



National Immigrant Justice Center

Immigration Consequences of Criminal Offenses:
Advice Post- Padilla v. Kentucky

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www.immigrantjustice.org

National Immigrant Justice Center

- The National Immigrant Justice Center (NIJC), a program of Heartland Alliance, promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education.
- Throughout its 30-year history, NIJC has been unique in blending individual client advocacy with broad-based systemic change.
- NIJC serves more than 8,000 immigrants annually with the support of a professional legal staff and a network of over 1,000 pro bono attorneys.

NIJC's Defenders Initiative

Through the generous support of the Chicago Area Foundation for Legal Services, NIJC's Defenders Initiative provides free training and technical assistance to criminal defense attorneys regarding the immigration consequences of crimes.

Contacting NIJC's Defenders Initiative

- Email:
defenders@heartlandalliance.org
- Call: 312-660-1610
- <http://www.immigrantjustice.org/programs/defenders-initiative>
 - Practice pointer pamphlets and materials

THE ROLE OF THE CRIMINAL DEFENSE ATTORNEY:

**SPECIAL CONSIDERATIONS IN
REPRESENTING NON-CITIZENS**

Due Process Considerations

- Non-citizens in the United States do not have a right to court-appointed counsel in their immigration proceedings, even if they are indigent.
- Many non-citizens appear *pro se* in removal proceedings.
- Correct advice by criminal defense counsel is vital to protecting due process in removal proceedings.

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

- March 31, 2010: Drug trafficking case
- Defense counsel: Duty under Sixth Amendment to advise non-citizen clients of the immigration consequences of their pleas
 - *Not limited to affirmative misadvice*
 - *Not constitutional duty of the court;*
725 ILCS 5/113-8

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

- Not a collateral consequence – integral part of the penalty
- 2 types of advice
 - Where deportation consequences are clear: Correct affirmative advice
 - Where deportation consequences are unclear: Must advise on risk of deportation
- In both “types” of cases, the duty to analyze immigration consequences of a plea remains the same

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

- Informed consideration during pleas
 - Prosecutorial discretion
 - Alternate charges
 - Alternate sentences
 - Construction of plea/diversion agreement
- Prejudice
 - But for the misadvice/lack of advice, would the client have pleaded guilty?

Post-conviction relief under *Padilla*

- Retroactivity?
Teague v. Lane, 489 U.S. 288 (1989)
- Constitutional claim based on ineffective assistance of counsel
 - 725 ILCS 5/122-2; *Strickland v. Washington*, 466 U.S. 668 (1984).
 - Where ineffective assistance rendered a guilty plea involuntary: Client would not have entered plea if advice had been competent. *Hill v. Lockhart*, 474 U.S. 52 (1985).
 - Illinois rule insufficient. *See People v. Huante*, 143 Ill. 2d 61 (1991).

Key Factors to Consider in Non-Citizen Cases

1. Current immigration status
2. Immigration history (date of entry, lawful or unlawful entry, prior deportation)
3. Criminal history, including arrests

Immigration Status

Non-citizens fall into different categories:

- **Lawful permanent residents (LPRs):** individuals who have indefinite legal status in the United States (“green card holders”)
- **Persons lawfully present who are not LPRs:** asylees, refugees, visitors, foreign students, work visas, temporary protected status
- **Undocumented individuals:** people who entered with a valid temporary status and overstayed or people who entered without inspection

Immigration History

Questions regarding immigration history:

- Arrival in the United States?
- Status when arrived (e.g. tourist visa)?
- Basis for obtaining immigration status (via relatives, work, refugee status)?
- Immigration status of relatives, especially spouse or parents?
- Any travel outside of United States for more than 6 months after obtaining status?
- Any prior deportations or encounters with immigration or an immigration judge?

