

TIPS FOR CRIMINAL DEFENSE COUNSEL REPRESENTING NON-CITIZENS*

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General:

There are 3 consequences of criminal convictions for non-citizens:

- Removal proceedings; ineligibility for bond, and ineligibility for immigration relief

To avoid a conviction for immigration purposes:

- Avoid any unnecessary admission of guilt; consider pre-trial diversion – this will likely avoid convictions for immigration purposes, if no admission of guilt is required

To avoid a “crime involving moral turpitude” (CIMT):

- Plead to an alternative or lesser-included offense that does not encompass the following elements: “knowing” or “intentional” conduct; deceit, fraud, or physical harm (generally)
- Where statute is divisible, specify you are pleading to conduct that does not implicate moral turpitude, i.e. exclude facts or admissions relating to intent to deceive, defraud or harm in the plea agreement

To avoid an “aggravated felony”:

- Remember that offenses involving “attempt” and “conspiracy” to commit any of the enumerated aggravated felonies are treated the same as if the person was convicted of the underlying aggravated felony. 8 U.S.C. § 1101(a)(43)(U)
- For aggravated felonies requiring a year of imprisonment to qualify (i.e. crimes of violence and theft), plead to a sentence of less than one year of imprisonment
- For aggravated felonies requiring a monetary loss (i.e. theft with loss to victim over \$10,000) try to get the loss under that amount

Drug offenses:

- All drug offenses (with the exception of possession of less than 30 grams of marijuana in certain circumstances) will result in removal
- Individuals with no lawful status who are convicted of a drug offenses - even mere possession (other than the marijuana exception) - will never be able to obtain lawful permanent resident (LPR) status
- LPRs (green-card holders) who are convicted of simple drug possession may remain eligible for a

* Note: This compilation of tips is meant to be a general guide and is not meant to be a substitute for legal research on an individual case. If you require further assistance on the potential immigration consequences of a criminal matter, please contact NIJC’s Defenders Initiative via email at defenders@heartlandalliance.org or via telephone at (312) 660-1610.

waiver, but if convicted of a drug trafficking offense (e.g.. “with intent to distribute”), with a limited exception for certain cases involving marijuana, an LPR will lose his or her lawful status permanently

Firearms offenses:

- Almost any type of firearms-related offense will result in removal – but a waiver may be possible in many circumstances
- A waiver will not be possible if the offenses involves firearms *trafficking* or *dealing* or if the offense involves possession of a firearm by an undocumented individual

Illegal Re-Entry:

There are various types of removal orders; knowing what type of order was issued against your client can help determine if a challenge can be made in an illegal re-entry case or, if a conviction for illegal re-entry is unavoidable, whether your client may nonetheless have immigration relief:

- §238 orders (for non-citizens with no lawful status who are convicted of an offense deemed an aggravated felony)

Potential challenge: Was the offense actually an aggravated felony?

- Expedited orders (for non-citizens who are apprehended at the border or port of entry and not allowed to enter the U.S.)
- Stipulated orders of removal (where non-citizens waive their right to see an immigration judge and “stipulate” to their removal)

Potential challenge: Was your client’s waiver “voluntary, knowing and intelligent”?

- In absentia orders of removal (where non-citizen was ordered removed without being present)

Potential challenge: Did your client receive notice of his or her hearing?

- **Reinstatement of removal order:** Typically, in an illegal re-entry case, Immigration & Customs Enforcement (ICE) will also seek to “reinstatement” a prior order of removal against the non-citizen. If your client seeks to challenge the illegal re-entry charge and/or reinstatement, he/she has 30 days to file a PFR with the court of appeals

Bond eligibility:

- Generally, non-citizens with removal orders are *not* eligible for an immigration bond
- Non-citizens will not be eligible for an immigration bond if they have certain convictions (typically: aggravated felonies, a single CIMT punishable by more than 1 year or multiple CIMTs)
- Non-citizen with *pending* charges and *no other disqualifying criminal convictions* are eligible for an immigration bond – it will be a matter of your client’s risk of flight and dangerousness

Things to always keep in mind....

- Might your client have acquired or derived citizenship? (i.e. does he/she have a parent born in the United States or a parent who naturalized before he/she turned 18?)
- Has your client been the victim of a qualifying crime and he/she cooperated with law enforcement in its prosecution?
- Does your client face persecution or torture in the country to which ICE seeks removal?