



# Immigration Law Advisor

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*The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.*

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## The Treatment of Multiple State Possession Offenses in Light of *Lopez* by Sydney O'Hagan

Section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B) defines an aggravated felony to include “a drug trafficking crime.” In turn, a drug trafficking crime is defined in part as “any felony punishable under the Controlled Substances Act” (CSA). 18 U.S.C. § 924(c)(2). The Supreme Court’s decision in *Lopez v. Gonzales*, *U.S.*, 127 S.Ct. 625 (2006), resolved one of the long-running debates between the circuit courts concerning the definition of an aggravated felony in the drug crime context. Under *Lopez*, the CSA must punish a crime as a felony in order for the crime to be a “felony punishable under the CSA.”

However, *Lopez* did not resolve another issue that has also caused a split in the circuit courts over the past few years: under what circumstances multiple state drug possession convictions are aggravated felonies as defined under section § 101(a)(43)(B) of the Act, given that subsequent misdemeanor offenses can be treated as felonies under the CSA’s recidivist provision. The Supreme Court indicated that multiple state drug possession convictions can be aggravated felonies in a footnote:

Congress did counterintuitively define some possession offenses as “illicit trafficking.” Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2), such as possession of cocaine base and recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2), regardless of whether these federal possession felonies or their state counterparts constitute ‘illicit trafficking in a controlled substance’ or ‘drug trafficking’ as those terms are used in ordinary speech.

*Lopez v. United States*, 127 S.Ct 625, 630 n. 6 (2006).

*Lopez* did not provide any further guidance on this issue, however. This article will provide an overview of the issues involved.

As background, the CSA generally punishes drug possession offenses as misdemeanors (that is, by one year's imprisonment or less). However, repeat drug offenders charged under the recidivist provision of the CSA are punished as felons. See 21 U.S.C. § 844(a). Under the CSA, a misdemeanor possession offense is converted into a felony if the federal prosecutor, who has the burden of proof beyond a reasonable doubt on any issue of fact, files an information with the sentencing court charging the prior drug conviction and allowing the defendant to challenge the fact, finality, and validity of the prior conviction. See 21 USC §§ 844(a), 851. Complicating this issue is the fact that many states' recidivist enhancement statutes do not correspond exactly to the CSA. See, e.g., Mass. Gen. Laws ch. 94C, § 34 and ch. 278, § 11A. In fact, most states' criminal procedure laws lack mechanisms for requiring notice and proof of the fact, finality, and validity of any alleged prior drug conviction in prior criminal proceedings.

In addressing whether multiple state drug possession offenders are aggravated felons, some circuit courts, such as the Second and Fifth Circuits, have found that such individuals are aggravated felons if they could be charged as felons under the CSA's recidivist provision. *United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5<sup>th</sup> Cir. 2005) (holding that an alien twice convicted of possession of marijuana was an aggravated felon because he "could have been punished under § 844(a) as a felony with a penalty of up to two years imprisonment"); *United States v. Simpson*, 319 F.3d 81, 85-86 (2<sup>d</sup> Cir. 2003) (holding that in the sentencing context, an alien's marijuana possession conviction is an aggravated felony because his prior drug convictions render him punishable as a felon under § 844(a) of the CSA.). In so ruling, the Fifth Circuit focused on the fact that if the possession charge had been brought in federal court "it would not . . . only have been punishable as a misdemeanor." *Sanchez-Villalobos*, 412 F.3d at 577.

The First and Third Circuits would find multiple state drug possession offenses to be felonies in certain circumstances. *Berhe v. Gonzales*, 464 F.3d 74 (1<sup>st</sup> Cir. 2006); *Gerbier v. Holmes*, 280 F.3d 297, 316-17 (3<sup>rd</sup> Cir. 2003). The Third Circuit focused on that fact that

under the CSA, misdemeanor possession offenses are not *automatically* converted into felonies, but are converted into felonies only if certain conditions are met. The Third Circuit concluded that "in order for a state drug conviction to constitute a ...felony under § 844(a) based on the prior drug conviction enhancement, we must be satisfied that the state adjudication possessed procedural safeguards equivalent to the procedural safeguards that would have accompanied the enhancement in federal court." *Gerbier*, 280 F.3d at 316-17.