Prior Criminal History

- Some non-citizens may face removal based on prior criminal convictions, even convictions that are decades old
- Multiple convictions may trigger certain negative immigration consequences
- All criminal history is relevant: arrests, convictions, sentencing, juvenile

**WHAT IS A “CONVICTION”
UNDER IMMIGRATION
LAW?**

Immigration Definition of Conviction

- Immigration law defines “conviction” at 8 U.S.C. § 1101(a)(48) as a formal judgment of guilt entered by the court, or if adjudication is withheld, where:
 - A judge/jury finds the non-citizen guilty; or
 - Non-citizen enters a guilty plea; or
 - Non-citizen enters a plea of “nolo contendere”; or
 - Non-citizen admits sufficient facts to warrant finding of guilt
- AND**
- A judge orders some form of punishment, penalty, or restraint on liberty.

CAUTION!

- For evidence of conviction, IJ can examine **record of conviction**:
 - indictment
 - judgment of conviction
 - jury instructions
 - signed guilty plea
 - the plea transcript
- Other documents?

Immigration Definition of Conviction

- Look to the period of incarceration or confinement ordered by the court regardless of suspension, imposition, or execution of sentence.
- Procedures such as deferred adjudications, *Alford* pleas, sealing, vacatur, and “410 probation” will not avoid convictions for immigration purposes. *Gil v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003).

TIP:

Avoiding a conviction for immigration purposes

- Avoid any unnecessary admission of guilt.
- Diversion programs such as “drug school” will likely avoid convictions for immigration purposes, if no guilty plea is required.
 - *See* U.S. Attorney’s Manual, Title 9, Criminal Resource Manual § 712(F) (“The offender must acknowledge responsibility for his or her behavior, but is not asked to admit guilt.”)

Expungements

- No effect for immigration purposes.
- Increase difficulty for an immigration attorney to analyze a non-citizen's eligibility for an immigration benefit, such as naturalization.
- To apply for many forms of relief, individuals must provide certified dispositions of ALL arrests. If a conviction has been expunged, it is difficult to impossible to obtain records.

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MAJOR CONSEQUENCES OF CRIMINAL CONVICTIONS FOR IMMIGRANTS

Three Major Consequences of Criminal Convictions

1. Removal (deportation) from the United States
2. Ineligible for an immigration bond, resulting in “mandatory custody” during removal proceedings
3. Ineligible for immigration waivers or relief

Removal from the United States

A non-citizen may be removed from the United States when charged with inadmissibility pursuant to 8 U.S.C. § 1182 or removability pursuant to 8 U.S.C. § 1227.

Criminal Grounds of Inadmissibility

- Crimes Involving Moral Turpitude (CIMTs)
- Controlled Substance Offenses
- Multiple crimes
- Prostitution

8 U.S.C. § 1182(a)(2) Criminal Grounds of Inadmissibility

- Admissions to or Conviction of a Crime Involving Moral Turpitude (CIMT), 8 U.S.C. § 1182(a)(2)(A)(i)(I)
- Admissions to or Conviction of Controlled Substance Violations, 8 U.S.C. § 1182(a)(2)(A)(i)(II)
- Conviction of 2 or more Crimes with Aggregate Sentence of 5 Years or more, 8 U.S.C. § 1182(a)(2)(B)

Criminal Grounds of Removal

- Crimes Involving Moral Turpitude (CIMTs)
- Aggravated Felonies
- Controlled Substance Offenses
- Firearms Offenses
- Domestic Violence Offenses

8 U.S.C. § 1227(a)(2)

Criminal Grounds of Removal

- Single Crime Involving Moral Turpitude (CIMT), 8 U.S.C. § 1227(a)(2)(A)(i):
 - Conviction for a crime of moral turpitude;
 - Committed within 5 years after the day of admission;
 - Punishable by a sentence of a year or longer.
- Multiple CIMTs, 8 U.S.C. § 1227(a)(2)(A)(ii)
 - Conviction of two or more CIMTs;
 - Not arising out a single scheme;
 - Can occur any time after admission.

