus it could not conclude that the respondent’s offense involved a “crime of domestic violence.” Therefore, the Board held that the respondent was not deportable on the basis of having been convicted of a “crime of domestic violence.”

Practice Tip

Although this is an unpublished decision, *In re Lee* indicates that a Penal Law 240.26 conviction may be considered a “crime of domestic violence,” which is a ground of deportation for lawfully admitted immigrants such as lawful permanent residents. Also note that the conviction may be considered a “crime involving moral turpitude.” Less risky options for these clients include an adjournment in contemplation of dismissal or a disorderly conduct conviction under Penal Law 240.20, neither of which would provide grounds for removal. However, if the client has to plead to harassment in the second degree, defense attorneys should try to keep any detail out of the record of conviction that would establish to which subsection of the harassment statute the client’s conviction pertains.

New York State Legislature Passes and Governor Spitzer Signs Legislation that Authorizes Early Release for Deportation for Noncitizen Inmates Sentenced or Resentenced to Definite Terms of Imprisonment

On July 18, 2007, New York State Governor Elliot Spitzer signed S.6228/A.3286 (Chapter 239), a technical fix bill that amends the New York Executive Law to clarify that the Board of Parole may grant discretionary early release to non-citizen inmates for purposes of turning them over to federal immigration authorities for deportation *even if the inmate was sentenced to a determinate sentence*.

Specifically, Chapter 239 amends section 259-i of the Executive Law to provide that, in addition to its authority to grant parole from an indeterminate sentence, the Board of Parole may grant release for deportation from a determinate sentence to a noncitizen who is not otherwise ineligible under existing law (*i.e.*, convicted of a violent offense). Early release remains conditioned on the prior issuance of a final deportation order and assurances from federal immigration authorities that deportation will occur promptly.

Enactment of this bill was necessary to preserve the Parole Board’s authority to release noncitizen drug offenders for deportation after the 2004 and 2005 Drug Law Reform Acts amended state law to require that drug offenders be sentenced to determinate terms of imprisonment. Also, some drug offenders who were convicted before the enactment of the Drug Law Reform Acts had been resentenced to a determinate term or are eligible to be resentenced to a determinate term. Prior to this bill,

Executive Law 259-i appeared to authorize early release for deportation only for noncitizen offenders sentenced to indeterminate sentences and eligible for parole. This created a hurdle for many noncitizens otherwise eligible for early release for deportation, especially since the overwhelming majority of noncitizen inmates granted early release purposes have been drug offenders.

The new legislation restores the possibility of early release for drug offenders sentenced to determinate terms. As the bill sponsor's memo states: "When sentences for drug offenders were changed from indeterminate to determinate terms, the legislature did not intend to render such offenders ineligible for early release for deportation only. . . . Therefore, this bill clarifies the existing law and allows inmates serving a determinate sentence who are not otherwise ineligible to be considered for parole for deportation purposes."

NYSDA Publishes and Begins Distribution of Updated and Supplemented Fourth Edition of IDP Immigrant Defense Manual

NYSDA has published and begun distribution of an updated and supplemented Fourth Edition of *Representing Immigrant Defendants in New York* (formerly *Representing Noncitizen Criminal Defendants in New York State*). The Fourth Edition includes many new and/or improved features, including the following:

- **Entire manual updated** to incorporate the many significant case law and practice developments since publication of the Third Edition, including the 2006 US Supreme Court decision in *Lopez v. Gonzales* on the breadth of the "drug trafficking crime" aggravated felony deportation category and the 2004 US Supreme Court *Leocal v. Ashcroft* decision on the breadth of the "crime of violence" aggravated felony deportation category, and other federal court and agency decisions potentially altering the immigration implications of conviction of the following NYS offenses:
 - drug possession offenses
 - DWI offenses
 - offenses involving reckless or negligent conduct generally
 - theft and burglary offenses
 - fraud and deceit offenses
 - sex abuse offenses involving minors
 - certain attempt or conspiracy offenses
- **Manual supplemented** to include new sections on analyzing immigration implications of the following:
 - convictions of broadly defined New York State offenses that cover deportable and non-deportable conduct
 - convictions of NYS accessory and preparatory offenses

- conviction appeals
- post-conviction vacatur and resentencing

- **Updated and expanded Quick Reference Chart for NYS Offenses, including quick reference practice tips** for criminal and immigration practitioners on avoiding adverse immigration consequences for noncitizen clients.
- **Over 200 pages of additional updated charts and outlines** on criminal/immigration issues to assist criminal and immigration practitioners in effective representation of noncitizen clients.
- **Updated and improved one-page Immigration Consequences of Criminal Convictions Checklist** binder insert for quick-reference courtroom use with new back page summarizing Suggested Approaches for Representing a Noncitizen in a Criminal Case.

To order a copy of the Fourth Edition, visit the IDP website at www.immigrantdefenseproject.org, or call NYSDA at 518-465-3524. ♪

Defender News (continued from page 3)

Save the Date—NYSDA's 41st Annual Meeting at the Spa Again

NYSDA's 41st Annual Meeting and Conference will take place on July 20-22, 2008 at the Gideon Putnam Resort in Saratoga Springs, NY. Hotel reservations can be made by calling 1-800-732-1560 or 518-584-3000 or faxing 518-584-1354.

NYSDA Welcomes Susan Bryant

In July 2007, Susan Bryant joined the NYSDA Backup Center as a staff attorney. Susan has a J.D. from St. John's University School of Law and a Masters of Science in Information Science from the University at Albany. Susan has been a law clerk for the Chief Judge of the U.S. District Court, District of Connecticut, an Honors Program trial attorney with the US Department of Justice's Civil Division, and an elder law attorney in private practice in Albany. We are delighted to have her on staff.

Editorial Staff Change

Mardi Crawford, editor of the *REPORT* for more than ten years, will be working much of the time as the Communications Officer for the New York Justice Fund, while remaining an active member of the NYSDA staff. As a result, Mardi has handed over her editorial position to Susan Bryant, NYSDA's new staff attorney.

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