

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

BIA Holds TX Felony DWI is an Aggravated Felony, Triggering Mandatory Deportation

The Board of Immigration Appeals (BIA) has ruled that the felony offense of driving while intoxicated (DWI) under Texas law is a conviction of a crime of violence and therefore an aggravated felony for immigration law purposes. *Matter of Puente-Salazar*, Interim Decision #3412 (BIA 9/29/99). Reaffirming and clarifying its earlier holding in *Matter of Magallanes*, Interim Decision #3341 (BIA 1998), the Board found that operating a motor vehicle in a public place while under the influence involves a substantial risk that physical force against the person or property of another may be used in the commission of the offense. Therefore, the Board held that the Texas felony DWI offense meets the second prong of the 18 USC 16 definition of "crime of violence" referenced in the 8 USC 1101(a)(43)(F) definition of an aggravated felony in the immigration statute. See also *Camacho-Marroquin v. INS*, 1999 WL 714179 (5th Cir. 1999) (decided the same day as *Puente-Salazar*).

When deemed an aggravated felony under the "crime of violence" category, conviction of a DWI offense may trigger deportation without any possibility of relief. Other potential consequences include mandatory detention after release from criminal custody, limited judicial review, permanent inadmissibility as a legal resident after removal from the United States, and greatly enhanced federal prison time if later convicted of illegally reentering the United States.

Defense lawyers and their noncitizen clients should keep in mind that a noncitizen accused of a DWI offense may still avoid the consequences of an aggravated felony conviction. The client may plead only to a misdemeanor DWI offense, or bargain for a sentence of imprisonment less than one year, e.g. a prison sentence of 364 days. See 8 USC

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Note: While Manny works on an update of the manual, the hours he is available by phone [(212) 367-9104] to take questions about immigration issues in a criminal case will be reduced to: **Thursdays only, from 9:30 a.m. to 4:30 p.m., November and December, 1999.**

For Immigration Info on the Internet

- Relevant Immigration News/Alerts/Practice Tips
- Notable Recent Immigration Decisions
- Project Resources
- Immigration Internet Links

See the Resources Section of NYSDA's Web Site

www.nysda.org

1101(a)(43)(F). See also *People v Cuaran*, 689 NYS2d 392 (1st Dept, 1999), noted in an earlier column (*Backup Center REPORT*, Vol. XIV, #5) and case digest (*Backup Center REPORT*, Vol. XIV, #6).

NYSDA to File Amicus Brief in Cases Challenging the Application of New Law to Lawful Permanent Residents Already Convicted

NYSDA plans to file an *amicus curiae* brief before the United States Court of Appeal for the 2nd Circuit in a consolidated group of cases challenging the federal government's retroactive application of a congressional repeal of deportation relief for lawful permanent residents convicted of crimes before the repeal took effect. *Calcano-Martinez v. Reno*, *Madrid v. Reno*, and *Khan v. Reno*. The brief is to be filed Nov. 12, 1999. The deportation relief at issue, known as the 212(c) waiver, was repealed effective April 1, 1997 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Many immigrant defendants relied on the availability of such relief from deportation when pleading guilty to deportable offenses. The brief will argue that the government's retroactive application of the IIRIRA 212(c) waiver repeal is impermissible under the traditional presumption against retroactivity of a new civil statute. The *amicus* brief may also be submitted on behalf of the New York State Association of Criminal Defense Lawyers and the Legal Aid Society of New York City; it will be available from the Backup Center.

NYSDA Comments on Proposed INS Rule on Early Release for Deportation

NYSDA filed comments on a proposed Immigration and Naturalization (INS) rule regulating early release for removal of noncitizens in state custody convicted of non-violent offenses. The proposed rule was published in the Federal Register on July 12, 1999 (Volume 64, Number 132, Page 37641-37465). NYSDA's comments, submitted on Sept. 10, 1999, express concerns that the proposed rule: 1) requires those who seek early release for removal to waive important legal rights to an extent inconsistent with domestic and international law; 2) requires individuals to waive these rights without the benefit of legal counsel; and 3) does not provide that the individual seeking early release for removal be fully advised of all the negative consequences of removal. Both the proposed rule and NYSDA's comments are available from the Backup Center. ♪