

INTRODUCTION TO IMMIGRATION LAW FOR CRIMINAL DEFENSE ATTORNEYS

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WHAT IS THE LAW

- THE IMMIGRATION AND NATIONALITY ACT (INA)
- FEDERAL REGULATIONS
- BOARD OF IMMIGRATION APPEALS DECISIONS
- CIRCUIT COURT DECISIONS
- SUPREME COURT DECISIONS
- ADMINISTRATIVE APPEAL OFFICE DECISIONS
- DHS AND USCIS POLICY (that interpret and provide guidance following BIA or AAO decisions)
- EXECUTIVE ORDERS

REMOVAL PROCEEDINGS (DEPORTATION)

- Removal proceedings are the main legal mechanism the Department of Homeland Security (DHS) uses to have immigrants deported.
- Immigration hearings are civil in nature. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952)
- Although the consequences of deportation may be “drastic,” deportation is not punishment. *Galvan v. Press*, 347 U.S. 522, 530 (1954). (Sidenote: this is not a comfort to clients)
- There is a statutory right to counsel, but because it is not grounded in the constitution **the government will not provide counsel for those who cannot afford it.** 8 U.S.C. 1362, INA 292.
- All immigration proceedings that began on or after April 1, 1997, are called removal proceedings (following the passage of IIRIRA in 1996).

REMOVAL PROCEEDINGS CONTINUED

- In removal proceedings, an immigration judge decides whether a noncitizen is inadmissible to or deportable from the United States. INA 240
- The grounds of inadmissibility apply if a person is seeking admission to the United States. Grounds of inadmissibility are found at INA 212. For example, someone who is undocumented is considered to be seeking admission and grounds of inadmissibility apply.
- Grounds of deportability apply to a person whom the United States admitted as either an immigrant or non immigration. Deportability is governed by INA 237. This would be a lawful permanent resident or someone admitted on tourist visa or employment based visa.

REMOVAL PROCEEDINGS CONTINUED

- This process is initiated by the issuance of a document called a Notice to Appear (NTA) that states the charges.
- The NTA will typically charge an immigrant with having entered without permission and possessing no valid visa, having overstayed a visa or committed a crime which makes them deportable. At times it is a combination of these charges.
- Applicants for admission must establish they are “clearly and beyond doubt entitled to be admitted.” INA 240(c)(2)(A). Read: immigrants have the burden of proof.
- The burden of proof is on the DHS to establish a ground of deportability by “clear and convincing evidence.” INA 240(c)(3)(A). Hint, this is easily done by submitting court records after which time the burden shifts back to the immigrant to present a defense.

BOND PROCEEDINGS/CUSTODY DETERMINATIONS

- When an immigrant is detained by ICE, the initial custody determination is first made by DHS/ICE
- ICE may set a bond or terms for release or they may deny bond/release in their discretion or because they believe the immigrant is subject to mandatory detention under INA 236(c).
- Once ICE has made a custody determination, the immigrant may file a motion for a “bond hearing” or to “re-determine custody” with the immigration judge. At the hearing the immigrant must present a case for why they should be released or why their bond should be lowered.

BOND HEARINGS/CUSTODY DETERMINATIONS

- An allegation of mandatory detention under INA 236(c) will require legal analysis of the conviction
- If the immigrant is not subject to mandatory detention, the immigration judge will consider whether the immigrant is a flight risk or danger to the community in setting a bond
- Recently, in *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018), the BIA held that “driving under the influence is a significant adverse consideration in determining whether an alien is a danger to the community in bond proceedings.”
- Practically, ICE now no bonds anyone with DUI convictions and getting bond for those with DUI convictions, particularly recent or multiple convictions is very difficult. ICE will now re-detain someone who gets convicted of DUI.

DETENTION: WHY DOES IT MATTER

- DHS/ICE uses detention as a litigation strategy
- When a client is detained, their access to counsel is limited
- Their access to documents needed to support their case is limited
- Their access to other services (medical or mental health evaluations) needed to support their case is limited
- The detained docket moves very fast, inhibiting the immigrants ability to fully develop their case
- Many immigrants will give up just to get out rather than fight out their case

MANDATORY DETENTION INA 236(C)

- Persons who are inadmissible for having committed an offense described in INA 212(a)(2) (e.g. crimes of moral turpitude (CIMT) or drug offenses)
- Persons who are deportable for having committed any offense in INA 237(a)(2)(A)(ii) (multiple CIMTs), 237(a)(2)(A)(iii) (aggravated felony), 237(a)(2)(B) (drug offenses), 237(a)(2)(C) (firearms offenses), or 237(a)(2)(D)(crimes related to espionage)
- Persons who are deportable under INA(a)(2)(A)(i) (has been convicted of a crime of moral turpitude that was committed within five years of admission and has been sentenced to a term of imprisonment of at least one year)
- Persons who are inadmissible under INA 212(a)(3)(B) or deportable under INA 237(a)(4)(B) (involved in terrorist activity)

WHAT IS A CONVICTION UNDER THE INA

- Oh, you thought you knew what a conviction was? INA 101(a)(48) says, not so fast. . .
- Under the INA, the term conviction means:
 - A formal judgement of guilt of the alien entered by a court, or
 - If adjudication of guilt has been withheld, where:
 - A judge or jury has found the alien guilty or an alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed (this includes fines).

