

Immigration Status: Consequences of Criminal Convictions

State Public Defenders Conference 2006

Erich C. Straub

260 East Highland Avenue, Suite 400

Milwaukee, WI 53202

414-224-8472

erich@straubimmigration.com

Wis. Stat. 971.08(1)(c)

- If you are not a citizen of the U.S.A., you are advised that your plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization under federal law.

Immigration consequences often exceed criminal punishment:

- Lifetime separation from family
- Banishment from home
- Loss of career
- Exile in a “foreign” land
- Return to war, famine, persecution etc. . .

Role of Attorney: Cultural Issues

- Non-citizen often has little or no experience with our legal system
- Civil vs. common law
- For many non-citizens, legal specialization is an unfamiliar concept
- Rumors

Immigration Basics

- Inadmissible v. Deportable
- Immigration Status
 - Lawful Permanent Resident
 - Undocumented
 - Refugee or Asylee
 - Non-immigrant
- Myths – Criminal v. Immigration Law

Inadmissible v. Deportable

- Two distinct legal concepts
- Similar, but not the same crimes will trigger removal
- Grounds of inadmissibility
 - 8 U.S.C. § 1182 (a)(2)
- Grounds of deportation
 - 8 U.S.C. § 1227 (a)(2)

Inadmissible v. Deportable

- Inadmissible – “I hear you knocking, but you can’t come in.”
 - Formerly known as “excludable”
 - Seeking admission to the U.S.
 - Applying for lawful permanent residence
 - Changing from one visa to another
 - Undocumented

Inadmissible v. Deportable

- Deportability – “Its been nice having you, now please leave.”
 - Admitted to U.S.
 - Government wants to deport
 - Includes persons who have overstayed a visa

U.S. Citizenship

- Birth: in U.S. or U.S. Territory
- Acquired: born abroad to U.S. Parent
- Naturalization
- Derived: based on parent's birth in U.S. or naturalization
- **If parent or grandparent was a U.S. citizen, your client may be a U.S. citizen.**

Immigration Status

Lawful Permanent Resident (LPR)

- “Green Card Holder”
- May live and work in the U.S. indefinitely
- Must naturalize to become a U.S. Citizen
- Primary concerns:
 - Deportable
 - Inadmissible if travel abroad
 - Naturalization usually requires 5 years of “good moral character”

Immigration Status

Undocumented or Out-of-Status

- Overstayed visa
- Entered without inspection (EWI)
- Primary concerns:
 - Deportable - remain “under the radar”
 - Inadmissible - preserve future eligibility for LPR or visa

Immigration Status Refugee or Asylee

- Have demonstrated a well-founded fear of persecution based upon race, religion, nationality, social group or political opinion
- Primary concerns:
 - Deportable
 - Inadmissible - preserve future eligibility for LPR
- A broad waiver is available for most crimes, except drug trafficking, in conjunction with application for permanent residence.

Immigration Status

Non-immigrant

- Business traveler, tourist, student or temporary worker
- Primary concerns:
 - Deportable
 - Inadmissible - preserve future eligibility for LPR or other visa

Five Common Myths

Myth One

- I'm not an immigration lawyer, so I don't need to worry about my client's immigration status

Immigration Status

- Don't make assumptions based on:
 - Language/accents
 - Race
 - Ethnicity
 - Religion

Status Questionnaire

- Immigration status
- Family (LPR/citizen)
- Arrests/criminal history
- Admissions
- Departures
- INS/Immigration Court History
- Employment
- Domestic Abuse (VAWA)
- Possible Asylum/Refugee

Timing

- An immigration attorney should be involved at the earliest stage of criminal proceedings:
 - The early bird gets the worm
 - The early criminal defense attorney gets the deal
 - The early immigration attorney avoids deportation

Myth Two

- If I can avoid a felony conviction, then my client will not get deported

Inadmissible Offenses

- Crime involving moral turpitude
 - Unless misdemeanor and imprisonment is no more than six months
 - Unless committed when under 18 YOA and offense/release from custody not within 5 years of application for visa/admission
- Controlled substance offense
- Two or more convictions with aggregate sentence of five years or more
- Drug trafficker – “reason to believe”
- Prostitution
- Money laundering

Deportable Offenses

- Crime involving moral turpitude
 - Felony within 5 years of admission
 - Two or more not in same scheme
- Aggravated felony
- Controlled substance offense
- Firearms offense
- Domestic violence or violation of a protection order

Admission of Offense vs. Conviction

- Inadmissible
 - A conviction is not required
 - Admitting to a CIMT or other criminal ground is sufficient
 - Right to counsel does not apply at a port of entry
- Deportable - conviction is required

Crimes Involving Moral Turpitude

- Can be a misdemeanor or felony
- No statutory definition
- Intent is the key element:
 - Defraud or steal
 - Cause great bodily harm by intentional or reckless act
 - Commit a “lewd” act (sex offenses)
 - Malice
- Norton Tooby, Criminal Defense of Immigrants

