

THE EVOLVING DEFINITION OF AN AGGRAVATED FELONY

By

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I. INTRODUCTION AND SCOPE OF ARTICLE

The term of "aggravated felony" first appeared in immigration law in 1988 under the piece of legislation known as the Anti-Drug Abuse Act of 1988 (ADAA).¹ At that time, it simply created a separate ground of deportation for serious crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices. ADAA did not impose any limitation on relief for aliens convicted of aggravated felonies. However, the passage of the Immigration Act of 1990 (IMMACT 90)² had a profound effect on aliens convicted of aggravated felonies. IMMACT 90 limited discretionary reliefs such as 212(c) waiver, suspension of deportation, voluntary departure, asylum, and withholding of deportation for aliens convicted of aggravated felonies. Moreover, the number of years of the sentence were factored into the definition of an aggravated felony. Four years later, the definition was again revised with the advent of Immigration and Nationality Technical Correction Act of 1994 (INTCA).³ The distinct feature of INTCA was the expansion of aggravated felonies to include common, less serious crimes such as fraud, burglary, theft, and others. However, the year of 1996 brought even greater dramatic and sweeping changes to immigration law by two acts of legislation known as the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, "IIRAIRA"⁴ and the Anti-Terrorism and Effective Death Penalty Act of 1996, "AEDPA."⁵ This article attempts to catalog and analyze the changes to the definition of "aggravated felony" as a result of AEDPA and IIRAIRA. It is not intended to be a definitive and exhaustive discussion and analysis of the changes brought by AEDPA and IIRAIRA since its impact and scope are currently being litigated before the Board of Immigration Appeals (BIA) and federal courts.⁶

II. THE EFFECT OF AEDPA

AEDPA was legislation passed in response to the growth of domestic terrorism, most notably the Oklahoma bombing. The legislation had resounding bi-partisan backing and passed without incident. However, an immigration portion of the bill was included in AEDPA much the same way as ADAA introduced the term aggravated felony into immigration law. It was a rider that would have a profound effect for permanent residents and aliens without permanent status. The definition of aggravated felony in AEDPA can be found at the Immigration Nationality Act (INA) § 101(a)(43).⁷ The following is a list of new crimes that are now considered aggravated felonies as implemented by AEDPA:

1. Under **INA §101(a)(43)(J)**, an offense "described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations, or an offense described in section 1084 (if it is the second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of 5 years imprisonment or more may be imposed;
2. Under **INA §101(a)(43)(K)(i)**, an offense relating to the owning, controlling, managing, or supervising of a prostitution business regardless of the maximum possible sentence or the sentence imposed;
3. Under **INA §101(a)(43)(N)**, an offense relating to alien smuggling for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 5 years;
4. Under **INA §101(a)(43)(P)**, an offense involved in falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of Section 1543 of title 18, United States Code, or as described in Section 1546(a) of such title (relating to document fraud) and for which a term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 18 months;
5. Under **INA §101(a)(43)(Q)**, an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more;
6. Under **INA §101(a)(43)(R)**, an offense relating to commercial bribery, counterfeiting forgery, or trafficking in vehicles the identification numbers for which a sentence of 5 years of imprisonment or more may be imposed;
7. Under **INA §101(a)(43)(S)**, an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which a sentence of 5 years of imprisonment or more may be imposed;

8. Under **INA §101(a)(43)(O)**, an offense described in section **275(a)** and **276** committed by an alien who was previously deported on the basis of a conviction for an offense under **INA §101(a)(43)**;
9. Under **INA §101(a)(43)(T)**, an offense relating to a failure to appear before a court pursuant to a court order to answer or dispose of a charge of a felony for which a sentence of 2 years imprisonment or may be imposed.
10. Section 440(d) of AEDPA eliminates **INA §212(c)** relief for permanent resident aliens who have been convicted of crimes designated as aggravated felonies.⁸

III. THE EFFECT OF IIRAIRA

On the other hand, IIRAIRA was the end product and genesis of the controversial proposition "187" in California. Like a match on a single twig exploding into a massive brush fire, the issue of legal and illegal immigration became blurred and heightened xenophobia was prevalent as IIRAIRA was passed. Again, the definition of aggravated felony received a greater expansion and the threshold of imposed sentence was lowered. The following is a list of changes under IIRAIRA:

