



# Representing Non-citizen Clients in Criminal Court

John Sesini, Grzeca Law Group, S.C., October 16, 2012

# Introduction

---

- Non-citizen clients may be subject to detention and removal from US following convictions of even relatively minor criminal offenses
- Even non-citizens who have some claim to lawful status may be made permanently ineligible upon conviction or even admission of commission of certain crimes
- After *Padilla*, defense lawyers have an duty to investigate and advise regarding potential immigration consequences of a criminal case



# Representing Non-citizens

---

- IMPORTANT DETERMINATIONS
  - WHAT IMMIGRATION STATUS (if any)
  - WHEN S/HE FIRST ARRIVED TO US
  - PAST CRIMINAL CONVICTIONS
  - ANY FAMILY IN THE US WHO HAVE LEGAL STATUS
    - US citizen or LPR family members of a non-citizen client can petition for the client to become a LPR



# Determinations

---

## ➤ STATUS

- **US CITIZEN:** if your client is a US citizen s/he will not be subject to removal from the country, even if s/he was born outside the US and immigrated to this country. All who are not US citizens, however, may be subject to removal and other immigration consequences even if they are here lawfully and have been for decades. Generally, the client is a US citizen if s/he was
  - Born in US, Puerto Rico, US Virgin Islands, Guam or American Samoa and Swains Island, OR
  - Born outside US but “acquired” US citizenship automatically through birth to US citizen parent(s), OR
  - Born outside US but “derived” US citizenship during childhood through naturalization of parent(s) as US citizen before the client reached age 16, 18 or 21 depending on the law in effect at the time, OR
  - Born outside the US but naturalized as a US citizen, either by
    - Client’s own application as an adult OR
    - During childhood by application of a U.S. citizen parent (“LPR”)
- **LPR: Legal Permanent Resident** – have been lawfully admitted to the US to live and work permanently. May apply to become US citizens after 5 years, 3 years if obtained LPR status through marriage and are still married.
- **REFUGEE/ ASYLEE:** Admitted to / allowed to remain in the US due to threat of persecution in home country.

---

## ➤ NO STATUS

# WHAT CONSTITUTES A CONVICTION FOR IMMIGRATION LAW PURPOSES

---

- **WHAT IS A CONVICTION FOR IMMIGRATION PURPOSES DIFFERS FROM CONVICTION FOR STATE PURPOSES:** dispositions that result in the dismissal of all criminal charges under state law still may be considered a conviction for immigration purposes
  - **CONVICTION FOR FEDERAL PURPOSES: [SOME FINDING, PLEA OR ADMISSION OF GUILT] + [PUNISHMENT, PENALTY OR RESTRAINT IMPOSED ON THE DEFENDANT]**
  - **STATE REHABILITATIVE RELIEF** or other measures imposed which have the effect of eliminating a plea or conviction in state court will not have the effect of eliminating the conviction for immigration purposes
  - **VACATED OR WITHDRAWN PLEAS OR CONVICTIONS:**
    - **VACATED PLEA**
      - State rehabilitative relief that permits withdrawal of a plea based on completion of probation conditions constitutes a conviction for immigration purposes if the client has entered a plea (even if the plea has not been accepted)
        - Exception for a first offense involving certain minor drug offenses
    - **VACATED CONVICTION**
      - Conviction is considered eliminated where a state court vacates a judgment of conviction for cause (based on some legal defect)
      - An order vacating a conviction for rehabilitative, humanitarian or immigration purposes will not be honored
    - **DPA**s –Hinges on whether they are post or pre –plea
      - If the client has entered a plea (or any admission of guilt), even if the charges are dismissed upon completion of rehabilitation → this is likely a conviction for immigration purposes
      - Noncitizens who have prior convictions and enter a guilty plea on a DPA may foreclose any possible form of relief