A Misdemeanor can be a Felony

- Sexual abuse of a minor
 - Misdemeanor sexual assault is an aggravated felony if the victim was a minor
 - Even if the relationship was consensual
 - Example - 4th Degree Sexual Assault
 - Guerrero-Perez v. I.N.S., 242 F.3rd 727 (7th Cir. 2001)

Myth Three

- I know what “conviction” means under criminal law, so it must be the same for immigration law

Conviction under Immigration Law

- 8 U.S.C. § 1101(a)(48)(A)
 - Judge or jury finds guilt; or
 - Plea of guilty or no contest; or
 - Admission of sufficient facts to warrant a finding of guilt; **and**
 - Some form of punishment, penalty, or restraint on liberty
- Juvenile adjudications **do not** count

How would you avoid a conviction?

Possible Dispositions

- Deferred prosecution agreement w/ plea
- Deferred prosecution w/ admission
- Expungement
- Diversion to juvenile court
- Dismissal and “read-in”
- Amendment to ordinance violation

Ordinance Violations

In re Eslamizar, 23 I&N Dec. 684 (BIA 2004)

– Oregon “violation” does not provide the constitutional safeguards of a criminal conviction:

- No proof beyond a reasonable doubt
- No jury trial
- No counsel at public expense

The Record of Conviction in Immigration Court

- Complaint, information or indictment
- Plea hearing
- Verdict
- Judgment of Conviction
- Sentencing hearing

The Record of Conviction in Immigration Court

- Factual basis for plea
 - Never, ever perfunctorily stipulate to the facts contained in the criminal complaint
 - Always submit a written factual basis for the plea that has been crafted in conjunction with immigration counsel and stipulated to by the state

The Record of Conviction in Immigration Court

- Judicial recommendations against deportation (JRAD) by the sentencing court will not help your client unless prior to 1990.
- Discussion of the avoidance of immigration consequences on the record should be avoided, if possible.
- **Carefully manage your record – generally the less the immigration judge knows, the better.**

Myth Four

- “Sentence of imprisonment” is the same as the amount of jail time served by the client

Sentence under Immigration Law

- 8 U.S.C. § 1101(a)(48)(B)
- “. . . incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

Aggravated Felony

Imprisonment - more than 364 days

- Crime of violence
- Theft
- Receipt of stolen property
- Burglary
- Passport/Document Fraud
- Commercial bribery
- Counterfeiting
- Forgery
- Trafficking in vehicles w/ altered VIN
- Obstruction of justice
- Perjury or subornation of perjury
- Bribery of a witness

How would you avoid
365 days of
incarceration?

Sentences

- Problematic
 - Imposed and stayed
 - Condition of probation
 - Revocation of probation or parole

Myth Five

- I know this conviction could get me deported, but if I take this deal I can avoid jail now, and then later I can ask the Immigration Judge to let me stay

Other Effects

- Will client be subject to mandatory detention?
 - 8 U.S.C. § 1226a
 - Most crimes triggering removal will result in mandatory detention

Other Effects

- Will conviction preclude relief in Immigration Court?
 - Cancellation of Removal
 - Aggravated Felony Bar
 - Stop Time Rule

Hypotheticals

Drugs, Domestic Violence
& Drunk Driving

Drugs

- Inadmissible
 - Any controlled substance conviction, but waiver if:
 - Simple possession
 - Single conviction
 - 30 grams or less of marijuana
 - Must show that denial of admission will result in extreme hardship to spouse, parent or son or daughter who is a citizen or LPR
 - Drug abuser or addict
 - Drug trafficker – “reason to believe”

Drugs

- Deportable
 - Any controlled substance conviction, except:
 - Simple possession
 - Single conviction
 - 30 grams or less of marijuana
 - Drug abuser or addict
 - Conviction of drug trafficking – aggravated felony

Drugs - Hypothetical

- Bob Marley is from Jamaica and has been a lawful permanent resident for 8 years. Bob has a gathering with his friends that draws the attention of the local police. He consents to a search of his apartment, where police find the following in three different areas:
 - 1 small marijuana plant in a pot in the kitchen that weighs 28 grams
 - 15 corner cut baggies of marijuana totaling 14.2 grams found floating in the toilet bowl
 - 10 corner cut baggies of cocaine totaling 9.7 grams found stuffed between the cushions of a couch

Drugs - Hypothetical

- There are about 30 people in Bob's small apartment scattered in every room. The police announced that if no one claims the drugs, then Bob takes the entire rap. No one talks, and Bob gets charged with the following:
 - Manufacture/delivery of marijuana
 - Possession of marijuana with intent to deliver
 - Possession of cocaine with intent to deliver

Drugs - Hypothetical

- The offer:
 - Plea to possession with intent to deliver marijuana and simple possession of cocaine
 - Analysis:
 - POCS w/ intent – aggravated felony and controlled substance violation
 - Possession of cocaine – controlled substance violation
 - Deportable
 - Aggravated felony
 - Controlled substance violation

Drugs - Hypothetical

- The counteroffer
 - Defense – simple possession of marijuana, 28 grams
 - Prosecutor – simple possession of marijuana and cocaine. “That’s my final offer!”
- Client will be eligible for cancellation of removal
- What if Bob had only been a LPR for 4 years?
- What if Bob is undocumented?

