

Defense-Relevant Immigration News

by Manuel D. Vargas*

Federal Courts Issue Decisions Favorable to Immigrants in INS Detention and/or Removal Proceedings Based on Criminal Charges

Following up on the two important immigrants' rights decisions issued by the US Supreme Court in June, 2001—*Immigration and Naturalization Service v St. Cyr* and *Zadvydas v Davis* (see *Backup Center REPORT*, Vol XVI, #4, p. 14)—federal courts in New York and elsewhere have recently issued several decisions favorable to immigrant petitioners on some key outstanding immigration detention or removal legal issues:

- *Patel v Zemski*, 2001 US App LEXIS 26907 (3d Cir. 2001)—In this decision, filed on Dec. 19, 2001, the US Court of Appeals for the 3rd Circuit struck down as unconstitutional provisions of the Illegal Immigration Reform and Individual Responsibility Act of 1996 (IIRIRA) that mandate the detention without the right to release on bond of immigrants in removal proceedings based on certain criminal charges. Although many federal district courts have come to the same conclusion, this is the first federal court of appeals to issue such a ruling. The 3rd Circuit's decision has immediate impact on New York and other immigrants held by the INS in prisons or other facilities located in Pennsylvania and New Jersey. (More recently, the 9th Circuit found that the IIRIRA mandatory detention provisions are unconstitutional as applied to lawful permanent resident immigrants, see, *Kim v. Ziglar*, No. 99-17373 [9th Cir. 2002].)
- *Greenidge v INS*, 2001 US Dist LEXIS 19816 (SDNY 2001)—On Nov. 27, 2001, US District Judge Victor Marrero accepted and adopted the Report of US Magistrate Judge Henry Pitman finding that the lawful permanent resident immigrant petitioner was eligible to apply for a waiver of deportation under former section 212(c) of the Immigration and Nationality Act even though he has now served more than five years in prison for conviction of an aggravated felony. Although service of more than five years for such a conviction barred relief under former section 212(c), the court found that the petitioner had not yet served five years at the time of his original hearing before an Immigration Judge. The court further found that the five-year mark had now passed only because the Immigration Judge had incorrectly found the peti-

tioner ineligible at the time of the hearing for reasons since rejected by the Supreme Court in *St. Cyr* (where the Supreme Court held that the 1996 IIRIRA amendments should not be applied retroactively to take away the right to apply for deportation relief from individuals who pled guilty to deportable offenses before the effective date of these amendments). The court therefore remanded the case for consideration of the petitioner's application for section 212(c) relief. See also *Fejzowski v Ashcroft*, 2001 US Dist LEXIS 16889 (ND Ill. 2001) (noting that the petitioner "may have a viable claim that it violated his due process rights for the INS to lie in the weeds waiting for the five year period to run before seeking removal"); *Bosquet v INS*, 2001 US Dist LEXIS 13573 (SDNY 2001); *Lara v INS*, No. 3:00CV24 (D Conn. 2000).

- *Henry v Ashcroft*, 2001 US Dist LEXIS 19795 (SDNY 2001)—On Nov. 30, 2001, US District Judge Denny Chin held that the lawful permanent resident immigrant petitioner could seek cancellation of removal under the 1996 IIRIRA amendments even if she had not resided in the United States for seven years prior to commission of a pre-IIRIRA removable offense. Although the IIRIRA eligibility requirements for cancellation relief require continuous residence of seven years prior to the commission of some offenses triggering removability, the court applied a *St. Cyr*-type analysis to find that in this case these amendments should not be applied retroactively to a pre-IIRIRA offense.
- *Borrero v Aljets*, No. 00-2351 (D Minn. 2001) – On Dec. 18, 2001, a federal court in Minnesota found that the *Zadvydas* decision—in which the Supreme Court ruled that the government may not indefinitely detain noncitizens whom the government is unable to remove—applied to an individual ordered excluded after being stopped at the border and "paroled" into the United States. Although the *Zadvydas* case dealt with an individual who had instead been formally "admitted" to the US, who has greater rights under the U.S. Constitution, the court noted that the *Zadvydas* decision was ultimately based not on the Constitution but on statutory interpretation. Further observing that these statutory provisions do not distinguish between different groups of detainees, the court ordered the petitioner released unless the government submits evidence demonstrating that there is a significant likelihood that the petitioner actually will be removed from the U.S. in the reasonably foreseeable future.

