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PROSECUTORIAL DISCRETION AND THE "CRIMINAL ALIEN"

Posted on October 7, 2011 by Cyrus Mehta

The June 17, 2011 Memo calling for prosecutorial discretion by ICE Director John Morton is being applied in favor of low priority non-citizens who are threatened with removal. For instance, some who were brought to the US at an early age have been given a temporary reprieve, especially those who would qualify under proposed DREAM Act legislation, which thus far Congress has failed to pass. This is very commendable, and makes sense since the Administration cannot use its limited resources to deport the 10+ million undocumented immigrants in the US. It also makes sense to allow such immigrants with long ties in the US to somewhat regularize their status and obtain a work permit, while under a stay of removal or deferred action order, and thus be allowed to contribute to the US and its economy.

While the Administration showcases low priority non-citizens as model immigrants but for the fact that they violated the immigration law, the Administration is cracking down hard on what it calls the “worst of the worst,” generally characterized as “criminal aliens.” In a recent seven day sweep, called Operation Cross Check, the Administration arrested 2,901 immigrants with criminal records. While the ICE press release highlights some of these individuals with multiple criminal records, including attempted murder, armed robbery and sex crimes against minors, it is not clear whether all of the 2,901 immigrants that were subject to this sweep could be or ought to be characterized as the “worst of the worst.” It is also unclear as to how many of them were undocumented or had permanent resident status.

Even a so called “criminal alien” can in some cases be deserving of prosecutorial discretion. Actually, the definition of “criminal alien” is rather amorphous, and could include one who has either been convicted of a crime or one who has

been charged with a crime. Under the Administration's Secure Communities program, information about a non-citizen charged with a crime and who is fingerprinted, is provided to the DHS, which can then start removal proceedings against this person even if there is no ultimate conviction or the resulting conviction is based on a very minor offense, such as disorderly conduct. While the use of the word "alien" is itself a pejorative, which applies to anyone who is not a citizen, the additional use of "criminal" is like rubbing salt into the wound. Apart from such a person not being charged at all or the charges being dismissed, non-citizens can also be placed into removal proceedings for having admitted to committing the essential elements of certain offenses, such as crimes involving moral turpitude or minor controlled substance offenses, including smoking pot as a student.

Also, a non-citizen convicted of a crime, even while a misdemeanor under the relevant penal law, can be characterized as an aggravated felon under section 101(a)(43) of the Immigration and Nationality Act (INA). For example, minor assault with a one-year suspended sentence can be an aggravated felony under INA 101(a)(43)(F). Take for example the well publicized case of Mary Anne Gehris who lived in the US since she was around one year old . Because she had pulled the hair of another woman in a quarrel over a boyfriend, and had pled guilty upon the advice of her public defender, she suddenly faced removal for the aggravated felony of misdemeanor assault, because she had gotten a one-year suspended sentence. Also, theft or forgery with a one-year sentence can be an aggravated felony under 101(a)(43)(G) , 101(a)(43)(R) . Thus, one who was convicted of a forgery of a check for $19.83 could be deportable as an aggravated felon. Shoplifting with a one-year sentence, suspended or not, could also be an aggravated felony. Even a "sex offense" relating to a consensual relationship between a 21-year-old man and his 16-year-old girlfriend can potentially be sexual abuse of a minor under INA 101(a)(43)(A).

Such cases are also deserving of prosecutorial discretion, and the DHS can exercise this discretion especially over permanent residents who are "aggravated felons" by not even issuing a Notice to Appear, which starts a removal proceeding. A non-citizen permanent resident who is convicted of an aggravated felony is generally foreclosed from relief from removal, such as cancellation of removal under INA 240A (a) or by applying for a waiver of inadmissibility under INA 212(h). Fortunately, with respect to the 212(h) waiver, two circuit courts, the Third, and Fifth, have held that the bar against

permanent residents only applies to those who were admitted to the United States as permanent residents at a border or port of entry as opposed to those who adjusted status in the US to permanent residence. *See* *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir 2008); *Lanier v. US*, 631 F.3d 1363 (11th Cir. 2011). The Ninth Circuit has also implied in Sum v. Holder, 602 F.3d 1092 (9th Cir. 2010) that this may be the case. However, these decisions are only binding within the respective circuits, and the Board of Immigration appeals has further blunted these holdings in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) by barring a permanent resident from applying for a 212(h) waiver who entered the US without inspection but who adjusted to permanent residence since the adjustment of status is this individual's only admission.

Even non-permanent residents who have been convicted of crimes that have been re-characterized as aggravated felonies are similarly deserving of prosecutorial discretion, on a case by case basis, if they can seek relief by virtue of say a potential marriage to a US citizen and by filing a 212(h) waiver. Similarly, such an individual who is convicted of an aggravated felony may have a US citizen child who may be turning 21 years in a few years who will be able to provide the basis for an adjustment application and a 212(h) waiver. Prior to the June 17, 2011 Morton Memo, a similar memo in 2000 by former INS Commissioner Doris Meissner contemplated prosecutorial discretion in cases involving non-citizens convicted of crimes and who would be unable to seek relief against removal despite the presence of US citizen qualifying relatives. The same spirit behind the Meissner memo (although it was rarely implemented) should guide ICE prosecutors under the new Morton Memo too, which is being taken more seriously, even though the focus of the latter is on low priority individuals, who ostensibly are not "criminal aliens." After all, the hyped up notion that "criminal aliens" are dangerous and should be immediately removed from the US is generally misguided as most have actually served their sentences or paid their fines under the penal system. If a US citizen is allowed to get a second chance after serving his or her sentence, an immigrant could also be given that chance if he or she is otherwise deserving of prosecutorial discretion through family ties and the gravity and nature of the past criminal conduct.

In the second decade of the 21st century, in light of other pressing concerns and challenges, the draconian impact of the 1996 Immigration Act, especially

pertaining to the retroactive re-characterization of minor criminal convictions as aggravated felonies, remains a distant memory and is taken for granted. Any movement for immigration reform of a broken immigration system must also press for a roll back on some of the harshest provisions of the 1996 law, especially the elimination of relief for persons convicted of aggravated felonies, despite evidence of reform, rehabilitation and close families ties in the US. While we continue to press ahead for reform in a Congress that is in a stalemate, including the DREAM Act for children who were brought into the US and are now out of status, the Administration has wisely used its powers to exercise prosecutorial discretion in favor of immigrants who clearly do not deserve to be deported from the US. Some of these people ought to also include those with criminal convictions.