

Overview of the Immigration Consequences of Criminal Convictions

A very brief exploration of the structure of immigration law, and then greater detail on typical criminal law issues faced by clients subject to removal (deportation) for criminal convictions

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0.1 Overview of immigration law

Immigration law is multi faceted. Many agencies impact immigration law:

- Department of Homeland Security;
- U.S. Department of State;
- Health and Human Services;
- Social Security Administration;
- FBI;
- State and County agencies;
- Local agencies including police departments

0.2 Immigrant vs. nonimmigrant status

Immigrants: Individuals coming to live and work permanently in the United States. Also called "Green Card" holders or "Legal Permanent Residents" (LPR's)

Nonimmigrants: Individuals coming to the USA for a defined specific purpose for a temporary defined period. Examples: students, visitors for business or pleasure (tourists), temporary workers, performers, visiting professors or scholars, trainees, etc.

0.3 Sources of immigration law

- Statutes
- Regulations
- Case Law

0.4 Additional sources of immigration law and policy

- BIA decisions;
- BALCA and other administrative agency decisions;
- Administrative Appeals Office of the USCIS;
- Policies and memoranda issued by various executive branch agencies;
- Emerging trend: state laws regulating immigration – example – Arizona SB 1070
- Immigration Reform on the horizon?
- Executive actions

0.5 Family and Employment based immigration law and priority dates – see online chart from US Department of State – updated monthly

Source – US Department of State, “Visa Bulletin” – basically, there are not enough immigrant visas per year for the number of people waiting in line. So the line gets longer.

Intermission



1.1.1 What is a “Conviction” under immigration law

Under the Immigration Act:

101(a)(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

101(a)(48)(A)(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

1.1.2 Conviction under immigration law (continued)

101(a)(48)(A)(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

101(a)(48)(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

1.1.3 Verifying your client is a U.S. citizen before a guilty plea

In Ohio, the statute requires that the court issue a warning to non-citizens:

ORC §2943.031: "court to advise defendant as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea."

1.1.4 Withdrawing a guilty plea

There must be an underlying issue of law or fact or a constitutional issue that permits the withdrawal of a guilty plea. If a plea is withdrawn purely for immigration purposes it may still count as a conviction for removal or exclusion purposes.

Entry into to a diversion program which requires an admission to the elements of the offense can still constitute a conviction for immigration purposes. See the definition of conviction above.

1.1.5 6th Circuit case: Barakat v. Holder

A conviction vacated for rehabilitative or immigration reasons remains valid, while a conviction vacated for substantive or procedural infirmities does not have any immigration consequence.

[Barakat v. Holder, 621 F.3d 398 (2010)]

1.1.6 Examples of Crimes specific to immigration law

- Inadmissible at time of entry or of adjustment of status or violates status;
- Present in violation of law (violation of status);
- Violation of condition of entry;
- Termination of conditional permanent residence;
- Alien smuggling (special exemption in case of family reunification);
- Marriage fraud;

Note: Waivers authorized in some cases.

1.1.7 Crimes with immigration consequences

Crimes involving moral turpitude: Two elements- (1) commission within 5 years after the date of admission and (2) sentence of one year or more may be imposed (ie, max sentence – even if not imposed – is one year or more per the statute)

Multiple criminal convictions: Two or more crimes involving “moral turpitude” not arising out of a single scheme of criminal misconduct – length of sentence not material

1.1.8 Crimes with immigration consequences (continued)

- Aggravated felonies: as defined under immigration law – see INA § 101(a)(43);
- High Speed Flight from a U.S. immigration checkpoint;
- Failure to register as a sex offender;
- Controlled substance violations: only exception: a single offense for one’s own use, of 30 grams or less of marijuana; and
- Firearms offenses

1.1.9 Crimes with immigration consequences (continued)

- Crimes of domestic violence, stalking, violation of a protective order, and crimes against children;
- Human trafficking;
- Failure to register and falsification of documents;
- False claim to U.S. citizenship; and
- Security and related grounds including espionage and terrorism

1.1.10 Critical: the time for vigorous defense is at criminal trial, not in removal proceedings

Defenses under immigration law may present extremely difficult or insurmountable burdens or may be completely unavailable.

