

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas and Sejal R. Zota*

US Supreme Court to hear appeal of decision striking down retroactive application of the 1996 repeal of a waiver of deportation for certain lawful permanent resident immigrants

On Jan. 12, 2001, the US Supreme Court agreed to review the Sept. 1, 2000 decision of the US Court of Appeals for the 2nd Circuit upholding a grant of habeas corpus relief. The petitioner had challenged the retroactive application of 1996 amendments restricting or eliminating relief from deportation to lawful permanent resident immigrants who pled guilty or nolo contendere to deportable offenses before the enactment dates of these amendments. *St. Cyr v Immigration and Naturalization Service (INS)*, 229 F3d 406 (2d Cir. 2000). The Supreme Court also granted cert in a group of companion cases in which the 2nd Circuit had dismissed petitions for review bringing the same challenges directly to the appeals court, without prejudice to the claims being brought instead under district court habeas jurisdiction. *Calcano-Martinez et al v INS*, 232 F3d 328 (2d Cir. 2000). See the *Backup Center REPORT* Vol. XV, #8, at pgs. 5-6. These cases—*INS v St. Cyr*, No. 00-767, and *Calcano-Martinez, et al, v INS*, No. 00-1011—are scheduled to be argued during the week of April 23, 2001.

BIA refuses to reconsider holding that NY YO dispositions are not convictions

On Jan. 18, 2001, the Board of Immigration Appeals (BIA) denied the Immigration and Naturalization Service (INS) motion requesting reconsideration of an important Sept. 12, 2000 decision. As a result, New York youthful offender (YO) dispositions still are *not* considered convictions for immigration purposes. *Matter of Devison-Charles*, Interim Decision #3435 (BIA 2000).

The BIA's original decision in this case found that an adjudication of YO status pursuant to New York Criminal Procedure Law Article 720 is "similar in nature and purpose" to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), 18 USC 5031-5042 (1994 & Supp. II 1996). Reaffirming that an adjudication of juvenile delinquency is not a criminal con-

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viction for purposes of the immigration laws despite recent broad readings of the new statutory definition of conviction, the Board held that the same reasoning applied to a New York YO adjudication. See the *Backup Center REPORT*, Vol. XV, #8, at pg. 5.

In its decision denying reconsideration of *Devison-Charles*, the BIA rejected the INS argument that New York's YO procedure parallels an adjudication under the former Federal Youth Corrections Act (FYCA), which the BIA would consider a conviction for immigration purposes. The Board stated:

"As we pointed out unanimously in our prior decision, there is a significant difference between the FYCA and the New York law in that under the FYCA a conviction was set aside on the basis of the offender's subsequent good behavior, whereas under the New York youthful offender procedure the conviction is vacated immediately and unconditionally once the offender is accorded youthful offender treatment."

Matter of Devison-Charles, supra, at pg. 22

The BIA also rejected INS arguments based on differences between New York YO procedures and the FJDA, stating: "In our prior decision we recognized that there are differences between the state statute and the FJDA. Nevertheless, we concluded that the state procedure is sufficiently analogous to the FJDA to classify and adjudication under the New York procedure as a determination of delinquency, rather than as a conviction for a crime. We are not inclined to revisit the issue." *Matter of Devison-Charles, supra*, at pg. 22.

The New York State Defenders Association, along with the Legal Aid Society of the City of New York and the New York State Association of Criminal Defense Lawyers, had filed an *amici curiae* brief in opposition to the motion for reconsideration.

2nd Circuit refuses to rehear decision holding a misdemeanor may be deemed an "aggravated felony" for illegal reentry sentencing purposes

On Dec. 12, 2000, the US Court of Appeals for the 2nd Circuit refused to rehear its Aug. 29, 2000 holding that amendments to the definition of an aggravated felony mean that certain misdemeanors can now be deemed aggravated felonies. The court had reached this conclusion in a federal criminal illegal reentry case. The defendant, who had been convicted of three misdemeanors prior to his deportation, was found to have been correctly subjected to the enhanced federal sentencing applicable to an illegal entrant whose prior deportation was subsequent to conviction of an aggravated felony. *US v Pacheco*, 225 F3d 148 (2d Cir. 2000).

