

# Immigration Practice Tips

## Defense-Relevant Immigration News

by Manuel D. Vargas\*

### DWI While License Suspended or Revoked Is a Crime Involving Moral Turpitude—Simple DWI Is Not

The Board of Immigration Appeals (BIA) issued further bad news in December for noncitizens facing DWI charges. Although DWI has traditionally been thought not to constitute a crime involving moral turpitude under the immigration statute, the BIA held that the Arizona offense of aggravated driving under the influence is a crime involving moral turpitude potentially triggering deportability/inadmissibility. The basis for the ruling is that the DWI statute in question requires a showing that the offender knew that his or her license to drive had been suspended, cancelled, revoked or refused. At the same time, the BIA ruled that simple driving while under the influence, without any such aggravating circumstance, is not a crime involving moral turpitude. *Matter of Lopez-Meza*, Interim Decision #3423 (BIA 12/21/99).

This latest DWI decision follows other rulings against immigrants in 1999 and in 1998. The earlier decisions found that felony DWI with a prison sentence of one year or longer may trigger the particularly harsh immigration consequences of the separate deportation ground for conviction of an aggravated felony. See, *Public Defense Backup Center REPORT*, Vol. XIV, #9, at pg. 4.

As a result of the *Lopez-Meza* decision, defense lawyers and their DWI noncitizen clients should now beware of more than conviction of any New York felony DWI offense with a prison sentence of one year or longer. Conviction of any other New York Vehicle and Traffic Law (VTL) offense or combination of offenses, regardless of sentence, where the conviction may establish unlicensed operation of a vehicle in addition to driving while ability impaired or intoxicated creates potential problems. For example, it now appears that a noncitizen convicted of first-degree aggravated unlicensed operation of a motor vehicle (VTL § 511(3)(a)(i)), which requires a showing of operating a vehicle both without a license and while under the influence, may now trigger the crime involving moral turpitude deportability/inadmissibility grounds. On the other hand, conviction of a DWI offense lacking such an aggravating circumstance and with-

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out a prison sentence of one year or longer should not, in and of itself, trigger removal from the United States.

### Two Federal Courts Reduce Sentences of One Year and One Day to Less than One Year to Avoid Triggering Deportation

Federal judges of the U.S. District Court for the Southern District of New York in two separate cases have granted writs of *coram nobis* and reduced sentences for federal convictions that had subjected the noncitizen defendants in each case to removal from the United States. The reduction should have the effect of removing the convictions in both cases from the purview of the aggravated felony deportation ground.

In December 1999, Senior District Judge Charles S. Haight, Jr., lowered a sentence of one year and one day to ten months for a noncitizen convicted of bribery. *United States v. Ko*, 1999 WL 1216730, 1999 U.S. Dist. LEXIS 19369 (SDNY, 12/20/99). Earlier, in September, Chief District Judge Thomas P. Griesa also reduced a sentence of one year and one day to ten months for a noncitizen convicted of conspiracy to commit robbery. *United States v. Corso*, 97 Cr. 56-6 (SDNY, 9/2/99). Bribery and robbery offenses constitute aggravated felonies for immigration law purposes only when the defendant is sentenced to a term of imprisonment of at least one year.

These federal court actions follow at least one state court decision earlier in 1999 in which the Appellate Division, First Department, reduced a noncitizen defendant's one-year sentence for attempted second-degree robbery to 364 days in order to relieve the defendant of the "unanticipated effect on his immigration status" of the one-year sentence. *People v Cuaran*, No. 993 (1st Dept., 5/11/99). See *Public Defense Backup Center REPORT* Vol. XIV, #5, at pg. 10.

### INS Deportations of Noncitizens with Criminal Convictions Up 12% in 1999

The Immigration and Naturalization Service (INS) announced that it removed 176,990 "criminal and other illegal aliens" in Fiscal Year (FY) 1999, up 3% from FY 1998. Of this total, 62,359 represented so-called "criminal alien" removals, up 12% over the number of such removals recorded in FY 1998. The INS reported that most of these criminal removals were accounted for by drug convictions (47%), criminal violations of immigration law (13%), convictions for assault (6%), and convictions for burglary (5%).

According to the INS, the largest increase in criminal removals occurred in the Institutional Removal Program (IRP). The INS describes IRP as a cooperative effort of the INS, the Executive Office for Immigration Review (*i.e.*, immigration judges), and participating federal and state correctional agencies "to identify, charge and conduct removal proceedings for convicted criminal aliens while they are still serving their prison sentence so that they can be immediately removed from the United States upon completion of

their sentences.” A total of 19,592 “criminal aliens” was removed through the IRP program in FY 1999, a nearly 45% increase over FY 1998. The INS reported that it targeted IRP resources to seven states — including New York, as well as Arizona, California, Florida, Illinois, New Jersey, and Texas — which account for 75 to 80% of all foreign-born state inmates nationwide. In New York, IRP removal proceeding hearings take place at three state facilities — Downstate Correctional Facility in Fishkill, Ulster Correctional Facility in Napanoch, and the Bedford Hills Correctional Facility for Women.

### **ABA Publishes New Standards Requiring Judges and Defense Counsel to Advise Defendants Pleading Guilty about Immigration Consequences**

The American Bar Association (ABA) has issued a new third edition of its ABA Standards for Criminal Justice, Pleas of Guilty. For the first time, separate standards require defense counsel and judges to advise noncitizen defendants regarding collateral consequences of guilty pleas, such as deportation.

New ABA Standard 14-3.2(f) (Responsibilities of defense counsel) provides: “To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” The commentary on this Standard states: “For example, depending on the jurisdiction, it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.” The commentary further states: “In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defen-

dant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, *nolo* or *Alford* plea.”

With respect to responsibilities of judges, new Standard 14-1.4(c) (Defendant to be advised) provides: “Before accepting a plea of guilty or *nolo contendere*, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including . . . if the defendant is not a United States citizen, a change in the defendant’s immigration status.”

The ABA Standards for Criminal Justice, Pleas of Guilty, Third Edition (ABA 1999) is available from the American Bar Association Service Center. tel (312)988-5522; \$39.95 (\$25.95 for public defenders, prosecutors, judges, and students), plus shipping — Cite Product Code 5090078).

### **Early Parole for Deportation Reactivated**

After being suspended for most noncitizen prisoners for much of the last two years, the state’s early parole for deportation program will now resume under new standards, according to the New York State Division of Parole.

New York law provides that the Board of Parole may, prior to completion of the minimum term of a sentence of imprisonment, grant early parole to certain noncitizens with final orders of deportation. Under state law, such early parole is statutorily barred only for an inmate convicted of either a violent felony offense or an A-1 felony offense, other than a section 220 controlled substance A-1 felony offense. See New York Executive Law 259-i(d). In March 1998, however, the state suspended the early parole program due to controversy over the early release and deportation of certain A-1 drug felons.

The Parole Division reports that over 100 cases of individuals previously approved for early parole are now being turned over to the INS for deportation. In addition, Parole will start processing new cases under the new standards. The new standards will be covered in a future issue of the *REPORT*. ☪

### **Pro Bono Counsel Needed For Death Row Prisoners**

Over 3,500 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The ABA Death Penalty Representation Project seeks lawyers in firms with the necessary resources to devote to this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Elisabeth Semel, Director, ABA Death Penalty Representation Project, 50 F Street NW, Suite 8250, Washington DC 20001; e-mail: esemel@aol.com. For information, also see the Project’s web site: [www.probono.net](http://www.probono.net) (Death Penalty Practice Area).