

The BASICS of Representing Non-citizen Defendants

Padilla v. Kentucky, 559 U.S. 356 (2010)

- Immigration consequences are an integral part of a criminal penalty, not mere collateral consequences
- “Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.” 559 U.S. 356, 357 (2010)

What is the client’s Immigration Status?

- Citizen – permanent, (mostly) irrevocable right to be in the U.S., cannot be deported unless proof of fraud
- Lawful Permanent Resident (LPR) – green-card holder – Permanent permission to stay in U.S. unless you do something to revoke that right
 - Risks: deportation, inadmissibility if travels outside country, ineligibility for citizenship
- Asylum / Refugee = permission to be in US bc of displacement + danger / persecution in home country
 - Risks: deportation, inadmissibility for permanent status (i.e. LPR), ineligibility for citizenship
- Temporary Protected Status (TPS) – temporary permission to live & work in the U.S.
 - This covers people from El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, Syria, & Yemen who have been in the US since a certain date (depends on country). This is not a pathway to more permanent status (i.e. LPR or asylum) and must be regularly renewed
 - Risks: any two misdemeanors (even no DLs) render person ineligible for TPS
- Non-immigrant Visa holders – legally in the U.S. on a temporary basis for work, study, travel, etc
- Deferred Action for Childhood Arrivals (DACA) – temporary permission to live & work in the U.S.
 - Not a pathway to a green card or citizenship; must be renewed every 2 years
 - Risks: 3 “non-significant misds,” 1 “significant misd” (DUI, DV), or any felony = loss of DACA
- Undocumented – illegal entry (EWI), overstayed a visa, or lost status (TPS or DACA)
 - Automatically deportable, though occasionally defenses are available
 - Risks: deportation/removal, loss of defenses to deportation, inadmissibility for legal status in the future, federal prosecution for illegal re-entry
- Order of Supervision – Already went through deportation proceedings and has final order of removal, but country of origin will not accept person back (no travel docs issued)
 - Will be physically deported when political situation improves

Immigration Consequences for Criminal Convictions

- Deportation / Removal – ANY non-citizen can lose their immigration status due to criminal convictions
 - “Aggravated felony” – leads to nearly automatic deportation
 - Other deportable grounds (CIMT, DV) – may not be deported immediately, but are likely to be deported at some point in the future (may be many years later)
- Inadmissibility – inadmissible for lawful entry or increase in status
 - Prevents future legal admission (permission) to enter the U.S.
 - Bars getting future improved status (usually LPR)
 - Prevents re-entry to the US after travel, even for immigrants w/ a legal right to be in the U.S.
 - Criminal grounds may disqualify person for some waivers (LPR cancellation, §212h waiver)
- Ineligibility for Citizenship – can be permanent or temporary (usually 3 or 5 years)
- Loss of “waivers” – a waiver is relief from deportation or inadmissibility
- Mandatory detention during deportation proceedings
- Enhanced federal prosecution for re-entering the United States (bumps max stc to 10 or 20 years)
- Expedited removal – no right to go in front of immigration judge. Also, harder to appeal or undo
- Loss of status / ineligibility to renew – for TPS and DACA

What counts as a Conviction for purposes of immigration?

- Under-advisement pleas – even if the case is then dismissed, this counts as a conviction for ICE
- §40-35-313 → completely useless for a non-citizen (except w/ DACA). Expungement is actually harmful because then the immigration attorney can’t get the underlying information or proof of dismissal.
- Any admission or plea + some sort of penalty (i.e. classes or CSW) = conviction (see INA §101(a)(48))
- NOTE – a juvenile adjudication is NOT a conviction, but admissions on the record may be used as a “controlled substance offense” for purposes of admissibility or eligibility

Representing Undocumented Defendants

- An undocumented person is automatically deportable, so the goal is to avoid coming to the attention of ICE. The first goal is to avoid staying in or returning to jail – because of the risk of a detainer.
- An “ICE detainer” in JMS means that the person will be sent to ICE instead of released. The person will then be shipped to Louisiana and held in custody while being processed for deportation.
- Advise clients that ICE gets a monthly list of everyone on probation (all types).
- If your client is likely to return to the U.S., try to avoid a felony and probation.

Classifications of Crimes in the Immigration & Nationality Act (INA)

- Aggravated Felony (AGF) - 8 USC §1101(a)(43) → deportation – almost no remedy or defense
 - Includes some rare misdemeanors: attempt crimes, sex offenses involving minors
 - Drugs: includes all felony offenses, even felony possession w/ priors
- Crime Involving Moral Turpitude (CIMT) - 8 USC §1227(a)(2)(A)
 - Triggers deportability if:
 - Felony CIMT conviction within 5 years of admission into the U.S., or
 - Any two CIMT convictions, at any time, arising from different incidents
 - Triggers inadmissibility – any CIMT conviction EXCEPT:
 - First offense CIMT if the sentence is < 6 months (petty offense exception)
 - Waivers (bars to removal or inadmissibility) may be available
 - Often difficult to determine what counts as a CIMT bc defined by case law, not statute
- Domestic Violence Conviction (DVO) - §1227(a)(2)(E) → triggers deportability
 - Includes stalking, orders of protection, & child abuse (note that DV assault is also a CIMT)
 - Can apply to simple assault if Record of Conviction (ROC) shows DV relationship
 - Does NOT include B misdemeanor offensive contact DV
- Controlled Substance Offense - §1227(a)(2)(B) → triggers deportability & inadmissibility
 - Conviction or *admitted commission* of a drug offense
 - The ONLY exception: first offense simple possession of < 30g MJ does not trigger
 - Includes paraphernalia & attempt crimes
- Firearm or Destructive Device Conviction – 8 USC §1227(a)(2)(C) → triggers deportability

“Safer” Plea Agreements

- Assault → B misd offensive contact, or A misd assault (non-DV) if reckless mens rea (best practice is to get “reckless mens rea” written on the judgment form or stated on the record)
- First offense MJ possession under 30g (still makes person inadmissible, but avoids deportability)
- Reckless Driving (Note: Reckless Endangerment is a CIMT. DUI is not, but is a DACA bar)
- Trespass / disorderly conduct / agg crim trespass
- Driver’s license offenses

Common Crimes that are Aggravated Felonies – as defined in 8 USC §1101(a)(43)

- Murder, Rape, sexual abuse of a minor, child porn
- Drug Trafficking – this includes:
 - Any drug crime involving sale or intent to sell (including misd att MJ sale)
- Felony theft or burglary (attempt is not an AGF if it bumps crime to a misd)
- Felony “Crime of Violence” – defined as:
 - 16(a): Crime with physical force (or threat or attempt of it) as an element OR
 - 16(b): An offense that, by its nature, involves a substantial risk that physical force may be used
- Prostitution business offenses (some controlling role in a “prostitution business”)
- Firearm trafficking or any felony gun charge
- Money laundering
- ATTEMPT to commit any of the above (unless bumped to misd & AGF definition requires felony)

Note: violation of the sex offender registry is an independent ground for deportation