In 1996, Congress had reduced the prison sentence threshold for a crime of violence or a theft offense to be

considered an aggravated felony for immigration purposes from “at least five years” to “at least one year.” In *Pacheco*, the 2nd Circuit held that the aggravated felony term, as amended, now included even misdemeanor crimes of violence or theft offenses if the prison sentence—whether actually imposed or suspended—was one year. See the *Backup Center REPORT* Vol. XV, #8, at pg. 6.

NYSDA, along with the American Immigration Lawyers Association and the National Immigration Project, had filed an *amici curiae* brief in support of the defendant-appellant’s petition for rehearing. *Amici* discussed legislative history demonstrating that Congress did not intend for the aggravated felony term to include misdemeanors, and legal precedent regarding the authority of the federal sentencing guidelines commentary, which defines felony as meaning only offenses punishable by imprisonment for a term exceeding one year. The rehearing petition was summarily denied without comment.

106th Congress adjourned without passing legislation to repeal any of the retroactive provisions of the harsh 1996 immigration laws

Congress adjourned for the year 2000 without passing HR 5062, legislation that would have provided a discretionary waiver hearing to a small number of lawful permanent residents who were retroactively deemed aggravated felons by the harsh 1996 immigration laws. A bipartisan bill, HR 5062 passed unanimously in the House of Representatives in September. Despite overwhelming bipartisan support for the measure, the Senate abandoned it during the December budget negotiations, pursuant to staunch opposition raised by Senator Phil Gramm from Texas.

Federal Court authorizes appointment of CJA counsel in federal habeas proceedings for noncitizen petitioner challenging removal order

In *Lawrence v INS*, Magistrate Judge Peck of the Southern District of New York appointed counsel pursuant to the Criminal Justice Act (CJA) for the petitioner who filed a federal habeas corpus petition under 28 USC 2241 to challenge the validity of his order of removal and his mandatory detention pending removal. The government opposed this appointment, arguing that the CJA does not authorize such appointment for challenge to administrative immigration orders. Judge Peck denied the government’s application to vacate the order, finding that federal law authorizes appointment of counsel in 2241 proceedings “whenever the United States magistrate or the court determines that the interests of justice so require.” 18 USC 3006A(a)(2)(B).

New York defense attorneys should advise former indigent noncitizen clients challenging their orders of removal that they may seek appointment of counsel

under CJA when seeking relief in federal court under section 2241, 2254, or 2255 of title 28.

New York County Supreme Court grants resentencing to avoid deportation

In *People v Cheung*, Oct. 30, 2000, New York County Supreme Court granted a 440 motion and resentenced a defendant to a term of imprisonment of 364 days in order to avoid his deportation. The defendant had been promised a judicial recommendation against deportation (JRAD) in 1983, as a condition of his plea. However, he was never granted a JRAD. While the legislation authorizing a JRAD has been repealed, New York defense attorneys should be aware of this case because it provides support for the idea of reducing a client’s sentence to avoid deportation.

INS releases memo authorizing the exercise of favorable prosecutorial discretion in low priority immigration cases

On Nov. 17, 2000, the INS released a memo explaining the exercise of prosecutorial discretion by its officers in determining which immigration cases to pursue. The memo specifies which factors can be taken into account in deciding whether to exercise prosecutorial discretion favorably, including immigration status, length of residence in the U.S., criminal history, eligibility for relief, and community attention. As the memo indicates, the exercise of prosecutorial discretion does not grant a lawful status under the immigration laws; there is no legally enforceable right to the exercise of such discretion.

Defense attorneys and their noncitizen clients should be aware of the INS’s authority to exercise prosecutorial discretion, as clients are often approached and interviewed by the INS while awaiting resolution of a criminal case or when in prison. In sympathetic cases where a client has been approached by the INS, defense attorneys may want to get involved and use the memo as a tool to persuade the INS not to charge the client as being deportable. A copy of the memo is available on the Internet at: <http://www.ins.usdoj.gov/graphics/lawsregs/handbook/discretion.pdf> or from the Backup Center. ☞

ABA Award Nominations Sought

The Government and Public Sector Lawyers Division of the American Bar Association is accepting nominations for the Dorsey Award, which is given to a public defense or legal aid lawyer for outstanding work in providing legal services to indigent clients. The awards will be presented at the ABA’s Annual Meeting. Complete information about filing a nomination and the award are available on the ABA’s web site: <http://www.abanet.org/govpub/dorsey.html> or by contacting Theona Salmon at (202) 662-1023. **All nominations must be received by April 5, 2001.**