

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

BIA Holds NY Youthful Offender Dispositions Not Convictions for Immigration Purposes

In a reversal of direction, the Board of Immigration Appeals (BIA or Board) issued a precedent *en banc* decision holding that New York youthful offender dispositions are not convictions for immigration purposes. The published decision in *Matter of Devison-Charles*, Interim Decision #3435 (BIA 9/12/00) was signed by all 16 of the Board members participating in the review. This resolves the differences in rulings that individual three-member panels had been reaching in unpublished non-precedent decisions. See the *Backup Center REPORT* Vol XV, #6, at pgs. 6-7. Designated as a precedent, the decision is binding on immigration judges and the Immigration and Naturalization Service.

The BIA found that an adjudication of youthful offender 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), codified at 18 USC 5031-5042 (1994 & Supp. II 1996). The Board stated:

[T]he central issue before both the state and federal courts is the offender's status, not his guilt or innocence. Perhaps most importantly, under the New York procedures a conviction precedent to a youthful offender adjudication is vacated, rendering it a nullity. . . . All that is left, as in the federal system, is a civil determination of status, which may not be treated as a conviction under governing law. Applying the FJDA as a benchmark, we find that a youthful offender adjudication under Article 720 of the New York Criminal Procedure Law corresponds to a determination of juvenile delinquency under the FJDA.

Matter of Devison-Charles, *supra*, at p. 9 (citation omitted).

The BIA reaffirmed that an adjudication of juvenile delinquency is not a conviction of a crime for purposes of the immigration laws despite recent broad readings of the new statutory definition of conviction for immigration purposes. It went on to hold that, likewise, a New York youthful offender adjudication should not be deemed a conviction for immigration purposes. Defense attorneys and their noncitizen clients should be aware that there is still some question whether the Board would apply its holding to a youthful offender adjudication involving an individual who committed the offense at issue between his or her eighteenth and nineteenth birthdays. The FJDA defines "juvenile delin-

quency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." 18 USC 5031.

2nd Circuit Holds that AEDPA and IIRIRA Restrictions on Relief from Deportation are Not Applicable to Individuals Who Pled Guilty Before Those Laws Passed

In a long-awaited decision, the United States Court of Appeals for the 2nd Circuit held that 1996 amendments restricting or eliminating relief from deportation under former section 212(c) of the Immigration and Nationality Act (INA) do not apply to noncitizens who pled guilty or *nolo contendere* prior to the enactment dates of these amendments. *St. Cyr v Immigration and Naturalization Service*, ___ F3d ___, 2000 WL 1234850 (2d Cir 9/1/00). This decision upheld the lower federal district court's ruling and the recent decisions of several federal district judges in other cases on this issue. See the *Backup Center REPORT* Vol XV, #6, at pg. 7.

Previously, the 2nd Circuit had held that lawful permanent resident immigrants whose deportation cases were pending on Apr. 24, 1996 when the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted should still be permitted to pursue relief from deportation under section 212(c) of the INA as it existed pre-AEDPA. However, the Court did not reach the issue of whether these amendments could be applied to persons whose proceedings were not yet pending on that date, but whose criminal convictions or conduct preceded that date. See *Henderson v INS*, 157 F3d 106, *cert den sub nom Reno v Navas*, 526 US 1004 (1999); see also the *Backup Center REPORT* Vol XIV, #2, at pg. 9, and Vol XIV, #3, at pg. 6.

In *St. Cyr*, the 2nd Circuit first held that the district court properly took *habeas corpus* jurisdiction of the petitioner's challenge to the immigration agency's interpretation of the retroactive applicability of Section 440(d) of the AEDPA of 1996 (restricting eligibility for 212(c) relief based on category of crime) and Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (eliminating 212(c) relief). On the same date, in a group of companion cases, the 2nd Circuit had ruled that it lacked jurisdiction to hear such challenges on direct petition for review. See *Calcano-Martinez et al v Immigration and Naturalization Service*, ___ F3d ___, 2000 WL 1336611 (2d Cir. 9/1/00) (dismissing petitions for review without prejudice to same claims being brought under habeas corpus).

Reaching the merits in *St. Cyr*, the Court then found that no clear congressional intent exists as to whether AEDPA 440(d) and IIRIRA 304 apply to noncitizens who pled guilty prior to the enactment dates of these Acts. The Court then found that there would be impermissible retroactive effect if the possibility of 212(c) relief were eliminated for the petitioner. Citing the *amici curiae* brief of 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, the Court stated:

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As the Amici in this case demonstrate, a legal resident who is charged with a crime that renders him removable from the United States carefully considers the immigration consequences of his or her conviction and, specifically, the availability of discretionary relief from removal. It is not unreasonable to attribute knowledge of the availability of relief to a legal resident because it is a common requirement that defense counsel and the court advise a criminal defendant of the immigration consequences of a guilty plea. Additionally, an attorney's professional duty to his or her client includes advising that client of the immigration consequences of a plea or conviction.