The Ninth Circuit, on the other hand, treats all state drug possession offenses as first offenses, without regard for how the offense could have been punished under the CSA's recidivist provision, and without regard for whether the offense was charged and prosecuted as a recidivist offense at the state level. See *United States v. Ballesteros-Ruiz*, 319 F.3d 1101, 1105-06 (9<sup>th</sup> Cir. 2003). The Court reasoned that under *Taylor v. United States*, 495 U.S. 575 (1990), it must examine the prior crimes by considering the statutory definition of the crimes categorically, without reference to the particular facts underlying those convictions. The Court concluded "we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements. This approach is consistent with the Supreme Court's historic separation of recidivism and substantive crimes. As the Court bluntly put it, 'recidivism does not relate to the commission of the offense.'" *Corona-Sanchez v. Gonzalez*, 291 F.3d 1201, 1210 (9<sup>th</sup> Cir. 2002) (citing to *Apprendi v. New Jersey*, 530 U.S. 466, 488).

The first issue the Immigration Courts and the Board must grapple with is whether the above precedent is still good law in light of *Lopez*. This is particularly acute in the Ninth Circuit, whose precedent directly conflicts with the footnote in *Lopez* that state recidivist possession crimes are felonies under the CSA. A preliminary issue is whether the statement in *Lopez* is dicta. Chief Justice Marshall, speaking of dicta appearing in *Marbury v. Madison*, 5 U.S. (1 Granch) 137 (1803) observed in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1821), that "it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." On the one hand,

the footnote is part of the analysis of the case, but on the other hand, *Lopez* did not involve multiple possession offenses. If *Lopez* is dicta, then *U.S. v. Ballasteros-Ruiz* may control until the Ninth Circuit revisits the issue.

In other circuits, the issue becomes whether *Lopez* changes the approach to deciding in what circumstances misdemeanor possession offenses are aggravated felonies. The Supreme Court’s language in *Lopez* provides some analytic tools. The *Lopez* Court acknowledged that disparities between state and federal law would, at times,

allow an alien to avoid the aggravated felon designation in apparently undesirable situations. For instance, the Court found that because some states graduate drug possession offenses from a misdemeanor to a felony depending on quantity, “whereas Congress generally treats possession alone as a misdemeanor whatever the amount . . . an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount.” In making this concession, the

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## FEDERAL COURT ACTIVITY

### CIRCUIT COURT DECISIONS FOR APRIL 2007

*By John Guendelsberger*

The overall reversal rate by the United States Courts of Appeal of petitions for review of Board decisions of 7.1 % for April 2007 continued a downward trend for the year from 19.1 % in January, 14.1 % in February and 10.9 % in March. The following chart provides the results from each circuit for April 2007 based on electronic database reports of published and unpublished decisions:

Circuit	Total	Affirmed	Reversed	%
1st	3	3	0	0.0
2nd	87	72	15	17.2
3rd	41	39	2	4.9
4th	15	15	0	0
5th	14	13	1	7.1
6th	4	3	1	25
7th	10	5	5	50
8th	9	7	2	22.2
9th	387	371	14	4.1
10th	9	9	0	0
11th	22	22	0	0
All:	602	559	43	7.1

This month’s batch of decisions included an unusually large number of Ninth Circuit short order dismissals of appeals from denials of untimely motions and challenges to denials of cancellation of removal for lack of the requisite hardship, qualifying relative, or physical presence. The Ninth Circuit issued nearly 64 % of the total decisions and denied or dismissed the petition for review in

over 95 % of these decisions. The weight of the Ninth Circuit numbers helped to bring the overall reversal rate down to near the 7 % mark.

The relatively few reversals from the Ninth Circuit were mostly in asylum cases and involved decisions on credibility (4); application of the presumption of a continuing well-founded fear of persecution after a finding of past persecution; failure to make case specific findings in applying the “particularly serious crime” bar; failure separately to address protection under the Convention Against Torture (CAT); failure to apply the “willful blindness” test for CAT; and a flawed frivolousness determination.

