

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

Parole Division Issues New Guidelines for Conditional Parole for Deportation

The New York State Division of Parole is reinitiating the conditional parole for deportation only (CPDO) program under new stricter standards. As reported earlier, the CPDO program had been suspended for most noncitizen inmates for close to two years. (See *Backup Center REPORT*, Vol. XV, No. 1, p. 12.) According to Executive Director Martin Cirincione, however, Parole is reinitiating the CPDO process under the new guidelines this month (March 2000).

The Division's newly revised Policy and Procedures Manual item for CPDO lists two possible types of CPDO cases: (1) those involving inmates who have not yet reached their parole eligibility date, *i.e.*, early CPDO, and (2) those involving inmates who are eligible for regular parole having reached or advanced beyond their minimum term of imprisonment, *i.e.*, regular CPDO. Noncitizen inmates are not eligible for *early* CPDO if they have been convicted of either an A-I felony offense (other than an A-I felony controlled substance offense), or a violent felony offense. See Executive Law 259-i(2)(d).

Under the new guidelines, noncitizen inmates will not be eligible for early or regular CPDO consideration unless a final order of deportation has been issued against them by an immigration judge, and the inmates have waived or exhausted their right to appeal. Inmates must also serve at least one half of their minimum prison term before they will be eligible for early CPDO. In addition, an inmate will not be placed on the Parole Board calendar for review until the sentencing judge, district attorney, and defense attorney have had an opportunity to respond to letters from the Parole Board requesting their recommendations relative to the inmate's possible release for deportation.

An inmate convicted of an A-I felony controlled substance offense will not be calendared for Board consideration of early parole until responses to these letters have been received. An inmate convicted of an A-II felony or lesser offense may be calendared without receipt of these letters, but only after 10 days have elapsed following the 60-day period allotted for responses. In addition, if the inmate has been convicted of an A-I or A-II felony offense, Parole Division staff must ascertain from appropriate and involved law

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enforcement agencies (such as the DEA, FBI, ATF) their position with respect to the inmate's possible release.

A copy of the Division of Parole's Policy and Procedures Manual item on the CPDO program is available from the Backup Center.

NYSDA Files Another *Amicus Curiae* Brief Challenging Retroactive Application of New Immigration Laws

NYSDA has filed another *amicus curiae* brief before the United States Court of Appeals for the Second Circuit challenging the federal government's retroactive application of the 1996 immigration laws to deport lawful permanent resident immigrants convicted of crimes committed before the new laws took effect. The cases at issue are *Pottinger v Reno*, *Maria v McElroy*, *Azcona v Reno*, and *Juin Yi Yu v Reno*. (*Amicus* brief filed Mar. 16, 2000). The brief was submitted on behalf also of the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the New York State Association of Criminal Defense Lawyers (NYSACDL), and The Legal Aid Society of the City of New York (LAS).

In these cases, the federal government is appealing a group of district court habeas corpus decisions and orders issued by US District Judge Jack Weinstein finding that a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricting lawful permanent resident eligibility for deportation relief should not be applied to deportation cases based on pre-AEDPA criminal conduct and convictions. See *Pottinger v Reno*, 51 FSupp2d 349 (EDNY 1999) and *Maria v McElroy*, 68 FSupp2d 206 (EDNY 1999), reported in September. (See *Backup Center REPORT*, Vol. XIV, No. 7, p. 6.)

Earlier, NYSDA, along with LAS and NYSACDL, filed an *amicus* brief in another, similar group of cases dealing primarily with the elimination of deportation relief in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), rather than in AEDPA. *Calcano-Martinez v Reno*, *Madrid v Reno*, and *Khan v Reno* (*amicus* brief filed Nov. 12, 1999). (See *Backup Center REPORT*, Vol. XIV, No. 9, p. 4.)

NYSDA's *amicus* briefs argue that the government's retroactive application of the restriction or elimination of the relief from deportation known as the 212(c) waiver in AEDPA and IIRIRA is impermissible under the traditional presumption against retroactivity of a new civil statute. The briefs describe how many immigrant defendants relied on the availability of relief from deportation when pleading guilty to deportable offenses prior to enactment of AEDPA and IIRIRA, but go on to point out that Supreme Court case law does not require a showing of reliance if the government's application of the new laws changes the legal consequences of past conduct.

