Immigration Basics for Defense Attorneys

Case Law Update

- No advice given at all
  - *Padilla v. Kentucky*
  - *State v. Mendez*

- Compare to *State v. Shata* and *State v. Ortiz-Mondragon*

Standard of Practice

- Ask questions to determine if your clients are citizens
- If they aren't, you need to give them advice about the consequences of any convictions
- We can do better than telling clients that they could be deported
- If you don't know what advice to give, fill out the immigration checklist and reach out to me or another immigration attorney

Possible Immigration Statuses

- Non-immigrant visa
- U, T, and S nonimmigrant status
- Refugee / asylee
- Temporary Protected Status (TPS)
- Deferred Action Status
- Lawful Permanent Resident (LPR)
- Entered Without Inspection (EWI)
- Overstay time authorized on visa
- Deferred Action for Childhood Arrivals (DACA)

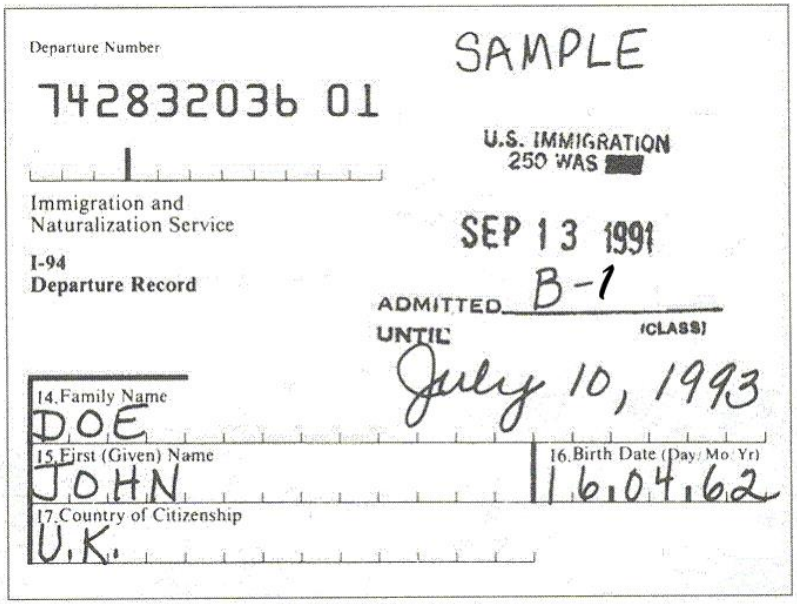
Non-immigrant visas

- Allow a person to come into and stay in the US for a specific period of time only
- If a person stays longer than authorized, his presence in the US is illegal > overstay
- Examples:
  - Tourist = B1/B2
  - Student = F1/F2
  - Exchange visitor = J1/J2

Proof of Non-Immigrant Status

VISA
UNITED STATES OF AMERICA
Issuing Post Name
CA/EX/CSD LAB
Control Number
20020515810001
Surname
TRAVELER
Given Name
HAPPY
Visa Type /Class
R B1/B2
Passport Number
123456789
Sex
F
Birth Date
01JAN1980
Nationality
MEX
Entries
M
Issue Date
20FEB2002
Expiration Date
19FEB2012
1000
Annotation
00000000
VNMEXTRAVELER<<HAPPY<<<<<<<<<<<<<<<<<<<<<<<<<<</</

Proof of Non-Immigrant Status


Departure Number

SAMPLE

742832036 01

U.S. IMMIGRATION
250 WAS

Immigration and
Naturalization Service

I-94
Departure Record

SEP 13 1991

ADMITTED B-1
(CLASS)

