



The Commonwealth of Massachusetts

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys

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From the Board of Immigration Appeals:

Matter of Cuellar-Gomez, 25 I&N Dec. 850 (BIA 2012)

Mr. Cuellar-Gomez is a legal permanent resident who has lived in the U.S. for 20 years. In January 2008, a municipal court in Wichita, Kansas found him guilty of violating a municipal ordinance which makes it a crime to possess marijuana. In September of 2008, the Kansas District Court found him guilty of a second offense of marijuana possession. His second conviction was charged under a recidivist statute as being in possession of marijuana after a prior municipal ordinance conviction for the same offense.

Based on these two convictions DHS initiated removal proceedings charging him as removable as both a noncitizen convicted of a controlled substance offense and a noncitizen convicted of an aggravated felony. Mr. Cuellar-Gomez argued that he was not subject to removal for three reasons: 1) the judgment of a municipal court is not a conviction for immigration purposes; 2) even if the municipal judgment is a conviction, it was for a violation of a municipal ordinance and not a "law or regulation of a state" as the immigration statute requires; 3) the judgment of a municipal court is not a valid predicate for the recidivist finding.

The BIA first held that a formal judgment of guilt is a conviction as long as it is entered in a "genuine criminal proceeding." The Board found that because the Wichita municipal court requires proof beyond a reasonable doubt and under Kansas law such findings are valid predicates for criminal history calculation, the municipal judgment was a "genuine criminal proceeding" and therefore the judgment in municipal court was a conviction for immigration purposes.

In response to Mr. Cuellar-Gomez's second argument, the Board held that Wichita is a political subdivision carrying out state government functions. Therefore, the language of the immigration statute, 8 U.S.C. §1227(a)(2)(B)(i), making it a deportable offense to violate "any law or regulation of a State[,] most naturally encompasses laws promulgated by a State through its political subdivisions." *Cuellar-Gomez*, 25 I&N Dec. at 856. Therefore, the Wichita Code of

Ordinances is “a law or regulation of a State” and a conviction for such an offense makes him deportable.

Finally, in response to the third argument, the Board reviewed the case law surrounding the drug trafficking aggravated felony ground, which holds that a person cannot be removable under that ground for simply having two possession convictions. As the U.S. Supreme Court held in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010), the prior conviction must be alleged and proven for the subsequent offense to be considered a recidivist offense. The Board then found that because the second conviction in this case was a recidivist charge that had required the state to prove that Mr. Cuellar-Gomez had previously been convicted of marijuana possession, it met the definition of recidivist drug possession for aggravated felony purposes under 8 U.S.C. §1101(a)(43)(B).

Practice Tip

In the opinion, the Board specifically notes that municipal and local judgments vary widely across jurisdictions and each must be examined on its own merits to determine whether it is a “genuine criminal proceeding” or a civil violation. *See Matter of Cuellar-Gomez*, fn 3. Under the standards set forth in the decision, civil possession of marijuana in Massachusetts would not meet the criteria for a “genuine criminal proceeding” and could not be used as a prior offense in a prosecution for subsequent possession of a controlled substance.

This case is also a good reminder that under *Carachuri-Rosendo*, in order to be considered a recidivist controlled substance offense, and therefore a drug trafficking aggravated felony, the prior offense must be pled and proven as part of the prosecution for the subsequent offense.