

CONSEQUENCES OF A CRIMINAL CONVICTION FOR ALIEN CLIENTS

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As Delaware's foreign-born immigrant population grows, state criminal defense attorneys, judges, and prosecutors are increasingly faced with legal issues concerning the federal immigration consequences of a state criminal conviction. The Immigration and Nationality Act ("INA") provides severe consequences for criminal convictions by non-U.S. citizen aliens. A criminal conviction may make an alien removable from, or inadmissible to, the United States.¹ Removal, formally referred to as deportation, requires the federal government to charge an individual with specific statutory violations under the INA and to prove those charges during proceedings before an immigration judge. Inadmissible aliens are aliens who are attempting to obtain entry into the United States or aliens who are in the United States and are seeking to change their legal status to permanent resident status.

"Aliens" include "any person, not a citizen or national of the United States."² Aliens are of three types: immigrants who are lawful permanent residents, commonly referred to as "green card" holders; non-immigrants who have temporary legal status, for example, visitors, students, and non-immigrant workers; and illegal aliens, individuals who either entered the country illegally or who entered the country legally but have remained beyond an authorized temporary stay.³

Citing data released in the United States Census Bureau's American Community Survey Hispanic report, the *Delaware News Journal* reported in February 2007, that Hispanics make up 5.9 percent of Delaware's population, or about 50,000 residents.⁴ The report, based on 2004 data, shows a 23 percent increase since 2000. The Census Bureau also reported Delaware's Asian population increased from about 2 percent to 2.8 percent between 2000 and 2004.⁵

Many of Delaware's foreign-born residents — both those with a legal status and those without — have U.S. citizen children, are married to a U.S. citizen, or have other immediate U.S. citizen family members. A state criminal conviction, even for what appears to be a minor offense, can trigger severe federal immigration consequences for an alien's entire family. In some cases, the immigration consequence of an alien's state criminal conviction far outweighs the state criminal punishment imposed. A Delaware misdemeanor theft conviction, for example, can make an alien removable or inadmissible. Criminal defense strategies, therefore, should include careful evaluation of the immigration consequences. Defense attorneys should seek to inform judges and prosecutors of the likely consequences of specific convictions. For a legal permanent resident, what appears to be a minor state conviction can result in a life-long sentence.

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1. 8 U.S.C. § 1182(a)(2).

2. *Id.* § 1101(a)(3).

3. *Id.* § 1101(a)(15)(A)-(V).

4. Summer Harlow, *Immigrants change the face of Delaware*, DELAWARE NEWS JOURNAL, Feb. 17, 2007, available at <http://www.delawareonline.com/article/20070217/NEWS/702170313/1006>.

5. Both survey reports referred to in the News Journal article are available in PDF-form on the United States Census Bureau website: www.census.gov.

I. What Constitutes a Conviction?

A conviction for federal immigration purposes is a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea, and/or admission of facts warranting guilt and the imposition of some type of penalty.⁶ A juvenile court disposition, however, is not a conviction for immigration purposes.⁷ Delaware's probation before judgment ("PBJ") provides a means for certain first offenders to avoid having a conviction entered against him or her. However, a PBJ would be a conviction for purposes of the INA if there is an admission of guilt and even a minor penalty is imposed.⁸

II. Types of Conviction that Trigger Immigration Consequences

The INA lists several categories of crimes for which a conviction can place an alien at risk of either removal or inadmissibility, including aggravated felonies,⁹ Controlled Substance Offenses,¹⁰ and Crimes Involving Moral Turpitude.¹¹

An aggravated felony is defined in the INA by reference to a list of twenty-one categories of criminal offenses.¹² Any offense described within that definition, "whether in violation of Federal or State law," is an aggravated felony.¹³ An alien convicted of an aggravated felony is ineligible for most forms of relief from removal; a conviction, therefore, could trigger automatic deportation without the usual rights of appeal and would further result in a permanent bar against returning to the United States.

However, for immigration purposes a crime that is not a felony under Delaware criminal law could be considered a felony for purposes of an alien's immigration status. For example in Delaware, theft is a class A misdemeanor unless the value of the property received, retained, or disposed of is \$1,000 or greater.¹⁴ The sentence for a class A misdemeanor may include one-year incarceration at Level V.¹⁵ A commonly ordered Delaware misdemeanor theft sentence includes a one-year sentence, suspended for all but a matter of days or months. Such a conviction and sentence would be considered an aggravated felony, under section 101(a)(43)(G) of the INA: an "aggravated felony" is "a theft offense (including receipt of

6. 8 U.S.C. § 1182(a)(48).

