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IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTION

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The 1996 amendment to the Immigration and Nationality Act imposed harsh sanctions on non-citizens in the United States. Some of the most sweeping changes dealt with the impact of criminal activity. Many acts which were not considered deportable offenses under the old law now carry serious immigration penalties: deportation and, in many cases, permanent exclusion from the United States. In addition, most aspects of the law are retroactive to convictions pre-dating 1996.

What follows is a brief overview of parts of the immigration laws which are relevant to attorneys defending non-citizens against criminal charges. It is designed to provide some red flags, to inform criminal defense lawyers of potential problem areas. It is not in any way intended to serve as a comprehensive analysis of U.S. immigration laws. If you think that any of the issues outlined below apply to your client, you should contact an immigration lawyer quickly. As many areas of immigration law change rapidly, it is especially important to consult an immigration lawyer before accepting any plea agreement. We have included a short list of experts in the field who have volunteered to answer questions.

DEFINITION OF A CONVICTION

Most grounds of deportation require a "conviction." However, unlike Massachusetts law, federal immigration law defines a conviction as:

a formal judgment of guilt of the respondent entered by a court or, if the adjudication of guilt has been withheld, where:

1) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or of nolo of contendere or has admitted sufficient facts to warrant a finding of guilt; and

2) the judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed. 8 U.S.C. § 1101(a)(48)(a).

The practical result of this statutory language means that the following dispositions may potentially be "convictions" for immigration purposes:

A continuance without a finding may be found to be a conviction for immigration purposes even if the charge is subsequently dismissed. 8 U.S.C. § 1101(a)(48)(A).

A plea of nolo contendere that results in a continued without a finding or a guilty finding is a conviction for immigration purposes. 8 U.S.C. §1101(a)(48)(A).

Even an admission to sufficient facts, with a dismissal, may be considered a conviction for immigration purposes. 8 U.S.C. §1101(a)(48)(A); See also Matter of Roldan, Interim Decision 3377 (BIA 1999). The key in that case is whether the judge ordered "some form of punishment, penalty or restraint." Probation, even pre-trial probation, qualifies as "some form of restraint." Therefore a dismissal upon payment of court-costs, with an admission of guilt, arguably qualifies as a conviction for immigration purposes. HOWEVER, as long as the defendant does not admit to sufficient facts, pre-trial probation is a safe disposition and does not equal a "conviction."

AGGRAVATED FELONIES

THE MOST IMPORTANT PRIORITY OF CRIMINAL DEFENSE LAWYERS SHOULD BE TO AVOID "AGGRAVATED FELONY" CONVICTIONS

Today, as a result of the change in the law, many previously "safe" charges for immigration purposes qualify as "aggravated felonies" subjecting the defendant/alien to mandatory deportation and mandatory detention. This means that defendants are transported directly from state jail to federal custody and face expedited deportation proceedings. Family contacts, US citizen children, and length of residence in the United States CANNOT save a defendant once convicted of an aggravated felony. There are almost no avenues of relief. Here is a list of general guidelines and SEE BELOW FOR A LISTING OF AGGRAVATED FELONIES.

Federal definition of a felony. Although technically immigration law calls this offense an "aggravated felony," the federal definition of felony includes any charge with a possible sentence of more than one year. As a result, almost every Massachusetts "misdemeanor" qualifies as a felony for federal immigration purposes, because most "misdemeanors" carry a possible sentence of two and one half years in the House of Corrections.

The "one year rule"- Any charge qualifying as (1) a "crime of violence" (2) a "theft" charge (including receiving stolen property), (3) a "burglary charge" or (4) "commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered" qualifies as an aggravated felony where the defendant receives a sentence of one year of incarceration or more, whether actually imposed or suspended. 8 U.S.C. §1101(a)(43)(A)

Specifically:

Crimes of Violence include any charge involving (a) an "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

As a result, courts have interpreted this provision extremely broadly to include not only rape, sexual assault, indecent assault and battery, or burglary but also some seemingly innocuous offenses such as:

Assault and Battery

Assault and Battery with a Dangerous Weapon (even "shod foot" cases)

Breaking and Entering (the immigration court has already held that during the nighttime into a residence is a crime of violence)

Statutory Rape

Arson

Therefore, not only is it important to avoid conviction for these offenses, and any other charge involving force or the threat of force, it is especially important to avoid a one year sentence on such charges.

Drug offenses -

Almost any drug offense involving sale, distribution, manufacture, etc. qualifies as a "trafficking offense" and therefore mandates deportation. Specifically:

Distribution, Possession With Intent to Distribute, Conspiracy to violate controlled substance act, or any other Sale/MFG/Drug Distribution offense.

