

## **Two Simple Drug Possession Convictions Don't Equal Aggravated Felony**

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The Supreme Court held, in Carachuri-Rosendo v. Holder (June 14, 2010), a lawful permanent resident (LPR), who was convicted on two occasions of minor drug possessions, was not convicted of any "aggravated felony"; therefore, he could apply for Cancellation of Removal to prevent his removal/deportation.

Under the Immigration and Nationality Act (INA), a LPR, who is convicted of any aggravated felony, is subject to removal from the U.S. without being capable of asserting Cancellation of Removal (a defense to removal if the LPR is eligible – present as a LPR in the US. for seven years or more, "extreme hardship" on a U.S. citizen if removed and not convicted of certain criminal offenses).

In this matter, the individual was a LPR for over 20 years. Most of his immediate family - wife, children and mother - were U.S. citizens. In 2004, he pled guilty to possessing less than two ounces of marijuana, a misdemeanor, and sentenced to 20 days in jail. A year later, he pled *nolo contendere* to possessing one Xanax tablet without a prescription, a misdemeanor, and received 10 days in jail.

In 2006, the federal government, through the Department of Homeland Security, filed to remove the LPR. The LPR filed for Cancellation of Removal, but the Immigration Judge found his second possession conviction was an aggravated felony, making him ineligible for this defense. The Board of Immigration Appeals, following the law of the 5th Circuit Court of Appeals, affirmed the Immigration Judge's decision. The LPR appealed the BIA's decision to the 5th Circuit, which affirmed.

Under the INA, an aggravated felony does not equal an aggravated felony conviction. 8 U.S.C. 1229b (a)(3). Rather, some misdemeanor convictions can equal an aggravated felony. In this case, the government asserted the latter and argued the underlying Xanax conviction "could" have been treated as a felony under federal law; therefore, the Xanax conviction could "hypothetically speaking" be a felony.

The Supreme Court rejected this analysis, finding it was contrary to the language of the INA. The INA states cancellation is not available to a non-citizen "convicted of an aggravated felony." U.S.C. 1229b (a)(3). To be convicted of an aggravated felony for a drug offense under the federal Controlled Substances Act, the maximum prison term must be more than one year. All simple possession offenses authorize only a one-year sentence unless the prosecution decides to charge the defendant as a recidivist and provide the defendant notice and opportunity to defend against that charge.

The Court stated an immigration court cannot enhance the state offense because facts known to it would have authorized a greater penalty under state or federal law.

Additionally, the government's position failed to meet a defendant's mandatory notice and opportunity to defend requirements. In this case, the Texas prosecutor chose not to charge the LPR with a recidivist enhancement, which would have made the prison sentence more than one year. Federal immigration court cannot apply their own "recidivist enhancement after the fact."

In conclusion, the Court remanded the case in order for consideration of the LPR's Cancellation of Removal defense. He will have to assert this defense from Mexico as he was removed after the Court of Appeals' 2009 decision.