Defense-Relevant Immigration News

by NYSDA's Immigrant Defense Project*

BIA Now Holds that ANY State Drug Felony Will Result in Mandatory Deportation for ALL Classes of Immigrants. Some Long-term Lawful Permanent Residents Convicted of NY Misdemeanor Drug Possession May Still Apply for Discretionary Relief from Deportation.

The Board of Immigration Appeals (BIA) of the US Department of Justice recently issued several precedent decisions that adopt a new approach to determining whether state drug offenses may be deemed "aggravated felonies" for immigration purposes. *See Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA May 13, 2002); *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA May 14, 2002); and *Matter of Elgendi*, 23 I&N Dec. 515 (BIA October 31, 2002).

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

The new approach offers mixed news for non-citizens convicted of New York State drug offenses. First, these decisions make clear that New York State misdemeanor drug possession offenses will now no longer be found to be aggravated felonies, even where the offense is preceded by a prior drug possession conviction. *See Matter of Santos-Lopez; see also Matter of Elgendi* (making clear that the BIA will apply *Santos-Lopez* in cases arising in the 2nd Circuit US Court of Appeals). These decisions reject arguments by the Immigration and Naturalization Service (INS) that second or subsequent drug possession convictions, even if classified as misdemeanors by the state, could be deemed aggravated felonies because second or subsequent drug possession offenses may be prosecuted as felonies under federal law.[1]

Second, these decisions make it much more certain that conviction of *any* New York State felony drug offense will be considered an aggravated felony for immigration law purposes. *See Matter of Yanez-Garcia; see also Matter of Elgendi* (making clear that the BIA will now apply *Yanez-Garcia* in cases arising in the 2nd Circuit). These decisions retreat from prior BIA precedents that held that at least first-time simple possession convictions, no matter how classified by the state, could not be deemed to be aggravated felonies. The *Elgendi* decision also declines to follow the decision of the 2nd Circuit, which had deferred to the prior 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 second-degree criminal possession of a controlled substance with a sentence of eight years to life is not an aggravated felony for immigration purposes). The BIA instead followed the approach of the 2nd Circuit on this point in the illegal reentry sentencing context. *See, e.g., United States v Pornes-Garcia*, 171 F3d 142 (2d Cir.), *cert. denied*, 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).[2]

The Bottom Line: 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 to know since conviction of an aggravated felony has many very harsh potential consequences, including likely mandatory deportation, ineligibility for asylum, ineligibility to return legally to the United States after deportation, and enhanced sentencing for illegal return. Defense lawyers and other immigrant advocates should warn their non-citizen 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. However, defense lawyers should be aware that a plea to a *misdemeanor* drug possession charge, while it may still trigger removability under the broader controlled substance deportability or inadmissibility grounds, should avoid the additional negative consequences of an aggravated felony conviction—even when the defendant has prior drug conviction(s).

2nd Circuit Clarifies Standards for Temporary Stays in Immigration Appeals

On October 24, 2002, the 2nd Circuit held that the heightened standard for injunctive relief provided by sub-

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* ***The Immigrant Defense Project*** *provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. Manny Vargas is Director of the Project, Saadia Aleem is Staff Attorney and coordinator of the Project's* pro bono *program, and Aarti Shahani is Advocate/Organizer. For hotline assistance, call the Project on Tuesdays and Thursdays from 1:30 to 4:30 p.m. at (212) 367-9104. For information on the Project's new community organizing initiative,* *see box p. 19.*

section 242(f)(2) of the Immigration and Nationality Act did not apply to a consideration of stay pending appeal, as application would lead to the absurd result that an immigrant would have to make a more persuasive showing to obtain a stay than is required to prevail on the merits. *Mohammad v Reno* 309 F3d 95, (2nd Cir. 2002). In ruling that the traditional standard for stay[3] applies to prevent deportation or removal, the 2nd Circuit joins the 6th and 9th circuits, which have also refused to allow the INS to apply such restrictive language to prevent immigrants from staying in this country and fighting the legality of their immigration proceedings. *Bejjani v INS*, 271 F3d 670 (6th Cir. 2001); *Andreiu v Ashcroft*, 253 F3d 477 (9th Cir. 2001) (*en banc*).

The 2nd Circuit ruling is great news for all classes of immigrants who are either in the process of challenging their removal orders or who may one day have to do so. Unfortunately, the ruling does not help Mr. Mohammad himself. Mr. Mohammad, a long-term lawful permanent resident of New York, was sentenced in 1997 for a 1996 criminal possession of stolen property. At the time of the alleged crime, Mr. Mohammad's conviction would not have led to deportation, and, even if he had been deportable, he would have been eligible to seek a waiver of deportation. Mr. Mohammad filed in federal court to challenge the retroactive application of laws eliminating relief from deportation to the pre-law conduct in his case. The 2nd Circuit held that despite a "thoughtful" and "provocative" argument made in favor of Mr. Mohammad, the Court was bound by prior case law on the subject. *Mohammad*, 309 F3d 95; *see also Domond v INS*, 244 F3d 81 (2nd Cir. 2001). The Court did stay the mandate for 30 days to allow Mr. Mohammad time to appeal, which Mr. Mohammad's *pro bono* counsel, David A. Yocis at Dewey Ballentine LLP, has done.

2nd Circuit Holds that Attorney's Affirmative Misrepresentation of Deportation Consequences of Guilty Plea Rendered Counsel Ineffective and Plea Invalid

In 1994, the New York Court of Appeals held that a counsel's failure to advise a defendant of the deportation consequences of a guilty plea did not, *per se,* constitute ineffective assistance of counsel. *People v Ford*, 86 NY2d 397 (1994). It has been an open question as to whether an affirmative misrepresentation about deportation consequence would invalidate a plea under New York law.