CONVICTIONS CONTINUED

- A juvenile court disposition is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). (But can still be considered as a negative discretionary factor so while it may not make someone statutorily eligible/deportable, it can still be held against them in evaluating if they merit relief from removal).
- Vacated convictions/Post Conviction Relief
 - Vacatur of the plea must be for procedural or substantive defect in the underlying criminal proceeding and not for reasons solely related to post-conviction events such as rehabilitation or immigration hardship. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

WHAT YOU CARE ABOUT: IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

- Example: you have a foreign national client charged with a crime. You pick up the phone and call an immigration attorney to ask how it will impact their immigration status.
- Answer: it depends.
- So now what. . .

ISSUE SPOTING

- What is your client's current immigration status?
- Where are they at in the process?
- What will happen if they are convicted of this charge?
- What is their criminal history?
- What forms of relief might be available for them if they detained and charged as removable by ICE?
- Will they be statutorily eligible for a bond? If so, is it realistic that they will get a bond?

CRIMINAL INADMISSIBILITY GROUNDS

(WILL OR MAY PREVENT A NON CITIZEN FROM BEING ABLE TO OBTAIN LEGAL STATUS OR MAY PREVENT A NON CITIZEN WHO HAS LEGAL STATUS FROM BEING ABLE TO RETURN TO THE US FROM A FUTURE TRIP ABROAD)

- Conviction or admission of a crime involving moral turpitude (CIMT)
- Conviction of a controlled substance or DHS has “reason to believe” that the individual is a drug trafficker (low burden of proof here, police reports are sufficient proof)
- Prostitution
- Conviction of two or more offenses of any type where the person served an aggregate sentence of more than five years

CRIMINAL DEPORTABILITY GROUNDS

(WILL OR MAY RESULT IN DEPORTATION OF A NON CITIZEN WHO ALREADY HAS LEGAL STATUS)

- CONVICTION OF A CONTROLLED SUBSTANCE EXCEPT A SINGLE OFFENSE OF SIMPLE POSSESSION OF 30G OR LESS OF MARIJUANA
- CONVICTION OF A CIMT
 - One CIMT committed within 5 years of admission into the US and for which a prison sentence of one year or more may be imposed
 - Two CIMTs committed at any time after admission and not arising from a single scheme of misconduct
- CONVICTION OF A FIREARM OR DESTRUCTIVE DEVICE OFFENSE
- CRIME OF DOMESTIC VIOLENCE, CRIME AGAINST CHILDREN, STALKING OR VIOLATION OF A PROTECTION ORDER
- AGGRAVATED FELONY

WHAT IS AN AGGRAVATED FELONY

(Hint: It doesn't have to be a felony)

- Murder
- Rape
- Sexual abuse of minor
- Drug trafficking
- Firearm trafficking
- Crime of violence + at least one year of prison sentence
- Theft or burglarly + at least one year of prison sentence
- Fraud or tax evasion + loss to victim > \$10,000

AGGRAVATED FELONY CONTINUED

- Prostitution business offenses
- Commercial bribery, counterfeiting, or forgery + at least 1 prison sentence
- Obstruction of justice or perjury + at least 1 year prison sentence
- Various federal offenses such as money laundering, certain firearm and explosive material offenses, alien smuggling
- Attempt or conspiracy to commit any of the above offenses
- Other offenses listed in INA 101(a)(43)
- Note: “at least 1 year” prison sentence includes a suspended sentence of at least 1 year or more

WHAT IS A CRIME INVOLVING MORAL TURPITUDE?

- The Board of Immigration Appeals has defined a CIMT as a crime that “refers generally to conduct which is inherently base, vile or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general. . . Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.” Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994).
- The BIA in Matter of Silva-Trevino, 26 I&N Dec. 826, 827 (BIA 2016) held that the categorical and modified categorical approaches provide the proper framework for determining when a conviction is a crime involving moral turpitude.