Several federal circuit courts in other parts of the country have recently issued favorable rulings in challenges to the government's retroactive application of the AEDPA/

IIRIRA restriction or elimination of the 212(c) waiver in both pre-4/1/97 deportation cases and post-4/1/97 removal cases. *Tasios v Reno*, 2000 WL 150710 (4th Cir, 2/28/00)(deportation case); *Alanis-Bustamante v Reno*, 2000 WL 58311 (11th Cir, 1/25/00)(removal case); *Magana-Pizano v INS*, 200 F3d 603 (9th Cir, 12/27/99)(deportation case); and *Wallace v Reno*, 194 F3d 279 (1st Cir, 10/26/99)(deportation cases); see also *Pena-Rosario v Reno*, 2000 WL 150710 (EDNY, 2/8/00)(removal cases). For further information regarding the claims raised in these cases and other defenses to removal in criminal charge cases, see NYSDA's newly updated Removal Defense Checklist in Criminal Charge Cases. The Checklist is available from the Criminal Defense Immigration Project page on NYSDA's web site (www.nysda.org) or from the Backup Center.

2nd Edition of Immigration Manual for New York Defense Lawyers Now Available

NYSDA has completed updating of its practice manual entitled *Representing Noncitizen Criminal Defendants in New York State*. The first edition was published in 1998. In the two intervening years, there have been significant developments in federal immigration law and practice, as well as in state criminal law and practice, and in relevant legal professional standards, that affect the defense of noncitizen criminal defendants in New York State. These developments, now incorporated into the second edition of the manual, include the following:

Some New York federal and state courts grant **sentence reductions** to avoid dispositions being deemed "aggravated felonies."

The New York State Division of Parole reactivates the **early parole for deportation** program under new, stricter standards.

The Congress and the Attorney General provide **new forms of relief from removal** under the immigration laws for certain noncitizens, e.g., certain Haitians, Hondurans, Kosovars, Liberians, and Nicaraguans, and individuals fearing torture in their country of removal.

The American Bar Association issues **new professional standards** regarding defense counsel's duty to advise noncitizen defendants regarding immigration consequences of guilty pleas.

New York **youthful offender dispositions** may now be deemed "convictions" for deportation purposes.

Guilty pleas precedent to New York **drug treatment diversion** programs may now be deemed "convictions" for deportation purposes, even if later vacated.

Certain New York Vehicle and Traffic Law offenses that include an element of **driving while under the influence** of alcohol or a drug may now more likely be deemed "aggravated felonies" or "crimes involving moral turpitude."

Certain New York **sex offenses involving a minor** are now more likely to be deemed "aggravated felonies."

Certain New York **misdemeanors** are now more likely to be deemed "aggravated felonies."

The New York Legislature amends the New York Penal Law to add new **stalking** offenses, which will likely trigger adverse immigration consequences for noncitizens.

The Board of Immigration Appeals (BIA) and federal courts offer new guidance on what **accessory and preparatory offenses** might avoid adverse immigration consequences.

The BIA and federal courts offer new guidance on what offenses might be deemed "**particularly serious crimes**" barring relief from removal for individuals pursuing asylum or withholding of removal under the immigration laws.

The Immigration and Naturalization Service (INS) implements new policy of **mandatory detention** of certain noncitizens upon their release from criminal custody.

The INS reports **increased deportation numbers**.

In addition, and in response to user comments, the second edition includes the following new features:

- New "**aggravated felony**" practice aids.
- New section on seeking **post-judgment relief** to avoid adverse immigration consequences.
- New section on the immigration effect of a **plea of not responsible by reason of mental disease or defect**.
- Reproduction of statutory provision on **mandatory detention**.
- Information on useful, **new immigration resources**.

Representing Noncitizen Criminal Defendants in New York State, Second Edition may be ordered from the Backup Center. Call (518)465-3524. ⚖

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 (Death Penalty Practice Area).