

## Defense-Relevant Immigration News

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### **2nd Circuit Says LPRs Convicted of Aggravated Felony Can't Apply for Family Hardship Discretionary Waiver of Deportation**

On May 29, 2002, the 2nd Circuit US Court of Appeals reversed a lower court decision that had held unconstitutional a 1996 amendment denying lawful permanent residents (LPRs) convicted of aggravated felonies a chance to apply for a family hardship waiver. See *Jankowski v INS*, 2002 US App. LEXIS 10035 (2nd Cir 2002).

A non-citizen who is the spouse, parent, or child of a United States citizen or LPR is eligible for a waiver from removal under the extreme family hardship provision (212[h]) of the Immigration and Nationality Act (INA). See 8 USC 1182(h). The 212(h) waiver is discretionary relief offered at the administrative level upon a showing that the US citizen, or LPR, relative will face extreme hardship if the person is deported. As part of the draconian 1996 amendments to the INA, Congress precluded 212(h) waivers for lawful permanent residents who, after lawful admittance, were convicted of an offense termed an "aggravated felony" and listed in INA 101(a)(43), 8 USC 1101(a)(43). However, Congress, did not preclude 212(h) relief for non-LPRs who had been similarly convicted of an aggravated felony. Some federal district courts, including the lower court in *Jankowski*, held that this violated equal protection. See *Roman v Ashcroft*, 181 FSupp2d 808 (ND Ohio 2002); *Song v INS*, 82 FSupp2d 1121 (CD Cal 2000); *Jankowski v INS*, 138 FSupp2d 269, 283 (D Conn 2001) ("the Court notes that the peculiarity of this result has led some courts and commentators to conclude that Congress must have erred in precluding only LPR aggravated felons from seeking discretionary relief under 8 USC 1182(h) relief.").

The 2nd Circuit found that the disparate treatment of LPRs and non-LPRs did not violate the Constitution. First, the Court held that LPRs and non-LPRs are consistently dealt with as two separate groups throughout the INA. Because two wholly different regimes are applied to LPRs and non-LPRs, members of the two groups cannot be "similarly situated." Rather, "Congress is . . . free to tweak what it considers a problem in one regime without worrying about the other." Moreover, the Court held that even if the equal protection rational basis test applied,

Congress could have rationally concluded to deny protections LPRs because of differences in recidivism, in opportunities to apply for other forms of discretionary relief, and in application rates.

Soon after *Jankowski*, the 3rd Circuit similarly rejected the equal protection argument, in *Leon-Reynoso v Ashcroft*, 2002 US App LEXIS 11381 (3rd Cir June 11, 2002). The 7th, 8th, and 11th Circuits have all also rejected the equal protection argument.<sup>1</sup>

**The Bottom Line:** Defense lawyers need to advise their lawful permanent resident immigrant clients that a conviction for one of the "aggravated felony" offenses enumerated in INA 101(a)(43) will now even more certainly lead to mandatory deportation. (Some relief may still be available if deportation will result in government-sanctioned torture or a threat to life or freedom.) To avoid mandatory deportation, lawyers must work to avoid pleas to offenses, or prison sentences, that will trigger "aggravated felony" deportability. For helpful tips, see Chapter 5 ("Strategies for Avoiding the Potential Negative Immigration Consequences of a New York Criminal Case") of the Project manual, *Representing Noncitizen Criminal Defendants in New York State*, available from NYSDA, or call the Project hotline.

### **NYSDA Submits Two Amicus Curiae Briefs in 2nd Circuit Cases Raising Issues Involving Interplay Between Criminal and Immigration Law**

- **NY manslaughter 2nd should not be a "crime of violence" for aggravated felony purposes**

On Apr. 24, 2002, NYSDA submitted an amicus curiae brief in support of the petitioner in *Jobson v Ashcroft*, No. 02-4019 (2d Cir. 2002), arguing that conviction of New York manslaughter, 2nd degree, should not be deemed a "crime of violence" for aggravated felony purposes. See INA 101(a)(43)(F), 8 USC 1101(a)(43)(F) (defining "aggravated felony" to include conviction of a "crime of violence" with a prison sentence of at least one year).

