

## Immigration Consequences of Crimes (November 2022)

### Duty to Inform Clients of Immigration Consequences (6<sup>th</sup> Amendment)

- *People v. Soriano*, 194 Cal.App.3d 1470 (1987), *Padilla v. Kentucky*, 559 U.S. 356 (2010), CA Penal Code § 1016.2 (2017)
- Insufficient to say that “there may be immigration consequences”, need to specifically explain what could happen
- Required even if odds of success are minimal
- Failure could lead to ineffective assistance of counsel claims and vacating the case

### Status in the U.S.

- **Citizens (USC)**: there are no immigration consequences to crimes for themselves
  - **Adam Walsh Act**: for citizens, permanent residents, or anyone who hopes to file for family in the future, convictions of certain offenses against minors, such as child abuse, can impact their ability to petition for a relative to immigrate to the U.S.
  - **To apply for citizenship** lawful permanent residents must show good moral character.
- **Lawful Permanent Resident (LPR)**: can live and work in the U.S. and can file for citizenship after a certain number of years. There are various paths to residence.
- **Conditional permanent residents**: spouse and children from a marriage that was less than 2-years old at the time of filing; must file to remove conditions after 2 years
- **DACA**: allows people who came to the U.S. unlawfully as children to live and work in the U.S., but they do not have lawful status and cannot become permanent residents based solely on having DACA. Currently people cannot submit new applications for DACA, but they can renew their status every two years if they already had DACA.
  - Ineligible if they have a felony conviction, a significant misdemeanor, or three or more misdemeanors. Significant misdemeanors include: DV, DUI, burglary, sexual abuse or exploitation, unlawful possession or use of a firearm, drug distribution or trafficking, or any offense with time in custody over 90 days.
- **VAWA**: usually U.S. citizens or lawful permanent residents must file for their non-citizen relatives, but this allows abused spouses, children, and parents to file on their own without relying on the abusive U.S. citizen or lawful permanent resident family member. Must show good moral character.
- **T Visas** are for victims of certain forms of severe trafficking (labor or sex), provides a path to citizenship.
- **U Visas** are for victims of certain crimes who aid in the investigation or prosecution of the crime. While these also provide a path to citizenship, it is taking about 20 years at the moment.
- **Special Immigrant Juvenile Status**: if under the age of 21 may apply for special immigrant juvenile status if they were abused, neglected, or abandoned by one or both of their parents. Path to citizenship.
- **Asylees and Refugees**: require a well-founded fear of prosecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. This also provides a path to citizenship. May lose status after conviction of a “particularly serious crime”
- **Temporary Protected Status**: allows living and working in the U.S. (without a path to citizenship) while there is ongoing conflict or environmental disasters in their country.
- **Various other statuses** (e.g. visas for work, school, visitors) **or no status**

### **Relief in Immigration Court – If deportable and end up in removal proceedings**

- **LPR Cancellation of Removal:** requires having been in the U.S. for 7 years, having been a permanent resident for 5 years, and good moral character. Ineligible if they have an aggravated felony—basically an aggravated felony would likely remove any chance that they could stay in the U.S.
- **Non-LPR Cancellation of Removal:** requires having been in the U.S. for at least 10 years, good moral character, and must have a U.S. citizen or LPR immediate family member. Ineligible if they have been convicted of a crime involving moral turpitude, drug offense (other than possession of less than 30 grams of marijuana), domestic violence, child abuse, or certain firearm offenses.

### **Potential Immigration Consequences of Crimes (Depends on their status and the crime)**

- Removable (deportable)
- Inadmissible: unable to adjust status (meaning they can't become a permanent resident) or enter the U.S.
- Complete bars to certain immigration benefits (e.g. DACA) and certain defenses in immigration court
- Finding of lack of Good Moral Character (required for citizenship, VAWA, certain defenses)
- Negative factor in discretionary decisions
- Inability to file for relatives

### **Criminal Grounds of Removability INA § 237(a)(2)**

These apply if they occurred after admission to the U.S. (unless noted otherwise)

- A conviction for a crime involving moral turpitude committed within 5 years of admission (10 years for some types of LPRs) with a sentence of a year or more
- Conviction of two or more crimes of moral turpitude that did not arise out of the same criminal misconduct (even if the first crime received a waiver)
- Conviction of an aggravated felony
- Conviction of a high-speed flight (before or after admission)
- Conviction of a controlled substance violation (exception for a single incidence involving possession for personal use of 30 grams or less of marijuana)
- Drug abusers or drug addicts
- Conviction of firearms offenses involving use or possession of a gun or bomb
- Conviction of domestic violence, stalking, child abuse, child neglect, or child abandonment
- Failure to register as a sex offender (before or after admission)
- Violation of certain provisions of domestic violence protection orders
- Traffickers of persons (before or after admission)
- Conviction of certain crimes related to espionage, treason, and sedition (before or after admission)

### **Criminal Grounds of Inadmissibility INA § 212(a)(2)**

- Admission or conviction of a crime involving moral turpitude (petty offense and youthful offender exceptions)
- Admission or conviction of a controlled substance offense (drug offenses)
- Two or more criminal convictions with an aggregate sentence of at least 5 years
- Reason to believe that they are, were, or benefitted within the last 5 years from family who are or were illicit traffickers of any controlled substance
- Prostitution and commercialized vice
- Money laundering

