U.S. Department of Homeland Security
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U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: All Special Agents-in-Charge
All Field Office Directors

MAR 5 2007

FROM: Marcy M. Forman (b)(6); (b)(7)(c)
Director, Office of Investigation

For

John P. Torres
Director, Office of Detention and Removal Operations

SUBJECT: Guidance re: Gonzales v. Duenas-Alvarez, 127 S.Ct. 815 (January 17, 2007)

On January 17, 2007, the Supreme Court issued its decision in Gonzales v. Duenas-Alvarez, 127 S.Ct. 815 (2007), holding that the crime of aiding and abetting a theft offense is included in the generic definition of "theft offense" for purposes of Immigration and Nationality Act (INA) Section 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). See 127 S.Ct. at 818. This ruling overturned the Ninth Circuit's decision in Penuliar v. Gonzales, 435 F.3d 961 (9th Cir. 2006), judgment vacated, 2007 WL 135700 (Mem) (U.S., January 20, 2007).

In Duenas-Alvarez , the Supreme Court stated that the widely accepted generic definition of theft is "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." 127 S.Ct. at 818 (citing Penuliar v. Gonzales, 435 F.3d 961, 969 (9th Cir. 2006) and Abimbola v. Ashcroft, 378 F.3d 173, 176 (2d Cir. 2004) (analyzing the BIA's definition and citing other circuits)).

Prior to the Supreme Court's decision in Duenas-Alvarez, the Ninth Circuit held in Penuliar that a statute containing liability for aiding and abetting a theft offense was broader than the generic definition of theft. Therefore, the Ninth Circuit held that a conviction under such a statute was not a theft offense for purpose of INA section 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). The Supreme Court disagreed and held that convictions under such statutes are theft offenses under INA section 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), because the generic definition of theft includes aiders and abettors who were at the scene of the crime, as well as aiders and abettors "before the fact." However, the Supreme Court left open the question of whether aiders and abettors after the fact were within the generic definition of theft. Additionally, the Supreme Court refused to address whether the crime of joyriding was within the generic definition of theft.

The Supreme Court's Duenas-Alvarez decision affects both ICE administrative and criminal enforcement actions, particularly in the Ninth Circuit. Specifically, an alien convicted of a theft offense under a statute that contains aiding and abetting liability, and who is sentenced to confinement of one year or more, is now chargeable and removable as aggravated felon pursuant to INA section 101(a)(43)(G), 8 U.S.C. § 1101 (a)(43)(G), in the Ninth Circuit. Likewise, an alien who was not previously removable as an aggravated felon, due to the Ninth Circuit's incorrect interpretation of theft may now be charged as an aggravated felon. Furthermore, an alien previously removed after a conviction for a qualifying theft offense may face prosecution for the crime of reentry after a conviction for the commission of an aggravated felony, pursuant to INA section 276(b)(2), 8 U.S.C. § 1326(b)(2).

All active immigration cases, where an alien has been convicted of a crime or has a criminal history, should be reviewed in order to determine if aggravated felony charges are warranted or whether the case should be presented to the U.S. Attorney's Office for prosecution. Please consult your local Office of Chief Counsel with any questions relating to the application of this decision.