8 U.S.C. § 1227(a)(2)

Criminal Grounds of Removal

- Aggravated Felonies. 8 U.S.C. § 1227(a)(2)(A)(iii), defined by 8 U.S.C. § 1101(a)(43)
- Conviction for a Controlled Substance Offense, except for a single possession of marijuana less than 30 grams. 8 U.S.C. § 1227(a)(2)(B)(i)
- Conviction for Firearms Offenses. 8 U.S.C. § 1227(a)(2)(C)
- Conviction for a Crime Involving Domestic Violence, Stalking, Child Abuse, Violation of Orders of Protection. 8 U.S.C. § 1227 (a)(~~2~~)(E)

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CRIMES INVOLVING MORAL TURPITUDE

Crimes Involving Moral Turpitude (CIMTs)

- There is no statutory definition for what constitutes a CIMT.
- Generally, any crime that involves deceit, and/ or theft, intended violence or serious bodily harm.
- Factors that can make a difference: *mens rea*, level of physical harm, broadness of the statutory definition.

CIMT Petty Offense Exception

The immigration petty offense exception states that if a non-citizen is convicted of a single misdemeanor CIMT offense with 6 months or less of jail time, the non-citizen may avoid deportation or at least may qualify for immigration relief. 8 U.S.C. § 1182(a)(2)(A)(ii).

*But *see Matter of Cortez*, 25 I.&N. Dec. 301 (BIA 2010)

Crimes Involving Moral Turpitude

Offenses that are generally CIMTs:

- Robbery
- Theft
- Fraud
- Bribery
- Aggravated assault
- Child abuse
- Rape
- Arson

Offenses that may not be CIMTs:

- Domestic violence
- Simple Battery
- Possession of a Controlled Substance
- Possession of a Firearm
- Driving Under the Influence

TIP:

Avoiding a CIMT

- Plead to an alternative or lesser-included offense that does not require a finding of:
 - “Knowing” or “intentional” conduct”
 - Deceit or fraud; other unlawful acts may not necessarily be considered CIMTs.

Possession/Use of Altered Immigration Document

18 U.S.C. § 1546:

“(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, ... or other document required for entry into or as evidence of authorized stay or employment in the United States, or utters, **uses, attempts to use, possesses, obtains, accepts, or receives** any such visa, permit, ... or document ..., knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained ... [s]hall be fined under this title or imprisoned not more than ... ten years, ... or both.”

TIP:

Avoiding a CIMT

- Plead to language that includes only the “possession” portion of the statute to prevent a CIMT finding. *Matter of Serna*, 20 I.&N. Dec. 579 (BIA 1992); *Lagunas-Salgado v. Holder*, 584 F.3d 707 (7th Cir. 2009).
- Exclude facts or admissions relating to use or intent to defraud in the plea agreement, or if the indictment already outlines them, specifically limit the facts.

TIP:

Avoiding a CIMT

Plead to an alternative offense that does not require a finding of:

- “Knowing” or “intentional” conduct.
- Deceit or fraud; other unlawful acts may not necessary be considered CIMTs.

AGGRAVATED FELONIES

Aggravated Felonies

- The term “aggravated felony” is defined by 8 U.S.C. § 1101(a)(43).
- This section of law contains a laundry list of offenses that can constitute aggravated felonies.

8 U.S.C. § 1227(a)(2)
Criminal Grounds of Removal

*Aggravated Felonies. 8 U.S.C.
§ 1227(a)(2)(A)(iii), defined
by 8 U.S.C. § 1101(a)(43)*

Caveat: Aggravated Felonies

Attempt and Conspiracy to commit any of the enumerated aggravated felonies are treated the same as if the person was convicted of the aggravated felony. 8 U.S.C. § 1101(a)(43)(U).

See Matter of Richardson,
25 I. & N. Dec. 226 (BIA 2010) 40

Categories of Aggravated Felonies

There are three ways to categorize aggravated felonies:

1. Charge-Based Aggravated Felonies
2. Sentence-Based Aggravated Felonies
3. Miscellaneous Aggravated Felonies

Advocacy Responsibilities re Aggravated Felonies

1. Current Charge: Where possible, help the client avoid an aggravated felony conviction by pleading to a lesser charge.
2. Prior Convictions: Get full criminal history info to determine whether there is a way to argue that the prior is not an aggravated felony: Daley Center for CH

Charge-Based Aggravated Felonies

- Also known as “categorical” aggravated felonies.
- These are convictions that make a non-citizen deportable if the crime meets the definition regardless of sentence.
- **Note:** Misdemeanor offenses, such as sexual abuse of a minor, can constitute an aggravated felony without being a felony under state law.