1. IIRAIRA significantly amended **INA §101(a)(43)(F)** (a crime of violence) by lowering the term of imprisonment from five to one year;
2. IIRAIRA also amended **INA §101(a)(43)(G)** (a theft offense including receiving of stolen property or burglary offense) by lowering the term of imprisonment from five to one year;
3. IIRAIRA amended **INA §101(a)(43)(N)** (alien smuggling) term of imprisonment threshold from five years to zero; however, an exception to the classification of an aggravated felony under this section was added providing that the act was a first offense in which the alien assisted, abetted, or aided the alien's spouse, child, or parent in violation of the **INA §101(a)(43)(N)**;
4. IIRAIRA amended **INA §101(a)(43)(R)** (commercial bribery, counterfeiting, forgery, and trafficking in vehicles) term of imprisonment threshold from five to one year;
5. IIRAIRA amended **INA §101(a)(43)(S)** (obstruction of justice, perjury, and bribery of a witness) term of imprisonment threshold from five to one year;
6. IIRAIRA amended **INA §101(a)(43)(J)** (gambling and racketeer offense) term of imprisonment threshold from five to one year;
7. IIRAIRA amended **INA §101(a)(43)(P)** (passport, visa and document fraud offenses) in two ways: by lowering the term of imprisonment threshold from 18 months to 12 months and an exception to the classification of an aggravated felony under this section was added providing that the act was a first offense in which the alien committed the offense for the purpose of assisting, abetting, or aiding the alien's spouse, child, or parent in violation of the **INA §101(a)(43)(P)**;
8. IIRAIRA amended **INA §101(a)(43)(M)** (crimes of fraud or deceit and tax evasions) by lowering the loss to the victim or to the government was in excess of \$200,000 to \$10,000;
9. Section 321 of IIRAIRA amends **INA §101(a)(43)** affirmatively providing that the definition of aggravated felony to apply to convictions entered before, on, or after the date of enactment of September 30, 1996;
10. IIRAIRA added under **INA §101(a)(43)(A)** rape and sexual abuse of minor as an aggravated felony regardless of the sentence or date of conviction;
11. Finally, IIRAIRA added to the **INA § 101(a)(48)**, the definition of a conviction. It states that:

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the Judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) **Any reference to a term of imprisonment** or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law **regardless of any suspension of the imposition or execution of that imprisonment or sentence** in whole or in part.

IV. CURRENT AND CUTTING EDGE ISSUES

As one peruses through the definition of aggravated felonies, an appropriate question that one is left with is "what is not an aggravated felony?" That is the tragedy unfolding both to aliens and their U.S. citizen dependents and relatives as a result of the enactment of IIRAIRA and AEDPA across this country. The Atlanta District Office has and is taking the position that a battery and shoplifting misdemeanor conviction under the Georgia statute in some instances is an aggravated felony.

In one acclaim case that appeared in the Atlanta Journal Constitution on June 12, 1998, a Nigerian woman was recently ordered deported by an Immigration Judge.⁹ In that case, the alien was a permanent resident of the United States with two U.S. citizen children. She was convicted for shoplifting a \$15.00 baby outfit and plead guilty pro se in 1994. She was ordered to confinement for twelve months and her sentence was probated with an additional condition that if she paid a fine of \$360.00 the probation would be dismissed. She did not spend **one** day in incarceration. In fact, she paid the fine in two months and her probation was dismissed shortly thereafter. Since she had been a legal permanent resident over eight years, in 1995, she applied for U.S. citizenship and was administratively approved by the Immigration & Naturalization (INS). However, while waiting to be sworn in, IIRAIRA was enacted and the INS reopened her naturalization application and denied it. The INS contends that she is an aggravated felony under **INA §101(a)(43)(G)** and even though there was no incarceration and a total suspension of her sentence. Under **INA §101(a)(48)**, any suspension of the imposition or execution of that imprisonment or sentence in whole or parts does not count.¹⁰ The BIA in a recent decision interpreted this section by holding that an alien's term of imprisonment or sentence is determined by the period of confinement or incarceration ordered by court regardless of any suspension or withholding of execution.¹¹

Other cases involving battery follow the same line of interpretation. In this instance, the INS contends that the battery is a crime of violence under **INA §101(a)(43)(F)**. It is very possible that drug crimes that are misdemeanor will be also converted into aggravated felonies under the same rationale. These cases will shortly be litigated before the BIA and in federal courts nationwide.

A recent decision by the BIA¹² held that an alien convicted of aggravated driving under the influence pursuant to an Arizona statute is an aggravated felony under **INA §101(a)(43)(F)**. The alien was sentenced to two and half years to imprisonment. In that case, the BIA perhaps in a groundbreaking fashion concluded that the Arizona statute for aggravated driving is a "crime of violence" because the conviction involved a substantial risk of physical force against the property or person of another. Moreover, the BIA may be using IIRAIRA to reflect a growing sentiment in society against drinking and driving.

