

2nd Circ. Backs BIA That Dominican Man Can't Nix Removal

By **Kelly Knaub**

Law360, New York (July 28, 2017, 6:01 PM EDT) -- The Second Circuit has upheld two Board of Immigration Appeals decisions that a Dominican lawful permanent resident was inadmissible to the U.S. for being a noncitizen convicted of drug offenses and that he was not eligible for cancellation of removal, according to an opinion filed Thursday.

Hoxquelin Gomez Heredia, who entered the U.S. as a lawful permanent resident in August 1997, argued to the appeals court that he should not have been classified as seeking admission to the U.S. in 2015 after he returned from a short trip to the Dominican Republic — when he was charged as inadmissible and subject to deportation because of two prior drug convictions — but the three-judge panel disagreed.

Gomez argued that the BIA should have applied the so-called Fleuti doctrine, under which lawful permanent residents don't have to formally seek admission to the U.S. if a trip out of the country is "innocent, casual, and brief," but the panel sided with the BIA, which ruled that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 overruled that doctrine.

"Because Gomez committed both relevant offenses after IIRIRA went into effect in April 1997, he is subject to 8 U.S.C. [Section] 1101(a)(13)(C)(v)," the panel said. "The BIA correctly concluded that Gomez was properly treated as seeking admission when he arrived in the United States in 2015."

Gomez had also appealed the BIA's ruling finding that he was not eligible for cancellation of removal on the ground he was prevented from accruing seven years of continuous residency in the U.S. due to a 1999 drug offense.

Specifically, he contended that the board abused its discretion in denying his bid to reopen his removal proceeding so that he could apply for cancellation of removal, which is available to lawful permanent residents who have at least five years of lawful admission for permanent residence and seven years of continuous residency in the U.S., and who do not have any convictions of aggravated felonies.

Gomez's 2010 conviction under New York law for criminal possession of cocaine with intent to sell was an aggravated felony under the Immigration and Nationality Act, but a New York court later vacated the conviction and Gomez pled guilty to possession of a narcotic substance of one half ounce or more, which isn't an aggravated felony, according to the opinion.

As such, he was only prevented from being eligible for cancellation of removal on the ground that he had failed to accrue seven years of continuous residency in the U.S. because of his 1999 marijuana conviction.

Although the BIA acknowledged that Gomez no longer had an aggravated felony conviction, it held that he wasn't eligible for cancellation of removal because the 1999 offense triggered the so-called "stop-time rule," preventing him from accruing the seven years.

Gomez argued that the stop-time rule wasn't triggered until he applied for admission in 2015 after returning from his trip to the Dominican Republic, but the panel disagreed, saying his continuous

residence ended on the date the 1999 offense was committed.

"The BIA considered whether the 1999 marijuana offense triggered the stop-time rule and provided adequate, legally correct reasons for concluding that it did," the panel said.

"Our fight for Mr. Gomez to remain in the United States with his wife and young children will continue as we believe that the Second Circuit decision is contrary to a common sense understanding and plain meaning interpretation of statute that the panel was considering," Raymond G. Lahoud, an attorney for Gomez, told Law360 in an emailed statement on Friday.

A U.S. Department of Justice spokeswoman said the agency declined to comment.

Circuit Judges John M. Walker Jr., Debra Ann Livingston and Gerard E. Lynch sat on the panel.

Gomez is represented by Raymond G. Lahoud and William Carl Menard of Norris McLaughlin & Marcus PA.

The federal government is represented by trial attorneys Surell Brady and Victoria M. Braga.

The case is Gomez-Heredia v. Sessions, case number 16-1465, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Jack Karp.