CIMT CONTINUED; OFFENSES GENERALL CONSIDERED CIMTS

- Intent to defraud
- Theft with intent to permanently or substantially deprive the owner; theft with intent to temporarily deprive, such as joyriding, is not a CIMT
- Intent to cause or threaten great bodily harm, or assault with a deadly weapon
- Recklessness involving a conscious disregard of a known risk of death or bodily injury
- Some, but not all, offenses that involve lewd conduct
- Some types of “bad commerce” such as drug trafficking and prostitution; some obstruction of justice offenses

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

- On June 23, 2016, the Supreme Court reaffirmed the application of a strict, elements based categorical approach for determining when a prior conviction will trigger adverse sentencing or immigration consequences. *Mathis v. United States*, 136 S. Ct. 2243 (2016).
- The also clarified the limited circumstances in which a criminal statute is deemed “divisible” and subject to a modified categorical approach.

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

- Under the categorical approach, Immigration Judges and the BIA compare the elements of the criminal statute of conviction with the generic crime referenced under the relevant criminal ground of removability. If the criminal statute's elements are the same as or narrower than the generic offense, there is a categorical match the criminal ground of removability. *Taylor v. United States*, 495 U.S. 575 (1990).
- If the criminal statute encompasses broader conduct than the generic crime, adjudicators determine whether a realistic probability exists that the minimum criminal conduct punished under the statute would be subject to prosecution.

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

- The criminal statute may list a single offense that incorporates disjunctive language or discrete offenses listed as alternatives. If not all the disjunctive alternatives or discrete offenses categorically match the generic offense, the statute is considered to be divisible, and the modified categorical approach can be applied.
- Under the modified categorical approach, adjudicators may consult specific documents from the record of conviction to attempt to ascertain which set of elements were required to be proven for conviction under the criminal statute.

DIVISIBILITY

- Distinguishing between elements and means
- The categorical analysis becomes more complicated when the statute sets forth alternative facts, which may constitute alternative elements and therefore distinct crimes, or merely alternative means of the committing the crime.
- If the alternative facts are not elements of distinct crimes and instead merely different factual means of the committing a single element, the statute may not be divisible and the adjudicator may not look beyond the statute to the record of conviction.

CRIMINAL BARS ON NON LPR CANCELLATION OF REMOVAL

- Conviction of an offense described in criminal inadmissibility or deportability grounds
- Convictions of crimes barring good moral character (INA)

CRIMINAL BARS ON LPR CANCELLTION OF REMOVAL

- Aggravated felony
- Offense triggering removability referred to in criminal inadmissibility grounds if committed before seven years of continuous residence in the US

CRIMINAL BARS ON ASYLUM

- Conviction of “Particularly Serious Crime”
 - Aggravated felony
 - Aggravated felonies with aggregate sentence of 5 years imprisonment bar withholding of removal
 - Aggravated felonies involving unlawful trafficking in controlled substances may bar withholding of removal
 - Violent or dangerous crimes will bar asylum
 - There is no statutory definition for particularly serious crime, case by case analysis
 - Some examples: battery with a dangerous weapon, burglarly, possession of child pornography, sexual abuse, drug trafficking, mail fraud, securities fraud

CRIMINAL BARS FOR 212(h) WAIVERS

- Controlled substance offense other than single offense of simple possession of 30g or less of marijuana
- Violent or dangerous crime
- Aggravated felony

CRIMINAL BARS FOR 209(c) WAIVERS

- REASON TO BELIEVE THAT THE PERSON IS A DRUG TRAFFICKER
- VIOLENT OR DANGEROUS CRIME

CRIMINAL BARS FOR CITIZENSHIP

- These offenses are statutory bars for demonstrating good moral character during the requisite 3 or 5 years as a lawful permanent resident
 - Controlled substance offenses
 - CIMT
 - Two or more offenses of any type + aggregate prison sentence of 5 years
 - 2 gambling offenses
 - Confinement to jail for an aggregate period of 180 days
 - Aggravated felony
 - However, any conviction or arrest during the 3 or 5 years period before applying for citizenship can and will be considered for citizenship

TAKE AWAYS

- Any criminal conviction will impact an immigration case. The question is to what extent. Will it be a statutory bar or make them automatically deportable or will simply be a negative discretionary factor.
- Knowing where the client is at in the process or what is their status is crucial
- Working with an experienced immigration attorney to help understand how to avoid statutory bars from relief, mandatory detention offenses is crucial
- It's also helpful to prepare the client for what the immigration case will entail. Some results in criminal cases are unavoidable and preparing clients for detention and working on their case in advance can make a big difference.
- Protecting the record of conviction
- Pleading to certain statutes or sections of the statute
- Giving the client a fighting chance in immigration court