Once the alien is convicted, that conviction becomes a matter of record for the immigration court and the alien can then be ordered removed simply by virtue of that conviction. A collateral attack on the underlying conviction is not permissible through immigration court.

1.2.1 Criminal considerations in immigration law: Mandatory Detention

The Attorney General of the United States MUST take into custody any alien who has committed certain crimes. Therefore, if your client has committed certain crimes, upon conviction and perhaps serving his or her prison sentence, he may remain in custody pending deportation proceedings.

1.2.2 Crimes requiring mandatory detention– INA § 236 (c)

- Inadmissible due to criminal or related grounds;
- Deportable for multiple crimes involving moral turpitude, conviction of an aggravated felony, conviction of controlled substance violations, firearms violations, and other “miscellaneous crimes”;
- Deportable due to a conviction for a crime – for which a sentence of one year or more was imposed; and
- Inadmissible for terrorist activities.

1.2.3 Mandatory detention upheld by Supreme Court

In *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), the Supreme Court held that the Immigration and Nationality Act (“INA”) authorizes the prolonged detention of certain noncitizens without a custody hearing during their removal cases. The Court reversed a decision by the Ninth Circuit Court of Appeals construing 8 U.S.C. §§ 1225(b) and 1226(c) to authorize detention for only six months, at which point the detainee must receive a custody hearing before an immigration judge.

1.3.1 How does an alien get on the DHS’ “radar”?

- Report of commission of crime - “secure communities” - INA § 287(g) agreement;
- Applications to a U.S. or state agency for any type of benefit;
- Workforce enforcement or SSA/IRS “no match” letters;
- Report to USCIS or DHS if a student or employee has fallen out of status; and
- Informants including competitors, family members, disgruntled employees, or ex-spouses

1.3.2 Deportation and exclusion

Deportation applies to individuals already in the United States after illegal entry or violation of status. By contrast, exclusion applies to individuals who never really made an entry to the United States, and could therefore be deported much quicker. Both the grounds of deportation and exclusion were merged into one process called "removal" subsequent to the IIRIRA of 1996, but the separate grounds for deportation and exclusion still apply.

1.3.3 Grounds for exclusion

- Health-related grounds;
- Criminal and related grounds;
- Multiple criminal convictions;
- Controlled substance traffickers;
- Prostitution and commercialized vice

1.3.4 Grounds for exclusion (continued)

- Aliens involved in serious criminal activity who have asserted immunity from prosecution (example: diplomats);
- Foreign government officials who have committed particularly severe violations of religious freedom;
- Significant traffickers in persons;
- Money laundering

1.3.5 Grounds for exclusion (continued)

- Security and related grounds;
- Espionage;
- Sabotage;
- Export of restricted goods, technology, or sensitive information;
- Overthrow of the U.S. Government

1.3.6 Grounds for exclusion (continued)

- Terrorist activities;
- Adverse foreign policy consequences to the United States;
- Membership in a totalitarian party;
- Participation in Nazi persecution, genocide, or any torture or extrajudicial killing;
- Association with terrorist organizations;
- Recruitment or use of child soldiers;
- Public charge

1.3.7 False claim to U.S. citizenship

There are no waivers available for a false claim to U.S. citizenship. In most instances, the alien will be prohibited from ever obtaining any immigration benefit if he or she has made such a false claim. Only relief available: asylum / withholding / Convention Against Torture

1.4.1 Aggravated felonies have immigration consequences

Aggravated felonies are defined as a separate class of crime under immigration law- see INA § 101(a)(43).

