



National Immigrant Justice Center

# Immigration Consequences of Criminal Offenses: Bond, Detention and Practical Issues In The Federal Context

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[www.immigrantjustice.org](http://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

# 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

# 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.

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# **IMMIGRATION DETENTION AND BOND**

# Seeking Criminal Bond

- Assessing whether you want to seek bond in the criminal case might involve assessing whether your non-citizen client would be eligible for an immigration bond.
- If your client has a final removal order, she will not be eligible for immigration bond or release with few exceptions.

# Seeking Criminal Bond, Cont'd

It may not be advisable to post a criminal bond:

- The individual may be transferred directly to ICE custody upon posting the bond.
- May need a court-ordered writ to secure a client's presence for criminal court hearings from ICE custody.
- It is challenging to locate non-citizens detained by ICE.

# Mandatory Detention

- Mandatory detention requires that most non-citizens with certain crimes be detained in immigration custody without eligibility for bond during their removal proceedings. 8 U.S.C. § 1226(c).
- Even if a person is legally eligible for a bond, any criminal history, including arrests will likely raise the bond amount.

# Grounds for Mandatory Detention

- National Security Grounds:
  - Terrorism, espionage, treason
- Individuals convicted of:
  - An aggravated felony
  - Firearms offenses
  - Controlled substances offense
  - More than one crime involving moral turpitude (CIMT)
  - One CIMT within 1 year of admission and received a sentence of one year or more

# Mandatory Detention: Detainers

- If ICE becomes aware of an individual in state or criminal custody who may be removable or has a prior removal order, it will lodge an immigration “detainer” against the individual.
- Even if a person posts a criminal bond, this will not necessarily result in physical release if there is an ICE detainer or hold lodged against the individual. The individual will not be released, but can be transferred into ICE custody.
- A detainer is not a final removal order.

# Seeking Criminal Bond, Cont'd

- Possible exceptions to mandatory immigration custody:
  - In an illegal reentry case if there is a challenge to the prior removal order.
  - In a case without a prior order if there is a challenge to crime categorization.
  - Participant in Witness Protection Program.
  - Humanitarian considerations.
- *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 US 371 (2005).

# Seeking Criminal Bond: Advisals

- If your client is eligible for an immigration bond and does obtain a criminal bond:
  - Avoid a stipulated removal order.
  - Initial bond determination by ICE can be reviewed by immigration judge.
  - If not granted immigration bond, must either file motion to revoke criminal bond or work with USAO to writ client back to criminal custody.

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# **PRACTICAL ISSUES IN THE FEDERAL CONTEXT**

# Illegal Reentry

Non-citizens facing charges of illegal re-entry have prior orders of removal in typically three scenarios:

- Administrative order of removal pursuant to 8 U.S.C. § 1228;
- Expedited order of removal pursuant to 8 U.S.C. § 1225(b)(1); or
- Order of removal issued by an Immigration Judge pursuant to proceedings under 8 U.S.C. § 1229a.

Federal defense counsel is in a good position to challenge these orders or nonetheless secure an immigration benefit for individuals facing illegal re-entry charges.

## Stipulated Orders of Removal

- Your client may have previously agreed to a “stipulated order of removal,” signed by an Immigration Judge (IJ) pursuant to 8 U.S.C. § 1229a. Stipulated orders of removal entail a waiver of an in-person hearing before an IJ, as well as the waiver of other due process rights.

## Stipulated Orders of Removal, Cont'd

- You may be able to successfully challenge these types of removal orders by showing that your client's waiver of rights was not knowing or intelligent. *U.S. v. Ramos*, 623 F.3d 672 (9th Cir. 2010).

# Administrative Removal Order (8 U.S.C. § 1228)

- Notice of Intent to Issue Administrative Removal Order must allow for representation and inspection of evidence. C.F.R. § 238.1(b)(4).
- Any challenge to the administrative order must be filed with DHS within 10 days if served in person, 13 if by mail. 8 C.F.R. § 238.1(c)(1).
- A petition for review must be filed with the court of appeals within 30 days of the issuance of the final administrative removal order.

# Reinstatement of Removal

- Typically, non-citizens facing illegal re-entry charges in the federal context are also subject to “reinstatement” of their prior removal order in the immigration context. 8 U.S.C. § 1231(a)(5).
- Note that if you are challenging a prior order of removal, you (or immigration counsel) might also challenge the reinstatement itself as a “final order of removal,” 8 U.S.C. § 1252(a) with a court of appeals.
- A petition for review must be filed with the court of appeals within 30 days of the issuance of the reinstatement notice. 8 U.S.C. § 1252(a)(5)(b)(1).

