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KNOWING THE CONSEQUENCES OF A CONVICTION TO A NONCITIZEN
IN A CRIMINAL CASE

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Knowing the consequences of a conviction to a Noncitizen in a Criminal Case

The bond between criminal and immigration law is more significant than it has ever been due to the serious adverse consequences that may result from a criminal conviction. This makes it much more difficult for defense counsel when representing a noncitizen. With so much at stake, it is extremely important that defense counsel be cognizant of the immigration consequences that may flow from a criminal conviction and discuss these with the client. If defense counsel does not have knowledge of this complex area of immigration law, he or she should consult with an experienced immigration attorney so that counsel and the client are fully aware of the immigration issues involved.

The Definition of Conviction

The definition of “conviction” for immigration purposes differs from what is considered a criminal conviction under state or federal law. Immigration and Nationality Act (“INA”) Section 101(a)(48) sets forth the definition of conviction for immigration purposes. That section states:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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 nolo 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.

The definition is broader than what would be considered a criminal conviction under state or federal law. Under INA § 101(a)(48), an alien is convicted for immigration purposes where he or she enters a plea of guilty or no contest or admits sufficient facts to warrant a finding of guilt and the judge has ordered some form of penalty, such as a fine, probation, or restriction on liberty. This is true even if the case is later dismissed after successful completion of some sort of probationary period. Thus, if an alien enters a guilty or no contest plea, adjudication of guilt is withheld and the case dismissed after successful completion of probation, this would still constitute a conviction for immigration purposes.

It is important to understand that certain pre-trial diversion programs would not fall within the immigration definition of conviction. If a defendant enters a pre-trial diversion program that does not require a guilty or no contest plea (or admission to the elements of the offense), the defendant will not be deemed to have been convicted for immigration purposes if the case is dismissed upon successful completion of the program. Thus, understanding the definition of conviction may allow defense counsel to seek a creative resolution to the case that would not adversely impact the client’s immigration status. A disposition of the case under this type of diversionary program is usually far preferable for the client than risking a trial.

In addition, it is important to understand that an expungement or sealing of records has no effect on a conviction for immigration purposes¹. Thus, a client cannot enter a guilty plea and

wipe out the immigration consequences of the plea by sealing the records or expunging the conviction.

Potential Immigration Consequences of a Criminal Conviction

In order to properly advise a client, defense counsel must understand the possible immigration consequences of a criminal conviction. A criminal conviction may not have all these potential adverse consequences since the standards for each are different.

A. Removal or Deportation from the United States

The most important potential adverse consequence to most noncitizens is deportation or removal from the United States. Certain criminal convictions, even misdemeanors, may subject a noncitizen to removal proceedings.

The following are offenses that subject a noncitizen to removal from the United States:

1. One crime of moral turpitude committed within five years of entry where the possible sentence is one year or more (there is no set definition for crime involving moral turpitude although there is a large body of case law on the subject);
2. Two crimes involving moral turpitude committed after admission to the United States;
3. Domestic violence or a crime of stalking;
4. Controlled substances offenses with the only exception being a single offense involving 30 grams or less of marijuana for one's personal use;
5. Firearms offenses; and
6. Aggravated felonies, which include but are not limited to:
 - Murder
 - Rape
 - Sexual abuse of a minor
 - Illicit trafficking in a controlled substance
 - Money laundering where the amount involved exceeds \$10,000
 - Crimes of violence where the term of imprisonment exceeds one year
 - Theft (including the receipt of stolen property) or burglary where the term of imprisonment is one year or more
 - Offenses involving fraud or deceit in which the loss to the victim exceeds \$10,000.

Whether a criminal conviction falls into one of the above categories may depend on the federal appellate circuit where your client resides. For example, there is a circuit split on the issue of whether a felony state drug possession offense is an aggravated felony.

As the above list indicates, there are a large number of crimes that can subject a person to removal from the United States. Many people are surprised to learn that a misdemeanor such as domestic violence can result in deportation even where no jail time is imposed. Additionally, possession or attempted possession of even a small amount of any controlled substance other than less than 30 grams of marijuana will subject a person to deportation.