- Murder, rape;
- Sexual abuse of a minor;
- Illicit trafficking in a controlled substance, including a drug trafficking crime;

1.4.2 Aggravated felonies (continued)

- Illicit trafficking in firearms, destructive devices, or in explosive materials;
- Money laundering or unlawful monetary transactions exceeding \$10,000;
- Explosive materials offenses;
- Firearms offenses;
- Crime of violence for which the term of imprisonment is at least 1 year

1.4.3 Aggravated felonies (continued)

- Theft offense or burglary offense for which the term of imprisonment is at least 1 year;
- Demand for or receipt of ransom;
- Child pornography;
- RICO crimes, gambling offenses

There are additional aggravated felonies listed in the statute- this list is not exhaustive.

1.4.4 Effect of criminal convictions on naturalization

Conviction for an aggravated felony after November 2, 1990 renders the alien forever ineligible to naturalize. Conviction for certain crimes is a prima facie indicator that the alien lacks “good moral character”, which is a prerequisite for naturalization. While the alien may not be removable, the alien may either become barred from naturalization or may be barred until 5 years or more have passed from the disqualifying conviction and the conclusion of any probation.

1.5.1 Waivers

- Unlawful presence waiver;
- US Citizen or LPR immediate relative-immigrant petition;
- Family-Based or Employment-Based petitions that are “current”
- Cancellation of Removal;
- Commission of certain crimes prior to 1997 (St. Cyr);
- Waivers for permanent resident aliens convicted of criminal offenses- INA § 212(h) - 7 year rule;
- “Petit offense” waivers- single crime involving moral turpitude for which a sentence of 6 months (for exclusion) or 1 year (for removal) was imposed;
- Petit offense- drug possession of 30 grams or less of marijuana for one’s own use

1.5.2 Waivers (continued)

- Victims of crime or of domestic violence;
- Waivers under INA § 212(k): fraud or lacking documentation on entry;
- Asylum, Withholding of Removal under the INA, Withholding of Removal under the United Nations Convention Against Torture;
- “U” (victim of crime) and “T” (victim of trafficking)
- Other waivers:
 - ABC Settlement;
 - NACARA;
 - Haitian Refugee Immigration Fairness Act;
 - Cuban Adjustment Act;
 - Cancellation of Removal (two types);
 - Registry;
 - Private Bills

1.6.1 Post conviction relief

Leading case: *Barakat v. Holder*, 621 F.3d 398 (6th Cir., 2010);

Holding: Whereas a “conviction vacated for rehabilitative or immigration reasons remains valid,” a conviction “vacated because of procedural or substantive infirmities does not.” *Id.* at 403. For the Government to carry its ultimate burden, then, “the government must prove, with clear and convincing evidence, that the [alien]’s conviction was quashed solely for rehabilitative reasons or reasons related to his immigration status.” *Id.* At no time, however, does the alien bear the burden of proving that his conviction was vacated on a “recognized legal ground.” *id.* At 404.

1.6.2 Post conviction relief

The BIA, in *Matter of Jose MARQUEZ CONDE*, 27 I&N Dec. 251 (BIA 2018), adopted the 6th Circuit’s reasoning on a nationwide basis in the immigration courts, concluding that - other than in the 5th Circuit.

“[W]e consider convictions that have been vacated based on procedural and substantive defects in the underlying criminal proceeding as no longer valid for immigration purposes” *id.*, at 255

1.6.3 Lessons learned from *Barakat*

- (1) consult with immigration counsel BEFORE entering any plea
- (2) entry into a deferred adjudication or rehabilitative / diversionary program which requires admission of the elements of the crime could amount to a guilty plea for immigration purposes;
- (3) include the *Barakat* “magic” language in any post-conviction motion to vacate a conviction and in the related order - “procedural or substantive infirmities”. Avoid any reference to vacating the conviction for “rehabilitative or immigration reasons.”