Second offense possession under certain circumstances. Although "first offense" possession of a controlled substance is deportable (except simple possession of 30 grams or less of marijuana), it is not an aggravated felony, mandating deportation. Second offense may qualify as an aggravated felony depending on the circumstances. As this is a very complicated analysis, you should consult with an immigration attorney.

With drug offenses, the SENTENCE IS IRRELEVANT. Therefore a first offense possession with intent to distribute is an Aggravated Felony, even with a 6 month suspended sentence. You will not be saving your client by negotiating an 11 month suspended sentence on possession with intent.

Attempt/Inchoate Offenses

The definition of "aggravated felony" specifically includes any attempted aggravated felonies or conspiracy to commit an aggravated felony. Therefore an attempted but unsuccessful burglary qualifies as an aggravated felony where the defendant receives a sentence of one year or more regardless of whether the sentence is suspended or imposed. Likewise, a conspiracy to violate the controlled drug laws qualifies as an aggravated

felony where the underlying offense involves “trafficking” (see above for definition of “trafficking”)

A list of other “aggravated felonies”:

Murder
Sexual abuse of a minor
Rape
Any drug trafficking offense as defined in 8 USC § 921
Any trafficking in firearms or destructive devices as defined in 18 USC § 921
Money laundering as defined in 18 USC § 1956
Any crime of violence, as defined in 18 USC §16 for which the term of imprisonment imposed is at least one year (note that this includes a suspended sentence). 18 USC § 16 defines a crime of violence as any crime which involves either the use of force against persons or property, or the substantial threat that such force may be used.
A theft offense (including receipt of stolen property), or burglary offense, for which the term of imprisonment is at least one year. (The statute does not mention possession of burglarious tools).
An offense involving fraud or deceit in which the victim’s losses exceed $10,000 or federal tax evasion in which the revenue loss exceeds $10,000. (If the docket sheet, indictment or complaint reads $10,000 or less this is not an aggravated felony).
An offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles involving the alteration of identification numbers, for which the period of imprisonment imposed is at least one year.
A variety of other crimes, including: child pornography, RICO violations, alien smuggling, obstruction of justice.

DOMESTIC VIOLENCE OFFENSES
A conviction after September 30, 1996 for an offense involving domestic violence, stalking or violation of a protective order involving “protection against credible threats of violence, repeated harassment, or bodily injury”, or child abuse or neglect is a deportable offense. 8 U.S.C. § 1227(a)(2)(e). The “victim” in a domestic violence case under state law qualifies as a “victim” for the purposes of deportation. Therefore if the victim in your case is entitled to protection under state laws against domestic violence, immigration may consider the conviction a crime of domestic violence. As a result, arguably, a conviction for assault on a parent or child may qualify as a crime of domestic violence.

FIREARM OFFENSES

Any conviction “under any law of purchasing, selling, offering for sale, exchanging using, owning, possessing or carrying” any “weapon, part or accessory which is a firearm or destructive device” is deportable under the immigration laws. An immigrant is deportable for any conviction for a firearms offense, including charges involving attempt or conspiracy to violate the firearm laws. 8 U.S.C. § 1227(a)(2)(C).

CRIMES OF MORAL TURPITUDE

In addition to “aggravated felonies” some crimes are considered “crimes of moral turpitude” and are therefore deportable if they are:

a) an offense with a possible sentence of one year or more; and

b) involving moral turpitude (8 U.S.C. 1227(a)(2)(A)).

The “one year rule” here.

Unlike aggravated felonies, what matters with crimes of moral turpitude is what sentence the defendant could have received rather than what the defendant actually received.

Number of Convictions required:

Crimes of moral turpitude are deportable offenses if a defendant commits:

One crime of moral turpitude within five years of admission into the United States OR

two crimes of moral turpitude at any time “not arising out of a single scheme”

-NOTE: defining “admission” for immigration purposes is complicated. You should always consult with an immigration attorney to determine when your client was “admitted” for analysis purposes.

-NOTE: The Single Scheme rule punishes crimes of moral turpitude “not arising out of a single scheme of criminal misconduct” - meaning that although the charge only resulted in one arrest and one docket sheet, if it contains multiple counts, INS may consider them separate crimes. Persons convicted of two crimes of moral turpitude “not arising out of a single scheme of criminal misconduct” are deportable. Where courts define “arising out a single scheme of criminal misconduct” narrowly, most incidents of criminal activity, unless the activity occurs almost simultaneously, will qualify as multiple convictions for immigration purposes.