# WHAT CONSTITUTES A CONVICTION FOR IMMIGRATION LAW PURPOSES CONT'D

---

## ➤ **JUVENILE DELINQUENCY**

- An adjudication in juvenile delinquency proceedings does not constitute a conviction for immigration purposes, regardless of the nature of the offense
- Treatment programs which are sufficiently analogous to juvenile delinquency proceedings will not be convictions

## ➤ **EXPUNGEMENTS**

- State court expungements under rehabilitative statutes are not considered to ameliorate the immigration consequences of a conviction

## ➤ **INFRACTIONS**

- Minor offenses that are handled in non-conventional criminal proceedings and that do not require usual constitutional protections are not convictions for immigration purposes
- 



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS

---

- **DEPORTABLE OFFENSES:** These will serve to deport a lawfully admitted client
  - **INA § 237 (a)(1)(A) /8 USC § 1227(a)(1)(A):** Deportable aliens – any alien in and admitted to US shall be removed if the alien is with one or more of the following classes:
    - Inadmissible at time of entry or of adjustment of status or violates status
    - Criminal Offenses
      - Aggravated Felonies (see below)
      - Crime Involving Moral Turpitude
      - Controlled Substances
      - Certain Firearm Offenses
      - Crimes of DV, stalking, or violation of protection order
      - Human Trafficking
      - High Speed Flight
      - Failure to register as a sex offender
- 



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

- **AGGRAVATED FELONY:** Any crime of violence, theft or burglary offense or obstruction of justice offense for which an individual gets a prison sentence of one year or more – includes misdemeanors and does not include all felonies
  - **INA 101(a)(43):** the term aggravated felony means:
    - Murder, rape or sexual abuse of a minor
    - Controlled substance trafficking
    - Firearm trafficking
    - Crime of violence + prison sentence of 1 year
    - Prostitution business
    - National security / obstruction of justice offenses
    - Fraud, deceit or tax evasion in which loss to the victim exceeds \$10,000
    - Alien smuggling
    - Commercial bribery, counterfeiting + prison sentence of 1 year or more
    - Failure to appear before court on a felony subject to 2 years prison sentence
    - attempt or conspiracy to commit one of these offenses



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

- **INADMISSIBLE OFFENSES**: These will serve to bar entry or re-entry to any non-citizen and also will prevent noncitizens from becoming LPRs
  - **INA 212(a)**
  - Conviction or admitted commission **CONTROLLED SUBSTANCE OFFENSE**- felony or misdemeanor
    - Government knowledge or reason to believe that the individual is an illicit trafficker or knowing aider, abettor, assister, conspirator or colluder with others in the trafficking of a controlled substance is sufficient
  - Conviction or admitted commission of a **CRIME INVOLVING MORAL TURPITUDE**- felony or misdemeanor
    - **\*\*PETTY OFFENSE EXCEPTION**: if no prior CIMT and the offenses is not subject to a potential prison sentence in excess of 1 year and does not receive an actual prison sentence in excess of 6 months
  - Conviction of **TWO OR MORE OFFENSES OF ANY TYPE WITH AN AGGREGATE SENTENCE TO IMPRISONMENT OF AT LEAST FIVE YEARS**



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

## ➤ INADMISSIBLE OFFENSES CONT'D

### ➤ **PROSTITUTION AND COMMERCIALIZED VICE**

- Government knowledge or reason to believe that the individual has been involved with prostitution is sufficient

### ➤ **TRAFFICKING IN PERSONS**

- Government knowledge or reason to believe that the individual has been a knowing aider, abettor, assister, conspirator or colluder with certain traffickers in severe forms of trafficking in persons is sufficient

### ➤ **MONEY LAUNDERING**

- Government knowledge or reason to believe that the individual has been a knowing aider, abettor, assister, conspirator or colluder with others in money laundering

### ➤ Disposition or record of criminal case that supports a federal government charge that the client falls within one of various other crime-related inadmissibility grounds that do not require a conviction or admission, including

