Defense-Relevant Immigration News

By Manuel D. Vargas*

Any state drug felony may now be deemed an aggravated felony for immigration purposes

Under a new precedent decision issued by the Board of Immigration Appeals (BIA) on May 13, 2002, there is now a significantly greater risk that conviction of any state felony drug offense will be considered an "aggravated felony" for immigration law purposes. *See Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2002). This decision retreats from prior BIA precedents that held that first-time simple possession convictions, no matter how classified by the state, could not be deemed to be aggravated felonies. At the same time, this decision and another BIA decision issued the next day make clear that there is now an improved prospect that conviction of certain state misdemeanor drug offenses that are now sometimes considered aggravated felonies by the Immigration and Naturalization Service (INS) will not be found to be aggravated felonies. *See id and Matter of Santos-Lopez,* 23 I&N Dec. 419 (BIA 2002).

In general, these BIA decisions mean that a state's classification of a drug offense as a felony or misdemeanor will now often be determinative of whether conviction of the offense will be deemed an aggravated felony for immigration purposes. Prior BIA precedent decisions had provided that state drug offenses would be deemed aggravated felonies only if they would be treated as felonies under federal law. *See, eg, Matter of L-G-,* 21 I&N Dec. 89 (BIA 1995); *Matter of K-V-D-,* 22 I&N Dec. 1163 (BIA 1999).

On the one hand, the prior BIA precedents meant that all state sale or intent to sell offenses would be deemed aggravated felonies–no matter how the state classified the offense–because such offenses are always treated as felonies under federal law. *But see Steele v Blackman,* 236 F3d 130 (3d Cir. 2001) (holding that New York misdemeanor marijuana sale offense could not be deemed an aggravated felony because the offense could include transfer of a small amount of marijuana without compensation). In addition, the INS argued that these precedents meant that second or subsequent state possession offenses—again no matter how the state classified the offense—should be deemed aggravated felonies because such offenses could be prosecuted as felonies under federal law.

On the other hand, the prior precedents also meant that first-time possession offenses would not be deemed aggravated felonies because first-time possession offenses (except for offenses involving possession of more than five grams of crack cocaine) are treated as misdemeanors under federal law. The US Court of Appeals for the 2nd Circuit here in New York has deferred to the BIA precedents on this point in the immigration context. *See Aguirre v INS*, 79 F3d 315 (2d Cir. 1996) (deferring to the BIA interpretation in *Matter of L-G-*, and holding that a conviction of the New York felony of criminal possession of a controlled substance in the second degree with a sentence of eight years to life is not an aggravated felony for immigration purposes). The 3rd Circuit applied the *L-G-* approach to find that even a felony conviction of a second possession offense could not be deemed an aggravated felony when the prior conviction did not have to be proven as part of the second prosecution, as would have been required under federal law for the second conviction to be treated as a felony. *See Gerbier v Holmes,* 280 F3d 297 (3d Cir. 2002).

Nevertheless, at least in the illegal reentry federal criminal sentencing context, several federal circuit courts, including the 2nd Circuit, have differed with the BIA's approach of basing the aggravated felony determination on how the offense would have been treated under federal law. *See, eg, US v Pornes-Garcia,* 171 F3d 142 (2d Cir.), *cert den*, 528 US 880 (1999) (acknowledging the 2nd Circuit's following of the BIA's interpretation in the immigration context in *Aguirre* but, nevertheless, reaffirming prior circuit decisions holding that a state felony possession offense would be considered an aggravated felony for purposes of the sentence enhancement for illegal reentry after removal subsequent to an aggravated felony conviction); *compare with US v Hernandez-Avalos,* 251 F3d 505 (5th Cir.) (also holding that a state felony offense could be deemed an aggravated felony even if it would have been treated as a misdemeanor under federal criminal law, but rejecting the notion that the aggravated felony term may be interpreted differently in immigration and criminal cases).