On Nov. 15, 2002, the 2nd Circuit held that a defendant's guilty plea to a federal charge was invalid because her counsel was ineffective for misrepresenting the deportation consequences of her guilty plea; the court found that had the defendant known of the consequences, she likely would not have pleaded guilty as her overriding concern was remaining in the US. *United States v Cuoto*, 2002 US App LEXIS 23680 (2d Cir 11/15/02). Litigation is pending in New York State with respect to analogous state cases.

The Bottom Line: The American Bar Association requires investigation of all laws relevant to a client's decision to plead guilty. *ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.) Std 14-3.2, at 73 (1994). Commentary makes clear that this includes investigation of immigration consequences.[4] Given that once a plea is entered, most immigrants will not have the opportunity to contest the plea nor to avoid the collateral immigration consequences, it is increasingly important for defense attorneys to investigate possible immigration consequences for their clients. If you have a non-citizen client please feel free to contact our immigration hotline for assistance.

National Defending Immigrants Partnership Launched

The Immigrant Defense Project of NYSDA has joined with the Immigrant Legal Resource Center (California), the National Legal Aid and Defender Association, and the National Immigration Project of the National Lawyers Guild, to launch a new initiative called the Defending Immigrants Partnership (DIP). DIP will offer information, education, technical assistance and legal back-up to state and federal public defenders, appointed counsel, and private defense counsel on the immigration consequences of crime. DIP's initial mandate is to address the law and practices in California, Florida, Illinois, New Jersey, New York, and Texas—the six most immigrant-populous states and to work with federal defender programs across the country. The thesis underlying our partnership is that the best way to insure that immigrant defendants have informed, effective counsel is for the defender community to embrace the issue of immigration consequences as its own.

Updated Removal Defense Checklist in Criminal Charge Cases Available on NYSDA Website

The Immigrant Defense Project has updated its Removal Defense Checklist in Criminal Charge Cases to include relevant new legal developments over the past several months. The checklist provides a fairly exhaustive compilation 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 Oct. 15, 2002) visit NYSDA's website at www.nysda.org and click on Immigrant Defense Project Resources.

Immigrant Defense Project Moves to the Battery Park Area in Lower Manhattan

Increased staff at the IDP has led the Project to move to new offices in the Battery Park area. The move is a temporary one. Plans are for a move to more permanent space in the summer of 2003. Mail sent to our old address will be forwarded to us. Correspondence may also be sent to our new address:

Immigrant Defense Project—NYSDA
2 Washington Street, 7 North
New York, NY, 10004

Until further notice, the Project's hotline number remains the same: (212) 367-9104. ⚖

Endnotes

1. The INS may nevertheless continue to argue that a conviction of New York misdemeanor sale of marijuana is an aggravated felony based on a claim that such a "sale" offense is necessarily a "trafficking" offense. This INS argument has been rejected by one federal circuit court. *See Steele v Blackman*, 236 F.3d 130 (3d Cir. 2001) (holding that New York misdemeanor marijuana sale could not be deemed an aggravated felony because the offense could include transfer of a small amount of marijuana without compensation).

2. In *Yanez-Garcia*, the BIA indicated that it would continue to follow any contrary federal circuit court precedents. In *Elgendi*, however, as described in the text, the BIA makes clear that, in the 2nd Circuit, the BIA will follow case law in the illegal re-entry sentencing context, rather than in the immigration context. Nevertheless, New York immigrants and their lawyers might still argue that a New York felony possession offense is not necessarily an aggravated felony in the federal courts, or, if the immigrant winds up being detained in states such as New Jersey or Pennsylvania, in any immigration proceedings in such states, because immigration judges there are bound by 3rd Circuit case law agreeing with the old BIA approach. *See Gerbier v Holmes*, 280 F3d 297 (3d Cir. 2002).

3. The traditional standard requires consideration of: the likelihood of success on the merits; irreparable injury if a stay is denied; substantial injury to the party opposing a stay if one is issued; and the public interest.

4. Standard 14-3.2, Responsibilities of Defense Counsel, states:

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

The Commentary includes:

Standard 14-3.2(f) is another new provision. It requires defense counsel, "sufficiently in advance of the entry of any plea," to determine and advise the defendant as to "the possible collateral consequences that might ensue from entry of the contemplated plea." While the standards always required defense counsel to advise his or her client concerning other considerations "deemed important by defense counsel or the defendant" (Standard 14-3.2(b)), the number and significance of potential collateral consequences has grown to such an extent that it is important to have a separate standard that addresses this obligation. . . .

Given the ever-increasing host of collateral consequences that may flow from a plea of guilty or nolo contendere, it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances. Courts do not requires such an expansive debriefing in order to validate a guilty plea. This Standard, however, strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. *In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or* Alford *plea.* Further, counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces. For example, depending on the jurisdiction, it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client. Knowing the likely consequences of certain types of offense conduct will also be important. Defense counsel should routinely be aware of the collateral consequences that obtain in their jurisdiction with respect of certain categories of conduct. The most obvious of such categories are controlled substance crimes and sex offense because convictions for such offense conduct are, under existing statutory schemes, the most likely to carry with them serious and wide-ranging collateral consequences.

NYSDA Immigrant Defense Project
Community Organizing Initiative

Do you have a loved one getting deported? ❑Yes ❑ No
Were you ever in immigration detention? ❑Yes ❑ No
Are you sick of how the laws hurt your family? ❑Yes ❑ No
Do you want to do something about it? ❑Yes ❑ No

If you answered yes to ***any*** of these questions…
JOIN US!
We are loved ones who have decided
it's time to take our lives and
our loved ones back!!!

For more info contact:
Aarti Shahani
(212) 367-9104
ashahani@nysda.org
or
Subhash Kateel
(347) 524-3374