Domestic Violence

- Statute - 8 U.S.C. § 1227(a)(2)(E)
 - Domestic violence
 - Stalking
 - Child abuse, neglect or abandonment
 - Violation of a protection order

Domestic Violence

- Only convictions after “lawful admission”
- Only convictions after 9/30/1996
- DV battery in WI may not trigger deportation under 8 U.S.C. § 1227(a)(2)(E)
- DV battery in WI is probably a CIMT

Domestic Violence

- Crime of Violence – 18 U.S.C. § 16
 - Subsection (a)
 - Use, attempted use, or threatened use of physical force against the person or property of another
 - Subsection (b)
 - Substantial risk that physical force against the person or property of another
 - Felony

Domestic Violence

- Domestic violence victim:
 - Current or former spouse
 - Person who shares child in common
 - Cohabitant or former cohabitant as spouse
 - Similarly situated to spouse in jurisdiction
 - Any person protected under DV laws of jurisdiction

Domestic Violence

- Wis. Stat. § 968.075(1)(a):
 - Spouse or former spouse
 - Adult with whom the person resides or formerly resided
 - Adult with whom the person has a child in common

Domestic Violence

- Strategies:
 - Avoid pleading to a crime of violence
 - Purge the record of reference to DV victim
 - Charge on another victim not on the DV list
 - Victims often will be opposed to deportation

Domestic Violence

- Protection order – violates the “portion” of the order that protects against:
 - Credible threats of violence
 - Repeated harassment
 - Bodily injury

Domestic Violence - Hypothetical

- Attila the Hun is from Mongolia and has been an LPR for 6 years. Attila always drinks heavily to put himself in the mood for war. After one night of pillaging, he returns home to find that his U.S. citizen wife has scattered all of his clothes across the front lawn because she is fed up with his constant parade of concubines. Attila and his wife begin a shouting match that wakes up most of the neighborhood. Several neighbors attempt to intercede, and a brawl erupts. Attila leaves the scene when the police are called, but returns about 45 minutes later, just in time to be arrested.

Domestic Violence - Hypothetical

- Attila is arrested and charged with DV battery, disorderly conduct, 4 counts of simple battery and obstructing for giving a false name to the officers. The basis for the disorderly conduct is the following statement to his wife: “My marauding armies will crush you, you old battle axe!” Attila, being the braggart that he is, makes a full confession to the police.
- Two months later, you interview the wife in preparation for trial. She tells you that she really loves Attila and he is a great father to their little warriors. She says Attila is in counseling and is really starting to get in touch with his inner child.

Domestic Violence - Hypothetical

- The offer:
 - Plea to DV battery, simple battery and resisting an officer. 14 months jail with Huber release for pillaging.
 - Analysis:
 - DV battery – domestic violence crime and CIMT
 - Simple battery – no immigration issue
 - Resisting an officer – CIMT
 - Deportable
 - For domestic violence crime
 - Two or more CIMTs

Domestic Violence - Hypothetical

- The counteroffer
 - Defense – 5 counts of disorderly conduct.
 - Prosecutor – “You want a DC, you got it. Plea to the DC, the simple battery and the obstructing. That’s my final offer!”
- Problem – factual basis of the DC is a threat of violence to the wife.

Domestic Violence - Hypothetical

- Strategies:
 - Avoid pleading to a crime of violence
 - Purge the record of reference to DV victim
 - Charge on another victim not on the DV list
 - Property instead of people

Domestic Violence - Hypothetical

- Sentencing:
 - DC/3 months jail
 - Battery/3 months jail
 - Obstructing/9 months jail
- Not deportable
- What happens if Attila decides to take a short trip to visit mom back in Mongolia?
 - Inadmissible upon return
 - Ineligible for Petty Offense Exception
 - Ineligible for cancellation or 212(h) waiver
- What if Attila was undocumented instead of an LPR?

Drunk Driving

- Not a CIMT in WI because no *mens rea*
- January 16, 2004, USCIS memo
 - OWI w/suspended license base on prior OWI
 - OWI w/ personal injury or death
 - OWI felony or where incarceration is imposed
 - 2 or more arrests or convictions for alcohol related driving within past 2 years
 - 3 or more where one arrest or conviction was within past 3 years
- Inadmissible based on mental disorder alcohol abuse or dependence

Drunk Driving

- Possible changes in the law
 - Senate - third offense or greater is an aggravated felony
 - House – deportable:
 - Person unlawfully present
 - Convicted of drunk driving, or
 - Refusal to take test

Gangs

- Both the Senate and House bills
 - Deportable and inadmissible
 - Gang related activity
 - Conviction not necessary
 - “Reason to believe” standard of evidence