The Second Circuit reversed in 15 of 87 cases (17.2 %), up from last month’s 12.5 %, but still below its usual reversal rate. Over half of the Second Circuit reversals involved flaws in the adverse credibility determination in asylum claims. Other reversals involved the level of harm for past persecution assessment of relocation possibilities in determining well-founded fear, and three motions to reopen in which issues raised or evidence submitted were inadequately addressed.

The highest reversal rate came from the Seventh Circuit whose five reversals in ten decisions covered a wide range of issues including Immigration Judge bias, the “persecutor” bar to asylum, corroboration requirements, denial of a motion to reopen without adequate explanation of reasons, and particular social group in the context of domestic abuse.

Notably, the three circuits with the highest reversal rates -- the Sixth, Seventh and Eighth -- altogether

issued 24 decisions and reversed in 9. By way of contrast, the First, Fourth, Tenth and Eleventh circuits combined issued 49 decisions with no reversals.

The chart below shows the numbers of decisions for the first four months of calendar year 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	37	25	12	32.4
8th	37	28	9	24.3
2nd	389	311	78	20.1
10th	24	21	3	12.5
6th	43	38	5	11.6
9th	942	846	96	10.2
3rd	129	118	11	8.5
4th	72	66	6	8.3
5th	68	64	4	5.9
11th	116	113	3	2.6
1st	11	11	0	0
All:	1868	1641	227	12.2

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## RECENT COURT DECISIONS

### *Supreme Court*

*James v. United States*, \_\_ US \_\_, 127 S.Ct. 1586 (April 18, 2007). This is not an immigration related case. However, it applies the categorical approach outlined in *Taylor v. United States*, 495 U.S. 575 (1990), and may be relevant to immigration proceedings. The question in *James* was whether the defendant’s prior conviction for attempted burglary subjected him to the 15 year mandatory minimum sentence for his firearm conviction as mandated by the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). In order for the mandatory minimum to apply the defendant must have been previously convicted of 3 prior violent felonies or serious drug offenses (in addition to attempted burglary, the defendant had been twice convicted of possession of cocaine and trafficking in cocaine which were determined to be “serious drug offenses” under the ACCA). Whether the defendant’s

burglary conviction qualified as a “violent felony” under the ACCA depended on whether it “otherwise involved conduct that presents a serious potential risk of physical injury to another.” One of the defendant’s arguments was that under *Taylor*, attempted burglary, as defined in the Florida statute, cannot be treated as one that “presents a serious potential risk” under the ACCA unless all cases present such a risk. The Court rejected this argument, finding that *Taylor’s* categorical approach does not require “that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony. . . . Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” *Id.* at 1597.

### *Fifth Circuit*

*Garrido-Morato v. Gonzales*, \_\_ F.3d \_\_, 2007 WL 1196510 (5<sup>th</sup> Cir. April 24, 2007). The Court found that application of the amended definition of “aggravated felony” contained in section 321 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to the alien’s conviction for harboring aliens which occurred prior to the date of amendment was not impermissibly retroactive, as Congress clearly intended the new definition of aggravated felony apply to all convictions without regard to date of occurrence. The petitioner conceded that section 321(b) of IIRIRA expressed an intent of retroactivity as to the definition of aggravated felony under the statute, but argued that it was unclear if section 321(c) (“the amendments . . . shall apply to actions taken on or after the date of the enactment”) applied to her claim for relief. The Fifth Circuit held that the phrase “actions taken” referred to decisions of the Attorney General’s representatives with regard to a particular alien and not to the action of an alien pleading guilty or applying for relief.