1.7.1 Recent Supreme Court decisions

INS v. St. Cyr, 533 U.S. 289 (2001): reinstated INA § 212 (c) relief for pleas entered into before the effective date of IIRIRA (April 1, 1996)

Padilla v. Kentucky, 130 S. Ct. 1473 (2010): Ineffective assistance of counsel in failing to advise of the immigration consequences of a guilty plea permits the affected alien to reopen the underlying proceedings and vacate the plea.

1.7.2 Padilla update

The Supreme Court heard arguments on November 1, 2012 in *Chaidez v. USA* as to whether *Padilla* should be applied retroactively (if *Padilla* created a new rule, then not retroactive; if *Padilla* simply extended the old rule requiring effective assistance of counsel to the immigration setting, then retroactive): Held: *Padilla* created a new rule, therefore NOT retroactive. Applies only to convictions that became final on or after March 31, 2010. (The date of the *Padilla* decision).

1.7.2 Recent Supreme Court decisions (continued)

Judulang v. Holder, 132 S. Ct. 476 (2011): Equivalence between grounds for removability and grounds for exclusion in order to qualify alien for relief under 212 (c) for prior crimes to which the alien pled guilty (NOT eligible for 212(c) relief if found guilty at trial)

Moncrieffe v. Holder, no. 11-702 (decided April 23, 2013) – drug possession statute divisible, hence not removable under categorical analysis.

1.7.2 Recent Supreme Court decisions (continued)

Jennings v. Rodriguez, 583 U.S. ____ (2018):

Constitutionality of prolonged detention:
SCOTUS says its OK; no need for custody review at 6-month intervals. Affects:

1. Aliens subject to Mandatory detention
2. Arriving aliens including asylum seekers
3. Aliens detained pending commencement and completion of removal proceedings

1.7.2 Recent Supreme Court decisions (continued)

Sessions v. Dimaya (No. 15–1498, April 17, 2018):
The Supreme Court affirmed the Ninth Circuit’s judgment that the language in 18 USC §16(b), as incorporated into the INA, that defines a “crime of violence” is unconstitutionally vague.

SCOTUS held that the “catch all” provision of “crime of violence” - “presents a serious potential risk of physical injury to another,” 18 U. S. C. §924(e)(2)(B)—was unconstitutionally “void for vagueness” (relying on *Johnson v. United States*, 576 U. S. ____, (2015).) – this extends to agg felony under INA as well.

1.7.3 Other court decisions

Violation of Municipal Ordinance is a “Conviction” for immigration purposes:

The 8th Circuit, in *Rubio v. Sessions*, (No. 17-1902; 5/25/18) found the BIA properly denied TPS (Temporary Protected Status) for conviction of two misdemeanors, adding that it is irrelevant whether state law classifies crimes as “infractions” or “violations,” so long as punishment imposable under state law meets definition of misdemeanor.

Intermission



2.1.3 EOIR and BIA

- The immigration court system is composed of approximately 260 immigration judges at 59 immigration courts in the USA;
- IJ decisions can be appealed through the Board of Immigration Appeals (“BIA”);
- Currently 14 permanent members at the BIA, and 5 temporary appointees;
- BIA decisions can be appealed to a Circuit Court on “questions of law or constitutional issues” – review limited by IIRIRA and the REAL ID Act (2005)

2.1.4 Master hearings and individual hearings

- Master and initial hearings are set at the immigration court. A master hearing is similar to criminal court arraignment and plea;
- Individual hearing is similar to a trial. There is no jury. There is no appointed counsel

2.2.2 What is relief from removal?

An alien may have no basis for arguing that he or she is not removable (excludable or deportable) from the United States. That being the case, the alien may have some legal options to remain in the USA. Any such option is “relief from removal” and must be presented before the immigration court in order for the court to decide whether the alien qualifies for such relief or not.