A conviction for an aggravated felony is significant for immigration purposes. Such a conviction not only subjects an alien to removal, but also eliminates most forms of relief from removal, including asylum and cancellation of removal. An aggravated felony also acts as a bar to returning to the United States and for naturalization. It is also important to note that when a certain term of imprisonment is a prerequisite for an aggravated felony conviction, the term of imprisonment is defined as the term imposed by the court even if that term was suspended. Additionally, even a misdemeanor conviction can constitute an aggravated felony if it otherwise meets the aggravated felony definition. Thus, defense counsel should take all steps possible to avoid an aggravated felony conviction.

Although an alien may be subject to removal if convicted, the defense attorney and client must be aware of potential relief from removal that may be available if the client is convicted of the criminal offense. This is essential to a client making an informed decision as to how to proceed. Potential relief available in removal proceedings includes asylum, withholding of removal, cancellation of removal, and adjustment of status.

The availability of relief from removal will depend upon the client's individual circumstances such as current immigration status and length of time in the United States, as well as whether the client is a lawful permanent resident or has family members in the United States who are U.S. citizens. For example, a lawful permanent resident with a criminal conviction may be eligible for cancellation of removal if he or she has continuously resided in the United States for seven years after having been admitted in any status, has been a permanent resident for five years, and has not been convicted of an aggravated felony. A person granted cancellation of removal on this ground would be permitted to continue residing in the United States as a lawful permanent resident. Additionally, an alien subject to removal may be eligible for adjustment of status in removal proceedings depending on the circumstances and the nature of the conviction.

Since the possibility of removal is often the most important consideration for a noncitizen conviction could result in the commencement of removal proceedings and if so, whether the defendant would have any defense to removal. Otherwise, the defendant will not be able to make a knowing and intelligent choice as to whether it is in his or her best interest to enter a plea or go to trial. Defense counsel may be able to use the possibility of removal as a bargaining chip to secure a better plea deal that avoids any adverse immigration consequences.

B. Admissibility to the United States

A criminal conviction may also cause a noncitizen to be inadmissible to the United States. This comes into play when an alien attempts to enter the United States on a visa or if he or she is applying to become a lawful permanent resident.² Examples of crimes that may render an alien inadmissible are controlled substance convictions, a crime involving moral turpitude (except where there is only one conviction, the maximum penalty did not exceed one year and the term of imprisonment did not exceed six months), and two or more offenses for which the aggregate sentences of confinement were five years or more.

C. Naturalization

A criminal conviction may also result in the denial of naturalization. Certain convictions act as a bar to naturalization, such as aggravated felonies or other convictions (such as controlled substance offenses) committed during the five-year period of time that an alien must show good moral character prior to filing the naturalization application (three years if married to a United States citizen).³ Other convictions such as DUIs do not act as a bar, but reflect poorly on the person's moral character and may result in the denial of naturalization. Thus, a lawful permanent resident client must be made aware that a criminal case may result in the denial of naturalization or cause him or her to wait an additional period of time before filing the naturalization application.

D. Mandatory Detention

An often overlooked consequence of a criminal conviction is that it may result in mandatory detention during removal proceedings.⁴ Pursuant to INA § 236(c), the Department of Homeland Security ("DHS") must detain a noncitizen who has been convicted of certain criminal offenses during their removal proceedings. There is no opportunity for a bond hearing. The mandatory detention provisions of the INA may result in a noncitizen spending a significant amount of time in DHS custody while fighting the removal case. The detention could extend beyond the maximum prison sentence for the criminal offense that resulted in the removal proceedings because it may take a year or longer to resolve the removal case. Some crimes that trigger mandatory detention are controlled substance offenses, crimes involving moral turpitude, firearm offenses, and aggravated felonies. A client must be aware of whether the mandatory detention provisions of INA § 236(c) would be applicable when determining the appropriate course of action in a criminal case.

Notes

❶ There is an exception for first-time simple drug possession cases where the case is expunged under the Federal First Offender Act. 18 U.S.C. § 3607. However, outside the Ninth Circuit, this exception does not apply to state counterparts to the Federal First Offender Act.