In the recent *Matter of Yanez-Garcia* decision, the BIA retreated from its prior precedent decisions in *Matter of K-V-D- and Matter of L-G-* and announced that immigration judges and the BIA will now follow the precedent decisions of the relevant federal circuit court of appeals (or, if there is no applicable circuit authority, the interpretation of the majority of the federal circuit courts). And, in its decision the next day in *Matter of Santos-Lopez,* the BIA applied this new approach to find that a second Texas possession offense was not an aggravated felony under the 5th Circuit's *Hernandez-Avalos* precedent because Texas classified the second offense as a misdemeanor, even though the second offense could have been prosecuted as a felony under federal law.

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The BIA's new approach of applying relevant circuit law, which may have arisen outside of the immigration context, creates a confusing picture for New York immigrants and their lawyers for two reasons. First, uncertainty is created because New York immigrants may wind up being detained and having their Immigration Judge hearings in other states (such as Louisiana, Pennsylvania, and New Jersey). Thus, it is often impossible to know in advance which circuit's law will be applicable in a particular individual's case.[1] Second, even if an individual might know in advance that his or her hearing would likely take place here in the 2nd Circuit, additional uncertainty is caused by the fact that the 2nd Circuit may itself at some point soon retreat from its following of *Matter of L-G-* in *Aguirre* based on the BIA's own departure from the *L-G-* approach.

In any event, the trend in federal court decisions makes it safe to say that it is now significantly more likely that the determination of whether a particular New York State drug offense will be deemed an aggravated felony for immigration purposes will depend on how the offense is classified under New York law, rather than on how the offense would be treated under federal law. This is tremendously important for criminal lawyers and immigrant advocates counseling noncitizens in criminal or immigration proceedings to know. Conviction of an aggravated felony has many very harsh potential consequences, including likely mandatory deportation, ineligibility for asylum, ineligibility to return legally to the US after deportation, and enhanced sentencing for illegal return.

The bottom line: Defense lawyers should warn their noncitizen clients that pleading guilty to virtually any state *felony* drug offense will now be much more likely to result in an aggravated felony finding triggering these very harsh negative immigration consequences, even where the offense is a first-time possession offense. In addition, defense lawyers should be aware that a plea to a *misdemeanor* drug charge will also usually trigger deportability, but should generally avoid the additional negative consequences of an aggravated felony conviction–even when the defendant has prior misdemeanor drug conviction(s).

Post-September 11 law enforcement targeting of immigrants continues

In recent months, federal, state, and local law enforcement efforts have continued post-September 11th targeting of immigrants, especially those of Middle Eastern or Muslim country origins. Recent such law enforcement developments include:

- In March, 2002, the US Justice Department (DOJ) announced plans to question an additional 3,000 noncitizens mostly from Middle Eastern or Muslim countries to add to the close to 5,000 earlier called in for questioning.

According to DOJ last year, when questioning of the first group was announced, these names were compiled from INS and State Department records identifying males aged 18-33 from 20 Middle Eastern and European countries who entered the country on non-immigrant visas since January 1, 2000. The more recent group includes additional recent arrivals. Lawyers counseling immigrants called for questioning should warn such clients about a DOJ memorandum. It instructs US attorneys and members of the Anti-Terrorism Task Forces conducting the interviews, "You should specifically ask to see the individual's passport and visa, and you should take note whether he appears to be residing in the United States within the time period allowed by the visas." It goes on, "[I]f you suspect that a particular individual may be in violation of the federal immigration laws, you should call the INS representative on your Anti-Terrorism task Force or the INS officials at the closest Law Enforcement Support Center. These officials will advise you whether the individual is in violation of the immigration laws and whether he should be detained." The INS sent out its own memorandum directing its agents to detain suspected immigration violators identified by the interview project without the possibility of release on bond, if they are requested to do so by the federal investigators doing the interviewing. Of the over 2,261 young men interviewed as of March 20, 2002, about 20 had been arrested, most for immigration violations and none on charges involving terrorism.

- In March 2002, DOJ announced new initiative to track down and deport an estimated 6,000 immigrants from Arab and other Muslim countries who have pre-September 11 deportation orders but who have not been deported.

The immigrants on which this initiative focuses comprise fewer than 2 percent of the total number of 320,000 so-called "alien absconders" reported by the INS.

