



## IMMIGRATION CONSEQUENCES OF CRIMINAL LAW

For non-citizens, the immigration consequences of a criminal conviction may be far greater than any punishment of incarceration and/or a fine. These consequences flow from relatively minor offenses and impact non-citizens regardless of economic or social class. For those non-citizens who are convicted of crimes, particularly those given state or federal prison sentences, the INS systematically moves to deport them from the United States, regardless of the length of time in the U.S., family ties in the U.S., or the U.S. government's diplomatic relations with the person's home country.

Based on a criminal conviction, or even a pre-trial diversion that a state does not define as a "conviction," a client might be subject to deportation or exclusion (now called "removal") from the United States, be ineligible for discretionary relief (to avoid deportation), and often become permanently unable to lawfully return to the United States. There are thousands of non-citizens presently serving federal sentences for the crime of illegal reentry based on the illegal return to the U.S. after deportation for a state, local, or federal conviction.

The following case example demonstrates how these issues can arise, and how such consequences may be avoided.

### CASE EXAMPLE

Sue and her former boyfriend, John, have an argument over their 3-year-old child. John drives over to Sue's house and enters the house by breaking a win-

dow. A confrontation ensues, and John shoves Sue into a wall. He then strikes her current boyfriend, who is also at Sue's house. The neighbor calls the police, and John is arrested and charged with two counts of burglary and two counts of assault IV. He hires an attorney to defend him and hopes to enter into an arrangement that would allow him to avoid trial. At first glance, the best course of action for John seems to be a plea to one count of assault IV with a sentence of anger counseling, probation, and no jail time. However, John is a non-citizen from Great Britain who first came to the United States as a businessman and then became a lawful permanent resident. The assault IV would be considered by an Immigration Law Judge as a crime of domestic violence, which is grounds for deportation or "removal." The fact that he acknowledged that he had an anger problem and was willing to get treatment would not change the fact that he would be deportable. Because he has not been lawfully present in the U.S. for long enough, he is not eligible for "cancellation of removal," a form of discretionary relief from deportation. However, he might not be subject to deportation if he can plead to only one count of assault IV as to the boyfriend, and is sentenced to a term of imprisonment of less than one year.

As demonstrated by this example, there may be ways to structure the outcome of criminal cases so as to avoid, or at least minimize, the immigration consequences.

### DETERMINE IMMIGRATION STATUS

In order to avoid an unexpected immi-

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gration consequence to your client, determine the client's current immigration status at the first client interview. Always ask *every* client directly about his or her place of birth and immigration status. A lawyer cannot assume that a client is a U.S. citizen simply because he or she speaks English well. This is especially true of clients who may even assume that they are U.S. citizens, having been brought to the United States as infants, when in fact their parents never followed through with the appropriate immigration visa application.

Ask to examine documentation evidencing the client's immigration status. If they have a card issued by the INS which has their photograph, copy both sides of the document and make particular note of the Immigration Service file number, which begins with the letter "A." If they do not have a card, but have a passport with a stamp from the U.S. government, copy all appropriate pages and attachments. If the client does not currently have documentation, ask if he or she ever had documents, and if so, what they were and how they were obtained. If the client advises that the documents have been lost, this is a good opportunity to determine whether the client has previously been arrested or has previously been placed in deportation proceedings. A client might be reluctant to admit that he or she has been deported from the United States previously, and hope that the authorities won't learn of the prior history. The non-citizen client must understand the potential consequences.

#### **CASE EXAMPLE**

Anna first entered the United States without a visa. However, she later met and married Ralph, a U.S. citizen. Ralph then petitioned for Anna to become a lawful permanent resident alien. Anna was given conditional residence (valid for two years), and she and Ralph later had a child. When their son was one year old, she and Ralph separated due to domestic violence. She later obtained public assistance for her son but failed to report income that would have disqualified her. She was charged with Unlawfully Obtaining Public Assistance. Frightened, she failed to appear in court and was charged with Failure to Appear in the First Degree. After her arrest, Anna was desperate to resolve her case. She advised her attorney that she did not understand the paperwork and had never intended to lie about her earnings. A good resolution would appear to be a plea of Guilty to the Failure to Appear charge, for

which she had no defense, if the prosecutor would dismiss the charge of Unlawfully Obtaining Public Assistance. Unfortunately the Failure to Appear in a matter for which a sentence of more than 2 years can be imposed is an aggravated felony for immigration purposes, and she would be deportable from the United States and no relief from deportation would be available. On the other hand, if she had pled to Attempted Theft, for which a maximum sentence of only 6 months could be imposed, she might still be subject to deportation but not as an aggravated felon. In addition, if she can establish that she has been the victim of domestic violence, there is a special immigration program for which she might qualify to remove the condition on her lawful permanent residence; she would not be qualified, however, if she has been convicted of an aggravated felony. This could also assist her in fighting deportation.