# TIP

- If prior order was an administrative order and the regulations in C.F.R. § 238.1 were not complied with, can argue that not a lawful prior order so cannot be used to sustain a charge under 8 U.S.C. § 1326(a) for illegal reentry since prior order was unlawful.
- Conviction under 8 U.S.C. § 1325(a) for unlawful entry may allow for more immigration options and lesser sentence.

# TIP

- Confirm that the underlying conviction on which the prior administrative removal order is based is not an aggravated felony pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).
  - Example: *United States v. Tapia-Lemos* 10-CR-946 (N.D. Ill. Filed Nov. 10, 2010)
  - State conviction for “Resisting Law Enforcement” is not an aggravated felony as not comparable to the federal obstruction of justice offense. *Matter of Espinoza*, 22 I&N Dec. 889, 897 (BIA 1999); *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)
  - Charge under 8 U.S.C. § 1326(a) dismissed as USAO agreed that not a proper prior order since the conviction is not an aggravated felony.

# U-Visa: Has Your Client Been the Victim of a Crime?

- Under immigration law, an individual may receive a benefit if she has been the victim of a qualifying crime and cooperates with law enforcement in the investigation or prosecution of the crime. If an individual qualifies for, and ultimately receives one of these visas, an administrative removal order (i.e., pursuant to 8 U.S.C. §§ 1228 or 1225(b)(1)) will be canceled by “operation of law.” 8 C.F.R. § 214.14(c)(5)(i).

# U-Visa, Cont'd

- Qualifying Crimes must involve one or more of the following or any similar activity in violation of U.S. Federal, State, or local criminal law:
  - Rape
  - Torture
  - Trafficking
  - Incest
  - Domestic violence
  - Sexual assault
  - Blackmail
  - Prostitution
  - Sexual exploitation
  - Felonious assault
  - Being held hostage
  - Perjury
  - Involuntary servitude
  - Slave trade
  - Kidnapping
  - Abduction
  - Unlawful criminal restraint
  - False imprisonment
  - Abusive sexual conduct
  - Extortion
  - Manslaughter/Murder
  - Female Genital Mutilation
  - Witness tampering
  - Obstruction of justice

## U-Visa, Cont'd

- Law enforcement, authority or prosecuting agency must certify that client has been helpful.
- Criminal defense attorneys often in best position to work with agencies such as the USAO, FBI, DEA, DOL or federal judge to obtain signed certification.

# Does Your Client Fear Returning to Country of Origin?

- Even if there is no way to challenge a removal order for your client and he/she fears returning to country of origin, he/she may be eligible to seek protection in the United States. Individuals with administrative removal orders may still request a “reasonable fear” interview with an asylum officer to determine whether they should receive a hearing before an immigration judge for asylum-type protection in the U.S. 8 C.F.R. § 208.31.

# Protection Based Relief from Removal: Withholding of Removal

An individual must demonstrate:

- Past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion;
- By the government *or* a group the government is unable or unwilling to control;
- Cannot have been convicted of a particularly serious crime. 8 C.F.R. § 1208.16.
- Standard of proof is “more likely than not”

# Protection-Based Relief from Removal: Convention Against Torture (CAT)

An individual must demonstrate:

- A likelihood of torture;
- By or with the acquiescence of a government actor;
- No criminal bars.
- See 8 C.F.R. § 1208.16

# TIP:

## Avoiding Bar to Withholding of Removal

- Any offense that is considered an aggravated felony under immigration law and for which an individual receives a 5 year jail sentence is *per se* a particularly serious crime. 8 U.S.C. § 1231(b)(3)(B)(ii).
- If sentence is under 5 years, individual analysis per the factors in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

**TIP:**  
**Avoiding Conviction for Use  
of False Passport (18 U.S.C. §  
1544)**

- For immigration proceedings, the use of a false passport is outweighed by the danger of persecution. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987);
- Assess whether client facing this charge may be an asylum-seeker;
- Argue individual obtained false passport because fleeing persecution in home country.

# Is Your Client a U.S. Citizen?

- U.S. citizens cannot be removed or detained by immigration.
- There are cases where a non-citizen may have acquired or derived U.S. citizenship without being aware of it.
- U.S. citizens are not subject to any removal grounds and cannot be held in immigration custody.

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