- In April 2002, the INS announced a new interim rule putting limits on the public disclosure by any state or local government entity or by any privately operated facility of the name or other information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of the INS. (Published at 67 Fed Reg. 19508-19511, amending 8 CFR 236 and 241, effective April 17, 2002.)

(Continued on page 31)

[1] Venue for a petition for review to challenge a finding of deportability is in the circuit court of appeals in which the Immigration Judge hearing takes place.

(Continued from page 9)

- News sources have recently reported that, earlier this year, an internal legal ruling by the DOJ Office of Legal Counsel cleared the way for the Attorney General to give state and local police departments the power to enforce federal immigration laws.

If this opinion becomes official DOJ policy, it may encourage local police departments to consider and negotiate immigration law policing partnerships with the Justice Department. A 1996 DOJ legal opinion had found that state and local police could temporarily detain or arrest noncitizens for violating the criminal provisions of the Immigration and Nationality Act, but not stop and detain them solely on suspicion of civil deportability. Florida will soon become the first jurisdiction to enter a policing partnership with DOJ. Others, including New York State, are considering it.

Immigrant Defense Project adds two new staff members

Defense lawyers contacting NYSDA's Immigrant Defense Project for backup support will soon encounter two new Project staff members.

On May 28, 2002, new staff attorney Saadia Aleem started work with the Project. Ms. Aleem will, among other tasks, take primary responsibility for the Project's new initiative to screen cases of immigrants facing deportation (see *Backup Center REPORT* Vol XVI, No. 5). She will recruit, train, and mentor *pro bono* law firm attorneys to provide legal representation in initiative cases raising important legal issues. She will also be a new resource person for Association members and others contacting the Project's Tuesday and Thursday hotline number. Ms. Aleem comes to the Project from the Washington offices of Morgan, Lewis & Bockius, where she did *pro bono* deportation defense work. She is a 2001 graduate of New York University Law School, where she was a Root-Tilden-Kern Public Service Scholar, as well as a Robert McKay Academic Scholar. Ms. Aleem's hiring was made possible by grants from the Open Society Institute and the New York Foundation.

On August 1, 2002, former Project intern Aarti Shahani will begin a two-year New Voices Fellowship with the Project. Ms. Shahani's fellowship work as an organizer/advocate will include: holding clinics for immigrants and their families affected by the harsh impact of current immigration laws and policies; developing immigrant self-help materials; preparing and distributing newsletters; organizing advocacy events and public forums; and improving Project information management and administrative technologies. Ms. Shahani, who herself has family members affected by the harshness of the current immigration laws, is a 2002 graduate of the University of Chicago and interned with the Project during the summer of 2001. She and the Project were awarded a New Voices Fellowship by the Academy for Educational Development under a grant from the Ford Foundation. ⚖

From My Vantage Point *continued*

(Continued from page 13)

Low Bid Not the Way for Localities to Lower Cost

Already we see localities looking for ways to lower costs. A bill allowing the County of Tioga to contract directly with private lawyers, eliminating the assigned counsel system, passed the Senate on June 20 but has thus far stalled in the Assembly. This bill deleted from the county law the requirement that the services of private counsel be rotated and coordinated by an administrator, and permitted the county to develop and approve a contract with private lawyers.

I don't expect this to be the last effort to abandon assigned counsel in favor of low bid contracting. Organized defenders and assigned counsel practitioners should join to oppose low bid alternatives that fail to serve clients.

Nor should the role of the private bar in handling criminal cases be abandoned as a cost saving measure. We must recognize that efforts to shift resources from assigned counsel plans to overburdened Legal Aid Societies and Public Defenders are not the answer; what is needed is more resources for all forms of public defense.

Need for Standards and Commission Clear

The recent history of public defense in New York State shows clearly that we need standards that protect clients, and an Independent Public Defense Commission to provide guidance to counties as they explore alternatives. At this extraordinary moment, as we all bring change to a system on the brink of collapse, it is critical that we protect the values that underlie what we are trying desperately to reform. ⚖