7. Matter of Devison, 22 I. & N. Dec. 1362, 1373 (B.I.A. 2000); Matter of Ramirez-Rivero, 18 I. & N. Dec. 135 (B.I.A. 1981).

8. DEL. CODE ANN. tit. 11, § 4218.

9. 8 U.S.C. § 1227(a)(2)(iii).

10. *Id.* § 1227(B).

11. *Id.* § 1227(a)(2)(A)(i).

12. See, e.g., *id.* § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"); § 1101(a)(43)(F) ("a crime of violence ... for which the term of imprisonment [is] at least one year"); § 1101(a)(43) ("a theft offense ... or burglary offense for which the term of imprisonment [is] at least one year").

13. *Id.* § 1101(a)(43).

14. DEL. CODE ANN. tit. 11, §§ 4205(b)(7); § 841; § 841(c)(1).

15. *Id.* § 4206(a).

stolen property) or burglary offense for which the term of imprisonment is at least one year.” The one-year determination is governed by the alien’s actual sentence, not, for example, a suspended sentence.¹⁶ Therefore, a Delaware misdemeanor theft conviction with a 364-day sentence avoids triggering the INA’s aggravated felony definition.

Even if a theft offense is not an aggravated felony (because, for example, the term of imprisonment imposed is less than one year), it could still be considered a crime involving moral turpitude under the INA.¹⁷ Any alien, including a lawful permanent resident, who is convicted of a crime involving moral turpitude, committed *within five years of admission*, and is convicted of a crime for which a sentence of one year or longer *may* be imposed (even if the sentence imposed is less than one year) is removable under the INA.¹⁸

It should be noted that the United States government often charges an alien as being removable under several different sections of the INA, even though only one crime occurred. As described above, crimes such as theft can be both a removable offense and an inadmissible offense in certain situations.

III. Crimes Involving Moral Turpitude

The definition of moral turpitude has been defined by immigration case law and is, as a result, extremely broad. Moral turpitude crimes include fraud, thefts, burglaries, robberies, murder, manslaughter, conspiracy related crimes, and drug trafficking.

Aliens who have multiple convictions involving moral turpitude, not arising out of a single scheme, are both deportable and inadmissible.¹⁹ A single scheme has been defined under immigration law as a situation where an alien did not have any opportunity between the commission of two crimes to reflect or think about the crimes, or the crimes occurred as a result of a single action.²⁰ Two separate misdemeanor convictions can trigger removal proceedings. A single conviction of a moral turpitude crime that provides for a penalty of less than one year will normally not result in removal.

16. *Singh v. Ashcroft*, 383 F.2d 144, 162 (3d Cir. 2004) (citing *U.S. v. Graham*, 169 F.2d 787, 790-91 (3d Cir. 1999)).

17. 8 U.S.C. § 1227(a)(2)(A)(II). Although “moral turpitude” is not defined by statute, the United States Court of Appeals for the Third Circuit affirmed two approaches for defining it in *Partyka v. Attorney General of United States*, 417 F.3d 408, 413 (3d Cir. 2005). The court said moral turpitude includes “conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general.” *Id.*

The court also approved a longstanding test employed by the Board of Immigration Appeals (“BIA”) to determine the existence of moral turpitude in removal proceedings that asks “whether the act is accompanied by a vicious motive or corrupt mind.” *Id.* (internal citations omitted).

In addition, the court approved the BIA’s alternate approach in which moral turpitude is found to inhere in serious crimes committed recklessly, *i.e.*, “with a conscious disregard of a substantial and unjustifiable risk that serious injury or death would follow.” *Id.* at 414.

The court declared that “[u]nder either standard, the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation.” *Id.*

18. 8 U.S.C. § 1101(43)(G).

19. *Id.* § 1182(a)(2)(B).

20. *Matter of Amentia*, 20 I. & N. Dec. 506, 509–10 (B.I.A. 1992) (holding that in order for multiple crimes to be considered a “single scheme” ... there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done”).

IV. Controlled Substance Conviction

Under the INA, a single conviction for any controlled substance triggers inadmissibility.²¹ Specifically, any drug conviction, other than for the personal use of thirty grams or less of marijuana, provides for removal and/or inadmissibility.²² In some cases, a conviction for a second offense of possession may qualify as an aggravated felony depending on the circumstances.