Charge-Based Aggravated Felonies

Examples of charge-based or categorical aggravated felonies are:

- **Murder**, 8 U.S.C. § 1101(a)(43)(A)
- **Rape**, 8 U.S.C. § 1101(a)(43)(A)
- **Sexual Abuse of a Minor**, 8 U.S.C. § 1101(a)(43)(A)
- **Non-Citizen Smuggling**, 8 U.S.C. § 1101(a)(43)(N)
- **Drug Trafficking**, 8 U.S.C. § 1101(a)(43)(B)
- **Many Firearms Offenses**, 8 U.S.C. § 1101(a)(43)(C), (E)
- **Illegal Re-entry [after deportation on the basis of an aggravated felony]**, 8 U.S.C. § 1101(a)(43)(O)

Illicit Drug Trafficking

- Any drug offense that includes elements of buying, selling, manufacturing or delivery will be an “aggravated felony.”
- Simple possession offenses are not usually aggravated felonies
 - *Carachuri-Rosendo v. Holder*, 560 U.S. __ (2010)

**ILLEGAL RE-ENTRY TIP:
Avoiding a Finding that a Prior
Drug Trafficking Conviction is
an Aggravated Felony**

If the client has a prior conviction for possession with intent to distribute or distribution, always obtain complete criminal history documentation to determine if the client in fact was convicted of a lesser crime, such as simple possession.

Aggravated Felonies and Illegal Reentry After Deportation, 8 U.S.C. § 1326(a)

- If the conviction underlying the original deportation violated the client's constitutional rights, it may be collaterally attacked by post-conviction relief (e.g. *Padilla*).
- However, unless the removal order is itself vacated or rendered void, the client may still face Illegal Reentry charges. *See U.S. v. Santiago-Ochoa*, 447 F.3d 1015 (7th Cir. 2006).

Aggravated Felonies and Illegal Reentry, cont'd

- It is sometimes possible that a non-citizen client was previously issued a removal order for an offense erroneously deemed an aggravated felony. Case example: Obstruction of Justice.

Padilla TIP: Post-conviction relief

- If client facing Illegal Reentry after conviction for an aggravated felony has a claim for post-conviction relief under *Padilla*, client should proceed with PCR as soon as possible.
- Advocate with government to exercise prosecutorial discretion to prevent a second aggravated felony conviction.

Sentence-Based Aggravated Felonies

- Offenses that make a non-citizen deportable if the crime meets the definition of aggravated felony, and a court orders the requisite sentence
- The required sentence is usually one year or more of imprisonment

Sentence-Based Aggravated Felonies

Examples of offenses that require a sentence to at least one year of imprisonment (8 U.S.C. § 1101(a)(48)(B)):

- **Theft**, 8 U.S.C. § 1101(a)(43)(G)
- **Burglary**, 8 U.S.C. § 1101(a)(43)(G)
- **Receipt of stolen property**, 8 U.S.C. § 1101(a)(43)(G)
- **Bribery**, 8 U.S.C. § 1101(a)(43)(R)
- **Counterfeiting**, 8 U.S.C. § 1101(a)(43)(R)
- **Forgery**, 8 U.S.C. § 1101(a)(43)(R)
- **Obstruction of Justice**, 8 U.S.C. § 1101(a)(43)(S)
- **Perjury**, 8 U.S.C. § 1101(a)(43)(S)
- **Crime of violence**, 8 U.S.C. § 1101(a)(43)(F)

ILLEGAL RE-ENTRY TIP: Avoiding a an Aggravated Felony Finding

If it appears the client was convicted of a sentence-based or “crime of violence” aggravated felony, always obtain complete criminal history documentation to determine if the client in fact was sentenced to less than one year.