2.3.1 Immigration court - “Master” hearings and “Individual” hearings

- Immigration court process starts by service of the Notice to Appear; contains date, time, location of hearing and charges against the alien;
- NTA must also be filed with immigration court;
- Once NTA is filed, immigration court will set hearing;
- Notice sent to alien’s last known address

2.3.2 Charges in immigration court: Notice to Appear (“NTA”)

- Non-US Citizenship;
- Arrival date in the USA;
- Manner of entry to the USA;
- Specific violation of immigration law (illegal entry, overstay, conviction, etc.)
- Consequently, removable under INA

[Has the Supreme Court’s *Pereira v. Sessions* (No. 17–459, June 21, 2018) decision leveled the playing field a tad?]

2.3.3 Breaking news....Supreme Court Decision in *Pereira v. Sessions*; (No. 17-459, June 21, 2018)

Briefly, Pereira argued that his NTA was issued without a date and time for his Master Calendar hearing and therefore was legally deficient to stop the 10-year clock for non-LPR cancellation of removal. When he made the argument, he had already accrued 10 years of time in the USA, even though part of that time had been AFTER he was served with the (no date, no time) NTA. The Supreme Court agreed, and remanded the case for Pereira to be able to apply for Cancellation of Removal for Non-LPR's.

2.4 Immigration court in Ohio

- Federal Courthouse - 801 West Superior Avenue- Cleveland - 13th floor;
- Three Immigration judges; more to come
- Judges are administrative law appointees through the U.S. Department of Justice;
- Prosecutors are DHS attorneys under US Immigration & Customs Enforcement;
- Cleveland ICE district counsel currently has 6 active prosecuting attorneys and one supervising attorney

2.5.1 “*In absentia*” order of removal

Many aliens do not receive their Notice to Appear either because they gave an incorrect address to the ICE, or the ICE made a mistake when inputting the address, or the alien has since moved and NOT informed the ICE. If the alien fails to appear at the Individual hearing absent a compelling reason, the alien may be ordered removed in absentia.

2.5.2 “Master” hearing(s)

- All preliminary hearings in the immigration court case before the final Individual hearing;
- Analogous to pretrial hearing in state or Federal court;
- First Master establishes name, address and language requirements;
- At first master, may ask for and receive additional time to find attorney
- Subsequent masters may be set to file applications, discuss evidence, or eligibility for relief

2.5.2 Master hearing (continued): Other issues addressed

- Pleadings to charges on the NTA;
- Designation of country to which alien may be removed, if found removable;
- Discussion of available relief;
- Deadlines to file applications for relief

2.5.2 Master hearing (continued)

Further Master hearings may be set for status conferences, to determine if applications for relief have been timely filed, for discussion on whether relief may be premitted (barred), and other administrative functions.

2.5.3 “Individual” hearing

- The Individual hearing is like a trial;
- Alien must present his or her case;
- Alien may be represented by attorney at his or her expense;
- Present expert witness testimony and evidence;
- Hearings may be open to the public or closed (example, asylum, battered spouse) depending on case.

2.5.3 Individual hearing (continued)

- Some hearings- especially detained - are heard by televideo or telephone;
- Evidence must be submitted at least 15 days prior to hearing;
- Hearings are generally no more than 4 or 5 hours long at maximum;
- Court may admit testimony of witnesses or accept proffers in order to speed up the trial

2.6.1 Procedures in immigration court

- Master hearing and Individual hearings
- 15-day rule for submission of evidence
- IJ's have wide latitude to ask questions
- DHS can “surprise” by not introducing evidence for purposes of impeachment
- Witnesses sequestered
- 30 days to appeal to BIA from IJ decision

2.6.2 Appeal to BIA

- Thirty days to appeal following the decision of the IJ. Must file with BIA in Falls Church, Virginia;
- Appeals from USCIS decision on family-based cases are also appealed to the BIA within 30 days of the decision;
- Appeals from USCIS decision in non-family based cases are appealed to Administrative Appeals Office within USCIS

2.6.3 Appeals to federal courts

- Following BIA decision, alien may appeal to the federal circuit if permitted under IIRIRA and the restrictive provisions of the REAL ID Act of 2005;
- May be removed from the United States pending appeal unless appeals court has stayed the alien's removal.