Definition of Moral Turpitude:

Unfortunately, there is no statutory definition of “moral turpitude.” Generally, the term encompasses crimes involving fraud or evil intent. In general, crimes involving theft, fraud, and violence tend to qualify as crimes involving moral turpitude. Always check with an immigration attorney before agreeing to a plea where the charge sounds as if it may involve moral turpitude. A comprehensive list of decisions relating to crimes of moral turpitude can be found online at: { GOTOBUTTON BM_1_ http://ilw.com/tooby/cmt.html}

THE FIVE YEAR RULE

Finally, a non-citizen convicted of two or more offenses, regardless of whether they involved moral turpitude, regardless of whether the conviction was in a single trial or whether the offense arose from a single scheme of criminal misconduct, and regardless of whether the offenses involved moral turpitude is inadmissible if s/he was sentenced to an aggregate of five years or more of imprisonment. 8 U.S.C. § 1182(a)(2)(B). Thus the individual would face difficulties if he/she were to leave the country and tried to return.

DRUGS

Any alien who has a controlled substance offense conviction is most likely deportable and permanently barred from reentering the United States. This expansive definition includes convictions for conspiracy or simple possession of any controlled substance. The only exception is for a single offense of simple possession of not more than 30 grams of marijuana for personal use; 8 USC section 1227(a)(2)(B). It is unlikely that this exception would be available for possession of hashish as well.

Note: If you have a possession of marijuana case with an immigrant, ask the prosecutor to amend the complaint and docket sheet to include the amount if it is 30 grams or less. This helps the alien/defendant show the immigration court that the offense is not deportable.

DETENTION and DEPORTATION
Generally, criminal aliens are placed in deportation proceedings while incarcerated. The INS serves them a "notice to appear" and a detainer so they cannot obtain release prior to deportation. Typically, the INS cannot deport someone until after s/he completes the sentence although there are procedures to request an international transfer while still serving time.

Once the criminal sentence is completed, INS will transfer non-citizens to a jail or detention facility such as Hillsborough County House of Corrections in Manchester, NH or even a federal detention facility in Oakdale, Louisiana. Throughout the entire immigration proceedings, aggravated felons and many other criminal aliens may be subject to mandatory detention and cannot obtain bail no matter how long they have lived in the United States, how few convictions, or how many family members reside in the United States.

As a result, IF ALL ELSE FAILS, avoid committed jail time. The most common way INS locates aliens convicted of crimes is through the jail system. The jail is REQUIRED to report any alien convicted of a crime to the INS and the INS virtually always initiates deportation proceedings. As stated above, the defendant/alien is not entitled to return home, make bail and is not eligible for most forms of relief where s/he is convicted of an aggravated felony.

Avoiding jail IS NO GUARANTEE. Many aliens/defendants are caught through INS sweeps, through reports by probation officers, ADA's, and through mandatory reporters in the federal government (such as the Social Security Administration).

VACATING CONVICTIONS

Often, a non-citizen's only remedy is to return to criminal court after he or she has been convicted, to have that conviction vacated. The most common ground for vacating convictions in the immigration context is that the person did not receive the required alien warning that he/she may face "deportation, exclusion from admission or denial of naturalization."

M.G.L. ch. 278 § 29D requires that the judge advise all criminal defendants, before accepting a guilty plea, that if they are not citizens of the United States, their conviction may result in deportation, exclusion from admission or denial of naturalization. The statute places the burden on the government to establish that the warnings were given. If it fails to do so, the conviction must be vacated.

If you notice that the judge has not given the required alien warnings, request a tape of the proceedings from the clerk, and give it to your client (most courts destroy the tapes after several years). If s/he ever finds him/herself in trouble with the INS, it may allow him/her to vacate the conviction.

MOTIONS TO REVISE AND REVOKE

It is very important, due to the rapidly changing nature of immigration laws, that defense attorneys ALWAYS file a motion to revise and revoke at the conclusion of a case. This can easily be accomplished by bringing a standard motion to the court and having your client sign the affidavit while in court. The motion MUST BE FILED WITHIN 60 DAYS of the sentencing, otherwise, the court may not even have jurisdiction to reduce or amend an immigrant's sentence. Filing a motion to revise and revoke can easily prevent deportation where the INS seeks to deport the individual based on the length of the sentence. Reducing the length of the sentence can also make an immigrant eligible for additional forms of relief from deportation.

IF YOU HAVE ANY QUESTIONS, PLEASE FEEL FREE TO CALL:

The following immigration experts have agreed to answer questions from criminal defense attorneys:

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Sincerely,

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S h a h

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