Help From the Immigrant Defense Project

The petitioner in *Henry v Ashcroft*, *supra*, was represented by the law firm of Cleary, Gottlieb, Steen & Hamilton, which agreed to take the case pro bono after referral from

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NYSDA's Immigrant Defense Project. The Project provides a variety of assistance for immigrants and the lawyers representing them.

Pro Bono Referral in Selected Cases

As previously reported, the Project has commenced a new initiative to provide or obtain legal help for immigrants placed in removal proceedings based on conviction or accusation of a crime. (See *Backup Center REPORT*, Vol. XVI, #5, p. 15). The initiative will include expanded efforts to obtain *pro bono* legal representation for immigrants without counsel whose deportation cases raise important legal issues involving the interplay between criminal and immigration laws. The Project encourages *REPORT* readers to contact the Project regarding any such cases.

Removal Defense Checklist in Criminal Charge Cases Updated

The Removal Defense Checklist in Criminal Charge Cases prepared by the Immigrant Defense Project has been updated to include the above citations and other new legal developments of relevance in deportation cases based on criminal convictions. To access and/or download this resource material (now updated through Jan. 4, 2002), visit NYSDA's website at www.nysda.org and click on Immigrant Defense Project Resources. If you do not have access to the Internet, contact the Backup Center for a hard copy.

Legal Resource Materials, Training, and Backup Support for Those Representing Noncitizens Detained after Sept. 11

As reported in the last *REPORT*, the federal government has taken several steps in response to the events of Sept. 11 that create new risks for noncitizens suspected of criminal conduct or immigration law violations. (See *Backup Center REPORT*, Vol. XVI, #5, p. 14). To provide information and guidance to noncitizens and their lawyers regarding these new measures, NYSDA's Immigrant Defense Project has provided, and will continue to offer, backup support, training, and resource materials on legal issues arising in the cases of noncitizens targeted and detained by law enforcement authorities since Sept. 11.

For detailed information on immigration law developments and issues arising in these cases, *REPORT* readers are referred to the following two new Project resource materials (available on the Immigrant Defense Project page in the NYSDA Resources section of the NYSDA web site, www.nysda.org):

- Outline re: "New Developments in Representing Noncitizens Post-September 11"

- Law student memo re: "Constitutional Limits on Federal Government's Power to Detain Immigrants Whom the Government Suspects to Be Terrorists"

On Jan. 26, 2002, Project Director Manny Vargas was a panelist in a training session entitled "Special Considerations for Representing Non-Citizens," as part of an all-day CLE program, *Rights on the Line: Consequences and Implications of the USA PATRIOT Act for Client Representation*, co-sponsored by the New York City Chapter of the National Lawyers Guild, the Center for Constitutional Rights, the NLG Post 9-11 Project, the Legal Aid Society, and the New York Law School Justice Action Center.

Defense lawyers and other immigrant advocates may contact the Project hotline (212-367-9104) on Tuesdays and Thursdays between 1:30 p.m. and 4:30 p.m. for individual case guidance and backup support.

New Immigration Law Resource for Criminal Lawyers Published by ABA

The American Bar Association has published a useful resource for criminal lawyers who represent noncitizen defendants, or otherwise face immigration law issues in criminal cases. *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* (ABA 2001) was written by Robert James McWhirter, an Assistant Federal Public Defender for the District of Arizona since 1989. He is an expert on the intersection between criminal and immigration law and has written and lectured extensively on criminal/immigration issues.

The Criminal Lawyer's Guide offers a well-organized overview of immigration law for criminal lawyers presented in an accessible question-and-answer format. It is divided into three parts:

Part I: Immigration Law for Criminal Lawyers (including subparts on immigration consequences of criminal convictions, and border stops);

Part II: Immigration Crimes (including subparts on crimes of employing aliens and marriage fraud, illegal entry and reentry after deportation, and alien smuggling and document fraud); and

Part III: Noncitizen Witnesses and Defendants (including subparts on witnesses outside the United States, international extradition, and treaty transfer of noncitizen prisoners).

The Criminal Lawyer's Guide should be particularly valuable for defense lawyers who have a federal criminal practice as it covers many federal practice issues not extensively covered elsewhere, such as federal immigration crimes. The resource also contains useful appendices, including pertinent immigration statute provisions. ♪