### *Eighth Circuit*

*Hassan v. Gonzales*, \_\_ F.3d \_\_, 2007 WL 1308848 (8<sup>th</sup> Cir. May 7, 2007). The petitioner, a native and citizen of Somalia, sought review of the BIA’s affirmance of the IJ’s denial of her application for asylum. The Eighth Circuit granted the petition for review. The Eighth Circuit first found that the petitioner, who underwent female genital mutilation (FGM) as a child, established past persecution as FGM is persecution. Next, in analyzing whether the respondent established persecution on account of one of the grounds specified in the Act, the Court found that

“a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM.. As the Ninth Circuit noted ... `there is little question that genital mutilation occurs to a particular individual because she is a female. That is, possession of the immutable trait of being female is a motivating factor-if not a but-for cause-of the persecution’...We, therefore, conclude that Hassan was persecuted on account of her membership in a particular social group, Somali females.” *Id.* at \*3, citing to *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9<sup>th</sup> Cir. 2005). The Court then turned to the question of future persecution, finding that the Board erred in not shifting the burden to the government to show that conditions in Somalia have changed enough that the petitioner no longer has a well-founded fear of persecution. The Court further found that a petitioner need not fear the repetition of the exact harm that she has suffered in the past. The Court remanded the case for further proceedings, and for the Board to consider the petitioner’s claim that she is entitled to asylum based on her fear that her daughters would be subjected to FGM.

#### *Ninth Circuit*

*Lolong v. Gonzalez*, \_\_\_ F.3d \_\_\_, 2007 WL 1309564 (9<sup>th</sup> Cir. May 7, 2007). The Ninth Circuit concluded that nothing in the statute mandated the result reached in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9<sup>th</sup> Cir. 2004) (that the Board could not enter a removal order after reversing an Immigration Judge’s grant of relief from removal), and held, instead that “where the BIA reverses an IJ’s grant of relief that, by definition, follows an initial determination by the IJ that the alien is in fact removable, an order of deportation has already been properly entered by the IJ. In such cases, therefore, the BIA does not enter an order of deportation *in the first instance* when it orders the alien removed. Rather the BIA simply reinstates the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ’s subsequent cancellation of removal. Reinstating a prior order of removal by eliminating the impediment to that order’s enforcement is entirely consistent with the BIA’s appellate role.” *Id.* at 3.

In this case, the Immigration Judge found Lolong removable but granted her application for asylum. The Board reversed, but rather than remand to the Immigration Judge for entry of an order of removal, the Board granted

her voluntary departure. Although the Immigration Judge expressly found that she was removable before granting relief, the Ninth Circuit went on to state that an Immigration Judge’s grant of relief in the form of asylum or withholding of removal “necessarily requires the IJ to have already determined that the alien is deportable” and that “[u]nder the INA, this determination by the IJ constitutes an `order of deportation’ within the meaning of 8 USC § 1101(a)(47) (defining an `order of deportation’ to include both an `order ... concluding that the alien is deportable’ and one `ordering deportation’).” *Id.*

The Ninth Circuit also upheld the Board’s determination that Lolong, a Chinese Christian woman from Indonesia, had not demonstrated that the Indonesian government was unable or unwilling to control the perpetrators of ethnic and religious violence. The respondent had not presented evidence of an individualized threat and did not establish a pattern or practice of persecution. Four dissenters relied, in part, on *Sael v. Ashcroft*, 386 F.3d 922 (9<sup>th</sup> Cir. 2004), finding that country reports showed that government efforts to control violence against Chinese Christians were ineffective.

#### *Tenth Circuit*

*Valdez-Sanchez v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1180413 (10<sup>th</sup> Cir. April 23, 2007). Petitioner was deported from the U.S. in 1993 and illegally reentered a few months later. He married a U.S. citizen in 1995 and adjustment of status was granted in 1997. He filed an I-751 to remove the condition on his status in 1999. In 2005, an Immigration Judge terminated proceedings. Following termination, DHS reinstated petitioner’s 1993 order of deportation. Petitioner appealed from DHS’s application of section 241(a)(5) of the Act to reinstate a prior order of removal against him, claiming it was impermissibly retroactive. The Tenth Circuit agreed with the First, Seventh, and Eleventh Circuits in finding that DHS may not use new section 241(a)(5) to reinstate deportation orders for aliens who took certain steps to change their status prior to IIRIRA’s enactment. In vacating the order of removal and remanding for further proceedings, the Tenth Circuit held that application of IIRIRA to petitioner’s pre-IIRIRA adjustment of status application was an impermissible retroactive application of the statute