On the surface, IIRAIRA appears to settle the issue of retroactivity of the definition of aggravated felony. This issue remains alive and will highly be contested by aliens. Under two precedential BIA decisions,¹³ one must undergo a two-prong test before applying the aggravated felony bar. First, one must determine whether the offense fall under **INA §101(a)(43)**. Second, if the offense fits under one of the enumerated section, then one must decipher if there is a specific disability which applies. In other words, under the current BIA approach, where the specific provision of the statute is silent on applicability, then the characterization of aggravated felony applies regardless of the date of conviction. For example, convictions under **INA §242(a)(2)(A)(ii)** only applies to those on or after November 18, 1988 (the express statutory language of ADAA).

V. CONCLUSION

IIRAIRA and AEDPA are massive and complicated pieces of legislation which curtail, and in most cases end the U.S. life for an alien, and in numerous cases cause extreme hardships and undue separation of families. When an alien is deemed an aggravated felon, he is barred from the U.S. for twenty years and ineligible for virtually any form of reliefs.¹⁴ Therefore, it is very important, whether one is determining an appropriate criminal plea or defending a criminal alien in removal proceedings, to be on guard for the term of aggravated felony.

FOOTNOTES

1. Pub. L. 100-690, effective November 18, 1998.
2. Pub. L. No. 101-649, effective November 29, 1990.
3. Pub. L. No. 103-416, effective October 25, 1994.
4. Pub. L. No. 104-208, effective September 30, 1996.
5. Pub. L. No. 104-132, effective April 24, 1996.
6. For other discussion and analysis of the impact of IIRAIRA and AEDPA on the issue of aggravated felony, see AILA 1997-1998, 1998-1999, *Annual Handbook*, AILA's *New Law Handbook*, Interpreter Releases'

publication *Understanding The 1996 Immigration Act*, Interpreter Release issues dated April 29, 1996 and December 16, 1996, and *Immigration Law and Crimes*.

7. The entire section of INA § 101(a)(43) is attached hereto as Exhibit "A."
8. This provision is the subject of current litigation before the BIA and in federal courts nationwide. In *Matter of Soriano*, Int. Dec. 3289 (BIA June 27, 1996), the Board ruled in a split decision that AEDPA did not apply retroactively to deportation proceedings where the respondent had filed his or her application for 212(c) relief prior to the enactment of AEDPA on April 24, 1996. This decision was later vacated by Attorney General Janet Reno. At the federal courts level, these district courts have held that section 440(d) is not retroactive, *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), *Jurado-Guiterrez v. INS*, 977 F. Supp. 1089 (D.Colo. 1997), *Avelar-Cruz v. Reno*, No. 98-C-1193, 1998 WL 208810 (N.D. Ill., April 27, 1998), *Shav v. Reno*, No. 4:98 CV 06361 (E.D. Mo., April 21, 1998). In similar fashion, the First Circuit Courts of Appeal in *Goncalves v. Reno*, No. 97-1953, 1998 U.S. LEXIS 9851 (1st Cir. May 15, 1998), held that section 440(d) is not retroactive. On the other hand, other courts have ruled that §440(d) is retroactive: *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997), *Gutierrez-Martinez*, 989 F. Supp. 1205 (N.D. Ga. 1998).
9. This article is attached hereto as Exhibit "B."
10. See section III and number 11 of this article.
11. *Matter of S-S*, Int. Dec. 3317 (BIA 1997).
12. *Matter of Magallanes*, Int.Dec. 3341 (BIA 1998).
13. *Matter of Reyes*, 20 I&N 789 (BIA 1994); *Matter of A-A*, 20 I&N 492 (BIA 1992).
14. Interestingly enough, an alien who has not been admitted as a permanent resident is eligible for the 212(h) waiver as recognized by a recent decision, *In re Michel*, A74 324 000, (BIA, January 30, 1998). On the other hand, permanent resident aliens are not eligible for the 212(h) waiver leading to a result where an illegal alien has more rights than a legal permanent resident alien. This Board also has ruled that an applicant for admission in exclusion proceedings who is otherwise inadmissible on the basis of a controlled substance offense is statutorily eligible for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. §1182(c), *In re Samuel Fuentes-Campos*, Applicant, Int. Decision 3318 (BIA, En Banc; May 14, 1997).

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