

Defense-Relevant Immigration News

By Manuel D. Vargas*

US Enacts New Regulation and Legislation Expanding INS Authority to Detain Noncitizens after 9/11

Within a week of the Sept. 11 attacks on the World Trade Center and the Pentagon, the US Immigration and Naturalization Service (INS) amended its regulations. It has expanded the amount of time the INS has to bring formal charges against a noncitizen arrested by the agency without warrant, and to make a determination regarding whether to continue custody or to release on bond or recognizance. The interim rule, deemed effective as of Sept. 17, changes the former 24-hour rule to a 48-hour rule. It provides the agency discretion to detain a noncitizen, without notice of charges or custody determination, for an additional "reasonable" period of time "in the event of an emergency or other extraordinary circumstance." 66 Federal Register 48334-48335 (9/20/01).

Subsequently, the US Attorney General sought legislation to expand their statutory authority to detain noncitizens suspected by the federal government of terrorist activities. In response, Congress passed and, on Oct. 26, President Bush signed into law, the USA PATRIOT Act ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001"). The law contains provisions that expand the definition of terrorism for the purposes of inadmissibility and removal, provides for mandatory detention of noncitizens who the Attorney General suspects have engaged in terrorist activity, and limits judicial review. On the somewhat positive side for immigrants, the law limits to seven days the federal government's authority to detain without providing notice of the immigration or criminal charges. It also includes some provisions that will preserve immigration benefits for immigrant members of the families of victims of the Sept. 11 terrorist attacks and others impacted by the attack. Pub. L. No. 107-56, 115 Stat. 272.

On Dec. 1, NYSDA Immigrant Defense Project Director Manny Vargas will participate in a New York State Association of Criminal Defense Lawyers trainer in New York City. The training, for defense lawyers, will

* Manuel D. Vargas is the Director of NYSDA's Immigrant Defense 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 1:30 to 4:30 p.m. at (212) 367-9104.

address immigration and other issues faced by noncitizen clients detained by law enforcement authorities since Sept. 11. [Ed. Note: Updated information on immigration and related civil liberties issues post 9/11 can be found on the "Defense News" and "Defense Immigration Project" pages of the NYDA web site, www.nysda.org.]

2nd Circuit Holds DWI Offense Not a "Crime of Violence" Constituting an Aggravated Felony for Immigration Purposes

On July 20, the US Court of Appeals for the 2nd Circuit held that a felony driving while intoxicated (DWI) conviction under New York Vehicle and Traffic Law 1192(3) does not amount to a "crime of violence" under 18 USC 16(b) for purposes of defining an "aggravated felony" for immigration purposes under 8 USC 1101(a)(43)(F). *Dalton v Ashcroft*, 257 F3d 200 (2d Cir. 2001). With this decision, the 2nd Circuit joins the 5th, 7th, and 9th Circuits in effectively overruling contrary determinations of the Board of Immigration Appeals (BIA) on similar DWI offenses in other states. However, defense lawyers should be aware that for cases arising in the remaining circuits (including cases of New York immigrants detained by the INS and placed in proceedings in these other circuits), the Board's determination still governs. See *Matter of Puente-Salazar*, Interim Decision #3412 (BIA 1999) (held 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 *Backup Center REPORT*, Vol. XIV, #9.

Defense lawyers should also be aware that some DWI offenses, or offenses involving a DWI element, may be considered to fall under the separate deportability and inadmissibility grounds for crimes involving moral turpitude. Compare *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999) (BIA held that an 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) (see *Backup Center REPORT*, Vol. XV, #1) with *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (BIA found that an aggravated driving under the influence conviction under section 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) (see *Backup Center REPORT*, Vol. XVI, #4). Thus, for example, a New York VTL 1192 conviction of

simple DWI will probably not be considered a crime involving moral turpitude even where preceded by other DWI convictions. However, a VTL 511 conviction of aggravated unlicensed operation of a vehicle, which includes a “knowing” element as well as a DWI element, *see, e.g.*, NY VTL 511(3), may be considered a moral turpitude offense.

US Sentencing Commission Reduces for Some the Sentence Enhancement Applied to Those Convicted of Unlawfully Entering the US After Being Deported Following Conviction of an Aggravated Felony

Effective Nov. 1, the US Sentencing Commission modified the 16-level enhancement contained in Sentencing Guideline 2L1.2 for unlawful entry into the United States following deportation after conviction of an aggravated felony. *See* 66 Fed Reg 30512 (2001). The purpose of the amendment is to address the inequity of applying this enhancement across-the-board given the wide range of offenses covered by the immigration law definition of “aggravated felony.” The Commission recognized that, under the prior guideline, “a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault.” USSG, App. C, Amend. 632, Reason for Amendment.

The new guideline provides for graduated enhancements, from 4 to 16 levels, based on the seriousness of the prior conviction. The 16-level enhancement will now apply where the prior conviction is for certain offenses, most significantly drug trafficking offenses where the sentence imposed exceeded 13 months, crimes of violence, and firearms offenses. A 12-level enhancement will apply to other felony drug trafficking offenses where the sentence imposed was 13 months or less. All other aggravated felonies under the immigration law definition will receive an 8-level enhancement. Finally, prior convictions for any other felony, or for three or more misdemeanors that are crimes of violence or drug trafficking offenses, are subject to a 4-level increase.

NYSDA’s Immigrant Defense Project to Provide Legal Support to Immigrants Placed in Removal Proceedings Based on Criminal Charges

NYSDA’s Immigrant Defense Project has commenced a new initiative to provide or obtain legal support for immigrants placed in removal proceedings based on conviction or accusation of a crime. The Immigrant Defense Project was formerly the Criminal Defense Immigration Project.

It adopted its new name to reflect the new focus not only on the legal issues faced by immigrants in criminal proceedings, but also on the legal issues faced by immigrants in the removal proceedings that may take place following completion of the criminal proceedings. The new initiative will include *amicus curiae* briefing and other legal support in cases involving challenges to overly broad interpretations of the deportation laws by federal immigration law enforcement authorities. It will also include expanded efforts to obtain *pro bono* legal representation for immigrants whose deportation cases raise legal issues whose resolution in an individual case may affect whole classes of immigrants other than that particular individual. The Project encourages *REPORT* readers to contact the Project at (212) 367-9104 regarding cases raising important legal issues involving the interplay between criminal and immigration laws.

Updated Removal Defense Checklist in Criminal Charge Cases available on NYSDA web site

The Immigrant Defense Project has updated its Removal Defense Checklist in Criminal Charge Cases to include many new relevant legal developments and court decisions of the past year that might be useful for immigrants currently facing deportation based on criminal convictions. The checklist provides a fairly exhaustive list of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing noncitizens placed in removal proceedings based on criminal charges. To access and/or download this resource material (now updated through Sept. 1, 2001), visit NYSDA’s web site at www.nysda.org and click on Immigrant Defense Project Resources.

Training Continues

In addition to the Dec. 1 training noted above, Immigrant Defense Project Director Manny Vargas will participate on Dec. 10, 2001 in a panel presentation on advanced criminal and deportation issues. Sponsored by the American Immigration Lawyers Association, New York City Chapter, it will be held at the New York Marriott Marquis Hotel in New York City.

During October and November, Mr. Vargas participated in trainers or public forums with: the National Association of Women Judges, the Office of the Attorney General, State of New York, US Court of Appeals for the 2nd Circuit, Association of the Bar of the City of New York, Civil Rights Committee, Prison Families of New York/Osborne Association, and the Federal Defender Clinic, New York University School of Law. ♪