*Sosa-Valenzuela v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1252477 (10<sup>th</sup> Cir. May 1, 2007). The Immigration Judge

granted petitioner, a lawful permanent resident, a waiver under former section 212(c). The Board reversed, finding respondent ineligible for 212(c) and ordered petitioner removed to Mexico. On appeal, the Tenth Circuit held that (1) an Immigration Judge must first either issue an order of removal or make a finding of deportability to confer the circuit court with appellate jurisdiction; and (2) the BIA does not have the independent statutory authority to issue an order of removal in the first instance. The Court did not find that a grant of relief by an Immigration Judge to be a substitute for a finding of deportability. The Court found it had no jurisdiction and remanded the case to the Board to remand to the Immigration Judge for a finding of deportability.

## BIA PRECEDENT DECISIONS

**I**n *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007), the Board discussed the term “forced abortion” within the meaning of a claim for refugee status based upon China’s coercive population control program under section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42). The Board found that the context and structure of the statute require that there be actual harm or a reasonable fear of harm amounting to persecutory harm. In addition, the Board concluded that an abortion is forced when “a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution.” *Id.* at 168.

In further clarifying what forms of nonphysical harm amount to persecution, the Board adopted the standard set forth in a 1978 House report: deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. *Id.* at 171. The first clause could include extraordinarily severe fines, wholesale seizure of assets, or a sweeping limitation of opportunities to continue to work in an established business or profession. The use of the word “severe” is the benchmark for the level of harm. In this case, the record did not contain sufficient evidence to determine whether the economic sanctions, principally the loss of the respondent’s wife’s job, would amount to persecution. This determination depended upon factors such as the respondent’s financial situation, their living arrangements, how their income compared with those of other households in the region and the minimal level

of income needed to provide the essentials of life in the region.

Lastly, the Immigration Judge denied the respondent’s asylum application in the exercise of discretion. The Board found that the Immigration Judge did not reconsider the denial of asylum in light of factors relevant to family reunification as required under the regulations. The Board remanded the record for further consideration of whether the economic sanctions were so severe as to amount to persecution, and to reconsider the discretionary denial.

In *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007), the Board addressed the physical presence eligibility requirement for special rule cancellation under section 309(c)(5) of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996. *See also* section 203 of the Nicaraguan Adjustment and Central American Relief Act and 8 C.F.R. § 1240.66. The issue is whether the application is considered “continuing”, meaning the applicant can continue to accrue physical presence until the issuance of a final administrative decision. Reasoning that it is, the Board has long held that suspension of deportation is a continuing application, congressional intent appears to favor such treatment since Congress did not make the “stop-time” rule for cancellation of removal apply to such applications, and the intent was ameliorative. The Board reaffirmed *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005) in which an application for cancellation of removal is found to be a continuing one for purposes of the good moral character period and the reasoning in that decision applied to physical presence for special rule cancellation. Further, the Board found that the term “filed” in the applicable phrase “has been physically present in the United States for a continuous period of 7 years immediately preceding the date the application was filed” is ambiguous (is it before DHS, when referred to Immigration Court or when signed in court if it is signed in court?). 8 C.F.R. § 1240.66(b)(2). The Board declined to follow *Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005). In addition, the Board found that derivative applicants, like the respondent, must meet the eligibility requirements. In this case, the Immigration Judge had found that the application was not continuous, and the application was filed on the date it was referred to the Immigration Court, which cut short the respondent’s continuous physical presence. The Board remanded the case for consideration of the respondent’s application.

## Law Clerks for All! – How Comprehensive Immigration Reform Could Impact Immigration Courts and the BIA

*by Edward R. Grant*

Capturing the essence of proposed immigration legislation is a bit like watching one's offspring play a video game – just when you think you've gotten the hang of it, the hero/heroine enters a new set of rooms with new parameters and a new cast of characters. We watch the video game so that we can share, at some level, one of our child's passions. We watch the path of immigration reform wondering what impact it will have on our daily work. What follows is a guarded assessment of that impact based on the Senate's proposed "compromise" legislation.

