

Basics of the Immigration Consequences of Criminal Convictions

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Topics Covered

- Standards
- Nature of Immigration Proceedings
- Identifying Client's immigration or citizenship status
- Illustrative grounds of deportability and inadmissibility
- Strategies to reduce consequences
- Relief from removal

Immigration consequences can be worse than the criminal case consequences

- May be taken away from family and job
- Never to be able to return
- To a country/language they do not know, with no family
- Where they may be afraid for their safety
- Could get probation in criminal case and be removed from US for that conviction

Standards

- "[C]ourts, state legislatures, and criminal defense lawyers consider it a duty of defense lawyers (or in some cases the criminal courts themselves) to give proper advice to a criminally accused non-citizen of immigration consequences of the disposition of the criminal case."
- Judge Jack Weinstein in *Mojica v. Reno*, 970 F. Supp. 130, 177 (E.D.N.Y. 1997), affirmed *sub nom. Henderson v. INS*, 157 F.3d 106 (2nd Cir. 1998).

Quote from INS v. St. Cyr 533 U.S. 289 (2001)

"There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. Even if the defendant were not initially aware of §212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance." See brief for National Association of Criminal Defense Lawyers, et al. as Amicus Curiae 6-8."



ABA Standard

"[C]ounsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." ABA Standards for Criminal Justice, Pleas of Guilty § 14-3.2 Comment, 127 (3d ed. 1999).



National Legal Aid and Defender Association

-- as part of the plea negotiations, "counsel should be fully aware of, and make sure that the client is fully aware of . . . other consequences of conviction such as deportation . . ." NLADA Performance Guidelines for Criminal Defense Representation, Guideline 6.2(a)(3) (2001)



Bureau of Prisons Statistics as of July 26, 2008

- United States: 147,796 (73.4%)
- Mexico: 35,033 (17.4%)
- Colombia: 3,003 (1.5%)
- Cuba: 1,739 (0.9%)
- Dominican Republic: 2,933 (1.5%)
- Other/Unknown: 10,913 (5.4%)



Collecting Information

- What country of citizenship?
- Current immigration status
- Complete immigration history
- Complete criminal history



Goals

- Inform client of immigration consequences of the particular charge
- Eliminate or reduce immigration consequences or removal or ineligibility for benefits
 - not to be convicted of an aggravated felony
 - not to create ground for removal (exclusion or deportation)



➤ Goals (continued)

- Not to make ineligible for relief from removal (second stage of immigration proceeding).

Nature of Proceedings: Civil

- Ⓜ Although “drastic,” deportation is not punishment. *Galvan v. Press*, 347 U.S. 522, 530 (1954).
- Ⓜ The prohibition against ex post facto laws does not apply to deportation proceedings, which are civil in nature. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 314 (1955).
- Ⓜ No entitlement to appointment of counsel

Types of Noncitizens

- Ⓜ Lawful permanent resident (green card holder)
- Ⓜ Nonimmigrant visa holder (e.g. student)
- Ⓜ Asylee or refugee
- Ⓜ Parolee
- Ⓜ Undocumented (visa overstay)
- Ⓜ Undocumented (never admitted, entered without inspection)
- Ⓜ Undocumented but has chance to immigrate in future

Paths to Immigrate

- family
- employment
- asylum: well founded fear of persecution
- lottery

General Approach: YOUR AFFIRMATIVE DUTIES

- Get info from client: determine client's immigration status-- ASK EVERY CLIENT!!
- Call expert/research yourself to determine what are immigration consequences of this particular charge

Affirmative Duties (continued)

- Explain DHS situation to client and find out how important it is to him/her to avoid removal: explain the specific consequences of the particular charge client is facing
- If important, identify potentially safer plea and sentence, if possible

Removal (formerly deportation and exclusion)

- Whether noncitizen has been admitted to U.S. determines what statute government must use to try to “remove” person from U.S.
- If admitted, 8 U.S.C. § 1229a (grounds of deportability apply).
- If not admitted or seeking a green card, then 8 U.S.C. § 1182 (grounds of inadmissibility apply).