### **Crimes of Moral Turpitude (CIMTs)**

- Examples (not a comprehensive list): murder, voluntary manslaughter, rape, serious assault, certain forms of burglary, arson, fraud, forgery, certain left offenses

## **Aggravated Felonies INA § 101(a)(43) – Certain misdemeanors are considered Aggravated Felonies**

- Murder, rape, or sexual abuse of a minor
- Illicit trafficking in a controlled substance
- Illicit trafficking in firearms or destructive devices or in explosive materials
- Money laundering exceeding \$10,000
- Certain firearms and explosive offenses
- Crime of violence in which the term of imprisonment is at least one year
- Theft or burglary offense (including receipt of stolen property) in which the term of imprisonment is at least one year
- Offenses related to demand for receipt of ransom
- Offenses related to child pornography
- Offenses related to racketeering or gambling in which a sentence of one year or more may be imposed
- Offenses related to slavery, trafficking in persons, or owning or managing a prostitution business
- Offenses related to treason, sabotage, etc.
- Offenses involving fraud or deceit with loss exceeding \$10,000
- Alien smuggling (exception for spouse, child or parent)
- Offenses related to forgery of a passport with imprisonment of at least 12 months, except for spouse, child, or parent
- Failure to appear by defendant for service of sentence if underlying offense is punishable by 5+ years
- Offenses related to commercial bribery, counterfeiting, forgery, or trafficking where term of imprisonment is at least one year
- Offenses related to obstruction of justice, perjury, or subornation of perjury, or bribery of a witness for which the term of imprisonment is at least one year
- Failure to appear before a court pursuant to court order to answer or dispose of a charge of a felony for which a sentence of 2 years imprisonment could be imposed.
- Attempt or conspiracy to the above

## **Conviction for Immigration Purposes**

- An admission or reason to believe may be sufficient for certain grounds, others are based on convictions
- Immigration considers a conviction to be any finding of guilt, a plea of guilty or nolo contendere, or admitting sufficient facts to warrant a finding of guilt—even if there was not a finding
- Both a conviction and a penalty are needed
- Penalties are interpreted broadly: any jailtime, probation, fine/restitution, potentially education programs
- **Not Convictions for Immigration Purposes:** juvenile court dispositions, infractions, convictions vacated for *legal error* (not for other reasons), and pretrial diversion with a plea of not guilty and no finding of guilt.

## **What can you do to help your clients?**

- **Try for a charge with less immigration consequences**
  - Example: AB 2195 effective January 1, 2023, immigration neutral alternative to drug charges
- **Length of sentence 364 days or less**
  - Time counts even if the execution of the sentence is suspended, when time is added at probation hearings, or if jail time is a part of probation (otherwise probation is generally not counted)
- **Opt for misdemeanors instead of felonies if possible** (but note that the maximum possible sentence of the new misdemeanor may matter)
- **Pretrial Diversion without pleading guilty** (pleading guilty is a conviction for immigration purposes)
  - PC § 1000 for Drug Charges – changed in 2018 to use a plea of “not guilty”
    - In contrast, PC § 1210.1 requires a guilty plea and therefore is a drug conviction

- PC § 1001.95 for Misdemeanors – may be offered by a judge over the prosecution’s objection
- PC § 1001.36 for Mental Health Issues
- PC § 1001.20 Developmental Disabilities
- **Work with an immigration attorney:** The law is complicated and often changes. Consequences may vary depending on the length of the sentence, their age, previous criminal interactions, their status, how they entered the U.S., what status they could potentially apply for in the future, the specific code section and options for lesser charges, if any exceptions or waivers apply, etc.

#### **Post-Conviction Relief:**

- Does not vacate crimes for purposes of immigration (unless for substantive or procedural error)
- Exception, expungements do prevent the bar for DACA
- Pardons (extremely rare) must be full and unconditional, from state governor or U.S. president, only prevent deportation (does not affect inadmissibility), and are only for aggravated felonies or crimes of moral turpitude (not domestic violence or controlled substances)

#### **DUIs**

- Generally, not a ground of inadmissibility or removability (unless it involves drugs or is more serious)
- **Complete bar to DACA, go for wet reckless instead**
- Two DUIs during a period where they have to show good moral character can impact citizenship, VAWA, and relief in removal proceedings
- Can affect asylees and refugees, may prevent release on bond from immigration detention
- Multiple can potentially be a ground for inadmissibility as a habitual drunkard

#### **Immigrant Legal Resource Center Chart**

- Great place to start, but still should contact an immigration attorney
- <https://www.ilrc.org/chart> (requires free registration to see the most up-to-date chart—case law often changes so it is best to be using the most current chart)

#### **ICE – Make sure your clients’ rights are being upheld**

- When booked into jail, fingerprints are sent to FBI database which may flag the detainee
- **Trust Act** (2014): prevents counties from releasing detainees to ICE, exception for felonies or serious misdemeanors
- If ICE arrests the detainee, they will go to a processing center where they may be deported, enter deportation proceedings, or be given voluntary departure (which allows them to leave the country without a deportation). Get an immigration attorney asap if this happens.
- **Truth Act** (2017): if law enforcement provides ICE with info on a detainee, they must notify the detainee—and their attorney! Interviews with ICE are not mandatory. If law enforcement allows ICE access to any individual, the local legislative body must hold an annual TRUTH Act forum.
- **SB 54** (2018): prevents law enforcement involvement with immigration enforcement (exceptions apply)