To start, the generosity of the "Z" visa – the first step toward legalization for those currently unlawfully present in the U.S. – might elicit visions that non-detained dockets across the country will suddenly empty. There is ample reason to believe this. While aliens with administratively final orders of removal are technically ineligible for Z-visa status, they may apply for a waiver based on extreme hardship to themselves, a spouse, minor child, or parent – regardless of the immigration status of these relatives. For aliens currently in removal proceedings, the Immigration Judge, upon notification by DHS that the alien is *prima facie* eligible for a Z-visa, must either administratively close or terminate proceedings "and permit the alien a reasonable opportunity to apply for such classification."

Yet, the drafters of the Senate proposal hardly foresee a future without Immigration Courts. Rather, their proposal calls for an increase in the membership of the Board of Immigration Appeals by 10 members (to a potential total of 25), and an increase, by 2012, of 100 Immigration Judge positions, plus additional Board attorneys and support staff. In addition, DHS trial attorneys would increase by 500 during the same period, and immigration attorneys working for the Civil Division (Office of Immigration Litigation) and Criminal Division (assistant United States Attorneys) by 250 each. To help get through the mounds of work potentially generated by these litigators, each Immigration Judge and Board Member would be assigned a law clerk – at the ratio of "no less than one per judge and member."

But if most of those unlawfully present in the United States would be eligible for a "Z" visa and an eventual path to citizenship, where will the cases come from? The Senate proposal provides a number of potential answers to this question.

First, the conditions attached to obtaining a Z-visa may mean that millions of aliens not lawfully present will either be ineligible for this benefit, or may opt out of applying. A Z-visa applicant must be present in the U.S., establish continuous physical presence since January 1, 2007 (subject to a 90/180-day rule similar to section 240A(d)(2) of the Immigration and Nationality Act), and, in the case of a principal applicant, be employed and seek to continue employment. Principals may confer derivative benefits on their spouses, parents, and children under 18, and there is a provision for battered spouses.

Among those excluded from eligibility – and thus still potentially amenable to removal – are: those inadmissible under section 212(a)(2) of the Act (criminal activity); those subject to section 241(a)(5) of the Act (reinstatement of prior order after removal); and those who have been convicted of any felony, any aggravated felony, 3 or more misdemeanors, or a serious criminal offense as defined in section 101(h) of the Act – which includes a reckless driving or DUI offense "if such crime involves personal injury to another." (However, many inadmissibility grounds will not be applicable to Z-visa applicants: unlawful entry and presence; failure to attend a removal hearing; fraud and misrepresentation; false claim to U.S. citizenship.) These aliens, therefore, would remain subject to removal on grounds of unlawful presence or criminal activity.

Second, while obtaining a Z-visa is the first step toward lawful permanent resident status, numerous conditions apply down the road. Application fees are not negligible: Up to \$1500 for the first Z-visa application, and the same for the second, 4-year extension. A penalty fee of \$1000, plus \$500 for derivatives, and a

“state impact fee” of \$500 also are to be assessed. In addition, in order to obtain the second Z-visa, an applicant must establish progress toward English language proficiency and knowledge of civics sufficient to pass a naturalization exam. Interviews also are required of all Z-visa applicants, as well as fingerprinting and background checks. Applicants also will have a 2-year window in which to apply for their first Z-visa.

The details of such requirements are subject to change in the legislative process, and even after enactment through regulation or subsequent legislative amendment. But it is likely that formal requirements of this nature would remain in any program of “legalization” and experience teaches that there will be large numbers of people who, for various reasons, do not meet (or even attempt to meet) those requirements. Such persons also would remain amenable to removal proceedings.

Third, while the current draft mandates the closure or termination of removal proceedings for those eligible for Z-visa status, many aliens may prefer to prosecute their claims for asylum, withholding of removal, adjustment of status, or other relief in their pending proceedings. The reason is simple: the potential for more rapid acquisition of lawful permanent resident status than the 10-13 years facing Z-visa applicants. This is one of the “gaps” in the current draft that one expects will be filled by amendment, regulation, or even judicial decision. What remains to be seen is whether aliens who choose to proceed in Immigration Court, are not successful, and are ordered removed, would then be able to apply for a Z-visa. For example, would an alien eligible for a Z-visa, but with a pending asylum claim, be forced to choose between pursuing that claim and foregoing the chance to apply for a Z-visa if not granted asylum? It is difficult to imagine asylum applicants, at least, being forced into that Hobson’s choice.

