

## Defense-Relevant Immigration News

Manuel D. Vargas\*

### **US Supreme Court Affirms 2d Circuit Decision Striking Down Retroactive Application of 1996 Repeal of Waiver of Deportation for Certain Immigrants**

On June 25, the US Supreme Court struck down the government's retroactive application of 1996 amendments restricting or eliminating relief from deportation to lawful permanent resident immigrants who pled guilty to deportable offenses prior to the enactment dates of these amendments. *Immigration and Naturalization Service v St. Cyr*, No. 00-767, 2001 US LEXIS 4670 (6/25/01). The Court's decision affirmed the Sept. 1, 2000 decision of the United States Court of Appeals for the 2nd Circuit that upheld a district court's grant of *habeas corpus* relief to a petitioner challenging this retroactive application of the 1996 amendments to eliminate his pre-1996 right to apply for relief from deportation under former section 212(c) of the Immigration and Nationality Act. *St. Cyr v Immigration and Naturalization Service*, 229 F3d 406 (2d Cir. 2000). See the *Backup Center REPORT*, Vol. XV, #8, at pp. 5-6.

As an initial matter, the Court held that the federal courts have jurisdiction under 28 USC 2241 (*habeas corpus* statute) to decide the legal issue raised by the petitioner despite claims by the government that the 1996 amendments stripped the courts of jurisdiction to decide such questions of statutory interpretation.

On the merits, the Court then found that the 1996 amendments had impermissible retroactive effect under the traditional presumption against retroactive application of new statutes. The Court stated that the 1996 amendments' "elimination of any possibility of § 212(c) relief [from deportation] for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past'" (quoting *Landgraf v USI Film Products*, 511 US 244, 269 (1994)). The Court noted that, "[e]ven if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance." (citing *amici curiae* brief of the National Association of Criminal Defense Lawyers, NYSDA, and 13 other criminal defense organizations).

\* Manuel D. Vargas is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. If you have questions about immigration issues in a criminal case, you can call the Project on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.

### **US Supreme Court Holds that Government May Not Indefinitely Detain Deportable Immigrants Who Cannot be Returned to their Countries of Origin**

On June 28, the Supreme Court struck down the government's practice under the current immigration statute of indefinitely detaining immigrants who have been ordered deported or removed but whom the government is unable to remove. *Zadvydas v Davis*, No. 99-7791, 2001 US LEXIS 4912 (6/28/01). Noting the serious constitutional problem that would arise if the immigration statute were read to permit indefinite or permanent deprivation of human liberty, the Court interpreted the statute to limit a deportable immigrant's detention to a period reasonably necessary to bring about the individual's removal from the United States. For the sake of uniform administration in the federal courts, the Court stated that six months would be a presumptively reasonable period of detention to effect a deportable immigrant's removal from the country. If removal is not accomplished within this period, the Court indicated that the individual should be released if "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." This decision affects primarily immigrants who are subject to deportation orders to countries such as Cuba with which the United States does not have a repatriation agreement or which for other reasons will not accept return of its nationals, and those immigrants who are stateless.

### **Supreme Court Upholds Constitutionality of Law Allowing Citizen Mothers but Not Citizen Fathers to Confer Citizenship on Child Born Outside the US**

In a close 5-4 decision issued on June 11, the high court upheld the constitutionality of the gender-based distinction in US citizenship law that allows a United States citizen mother to confer citizenship on her child born "out of wedlock" outside of the United States, but does not so allow a father unless the father had formally acknowledged paternity before the child turned age 21. *Nguyen v INS*, No. 99-2071, 2001 US LEXIS 4340 (June 11, 2001). The Court's decision, which affirmed the decision of the Court of Appeals (see *Nguyen v INS*, 208 F3d 528 [5th Cir. 2000]), has the effect of overruling the decisions of two other circuit courts that struck down this distinction on equal protection grounds, including a decision last year of the 2nd Circuit. See *Lake v Reno* (2d Cir. Sept. 15, 2000) (reported in *Backup Center REPORT*, Vol. XV, #8, at p. 17); *US v Ahumada-Aguilar* (9th Cir. 1999).

### **BIA Holds Multiple Convictions for Simple DUI Do Not Aggregate into a Crime Involving Moral Turpitude**

On May 9, the Board of Immigration Appeals (BIA) found that an aggravated driving under the influence

conviction under § 28-697(A)(2) of the Arizona Revised Statutes, defined as a third conviction for driving under the influence, did not constitute a crime involving moral turpitude for immigration purposes. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). Specifically, the Board stated: "We find that multiple convictions for the same DUI offense, which individually is not a crime involving moral turpitude, do not, by themselves, aggregate into a conviction for a crime involving moral turpitude."