As defined under other aggravated felony convictions, convictions related to drug trafficking provide for removal and inadmissibility. Almost any state or federal drug offense involving the sale, distribution, or manufacture of drugs qualifies as a trafficking offense under the INA, and therefore a conviction mandates removal.²³ Specifically, distribution and possession with intent to distribute and conspiracy to violate the federal Controlled Substance Act are removable offenses.²⁴

Given the interplay of the immigration code and state criminal law, a comprehensive review of possible immigration consequences is required in order to sort all issues resulting from a criminal conviction.

V. Other Common Convictions That Result In Deportation

The INA includes several types of commonly committed crimes that, if convicted, make an alien deportable, including, for example, violations of protective orders, domestic violence, and stalking or child abuse.²⁵ Crimes of violence found in Section 16 of Title 18 of the United States Code committed against a variety of family members, former spouses, or a person with whom the convicted shares a child in common result in deportation.²⁶ Conviction of nearly any firearms offense — sale, purchase, using, owning, possession, or conspiracy thereof — also triggers deportation.²⁷

VI. Waivers And Other Forms Of Relief From Removal

An Immigration Judge decides whether an alien is inadmissible to or removable from the United States.²⁸ The local office of Chief Counsel, Immigration and Customs Enforcement for the United States Department of Homeland Security prosecutes immigration cases. Immigration proceedings are civil proceedings.²⁹

21. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

22. *Id.* §§ 1227(a)(2)(B); § 1182(a)(2)(B); § 1182(a)(2)(B).

23. *Id.* § 1101(43)(B).

24. *Id.* § 1182(a)(2)(A)(ii)(C).

25. *Id.* § 2227(E).

26. *Id.*

27. *Id.* § 1227(C).

28. *Id.* § 1229(a).

29. *Airsides v. Toughness*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”).

If an alien is found to be removable by an immigration judge, the immigration laws in some cases provide opportunities for an alien to seek a waiver that may allow him to remain in, or be admitted to, the United States. Because a conviction of an aggravated felony is an absolute bar to the type of waiver known as Cancellation of Removal,³⁰ and is likely to be a bar to a waiver of inadmissibility,³¹ it is important for criminal practitioners to consider the requirements of cancellation of removal before a plea is accepted. In many cases, even minor adjustments of the nature of the offenses or the length of the sentence for a crime can make all the difference for eligibility.

Cancellation of removal is applicable only in two situations, however. The first is for permanent residents who have resided in the United States for a minimum of seven years, with at least five years in permanent residence status.³² This form of relief also requires establishing that removal of the alien would cause extreme hardship on the alien's family members.³³ This waiver is commonly used for criminal aliens and is available for some felonies that are not aggravated felonies.

Convictions for theft or a violent offense in which the sentence imposed is even one day shy of a year may make an alien eligible for cancellation of removal. Judges and prosecutors in many cases are willing to agree to convictions or sentences that allow for immigration relief.

The second form of cancellation of removal waiver applies to non-permanent residents (i.e., illegal aliens) who have been in the United States for 10 years.³⁴ Proof of "good moral character" is required.³⁵ Because this form of relief is discretionary, virtually any criminal conviction could prevent an Immigration Judge from finding "good moral character" has been demonstrated.³⁶

Note that a conviction for possession of controlled substances cannot be waived unless the conviction is for possession of less than thirty grams of marijuana.³⁷ A waiver is not required for a misdemeanor because it does not qualify as an aggravated felony.

VII. Conclusion

Legal analysis of the potential immigration consequence of a criminal conviction of an alien is a complicated process. It is necessary, however, because a criminal conviction can have dramatic, long lasting consequences for an alien beyond the criminal penalty. Indeed, a state penalty or sentence is, in some cases the least of an alien's worries. By carefully evaluating potential immigration consequences to specific convictions, criminal practitioners may be able to develop a resolution that will allow the alien to avoid removal or to be eligible for a waiver or readmission into the United States.

30. 8 U.S.C. § 1229b.

31. *Id.* § 1229b(a)(3).

32. *Id.* § 1255(A)(b)(1)(B).

33. *Id.* § 1229b(a)(3).

34. *Id.* § 1229b(b)(1).

35. *Id.* § 1229b(b)(B).

36. *Id.* § 1101(f).

37. *Id.* § 1227.