Removal (formerly deportation and exclusion) - continued

- Summary removal when not admitted (by officer, not judge)
- Voluntary departure (alternative to removal, which is not considered removal)
- Additional consequence: future inadmissibility depending on reason for removal now



Citizenship

- If client a citizen,
- Absolute defense to charge under 8 USC § 1326
- No need to consider immigration consequences because immigration courts have no jurisdiction over United States citizens



Citizenship

- By birth in US or US Territory
- By Naturalization
- Acquired: Client born abroad to citizen parent and various other conditions are satisfied. See 8 USC §§ 1420, 1433
- Because of esoteric statutory provisions, a person may be a United States citizen and not even realize it.

Difficult to Detect Citizenship Issues

- Derived citizenship: One or both parents naturalized before defendant is 18. Citizenship vests as a matter of law even if individual does nothing. See 8 USC § 1431
- Defendant does not know his parents and was found in United States under age of 5, not shown to be born outside of US prior to turning 21. See 8 USC § 1401(f)

Talk to client

- How much does s/he want to stay here?
- What is s/he willing to sacrifice to do so?
- Serve extra time?
- Plead to extra counts?
- Cooperate?

Selected Criminal Grounds of Deportability

- Aggravated felonies, including fraud and theft aggravated felonies
- Crimes of moral turpitude
- Drugs
- Firearms
- Domestic violence, child abuse, child neglect, child abandonment, stalking

More Criminal Grounds of Deportability

- Certain convictions under 18 USC § 1546 (fraud and misuse of visas, other documents)
- Espionage, sabotage, treason

Non-Criminal Grounds of Deportability: examples

- drug abuser or addict
- civil finding of violation of a domestic violence restraining order

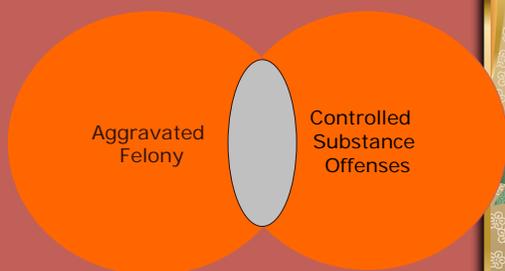
Framework

- ⑤ In analyzing grounds of deportability, it is important to look at the elements of the ground, which the government has the burden to establish by clear and convincing evidence.

Criminal Grounds of Inadmissibility

- ⑤ Controlled substance offense
- ⑤ Crime involving moral turpitude
- ⑤ Note, no ground of inadmissibility for firearm, domestic violence, or aggravated felony

A conviction can fall under more than one ground of deportability



8 USC § 1101(a)(48)(A): "Conviction" means

- ❏ A formal judgment of guilt or
- ❏ Where adjudication of guilt has been withheld:
- ❏ Defendant pleads guilty, nolo contendere or has admitted sufficient facts to warrant a guilty finding AND
- ❏ The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.



Immigration Law Definition Controls

- ❏ A conviction that is expunged, dismissed or discharged under a state rehabilitative scheme remains a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) .
- ❏ Except that the 9th Circuit will honor an expungement for first-time possession of a controlled substance *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000)



Juvenile Dispositions

- ❏ A juvenile court adjudication of delinquency is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).
- ❏ A minor who is convicted after having been transferred to adult proceedings has a conviction.



Suspended Sentences

❧ A custody sentence that a state court imposes qualifies as a sentence for immigration purposes, even if execution has been suspended. 8 USC § 1101(a)(48)(B)



Categorical Analysis

- ❧ Analytical framework outlined by the US Supreme Court in sentencing enhancement case in *Taylor v. U.S.*, 495 U.S. 575 (1990).
- ❧ Framework used by the courts and the immigration authorities to determine whether a conviction triggers criminal ground of deportability. See *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007).



Taylor

❧ In *Taylor*, the Court needed to interpret what Congress meant when it used the term “burglary.” The Court created a standard definition or “generic definition” that courts would use in all jurisdictions.



Generic Offense

To define a generic offense, a court will look at how the majority of jurisdictions define an offense. Generic offense is not the same as common law.

Categorical Analysis: first step

An immigration factfinder's first inquiry will be to determine if the crime categorically satisfies the ground of deportability. That is, does every crime defined under statute always or never satisfy the criminal ground of deportability (e.g. theft offense aggravated felony).

Modified Categorical Approach

If a statute defines distinct offenses either because it is multi-sectioned or because it is written in the disjunctive, then the factfinder will examine the record of conviction to discern of which crime the defendant was convicted. This second level is called "modified categorical approach." The statute is sometimes also called "divisible."