St. Cyr, 2000 WL 1234850, *13. Thus, because application of AEDPA 440(d) and IIRIRA 304 would upset reasonable, settled expectations, and change the legal effect of prior conduct, the Court applied the traditional presumption against the retroactivity of a civil statute to hold that these amendments do not apply to pre-enactment guilty pleas.

The Court's decision includes dicta that AEDPA 440(d) and IIRIRA 304 may permissibly be applied in cases not involving pre-enactment pleas, even when at issue is pre-enactment conduct, or a pre-enactment conviction after trial. Further litigation of this issue will take place in the government's pending appeals to the 2nd Circuit in *Zgombic v Farquharson* (amicus brief filed by NYSDA on Oct. 17, 2000), or in *Pottinger v Reno*, *Maria v McElroy*, *Azcona v Reno*, and *Juin Yi Yu v Reno*. (amicus brief filed by NYSDA and the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the New York State Association of Criminal Defense Lawyers, and the Legal Aid Society of the City of New York on Mar. 16, 2000). See *Backup Center REPORT* Vol XV, #6, at pg. 7. We will report on any significant 2nd Circuit or other decisions on these issues in future issues of the *REPORT*.

2nd Circuit Holds that a Misdemeanor Can Be an Aggravated Felony

The 2nd Circuit held that 1996 IIRIRA amendments to the definition of an aggravated felony mean that certain misdemeanors can now be deemed aggravated felonies. The Court reached this conclusion in a federal criminal illegal reentry case in which it ruled that the defendant, who had been convicted of three misdemeanors prior to his deportation, was correctly subjected to the enhanced federal sentencing applicable to an illegal entrant whose prior deportation was subsequent to conviction of an aggravated felony. *United States v Pacheco*, __ F3d __, 2000 WL 1218987 (2d Cir. 8/29/00).

In IIRIRA, 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 interpreting this amendment, the 2nd Circuit held that the aggravated felony term, as amended by IIRIRA, now included

misdemeanor crimes of violence or theft offenses if the prison sentence imposed—whether actually imposed or suspended—was one year. The Court cited the earlier decision of the 3rd Circuit in *United States v Graham*, 169 F3d 787 (3d Cir. 1999), reported in the June 1999 *Backup Center REPORT* Vol XIV, #5, at pg. 10.

In a strong dissent, Judge Chester J. Straub argued that the defendant's three suspended sentences of one year's imprisonment for misdemeanor convictions cannot constitute aggravated felonies "unless we adopt an 'Alice-in-Wonderland-like definition of the term 'aggravated felony' that does violence to the plain and settled meanings of both 'aggravated' and 'felony.'"

The defendant, represented by Albany attorney Attorney Martin J. Kehoe, III, filed a petition for rehearing or rehearing *en banc*. On Sept. 12, 2000, the New York State Defenders Association, along with the American Immigration Lawyers Association and the National Immigration Project, filed an *amici curiae* brief in support of the petition for rehearing. The *amici* brief discusses legislative history demonstrating that Congress did not intend for the aggravated felony term to include misdemeanors, legal precedent regarding the authority of the federal sentencing guidelines commentary, and the far-reaching impact of the decision being challenged. A copy of the brief, which is posted in the Immigration Project and Publications sections of NYSDA's web site (www.nysda.org), is available from the Backup Center.

Kirkland and Ellis Fellow begins work with Immigration Project

The NYSDA Criminal Defense Immigration Project is pleased to have Sejal Zota, a 2000 law graduate of New York University School of Law, working with the Project for one year on a Kirkland & Ellis New York City Public Service Fellowship. Ms. Zota, who previously worked with the Project as an Arthur Garfield Hays Civil Liberties Fellow during her third year of law school, began her work with the Project on Sept. 12, 2000.

Ms. Zota's proposed initiatives include: setting up a post-conviction relief project to make sure that only those immigrants whose convictions resulted from fair and legal criminal proceedings are subjected to deportation; developing an intensive immigration training curriculum to create a cadre of in-house immigration experts at each defender, legal aid, or assigned counsel program; and educating New York immigrant communities directly about the deportation risks of criminal cases.

