



USING THE SECOND CIRCUIT'S UNPUBLISHED DECISION IN *GARCIA V. SESSIONS*, __ F. APP'X __, 2018WL497201 (2D CIR. JAN. 22, 2018) TO DEFEND AGAINST DEPORTATION BASED ON NEW YORK CONVICTIONS*

On January 22, 2018, the Second Circuit decided *Garcia v. Sessions*, __ F. App'x __, 2018WL497201 (2d Cir. Jan. 22, 2018), vacating a noncitizen's removal order and remanding his case to the agency for further proceedings. Though unpublished, the Second Circuit's decision in *Garcia* provides useful insight into the court's position on a number of issues that affect the immigration consequences of certain convictions under the New York Penal Law (N.Y.P.L.), and the application of the categorical approach. Below we present four implications of the court's decision that noncitizens and their lawyers can use to defend against deportation in removal proceedings that take place under the jurisdiction of the Second Circuit.

- 1. The court affirms that the holding of *Harbin v. Sessions* is that conviction under N.Y.P.L. § 220.31 is categorically not an aggravated felony:**
 - In *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017), “we held that a conviction under N.Y.P.L. § 220.31 does not constitute the commission of an aggravated felony for immigration purposes, and is therefore not sufficient to make an alien removable.” *Garcia*, 2018WL497201 at *2 (citing *Harbin*, 860 F.3d at 61).
- 2. The court criticizes the BIA for providing insufficient analysis for its decision that convictions are removable CIMTs:**
 - “[A]ll the BIA included to support its finding that Garcia’s crimes were CIMTs was a single sentence and a string of citations to cases that, as we discuss below, do not fully support its findings. The BIA’s reasoning thus was too cursory to support its conclusion that Garcia’s convictions were CIMTs.” *Garcia*, 2018WL497201 at *2 (citing *Johnson v. Ashcroft*, 378 F.3d 164, 169 (2d Cir. 2004) (“The BIA is required to follow the law, including ...BIA precedents....”)).
- 3. The court indicates that whether conviction for theft of services under N.Y.P.L. § 165.15(3) is a CIMT is an open question:**
 - “It is not clear that theft of services under N.Y.P.L. § 165.15(3) is a CIMT.” *Garcia*, 2018WL497201 at *2.
 - “[W]e remand the case to the BIA to consider, in the first instance” whether theft of services in violation of N.Y.P.L. §165.15(3) is categorically a CIMT.” *Garcia*, 2018WL497201 at *2 (quoting *Butt v. Gonzales*, 500 F.3d 130,131 (2d Cir. 2007)).

*This practice guide was written by Andrew Wachtenheim, Supervising Attorney, Immigrant Defense Project. It presents potential arguments that noncitizen litigants and attorneys can raise in immigration proceedings. It is not a substitute for independent legal advice associated with the specific details of an individual's case.



4. **The court affirms that subsection (1) of N.Y.P.L. § 120.00 is the only turpitudinous subsection of N.Y.P.L. § 120.00. The court further provides support for arguments that DHS has not proffered sufficient evidence of the subsection of conviction (specifically, the court rejects the BIA’s attempts to use the noncitizen’s testimony and the rap sheet as bases for proving the subsection of conviction):**
- “The BIA’s CIMT analysis of Garcia’s attempted third-degree assault conviction is flawed for a different reason: it is not clear that it was established that his conviction was under subpart one of N.Y.P.L. § 120.00. This matters because subpart one is the only portion of that provision that the BIA has previously determined constitutes a CIMT.” *Garcia*, 2018WL497201 at *3 (citing *Matter of Solon*, 24 I. & N. Dec. 239, 245 (BIA 2007)).

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