Record of Conviction

Record of conviction includes:

- the definition (statute and cases)
- charging document
- written plea agreement
- Judgment and sentence document
- transcript of plea colloquy, sentencing hearing
- any explicit factual finding by the trial judge to which the defendant assented.

Scope of record of conviction

- Where the inquiry is limited to the record of conviction, a police report or a presentence report is not part of record of conviction. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996).

Burden on Government

- Under modified categorical approach, the government will prove criminal ground of deportability only if record of conviction establishes
- crime of which noncitizen convicted
- crime of which noncitizen was convicted is a deportable offense.
- Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992).

What Matters

- ❑ In general, an immigration factfinder will examine the elements of the offense. The name of the offense or the defendant's actual behavior are not relevant.
- ❑ The elements of the offense, rather than the facts of the conduct



Divisible Statute Example

- ❑ "A person who negligently or intentionally causes extreme bodily injury to another is guilty of assault"
- ❑ Statute is divisible as to mental state
- ❑ Immigration law treats negligent assault differently than intentional assault
- ❑ KEEP RECORD VAGUE



Specific Grounds of Deportability: Moral Turpitude-Prong 1

- ❑ A noncitizen is deportable for a crime of moral turpitude if he or she:
- ❑ Is convicted
- ❑ of a crime involving moral turpitude
- ❑ Committed within five years of admission; and
- ❑ Punishable by a sentence of one year or more



Moral Turpitude: Prong 2

- Has two convictions for crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.
- 8 USC § 1227(a)(2)(A)(i).

Assessing Priors

- In determining whether your client has a prior for purposes of whether pending charge will be offense number one or two, it is important to know that there is a separate definition of “conviction” for immigration purposes.
- This means that an expunged theft (permanent taking) offense will count as a prior even though conviction may not exist for state purposes

Immigration Definition of Moral Turpitude

- A crime where the elements of the offense require conduct:
 - that is inherently base, vile, or depraved
 - per se morally reprehensible and intrinsically wrong, or malum in se
- Supreme Court has held that statute is not unconstitutionally vague. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

Fraud offenses as Moral Turpitude

- Any offense that has fraud as an element is a crime involving moral turpitude.
Jordan v. DeGeorge, 341 U.S. 223 (1951).
- Do not assume fraud is necessarily an element of the offense. *See, e.g., Omari v. Gonzales*, 419 F.3d 303, 308 (5th Cir. 2005) (federal offense for transportation of fraudulent property is not categorically a fraud offense).



Theft as Moral Turpitude

- ❏ *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1350, n. 12 (BIA 2000), the BIA reiterated that an offense that involved a temporary deprivation could be a theft offense aggravated felony without being a crime involving moral turpitude.
- ❏ *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2008) (same).



Moral Turpitude Poll-1

- ❏ Does a conviction for intentionally taking a life with malice aforethought
- ❏ Always involve moral turpitude?
- ❏ Sometimes involve moral turpitude?
- ❏ Never involve moral turpitude?



Moral Turpitude-Poll 2

- ❑ Does an incest conviction
- ❑ Always involve moral turpitude?
- ❑ Sometimes involve moral turpitude?
- ❑ Never involve moral turpitude?

Aggravated Felonies Defined

- ❑ Congress used varied criteria in aggravated felony definition
 - ❑ conviction alone (e.g., murder, illicit trafficking in controlled substance)
 - ❑ conviction + sentence (e.g., theft + sentence of a year or more)
 - ❑ conviction + other characteristic (e.g., fraud + loss exceeds \$10,000)
- 8 USC § 1101(a) (43), INA § 101(a)(43)

Aggravated Felonies

- ❑ A misdemeanor can be an aggravated felony. *Matter of Small*, 23 I&N Dec. 448 (BIA 2002).
- ❑ A crime need not be committed “with aggravation” for it to be an aggravated felony.

