

## 9th Circ. Says BIA Erred In Presuming Conviction Was Serious

By **Nicole Rosenthal**

Law360 (June 13, 2022, 5:28 PM EDT) -- Mexican national Diego Mendoza-Garcia has another shot at staying in the U.S. after the Ninth Circuit ruled that the Board of Immigration Appeals violated legal standards in assessing his burglary conviction as a "particularly serious crime."

A three-judge panel on Friday **found** that, while the BIA was tasked with determining anew if Mendoza-Garcia's conviction is a "particularly serious crime," the agency instead presumed as much and required him to rebut that presumption.

A particularly serious crime — defined as an aggravated felony resulting in a prison term of at least five years, or as determined by the attorney general via the BIA — can justify deportation for a non-citizen.

"The BIA committed an error of law, and abused its discretion, in failing to apply the correct legal standards in assessing whether Petitioner's offense was a 'particularly serious crime,'" said Judge Jennifer Choe-Groves, sitting on the panel by designation from the U.S. Court of International Trade. "We therefore remand to the BIA to consider Petitioner's application for withholding of removal under the correct standards."

Mendoza-Garcia, who was convicted in 2016 of a first-degree burglary of a dwelling in Oregon, had argued that his crime was not an aggravated felony, but the panel said it was an aggravated felony as his burglary charge landed him a prison sentence of at least one year. While he was initially sentenced to 36 months of supervised probation, the Mexican native violated his probation and ended up in Oregon state prison for over four years, according to the opinion.

The conviction led the federal government to begin removal proceedings against Mendoza-Garcia, who has been a permanent resident of the U.S. since 2000. Mendoza-Garcia challenged the removal proceedings before an immigration judge, arguing that Oregon's first-degree burglary conviction is too broad to match a burglary conviction under the U.S. federal code, which requires a prison term of at least one year and warrant deportation under the federal Immigration and Nationality Act.

But the immigration judge said that previous case law dictated that a first-degree burglary conviction is a categorical match to the generic definition, and the BIA affirmed that decision.

The Ninth Circuit also upheld that finding, saying that "all elements of first-degree burglary of a dwelling under Oregon law substantially correspond to, or are narrower than, the elements of generic burglary."

Mendoza-Garcia also applied for relief under the United Nations Convention Against Torture, arguing that his history of alcohol dependency would put him at risk due to the lack of support programs in Mexico, and that his religious and cultural tattoos would render him a target for police, gangs and cartels if deported. However, the Ninth Circuit found that he couldn't prove that he would more likely than not be tortured if deported to Mexico.

"Petitioner has not alleged past torture," Judge Choe-Groves said. "The potential for future torture at the hands of Mexican police and gang members because of his tattoos and the risks associated with alcohol abuse and dependence are too speculative."

Representatives for the U.S. government and Mendoza-Garcia did not immediately respond to requests for comment.

CIT Judge Choe-Graves and circuit judges Susan P. Graber and Daniel P. Collins sat on the Ninth Circuit panel.

Diego Mendoza-Garcia is represented by Nancy Alexander of Lucas & Barba LLP.

The U.S. government is represented by Rebekah Nahas of the U.S. Department of Justice, Office of Immigration Litigation.

The case is Diego Mendoza Garcia v. Merrick Garland, case number 20-73583, in the U.S. Ninth Circuit Court of Appeals.

--Editing by Peter Rozovsky.