Conviction of an aggravated felony generally results in mandatory deportation. Under the immigration statute, which references a definition of "crime of violence" in the federal criminal code, "crime of violence" includes: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property

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<sup>1</sup> In at least one district court opinion, *Beharry v Reno*, 183 FSupp2d 584 (EDNY 2002), the court held that treaty and international law requirements required LPRs be allowed a hearing to present evidence regarding the effect of deportation on citizen and LPR family members. The government is currently appealing to the 2nd Circuit.

of another may be used in the course of committing the offense. See 18 USC 16.

In the *Jobson* case, immigration authorities found that NY manslaughter 2nd is a crime of violence under the second prong of the 18 USC 16 definition. The NYSDA *amicus* brief argues, first, that this is incorrect because the language of the second prong requires a substantial risk that force will be intentionally used; a *mens rea* of reckless is insufficient. Secondly, NYSDA's brief argues that the conduct encompassed by NY manslaughter 2nd does not necessarily "by its nature" present "a substantial risk of physical force" being used because death of the victim may result from an act or failure to act that does not involve force. See *Dalton v Ashcroft*, 257 F.3d 200 (2d Cir 2001) (not all violations of the New York DWI statute in question are "by their nature" crimes of violence because risk of use of physical force is not a requisite element). In addition, NYSDA's brief argues that it is improper for the immigration judge in the case to rely on a presentence report to determine whether a conviction constitutes a crime of violence.

NYSDA's *amicus* brief was drafted and submitted by the law firm of Wilmer, Cutler & Pickering as *pro bono* counsel to NYSDA. It is available from NYSDA's web site at:

[http://www.nysda.org/NYSDA\\_Resources/Immigrant\\_Defense\\_Project/JobsonvAshcroft\\_2ndcir2002\\_.pdf](http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/JobsonvAshcroft_2ndcir2002_.pdf)

- ***The Supreme Court's invalidation of the government's retroactive application of a 1996 mandatory deportation provision should apply to immigrants convicted after trial as well as those convicted by guilty plea***

On Mar. 21, 2002, NYSDA submitted an *amicus curiae* brief in support of the petitioners in *Rankine/Lawrence v Reno*, No. 01-2135(L) (2d Cir 2002). It argues that the protections of a Supreme Court decision last year invalidating retroactive application of a 1996 mandatory deportation provision in cases in which the immigrant pled guilty to a deportable offense before the new law should be extended to immigrants convicted after trial.

Under pre-1996 law, most Lawful Permanent Residents in deportation proceedings were eligible to apply for a waiver of deportation as long as they had been lawfully domiciled in the US for at least seven years and had not served five years or more in prison for conviction of one or more aggravated felonies. See former INA 212(c). However, in 1996, Congress repealed INA 212(c) relief, making mandatory deportation for permanent residents convicted of many crimes. Nevertheless, the Supreme Court ruled last year that 212(c) relief remains available for permanent residents who agreed to plead guilty before the new laws and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service*

*v St. Cyr*, 121 SCt 2271 (2001) (holding that AEDPA and IIRIRA 212(c) waiver bars could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result). See the *Backup Center REPORT*, Vol. XVI, #4, at p. 14.

The NYSDA brief argues that the reasoning of *St. Cyr* extends to immigrants who were convicted after trial because such immigrants, like those who chose to plead guilty, may have similarly relied on the immigration consequences at the time they elected not to plead guilty.

This *amicus curiae* brief, which was filed on behalf of NYSDA, as well as the Legal Aid Society of the City of New York and the New York Association of Criminal Defense Lawyers, was also drafted and submitted by Wilmer, Cutler & Pickering. It is available from NYSDA's web site at:

[http://www.nysda.org/Publications/Amicus\\_Briefs/RankineAmicusBrief.pdf](http://www.nysda.org/Publications/Amicus_Briefs/RankineAmicusBrief.pdf)

### ***Updated Removal Defense Checklist in Criminal Charge Cases Available***

The Immigrant Defense Project has updated its Removal Defense Checklist in Criminal Charge Cases to include relevant new legal developments over the past six months. The checklist provides a fairly exhaustive list of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing non-citizens in removal proceedings based on criminal charges. The checklist is also a useful tool for defense attorneys who are trying to weigh the risk of various plea agreements. To access or download this resource material (now updated through June 21, 2002) visit NYSDA's web site at [www.nysda.org](http://www.nysda.org) and click on Immigrant Defense Project Resources. ☺

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