

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

MEMORANDUM FOR: All Special Agents-in-Charge JAN 23 2007
All Field Office Directors

FROM: Marcy Forman
Director, Office of
Investigations

John P. Torres
Director, Office of Detention
and Removal

SUBJECT: Guidance re: Lopez v. Gonzalez, ___ S. Ct. ___, 2006
WL 3487031 (2006)

Handwritten signatures of Marcy Forman and John P. Torres.

On December 5, 2006, the Supreme Court issued its decision in Lopez v. Gonzalez, ___ S.Ct. ___, 2006 WL 3487031 (2006), holding that a state felony conviction does not qualify as an "aggravated felony" within the meaning of section 101(a)(43)(B) of the Immigration and Nationality Act (INA) if the conduct for which the alien was convicted would not constitute a felony under federal law. This ruling upholds prior decisions of the Second, Third, Sixth, Seventh, and Ninth U.S. Circuit Courts of Appeals.

Prior to this decision, in other Circuit Courts, an alien convicted of a state controlled substance felony could be considered an "aggravated felon," even though his or her crime, if prosecuted federally, would only be punishable as a misdemeanor. This ruling relates primarily to drug possession convictions, and should have minimal impact on convictions that involve drug trafficking.

The Supreme Court's Lopez decision affects ICE enforcement actions both administratively and criminally. Specifically, the decision affects:

- (1) Notices to Appear - the determination of whether an alien is an aggravated felon directly affects his or her removability, custody determinations, eligibility for relief from removal, and reinstatement of removal orders; and
- (2) Criminal Prosecutions - the determination of whether an alien is an aggravated felon directly affects charging decisions and penalty enhancements (e.g., in 8 U.S.C. § 1326 prosecutions).

It is important to note, however, that although a drug possession conviction will in many cases no longer be an aggravated felony, it will generally still constitute a ground for removal under INA § 237(a)(2)(B) or a ground of inadmissibility under INA §§ 212(a)(2)(A)(i)(II) or (a)(2)(C). Also, although a defendant may no longer qualify for the sentencing enhancement under 8 U.S.C. § 1326(b)(2), he or she may still be prosecuted under 8 U.S.C. § 1326 if the other elements, including an underlying removal order that can withstand judicial scrutiny, are met.

Memorandum for Special Agents-in-Charge and Field Office Directors

Subject: Guidance re: Lopez v. Gonzales ___ S.Ct. ___ 2006 WL 3487031 (2006)

Because this decision could directly affect your decision to, for example, place an alien in removal proceedings, detain an alien, or criminally prosecute an alien, care must be given to carefully examine such determinations in light of this ruling. Please consult your local Chief Counsel with any questions relating to the application of this decision.

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