2.6.4 Detention of aliens during course of proceedings

Aliens detained by ICE are set for hearings on an expedited track. Since there is an urgency to process detained cases as quickly as possible, this represents a substantial push or even a burden to attorneys to be able to interview their client, identify applicable grounds for relief and to identify and prepare witnesses in a very limited time.

2.7 Rules of evidence

There are no rules of evidence. Federal rules do not apply. The EOIR Practice Manual mandates 15-day rule for evidence, witness lists, designate experts, etc. to be filed prior to an Individual hearing.

2.8.1 Statutory construction and “strict liability”

Most immigration statutes impose strict liability. Simply by being found guilty of a local, state or federal statute or ordinance may make the alien removable.

2.8.2 Strict liability

Unless the underlying conviction may be

(1) reopened and vacated or

(2) reopened and reduced to a non-removable offense, the charges are generally sustained in immigration court and the alien is found removable.

Waivers may apply - recall prior discussion

2.8.3 “*Mens rea*” in crime-based deportation cases

Definition of CIMT -

- Inherently base, vile, or depraved, and contrary to the accepted rules of morality;
- Contrary to the duties owed between persons or to society in general

2.8.4 *Mens rea* (continued)

“Whether a particular crime involves moral turpitude is determined by reference to the statutory definition of the offense and, if necessary, to authoritative court decisions in the convicting jurisdiction that elucidate the meaning of equivocal statutory language.”
Matter of Robles-Urrea, 24 I & N Dec. 22 (BIA, 2006)

2.10.3 Why is it important to understand CIMT’s?

Many immigration removal cases arise out of commission of CIMT’s. Therefore, it is important to understand what a CIMT is and whether a particular crime is a CIMT. The BIA has developed two tests for whether a conviction gives rise to a charge of removal – those are the “categorical approach” and the “modified-categorical approach”.

2.10.4 Test 1: The categorical approach

- View the elements of the underlying criminal statute;
- Look at the record of conviction;
- Compare both for any congruence between the statute and the immigration ground of removal;
- If there is a congruence, then the violation is a removable offense

2.8.5 The categorical approach - (continued)

"In determining whether an alien was convicted of a crime involving moral turpitude, we use the categorical approach, focusing on the statute and the record of conviction, rather than on the specific act committed by the alien... Accordingly, we look to the elements of the respondent's statutory offense in order to determine whether the crime is one that necessarily involves moral turpitude, without considering the circumstances under which it was committed." *In re Tejwani*, 24 I & N Dec. 97 (BIA 2007)

2.8.6 The categorical approach - (continued)

"The test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind." *In re Tran*, 21 I. & N. Dec. 291, 293 (BIA 1996)

2.8.7 Modified categorical approach

The criminal statute is silent as to the elements that are implicated in the immigration statute. So the categorical approach will not work. The immigration court then has to look behind the state's criminal statute to examine the following:

- Record of state court proceeding;
- Police report;
- Indictment;
- Testimony;
- Any other pleadings

2.8.8 Modified categorical approach (continued)

Under the modified categorical approach, the Board “may determine which statutory phrase was the basis for the conviction by consulting a narrow universe of “Shepard documents” that includes any charging documents, the written plea agreement, the transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” United States v. Palomino, 606 F.3d 1317, 1337 (11th Cir. 2010).

2.9.1 What do you do as counsel for a client with immigration issues?

Issue spotting – is immigration an issue?

Vigorously defend criminal charges at the trial court level!

Work with immigration counsel to craft a plea that will avoid immigration consequences or leave immigration consequences that can be ameliorated by a waiver.

2.9.2 Immigration Reform; Executive Actions

Immigration Reform:

Highly unlikely in this congress

Supreme Court Action:

President's visa ban 3.0 upheld by Supreme Court; (Hawaii v. Trump) – however, new justice's impact remains to be seen for next term.

Questions answered / discussion

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