Other Aggravated Felonies

- ❑ Crime of violence with a sentence of a year or more
- ❑ Sexual abuse of a minor
- ❑ Money laundering (over \$10,000)
- ❑ Discussion of most types beyond the scope of this presentation

Fraud or Deceit Aggravated Felony Ground

- ❑ INA §101 (a)(43)(M)(i); 8 USC § 1101(a)(43)(M)(i)
- ❑ Elements
- ❑ Alienage
- ❑ Conviction
- ❑ Crime involving fraud or deceit
- ❑ Loss to the victim exceeds \$10,000

Crime Involving Fraud or Deceit

- ❑ The BIA requires that an element of fraud or deceit be an element of the criminal statute for the offense to be an aggravated felony under INA §101 (a)(43)(M)(i); 8 USC § 1101(a)(43)(M)(i). *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007).

Bottom Line

- ❏ Plead to a sum certain that is \$10,000 or less
- ❏ Try to plead to offense that does not have fraud or deceit as an element.

Restitution

- ❏ A restitution order does not necessarily equal the amount of the loss. *See e.g., Obasahan v. U.S. Atty. Gen.*, 479 F.3d 785 (11th Cir. 2007); *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005); *Chang v. I.N.S.*, 307 F.3d 1185 (9th Cir. 2002); but see *Khalayleh v. I.N.S.*, 287 F.3d 978 (10th Cir. 2002).

Evidence of Monetary Loss

- ❏ In interpreting whether loss to victim exceeds \$10,000 for purposes of tax evasion/fraud or deceit aggravated felony ground, the BIA, Third, Fifth, and Eleventh Circuits do not require a financial loss element for the offense to be an aggravated felony.

Authority

§ *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007); *Nijhawan v. A.G.*, 523 F.3d 387 (3d Cir. 2008); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008); *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007).

Contrary Authority

§ The Second and Ninth Circuits require that loss be an element for the offense to be an aggravated felony. *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008); *Dulal-Whiteway v. DHS*, 501 F.3d 116 (2d Cir. 2007).

Must Loss be Actual?

§ In the BIA's view, a fraud in which the defendant was unsuccessful at obtaining any money can still be an aggravated felony as an attempted fraud crime under INA § 101(a)(43)(U); 8 USC § 1101(a)(43)(U), which covers attempts. *Matter of Onyido*, 22 I. & N. Dec. 552 (BIA 1999).

Elements of Theft Offense

- INA § 101(a)(43)(G); 8 USC § 1101(a)(43)(G):
- alienage
- conviction
- theft offense (including receipt of stolen property)
- one-year sentence.

Theft Offense Ground Interpreted

- Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000) (holding that a taking of property constitutes a theft offense aggravated felony regardless of whether a permanent taking of the property is an element of the offense).

Generic Definition of Theft

- “[A] taking of property is a ‘theft’ whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007) .
- A theft must be without owner's consent. *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008).

Theft by Deception

❧ In a recent case, the BIA held that a Rhode Island conviction for welfare fraud was not a theft offense because the property was taken with the owner's consent and theft is a taking without consent. *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008).



Fraud and Theft

❧ In the BIA's view, theft and fraud crimes are generally distinct offenses. *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008).



Interplay between Fraud & Theft

- ❧ In fashioning pleas consider taking advantage of distinction between theft and fraud.
- ❧ If size of loss is problematic, then consider pleading to theft offense with a sentence of less than a year.
- ❧ If government demands at least one year sentence, consider pleading to fraud/deceit offense where loss is low, so sentence does not matter.



18 USC § 1546

- Statute provides, in part,
- “whoever uses,... possesses, any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States...”



Analysis of 18 USC § 1546

- Unlawfully possessing a document and unlawfully using a document are two of the several crimes that 18 USC § 1546 defines.



Special Ground of Deportability for 18 USC § 1546 Convictions

- A conviction for violating 18 USC § 1546 (relating to fraud and misuse of visas, permits, and other entry documents) is a deportable offense. 8 USC § 1227(a)(3)(B)(iii)
- The ground of deportability also applies expressly to a conviction for an attempt or conspiracy to violate 18 USC § 1546 (relating to fraud and misuse of visas, permits, and other entry documents) .



Immigration Caselaw Interpreting 18 USC § 1546

❶ The BIA has held that a conviction for violating 18 USC § 1546 is a crime involving moral turpitude only where the record of conviction shows that the defendant used a document. *Matter of Serna*, 20 I. & N. Dec. 579 (BIA 1992).



Postville Plea Agreement

❶ The defendants in Postville signed plea agreements admitting that they used a document. The federal judge accepted the guilty pleas. As a result, an immigration judge could identify that the conviction was for using a document, which is a crime involving moral turpitude



Alternative Plea

❶ Had the defendant plead to “possession” of a document, then the offense would not have involved moral turpitude under *Matter of Serna*.



