**MEMORANDUM**

TO: Judge Terry A. Bain
Executive Office of Immigration Review
Immigration Court
26 Federal Plaza
New York, NY

FROM: Jennifer Van Bergen
Paralegal Specialist/Intern

RE: [Case Name Confidential]

DATE: October 28, 1997

---

FACTS:

Respondent is a 30 year old native and citizen of China. He entered the United States on a B-2 visitor visa in 1984 and overstayed his visa. On September 16, 1991, Respondent was convicted under 21 U.S.C. sec. 846 of conspiracy to possess with intent to distribute a controlled substance, an aggravated felony. On May 14, 1993, he was sentenced to 32 months, which was reduced to 28 months. The government had requested sentencing below the sentencing range and below minimum guidelines, and further requested reduction of the sentence, because of "substantial assistance to the government" in a criminal prosecution (*see* letter of Mary Jo White, U.S. Attorney, to U.S. District Judge Carol Bagley Amon, dated May 12, 1993, attached to Respondent's Memorandum in Support of Application for Status Adjustment, May 20, 1997).

On April 4, 1995, Respondent was served an Order to Show Cause charging him with deportability.

Respondent is married to Rose, a U.S. citizen, and has two step-children. He married Rose on November 16, 1989. He claims that some time in 1989 or 1990 his wife filed a petition (Form I130) to obtain permanent legal residence status for him, but he says he never received any notification from INS as to his status. His mother and father were both granted asylum while he was serving his sentence. They reside as legal permanent residents in New Jersey.

After Respondent was arrested, he supplied the government with "extensive" information about the drug trafficking ring in which he had been involved. He testified twice before the grand jury and before the District Court (E.D.N.Y.) in the trial of one of his co-conspirators. He name suppliers and accomplices. In sum, he supplied information which led to the arrest and conviction of at least four drug traffickers in a trafficking ring which handled hundreds of thousands of dollars of drug proceedsa.

Respondent has appeared for numerous hearings at EOIR, beginning on September 5, 1995. He is not in INS custody. He was unable to find counsel who would take his case, and the court granted him additional time to do so. Finally, on June 25, 1996, he appeared with counsel Stanley Wallenstein. The court ruled that Respondent was ineligible for asylum (INA Sec.208(b)(2)(ii)). The court reserved the question whether Respondent is eligible for withholding of deportation (removal) and asked the parties to brief their positions.

QUESTION:

Is Respondent eligible to apply for withholding of deportation?

DISCUSSION:

Yes.

Respondent is incorrect that an aggravated felon who was convicted for under 5 years is "presumptively eligible" for relief from removal. Such a felon is still presumed to have committed a particularly serious crimes for which removal would generally be mandatory. However, if the sentence was for under five years, that presumption is rebuttable. In Re. QTMT, Int. Dec. 330 (BIA 1996).

In this case, Respondent's substantial assistance to the government in a criminal prosecution does not, in itself, rebut the seriousness of his crime. However, in determining what is a particularly serious crime, the Immigration Court should "look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." Matter of Frentescu, 18 I. & N. Dec. 244, 247, Int. Dec. 2906 (BIA 1982). A "Frentescu analysis" is appropriate "where there is room for disagreement as to whether the crime in question was 'particularly serious.'" QTMT, supra, quoting Ahmetovic v. INS, 62 F.3d 48, 52 (2d Cir. 1995). While prior to the present law, drug trafficking was considered to be *per se* particularly serious, under IIRIRA and QTMT, an aggravated felony for which a sentence was imposed of under five years is only rebuttably particularly serious, and the Frentescu analysis applies. QTMT, supra; INA sec. 241(b)(3)(B).

Under this line of reasoning, the Government argues that a conviction for conspiracy to possess with intent to distribute a controlled substance creates an imminent danger to the American public. The Government is correct in this approach because, while QTMT does not require a separate danger analysis, it stands to reason that in determining whether a crime is a particularly serious one, danger to the community can be a factor. However, the fact that Respondent gave substantial assistance to the Government in its prosecution of criminals weighs against his being considered a danger. Furthermore, the fact that Respondent was released on April 4, 1995 on an Order of Recognizance and has not been held in custody indicates that he has already satisfied the INS that he is not a danger. *See* In Re Noble, Int. Dec. 3301 (BIA 1997) (the standard for release from

detention for an aggravated felon under the Transition Period Custody Rules of IIRIRA is danger to community and likelihood person will show up for hearings); Matter of De La Cruz, 20 I. & N. Dec. 346, Int. Dec. 3155 (BIA 1991) (rebuttable presumption against release of an aggravated felon, unless not a threat).

The government bases its danger argument on QTMT, stating without a citation reference that the rebuttable presumption could only be overcome with "convincing evidence that the crime cannot rationally be deemed 'particularly serious' in light of our treaty obligations under the Protocol." *See* Government's Service Response to Respondent's Motion for Withholding of Deportation, served June 3, 1997, p. 1; QTMT, supra. However, QTMT goes on to state that "[t]o make this determination, we will look to the conviction and circumstances of the crime to determine whether the alien, having been convicted of that crime, can be said to represent a danger to the community of the United States." QTMT, supra. If these factors are considered in Respondent's case, his reduced sentence and assistance to the Government may and should be considered.

The Government's reference to the treaty obligations is meaningless. It does not go beyond the fact that, as QTMT decided, categorical classifications of crimes as *per se* particularly serious are not necessarily out of compliance with the Protocol. *Id.* The standard under the Protocol is not whether a crime is an aggravated felony, but whether it is a "particularly serious crime [which] constitutes a danger to the community of that country." United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577, 696 U.N.T.S. 268, Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S.).