#### **NON-CITIZEN CLIENTS INCLUDE IMMIGRANTS AND NON-IMMIGRANTS**

Non-citizens lawfully in the United States include immigrants who are admitted to reside in the United States as lawful permanent residents and non-immigrants who are permitted to enter the U.S. for a limited period of time and given temporary visas. Immigrants include those who immigrate via family-based and employment-based petitions and as refugees and asylees. Examples of non-immigrants are students, tourists, temporary workers, business executives, and diplomats. Some non-citizens are in the U.S. without documentation, either because they never had documentation ("entered without inspection") or because they overstayed the period of their non-immigrant status or violated the terms of their status (such as working without a work permit) or they are Canadian citizens (who normally don't obtain documentation when they enter the U.S. as tourists). When determining a person's status, be sure to determine the person's status *at the time* of your initial interview. Often people will say they are in the process of applying for some status, but that is a statement of what they hope their status will become in the future rather than what their status is at the moment. It is important to also determine if they are eligible for a lawful immigration status.

If your inquiry raises immigration issues, gather the information listed in the immigration checklist. (See Page 4.)

In addition to determining a client's current sta-

tus, it is important for an attorney to find out what actions immigration authorities have taken with respect to the client in the past. A client's record of immigration actions, both positive and negative, can be just as important as his or her criminal record in litigation decisions or plea negotiations. In addition, the date of a client's admission to the United States can determine whether a conviction for a crime of moral turpitude renders the client deportable. The date upon which a client was admitted as a lawful permanent resident alien will determine whether the client is eligible for Cancellation of Removal. In most cases it is possible to file a Freedom of Information Act request to obtain copies of your client's immigration file. (This process usually takes a long time.)

### **INS HAS ITS OWN DEFINITIONS**

Many terms used in criminal law have a different meaning or consequence in immigration law. The following are some examples.

**Conviction.** Conviction of a crime means that (1) a court has found a person guilty, a person has pled guilty or *nolo contendere*, or a person has admitted that the facts are sufficient to support a finding of guilt, and (2) a court has ordered some form of punishment, penalty, or restraint on the person's liberty. See, 8 U.S.C. 1101(a)(48)(A). Thus, the question of whether a pre-trial diversion program constitutes a conviction depends on whether an admission of guilt is part of entry into that program. Programs which require an admission of guilt and then some period of court-ordered probation or community service, followed by setting aside of the conviction on successful completion of that program, do constitute convictions for immigration purposes.

A general continuance or deferral of prosecution to monitor the defendant for good behavior (without entry of a plea or admission of the charges), followed by dismissal, is a non-conviction alternative. Payment of restitution is another possible non-conviction alternative. In some states, the defendant can reach a civil accord and satisfaction with the complaining witness, in lieu of prosecution. This provides yet another non-conviction alternative.

Generally, a case still under direct appeal is not considered a conviction for inadmissibility or deportation purposes. INS may, however, consider a case under appeal in making discretionary decisions or

they may defer their decision until the appeal process has been completed.

**Moral Turpitude.** The question of whether a crime constitutes moral turpitude for the purposes of inadmissibility or deportability depends not on the facts of the particular case of the defendant, but rather on the elements of proof under the state or federal statute for which the defendant was convicted. For example, in some jurisdictions, passing bad checks may involve an intent to defraud, but in other jurisdictions that same statute may not involve fraud as an essential element of the offense. Convictions for incest, gross indecency, and simple fornication have been held not to involve moral turpitude under the Board of Immigration Appeals case law. However, incest with a minor could be viewed as sex abuse of a minor. The crime of making false statements is a crime of moral turpitude when the elements of materiality and knowledge are shown.

**Single Scheme of Misconduct.** To be considered a single scheme of criminal misconduct for deportability purposes, the crimes must have arisen out of a single criminal episode "such as where one crime constitutes the lesser offense of another, or where two crimes flow from and are the natural consequence of a single act of criminal misconduct." Whether actions flow from a single act can have important immigration consequences.

**Sentence.** A sentence remains a sentence for immigration purposes, even if imposition or execution of it has been suspended. See, 8 U.S.C. 1101(a)(48)(B).

### **RESOURCES**

Criminal defense attorneys are well-advised to consult with an attorney experienced in immigration law. The trial court may be willing to appoint one to assist the defense. An excellent resource is the American Immigration Lawyers Association at [www.AILA.org](http://www.AILA.org) and [www.AILAoregon.com](http://www.AILAoregon.com)

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