Fourth, no one expects that illegal entries and visa overstays will cease entirely; indeed, the proposal to allow the entry of up to 400,000 “temporary” workers each year under “Y” visas, limited in duration to 2 years, creates a significant pool of potential overstays. While the percentage of such violations may be low due to the harsh consequences – a virtual bar to all future immigration benefits – the absolute number of cases generated could be significant. The proceedings in such cases would likely be swifter and more streamlined than most current non-detained matters. In the future, illegal entrants and overstays would be eligible to apply only for asylum, withholding

of removal, and protection under the Convention Against Torture – no applications for cancellation of removal, adjustment of status, or other waivers would be permitted. How this would affect the size of dockets is uncertain, but given the increased resources authorized in the legislation for detention and removal, the potential exists for a high volume of cases to be put into the system.

Other factors, of course, will affect the immigration docket. But the evident intent of the current Senate proposal is to “close the back door” by means of stepped-up enforcement efforts, while helping to keep it closed by curtailing the inducements – both in employment and in potential immigration benefits – to future illegal migration. It is apparent that the drafters see a larger, better-funded immigration court system as part of that policy, and intend for those courts to remain busy.

### Other Highlights:

The following are a few selected highlights from the proposal that could also affect the work of EOIR:

*Grounds for Removal:* The grounds for removal are amended in several ways: first, to clarify that a crime constitutes sexual abuse of a minor under section 101(a)(43)(A) “whether or not the minority of the victim is established by evidence contained in the record of conviction or by evidence extrinsic to the record of conviction;” second, to define all offenses under section 274(a) of the Act (bringing in and harboring certain aliens) as aggravated felonies; third, to create a new removal ground for those who have participated in a criminal gang (under the “knows or has reason to believe” standard); and fourth, to expand inadmissibility and deportation grounds for passport, visa, and marriage fraud.

*Voluntary Departure:* To encourage compliance, the maximum periods would be reduced to 90 days and 45 days respectively, and greater penalties would be imposed for non-compliance. Also, penalties would be enhanced for non-compliance with removal orders and illegal re-entry.

*Fraudulent Immigration Practitioners:* A 3-year pilot program would be established for DHS to receive and process complaints regarding fraudulent practitioners, including attorneys.

*Federal Court Jurisdiction:* The legislation commissions a General Accounting Office study regarding

the feasibility of consolidating circuit court review, and to specifically consider the following options: (a) consolidating all immigration cases into one circuit court, such as the Federal Circuit; (b) consolidating all appeals into a single, specially-created appellate court consisting of active circuit judges assigned temporarily from their “home” circuits; and (c) managing the dockets by permitting re-assignment of cases from circuits with a high volume of immigration cases to those with a lower volume.

No safe prediction can be made whether any immigration bill will pass this year or whether it would contain the specific provisions discussed here. However, the Senate proposal does provide key insight into the thinking of important Congressional players on the immigration issue, and the potential impact of their handiwork on the role of EOIR in the future immigration system.

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## REGULATORY UPDATE

### DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

#### **Jurisdiction and Venue in Removal Proceedings**

**SUMMARY:** This proposed rule would amend the Department of Justice (Department) regulations addressing jurisdiction and venue in removal proceedings. The amendment is necessary due to the increasing number of removal hearings being conducted by telephone and video conference. The proposed rule establishes that venue shall lie at the place of the hearing as identified on the charging document or initial hearing notice, unless an immigration judge has granted a change of venue to a different location. The hearing location is the same whether or not the immigration judge or a party to the proceeding appears at the hearing location in person or participates in the hearing by telephone or video conference. The proposed rule also establishes that removal proceedings shall be deemed to be completed at the location of the final hearing, regardless of whether all parties are physically present at that location. The Department also proposes to amend the regulations to state expressly that, when the Department of Homeland Security (DHS) files a charging document, jurisdiction vests with the Office of the Chief Immigration Judge (OCIJ) within the Executive Office for Immigration Review (EOIR).

