

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

BIA Holds NY Youthful Offender Adjudication Is a Conviction for Deportation Purposes

A panel of the Board of Immigration Appeals (BIA) has decided that a New York youthful offender adjudication is a conviction for immigration law purposes despite NYSDA's submission of an *amicus curiae* brief explaining how New York law provides that such a disposition may not be deemed a conviction and is confidential. *Matter of Pereira*, A44-802-198 (BIA, 9/10/99). The decision of the three-member panel did not go to the entire eighteen-member Board and was not designated as a precedent decision. Nevertheless, because the BIA panel reached its conclusion on a youthful offender disposition despite detailed briefing regarding New York youthful offender law, the decision confirms fears expressed earlier in the *REPORT* based on dicta in the BIA's March 1999 precedent decision involving an Idaho plea that was later vacated. *Matter of Roldan-Santoyo*, Int. Dec.#3377 (BIA March 3/3/99). See the *Backup Center REPORT* Vol. XIV, #3, at pg. 6.

The BIA panel in *Matter of Pereira* found that the respondent had pled guilty to two counts of robbery under New York State Penal Law and, although his plea was replaced with a youthful offender finding, was sentenced to serve 1½ to 4 years imprisonment. The panel cited *Roldan-Santoyo* and stated: "Since no effect is to be given to a state action which purports to expunge, cancel, vacate, discharge, or otherwise remove a guilty plea and since an order placing a restraint on the alien's liberty has been imposed we must find that this respondent has been convicted within the meaning of section 101(a)(48)(A) of the Act. We, therefore, reject both the respondent's and the NYSDA's arguments that the respondent's youthful offender adjudication is not a conviction as defined under the Act."

NYSDA will continue its efforts to persuade the BIA and/or federal courts that the new definition of conviction does not cover New York youthful offender adjudications. The Association has submitted *amicus* briefs in two additional cases before the BIA (*Matter of Rose* and *Matter of Das*, both filed September 15, 1999) raising the youthful offender issue. *REPORT* readers who are aware of cases raising the youthful offender issue either before the BIA or the courts are asked to contact the Criminal Defense Immigration Project at (212) 367-9104.

***Manuel D. Vargas** is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. If you have questions about immigration issues in a criminal case, call Manny at (212) 367-9104. Hours are: Tuesdays and Thursdays, 9:30 a.m. to 4:30 p.m.

US Court in Brooklyn Rules AEDPA Relief Restriction Not Retroactive

United States District Judge Jack B. Weinstein has issued two decisions ruling that the restrictions on deportation relief for lawful permanent residents in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) may not be applied retroactively to individuals whose criminal conduct or conviction preceded AEDPA's enactment even if they were not yet in deportation proceedings on the date of enactment. *Pottinger v Reno*, 51 FSupp.2d 349 (E Dist NY 8/2/99) and *Maria v McElroy*, 1999 WL 680370 (E Dist NY 8/27/99).

At issue was the government's retroactive application of AEDPA section 440(d), which barred lawful permanent residents from eligibility for a waiver of deportation if they were convicted of any of several enumerated criminal offenses no matter how minor the offense or what equities were present. In 1998, the 2nd Circuit held, as a matter of statutory interpretation, that Congress did not intend for this relief restriction to be applied in pending deportation cases. *Henderson v INS*, 157 F3d 106 (2d Cir 1998), *cert den sub nom Navas v Reno*, 199 SCt 1141 (3/8/99). The Circuit did not reach the issue of whether Section 440(d) applies in cases that were not pending on April 24, 1996, but which involved pre-Act convictions and/or conduct.

The federal government is expected to appeal the *Pottinger* and *Maria* decisions.

Project Trainers

Project Director Manny Vargas is having a busy fall making presentations on criminal/immigration issues. On Sept. 2, 1999 he spoke to new law clerks at the US Court of Appeals (2nd Circuit) in New York City about potential crime-related immigration issues. On Sept. 7 he spoke on immigration consequences of criminal convictions to the Criminal Defense Clinic class at City University of New York School of Law in Queens. On Sept. 9, he discussed immigration consequences of "aggravated felony" criminal convictions at the Criminal Courts Bar Association of Nassau County in Westbury. And on Sept. 22 he visited a leading immigration law firm in New York City, **Fragomen, Del Rey & Bernsen P.C.**, to discuss issues of deportability and relief for criminally convicted noncitizens in removal proceedings.

Manny will be traveling to California in October to participate in a panel presentation on relief for criminally convicted noncitizens in removal proceedings during a daylong seminar entitled "The Immigration Consequences of Criminal Conduct" sponsored by the National Immigration Project of the National Lawyers Guild. He has additional trainings scheduled in New York City and elsewhere in the coming weeks. ☺