

Excludability under "Zero Tolerance Program"

20 Jan 95

HQ 235-P

LEGAL OPINION: Your CO 235-C Memorandum of October 25, 1991: Excludability under Customs Zero Tolerance Fines

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QUESTION

In the subject memorandum, you instructed Service officers that an alien's signing of a United States Customs Service "Agreement to Pay Monetary Penalty" in conjunction with the Customs Service "Zero Tolerance Program" is sufficient to make the alien subject to exclusion as an alien who has admitted a violation of a law regulating controlled substances. James W. Grable, district counsel, Buffalo, has questioned whether the subject memorandum is a correct statement of the law. This legal opinion addresses the following question:

May the Service charge an alien with exclusion for having admitted a controlled substance violation, based solely on the alien's having signed the Customs Service "Agreement to Pay Monetary Penalty?"

SUMMARY CONCLUSION

The subject memorandum is an incorrect statement of the law. The Service may not seek an alien's exclusion as an alien who has admitted a controlled substance violation, based solely on the alien's having signed the "Agreement to Pay Monetary Penalty."

ANALYSIS

Since June 1, 1991, the Immigration and Nationality Act has provided for the exclusion of an alien who, although not convicted of a crime, "admits having committed, or... admits committing acts which constitute the essential elements of" a controlled substance violation under Federal, State, or foreign law. INA § 212(a)(2)(A)(i) (18 U.S.C. § 1182(a)(2)(A)(i)(II)). The Customs Service uses an "Agreement to Pay Monetary Penalty" ("Agreement") in disposing of some cases involving an

individual who is found to have a controlled substance in his or her possession at the time of a Customs inspection. If the individual agrees to pay the penalty, the Customs officer may release the individual and the conveyance and baggage that the individual brought to the United States. If the individual does not pay the penalty within the fixed period, the Agreement provides that the Customs Service may sue to collect the unpaid amount.

The Agreement expressly states that the penalty is based upon seizure of one or more controlled substances. The authority to assess the penalty, however, is not based specifically on "any law or regulation... relating to a controlled substance." *Id.* A person arriving in the United States must present himself or herself to a Customs officer for inspection. *19 U.S.C. § 1459.* The person must also present for inspection any items that the person brought to the United States. *Id.* The penalty that an individual agrees to pay by signing the Agreement is the penalty fixed by *19 U.S.C. § 1459* for violating the Customs reporting requirements under section 1459 or under *19 U.S.C. § 1433* or *1436.* These reporting provisions are not limited to the reporting of controlled substances. A failure to present for Customs inspection *any* item brought to the United States could be the basis for the penalty. *Id.* § 1459.

In order for a drug offense to form the basis of an alien's exclusion or deportation, "guilty knowledge" must be an essential element of the drug offense. *See Lennon v. INS, 527 F.2d 187 (2d Cir.1975).* But that the item that an individual did not present for inspection be a controlled substance is not an essential element of *19 U.S.C. § 1433, 1436, or 1459.* Still less does it appear from these Customs statutes that the alien had to know that the item that he or she failed to present for Customs inspection was a controlled substance.

Although the Agreement indicates that the item that was not presented was a controlled substance, the penalty is actually imposed for violating the requirement to present for Customs inspection items brought to the United States. An alien who agrees to pay the penalty does not by doing so "admits having committed, or. .. admits committing acts which constitute the essential elements of a controlled substance violation. INA § 212(a)(2)(A)(i)(II), *8 U.S.C. § 1182(a)(2)(A)(i)(II).* The Service may not rest an exclusion charge under section 212(a)(2)(A)(i)(II) solely on an alien's having signed this Agreement.

/s/ TAA

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