The Board distinguished its prior published decision in *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999) (see *Backup Center REPORT*, Vol. XV, #1, at p. 11), in which the Board held that a separate Arizona offense of aggravated driving under the influence is a crime involving moral turpitude because it requires a showing that the offender drove knowing that his or her license to drive had been suspended, cancelled, revoked or refused. The Board stated that conviction under section 28-697(A)(2), on the other hand, did not require demonstration of such a culpable mental state.

What this appears to mean for New York defense lawyers and their noncitizen clients is that a New York VTL 1192 conviction of simple DUI will probably not be considered a crime involving moral turpitude even where preceded by other DUI convictions. However, a VTL 511 conviction of aggravated unlicensed operation of a vehicle, which does include a "knowing" element, may be considered a moral turpitude offense when the offense has a DUI element. See e.g., NY VTL 511(3).

Defense lawyers should be aware that the issue of whether a driving while intoxicated conviction is a crime involving moral turpitude is separate and distinct from the issue of whether such a conviction is an aggravated felony for immigration purposes. In *Matter of Puente-Salazar*, Interim Decision #3412 (BIA 1999), the Board ruled that a felony offense of driving while intoxicated under Texas law is a conviction of a crime of violence and, where a prison sentence of one year or longer is imposed, is therefore an aggravated felony for immigration law purposes. See the *Backup Center REPORT*, Vol. XIV, #9, at p. 4.

### ***BIA Says Misdemeanor Sexual Abuse of a Minor Not Necessarily an Aggravated Felony***

On March 21, the BIA held that a conviction for sexual abuse of a minor must be for a felony offense in order for the conviction to be considered an aggravated felony under INA § 101(a)(43)(A), 8 USC 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"). *Matter of Crammond*, 23 I&N Dec. 9 (BIA 2001).

Defense lawyers should be aware, however, where a prison sentence of one year or longer has been imposed, that the Immigration and Naturalization Service (INS) may still charge a misdemeanor sexual abuse offense as a "crime of violence" aggravated felony. See INA § 101(a)

(43)(F), 8 USC 1101(a)(43)(F) ("a crime of violence for which the term of imprisonment is at least one year"). In addition, such an offense could be charged as a crime involving moral turpitude.

### ***2nd Circuit Holds Offense Involving Mere Possession of Counterfeit Securities not Necessarily an Attempt to Commit Offense Involving Fraud or Deceit, an Aggravated Felony***

On May 11, the 2nd Circuit held that a federal conviction for knowingly and unlawfully possessing counterfeit securities with the intent to deceive another in violation of 18 USC 513(a) does not necessarily constitute an "attempt" to pass these securities and is, therefore, not an aggravated felony under INA § 101(a)(43) (M)&(U), 8 USC 1101(a)(43)(M)&(U) (attempt to commit an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000). *Sui v INS*, 2001 US App LEXIS 8934 (2d Cir. 2001). The 2nd Circuit stated that the petitioner's conviction did not constitute an "attempt" as it did not require a finding or admission that he completed a substantial step toward actually passing the checks.

### ***California Finds Wrong Advice about Immigration Consequences of a Guilty Plea is IAC***

On April 2, the California Supreme Court held that a criminal defense attorney provides ineffective assistance of counsel when he or she gives wrong advice to a non-citizen defendant about the immigration consequences of a proposed guilty plea. *In re Resendiz*, 25 Cal4th 230, 19 P3d 1171, 2001 Cal LEXIS 1812 (2001).

### ***1-Page Immigration Consequences of Convictions Checklist Available on NYSDA Web Site***

NYSDA Criminal Defense Immigration Project staff attorney Sejal R. Zota has prepared a one-page checklist providing the basic information a defense attorney needs to know regarding the immigration consequences of criminal convictions for a noncitizen client. The one-page checklist, which was designed as a quick reference tool that defense attorneys could easily carry to court with them, is available for downloading from NYSDA's web site. Also available on NYSDA's website are the following practice aids for defense lawyers who represent noncitizen defendants: Tips on How to Work With an Immigration Lawyer to Best Protect Your Noncitizen Client, and Immigration Resources for Criminal Defense Lawyers, which offers a listing of some published materials, Internet resources, and immigration consultation possibilities for lawyers representing noncitizen defendants. To access and/or download these resources, visit NYSDA's website at [www.nysda.org](http://www.nysda.org) and click on Immigration Project Resources. ☺