Other Defense-relevant BIA and Second Circuit Immigration and Nationality Decisions

Following are other decisions concerning immigration consequences of criminal proceedings issued in the last few months.

- *Matter of Rodriguez-Ruiz*, Int. Dec. #3436 (BIA 9/22/00)
The Board held that a conviction that has been vacated

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Chap. 262 (S.8177) (Unlawful Shipment or Transport of Cigarettes). Eff.: Nov. 14, 2000

Amends the Public Health Law to provide for new criminal offenses, including felony offenses for certain repeat violations, concerning the unlawful shipment or transport of cigarettes.

Chap. 48 (A.9596-A) (Agriculture & Markets Law — Forfeiture of Abused Animals). Eff.: June 6, 2000

Amends the Agriculture and Markets Law § 374 (5) to provide that persons convicted of aggravated cruelty to animals under “Buster’s Law” (§ 353-a) may be required to forfeit the animal to a society for the prevention of cruelty to animals or humane society following a forfeiture hearing.

SUNSET CLAUSE EXTENDED

Chap. 16 (Sunset Extended — Medical Parole — Executive Law § 259-r). Sunset Extended to Sept. 1, 2001

Extends the sunset provision of the medical parole law [Executive Law §259-r] to Sept. 1, 2001

Chap. 449 (S.7137) (Sunset Extender — Closed-Circuit testimony of child witnesses). Sunset Extended to Sept. 1, 2001

Extends the sunset clause of CPL Article 65 relating to the closed-circuit testimony of certain child-witnesses to Sept. 1, 2001

Chap. 42 (S.6802) (Sunset Extended — Arts and Cultural Affairs Law — Ticket Scalping) Sunset Extended to June 1, 2001

Extends the sunset clause of New York’s anti-scalping laws (Arts and Cultural Affairs Law Article 25) to June 1, 2001

Chap. 4 (S.6362) (Sunset Extender — Elimination of Mandatory Sequestration). Eff.: Feb. 1, 2000

In 1995, mandatory jury sequestration was eliminated for misdemeanor and lower level felony trials (L.1995, ch. 83). The sunset provision of this law has been extended to Apr. 1, 2001

Chap. 447 (S.7030-a) (Sunset Extender — Driver’s License Suspension after Drug Conviction). Sunset Extended to Oct. 1, 2001

In 1993, the Legislature passed a law requiring a 6-month suspension of the driver’s license, or a 6-month delay in eligibility to receive a license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, ch. 533). The sunset provision of the law has been extended to Oct. 1, 2001 ♪

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pursuant to Article 440 of the New York Criminal Procedure Law does not constitute a conviction for immigration purposes.

- *Sutherland v Reno* (2nd Cir. 9/15/00)
The 2nd Circuit held that the petitioner’s Massachusetts conviction for indecent assault and battery constituted a crime of domestic violence for deportability purposes based on findings that the offense was both (1) a “crime of violence” under 18 USC 16 because it involved a substantial risk that physical force may have been used, and (2) a crime committed against a person protected by the domestic or family violence laws of Massachusetts.
- *Lake v Reno* (2nd Cir. 9/15/00)
The 2nd Circuit held that the gender-based discrimination mandated by section 309(a) of the INA—deeming out-of-wedlock children born abroad to US citizen mothers to be US citizens but denying citizenship to those born abroad of US citizen fathers unless the father had formally acknowledged paternity before the child turned 21—violates the right to equal protection secured by the Due Process Clause of the 5th Amendment.

New and Updated NYSDA Immigration Resources Available

The following new or updated resources are available from the Defense Immigration Project page on NYSDA’s website (www.nysda.org):

Immigration Resources for Criminal Defense Lawyers — This informational handout (3 pp.) offers a listing of some published materials, internet resources, and immigration consultation possibilities for criminal defense lawyers representing noncitizen defendants throughout the country.

Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses — Appendix A of the Project manual entitled *Representing Noncitizen Defendants in New York State, Second Edition (2000)*. (The full manual is available from the Backup Center for \$50.)

Aggravated Felony Practice Aids— Appendix C of the Project manual.

“Particularly Serious Crime” Bars on Asylum and Withholding of Removal: Case Law Standards and Sample Determinations— Appendix F of the Project manual.

Removal Defense Checklist for Criminal Charge Cases — This checklist (20 pp.) of removal defense arguments and strategies for noncitizens or lawyers counseling or representing noncitizens in removal proceedings based on criminal charges has recently been updated to include new legal developments through Sept. 8, 2000. ♪