PLEA AGREEMENT TIP: Avoiding A Conviction for an Aggravated Felony

- Plead to a sentence of less than one year of imprisonment to avoid a sentence-based or “crime of violence” aggravated felony.
- Even if you are able to obtain a sentence of less than a year, thus avoiding an aggravated felony, your client’s conviction may still be considered a CIMT, but more defenses exist for people convicted of CIMTs than of aggravated felonies.

Miscellaneous Aggravated Felonies

- Fraud or Deceit where the Loss to Victim Exceeds \$10,000, 8 U.S.C. § 1101(a)(43)(M). *See Nijhawan v. Holder*, 557 U.S. ___ (2009)
- Offense Relating to Owning, Managing a Prostitution Business, 8 U.S.C. § 1101(a)(43)(K)
- Offense Relating to Peonage, Slavery, Involuntary Servitude and the Trafficking in Persons, 8 U.S.C. § 1101(a)(43)(K)

TIP:
**Avoiding a Conviction
for Theft-Based
Aggravated Felony**

Convince the prosecutor to agree to a loss amount of less than \$10,000.

Crimes of Violence

8 U.S.C. § 1101(a)(43)(F)

- For an offense to constitute a “crime of violence” under immigration law, it must be a crime of violence as defined by 8 U.S.C. § 16.
- The definition of a crime of violence is constantly evolving as it is a highly litigated area of immigration law.

TIP:

Avoiding Crime of Violence

Obtain a sentence of less than one year of jail time, as the crime of violence ground of removal is a sentence-based aggravated felony.

Manslaughter

18 U.S.C. § 1112

- (a) Voluntary: Upon sudden quarrel or heat of passion.

- (b) Involuntary: In the commission of an unlawful act not amounting to a felony; or in the commission in an unlawful manner or without due caution and circumspection, of a lawful act which might produce death.

TIP:

- Pleading to an offense that involves *negligently* taking the life of another is not a crime of violence.
- *Leocal v. Ashcroft*, 543 U.S. ____, 125 S. Ct. 377 (2004), requiring at least a mental state of recklessness for an offense to be a crime of violence under 18 U.S.C. §16.

TIP:

Avoiding An Aggravated Felony

- Plead to a sentence of less than one year of jail.
- Even if you are able to obtain a sentence of less than a year, thus avoiding an aggravated felony, your client's conviction may still be considered a CIMT, but more defenses exist for people convicted of CIMTs than of aggravated felonies.

Miscellaneous Criminal Grounds for Removal

- Controlled substance offenses
- Firearms offenses
- Domestic violence

Controlled Substance Violations

All drug crimes have severe consequences for non-citizens:

- Any state or federal conviction relating to a controlled substance as defined at 21 U.S.C. § 802 will render a non-citizen removable (with the exception of a single marijuana possession of 30 grams or less). 8 U.S.C. § 1227(a)(2)(B).
- Any state or federal conviction for a controlled substance violation will render a person inadmissible, including possession of less than 30 grams of marijuana. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Controlled Substance Violations Lawful Permanent Residents (LPRs) v. Non-LPRs

- LPRs can seek a waiver of removal if they are convicted of ONE possessory drug offense as long as it is not a drug trafficking offense
- **NOTE:** Multiple possessory drug offenses will not disqualify an LPR from a waiver so long as the LPR is not charged as a recidivist.
- Non-LPRs may seek a waiver of inadmissibility if their offense was for possession of 30 grams or less of marijuana and their removal would result in extreme hardship to a United States citizen or LPR immediate relative

Firearms Offenses

Firearms offenses are an enumerated ground of removal, however, firearms offenses can sometimes also be a an aggravated felony.

Domestic Violence

Domestic violence (DV) is an enumerated ground of removability, however it may be a CIMT, or also an aggravated felony

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ELIGIBILITY FOR RELIEF UNDER IMMIGRATION LAW

Forms of Immigration Relief

- Protection Based Relief:
 - Asylum
 - Withholding of Removal
 - Convention Against Torture
 - Violence Against Women Act
 - U and T Visa
- Legal Permanent Residence
- Relief in Removal Proceedings
- Naturalization

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