### 72 Fed. Reg. 29529

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

#### **Extension of the Designation of Honduras for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries**

**SUMMARY:** This Notice announces that the designation of Honduras for Temporary Protected Status (TPS) has been extended for 18 months to January 5, 2009, from its current expiration date of July 5, 2007. This Notice also sets forth procedures necessary for nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) for the additional 18-month period. Re-registration is limited to persons who have previously registered for TPS under the designation of Honduras and whose application has been granted or remains pending. Certain nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. Given the timeframes involved with processing TPS re-registrants, the Department of Homeland Security (DHS) recognizes that re-registrants may not receive a new EAD until after their current EAD expires on July 5, 2007. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Honduras for six months, through January 5, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the January 5, 2009, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

### 72 Fed. Reg. 29534

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

#### **Extension of the Designation of Nicaragua for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Nicaraguan TPS Beneficiaries**

**SUMMARY:** This Notice announces that the designation of Nicaragua for Temporary Protected Status (TPS) has been extended for 18 months to January 5, 2009, from its current expiration date of July 5, 2007. This Notice also sets forth procedures necessary for nationals of Nicaragua (or aliens having no nationality who last habitually

resided in Nicaragua) with TPS to re-register and to apply for an extension of their Employment Authorization Documents (EADs) for the additional 18-month period. Re-registration is limited to persons who have previously registered for TPS under the designation of Nicaragua and whose application has been granted or remains pending. Certain nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. Given the timeframes involved with processing TPS re-registrants, the Department of Homeland Security (DHS) recognizes that re-registrants may not receive a new EAD until after their current EAD expires on July 5, 2007. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Nicaragua for six months, through January 5, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the January 5, 2009 expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

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*continued from page 3*

### **The Treatment of Multiple State Possessions Offenses...**

Court was concerned with preventing stricter state law from improperly trumping more lenient federal law, finding it “[im]plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers.”

Under *Lopez*, a ruling that an individual convicted of multiple state drug possession offenses is not an aggravated felon can be seen as an example of a consequence of disparities between state and federal law that is undesirable yet acceptable. Lending support to this argument is the fact that federal prosecutors only rarely seek to enforce the recidivist provision against repeat offenders with misdemeanor possession convictions. Brief for New York State Defenders Association as Amicus Curiae supporting Petitioner at 2, *Martinez v Ridge*, No. 05-3189-ag (2d Cir. Jan. 23, 2007), available at [http://www.nysda.org/ipd/docs/07\\_Martinez%20Ridge\\_LetterBrief.pdf](http://www.nysda.org/ipd/docs/07_Martinez%20Ridge_LetterBrief.pdf). This infrequency may suggest that it is inappropriate to automatically treat any second or subsequent state possession offense as equivalent to recidivist possession. This may be especially true given that, in some instances, federal prosecutors presumably decline to enforce the CSA’s recidivist provision because the validity of the prior

conviction is questionable and will therefore not meet the CSA’s fact, finality, and validity requirement.

However, the opposite argument can be made by pointing out that, in making the concession described above, the *Lopez* Court was focused on ensuring that state laws could not overrule those contained in the CSA. As noted above, in *Lopez*, the Court wanted to prevent a stricter state statute from trumping the more lenient CSA. It can be argued that designating an individual with multiple state drug possession offenses to be an aggravated felon is proper because it would be a reflection of the CSA’s recidivist provision, rather than a case where a state law improperly trumped federal law.

In sum, though the Supreme Court’s decision in *Lopez* did not provide a definitive answer to the important question of when aliens convicted of multiple state possession drug offenses are aggravated felons, the *Lopez* court provided potentially useful guidance on this issue. The Board and Circuit Courts will undoubtedly continue to encounter this question. Their decisions are likely to address several issues, including Congress’s intent to broaden the definition of aggravated felonies to include less serious drug crimes, the fact that multiple possession offenders may be deemed felons under the CSA’s recidivist provision, and the recidivist provision’s requirement that federal prosecutors prove the validity of prior drug convictions before a sentence is enhanced.

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