Postville Charges

Many Postville defendants also plead to 42 USC § 408(a)(7)(B). See *Matter of Adetiba*, 20 I & N Dec. 506 (BIA 1992) (discussing whether 42 USC sec 408(a)(7)(B) conviction involved moral turpitude); *Matter of Serna*, 20 I. & N. Dec. 579 (BIA 1992) (treating 18 USC 1546 as a crime involving moral turpitude where record established use of document).

Selected Types of Relief for non-permanent Residents

- Adjustment of status. 8 USC § 1255.
- Cancellation of removal for non-permanent residents
- U Visas
- Protection for those fearing persecution
- Voluntary departure. 8 USC § 1229c(a).

Stipulated Removal

Default Postville plea agreement required defendants to give up all rights to relief.

Adjustment of Status

- Immediate relative of U.S. citizen (e.g. citizen spouse)
- Not inadmissible under 8 USC § 1182(a)
- Leads to permanent residence in U.S.

Inadmissibility and Adjustment of Status

- Inadmissible
 - Drugs
 - Moral turpitude*
- *Waiver available for *non-LPR*

U Visas for Crime Victims

- Path towards residence
- Certificate from justice systems:
- Has been, is being or is likely to be helpful in investigation or prosecution
- Substantial physical/mental abuse

Examples of U Visa Crimes

- ❑ Trafficking, Domestic violence,
- ❑ Sexual assault, Being held hostage,
- ❑ Peonage, Involuntary servitude,
- ❑ False imprisonment,
- ❑ or
- ❑ attempt, conspiracy, or solicitation, to commit any of the crimes above



Example

- ❑ Children working at Agriprocessors are in process of getting U visas
- ❑ Iowa AG filed criminal charges last week for child-labor law violations at Agriprocessors
- ❑ Parents who were convicted are also eligible for U visas
- ❑ Stipulated removal orders are an obstacle for family members to qualify for U visas



Protection from Persecution

- ❑ Asylum and withholding of relief are mechanisms that permit noncitizens who fear persecution to avoid return. See 8 USC § 1158 (asylum); 8 USC § 1231(b)(3) (withholding).
- ❑ Trust very important. It may take time for client to express, and may not be in response to question “are you afraid?”



Torture Convention Protection (CAT)

- ❑ Even if noncitizen does not have an individualized fear, the U.S. cannot, pursuant to the Convention Against Torture, return a noncitizen to somewhere they face torture.



Cancellation of Removal

- ❑ 8 USC § 1229b
- ❑ 10 years physical presence
- ❑ Exceptional and Extremely Unusual Hardship
- ❑ Hardship only to USC/LPR spouse, parent or child
- ❑ Good Moral Character



Cancellation for Survivors of Domestic Violence

- ❑ 8 USC § 1229b(2)
- ❑ Suffered battery or extreme cruelty
- ❑ By spouse or parent
- ❑ Who is or was USC or LPR
- ❑ 3 years physical presence
- ❑ Extreme Hardship to self or USC/LPR parent or child
- ❑ Good Moral Character



Good Moral Character

- Among other requirements,
- noncitizen must not have served 180 days in the past five years
- no moral turpitude crimes except if it is a petty offense, which means a single conviction for a misdemeanor (punishable by a year or less) for which defendant received sentence of six months or less.



Good Moral Character (GMC)

- GMC does not mean moral excellence and is not destroyed by a single incident.
- Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991).



Voluntary Departure

- Authority: 8 USC §1229c(a)
- Does not lead to residence by itself, but can enable someone with future eligibility to preserve it.
- Two ways to qualify.



Voluntary Departure (First way to qualify)

- ❑ Noncitizen did not contest charges or seek other relief
- ❑ Noncitizen can pay for ticket
- ❑ Relief not available if respondent has an aggravated felony conviction

Second Way to Qualify for Voluntary Departure

- ❑ If a person contests charges or asks for other relief, she/he can still get voluntary departure if
- ❑ person of good moral character under 8 USC § 1101(f)
- ❑ can pay for return trip
- ❑ warrants favorable exercise of discretion

Stipulated Orders

- ❑ For purposes of illegal reentry statute, Deportation includes “any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.”