- CRIMINAL ACTIVITY THAT ENDANGERS PUBLIC SAFETY OR NATIONAL SECURITY
  - DRUG TRAFFICKING, ABUSE OR ADDICTION
  - IMMIGRATION FRAUD
  - FALSELY CLAIMING CITIZENSHIP
  - ALIEN SMUGGLING
  - DOCUMENT FRAUD
  - UNLAWFUL VOTING
- 



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

- **PROCEDURAL CONSEQUENCE OF A DISPOSITION IN A CRIMINAL CASE THAT TRIGGERS DEPORTABILITY/ INADMISSIBILITY**
  - Client will be subject to a DHS detainer on the penal custodian
  - If not subject to imprisonment, client will be subject to immediate DHS arrest and detention
  - Removal proceedings will then take place soon after, either in the penal institution where client is serving the sentence or in the DHS detention facility – generally take place before the end of the state incarceration
  - DHS will remove the client from the US within 90 days of any final order of removal (if incarcerated the 90 day period begins on the day the client completes criminal imprisonment)
- ▶ ➤ DHS will retain the client in custody during the 90 day period

---

**IF YOU CANNOT AVOID INADMISSIBILITY OR  
DEPORTABILITY GROUND OFFENSES, THE  
CLIENT MAY STILL BE ABLE TO AVOID  
REMOVAL BASED ON A CLAIM FOR “RELIEF  
FROM REMOVAL” OR A WAIVER**



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

## ➤ RELIEF FROM REMOVAL

### ➤ CANCELLATION OF REMOVAL

#### ➤ LPR CANCELLATION (EOIR 42A)

- Eligibility:
  - LPR status for 5 years
  - Resided in US for 7 years
- Criminal Dispositions that will bar eligibility:
  - Aggravated Felony
  - Any Offense of Inadmissibility committed within the first 7 years of residence in the US

#### ➤ NON-LPR CANCELLATION (EOIR 42B)

- Eligibility:
    - Physical presence in the US for 10 years
    - Good moral character
    - No inadmissibility or deportability convictions
    - Removal would result in exceptional and extremely unusual hardship to US citizen or LPR spouse, parent or child
  - Ineligible if
    - Aggravated Felony conviction
    - Previously granted Cancellation
    - Crime of Moral Turpitude conviction unless “petty offense” exception
    - Conviction of two offenses with an aggregate sentence of 5 years or more
    - Convicted of drug, firearms, sex or certain other offenses
- 



# Deferred Action for Childhood Arrivals (DACA)

---

## ➤ Who qualifies:

- Those who arrived in the United States under the age of sixteen
- Have five years of continuous residence before June 15, 2012 and been physically present on that date
- Currently be in school, graduated from high school, have obtained a GED, or are honorably discharged veteran of the US armed forces
- Not be above the age of thirty-one on June 15, 2012

## ➤ Criminal Bars

- Convicted of a felony
  - “Significant misdemeanor” offense
  - Three or more “misdemeanor” offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct
  - Threat to national security or public safety
- 



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

## ➤ **WITHHOLDING OF REMOVAL**

- This will prevent removal if the client can establish a “clear probability of persecution” in the country of removal
- Criminal Dispositions Which Bar Eligibility
  - Aggravated felony
  - Felonies with an aggregate sentence of imprisonment of at least 5 years

## ➤ **RELIEF UNDER CONVENTION AGAINST TORTURE:** If the client can show that s/he may be tortured if returned to his/her country of removal, s/he may be able to avoid removal by applying for relief under the UN Convention Against Torture.

- **Withholding of Removal under CAT:** particularly serious crimes bar eligibility
  - **Deferral of Removal under CAT:** no criminal bars apply to this. However, this is only temporary and, although it prevents imminent removal, it does not necessarily mean that the client will be released from DHS detention.
- 



# IMMIGRATION CONSEQUENCES FROM CRIMINAL DISPOSITIONS CONT'D

---

- **209(c) WAIVER FOR ASYLEES AND REFUGEES** who want to avoid criminal grounds of inadmissibility. They can use 209(c) to waive certain grounds of criminal inadmissibility that would prevent their entry/ re-entry into the United States or their ability to become a LPR