UNTIL July 10, 1993

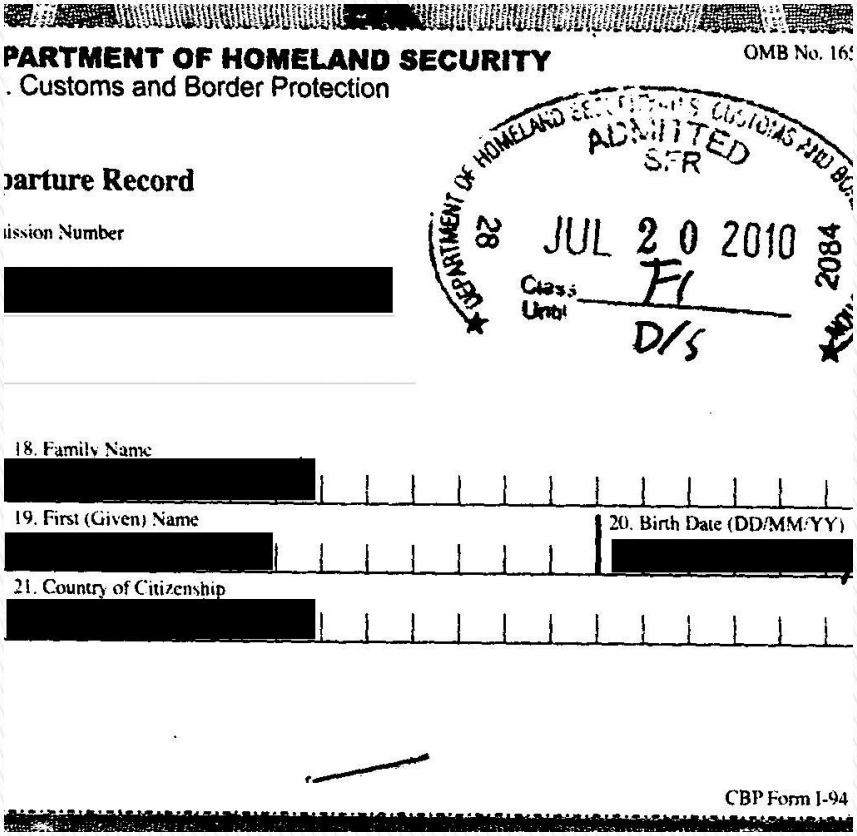
14. Family Name
DOE

15. First (Given) Name
JOHN

16. Birth Date (Day/Mo/Yr)
16.04.62

17. Country of Citizenship
U.K.

I-94 Arrival/Departure Record


PARTMENT OF HOMELAND SECURITY
. Customs and Border Protection

OMB No. 16

DEPARTMENT OF HOMELAND SECURITY CUSTOMS AND BO
ADMITTED
SFR
JUL 2 0 2010
28
2084

parture Record

ission Number

[redacted]

Class F1
Until D/S

18. Family Name
[redacted]

19. First (Given) Name
[redacted]

20. Birth Date (DD/MM/YY)
[redacted]

21. Country of Citizenship
[redacted]

CBP Form I-94

I-94: specific exit date

I-94: "duration of stay"

U, T, and S Non-Immigrant Status

- U Visa: victim of crimes who assisted law enforcement with the investigation
- T Visa: victim of human trafficking
- S Visa: "snitch" visa for defendants who have given crucial information to law enforcement
  - **Note: USCIS classifies these visas as non-immigrant visas, but they are like immigrant visas because recipients of U, T, and S visas can apply to become permanent residents

Proof of U/T Visa

THE UNITED STATES OF AMERICA

RECEIPT NUMBER		CASE TYPE
EAC- [redacted]		
RECEIPT DATE October 12, 2010	PRIORITY DATE	PETITIONER [redacted]
NOTICE DATE April 6, 2011	PAGE 1 of 1	BENEFICIARY A200 924 059 [redacted]

[redacted]

Notice Type: Approval Notice
Valid from

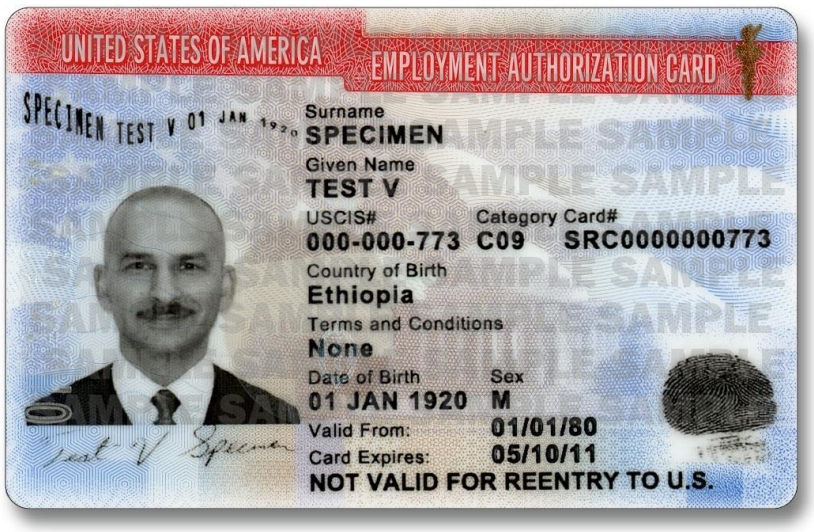
The above petition has been approved, and forwarded to the listed consulate. Please contact the consulate with any questions about visa issuance, or if you would now like them to forward the petition to a different consulate. The petitioner can also file Form I-824, *Application for Action on an Approved Application or Petition*, with this office to request that we notify another consulate of the petition approval for visa processing purposes. THIS FORM IS NOT A VISA AND MAY NOT BE USED IN PLACE OF A VISA.

When the person this petition is for enters the U.S. based on this visa, he or she will be admitted for ninety (90) days in order to marry the petitioner, and based on that marriage file for adjustment to permanent resident status on Form I-485. The form to apply for adjustment can be obtained at any local USCIS office or USCIS forms center. Please attach a copy of this notice to the adjustment application when you file it.

If the petitioner and the fiance(e) do not marry within these 90 days, status will expire, and he or she will be in violation of the Immigration and Nationality Act if he or she does not depart. An extension cannot be granted. It is requested that the petitioner inform his or her local USCIS office if he or she determines that the marriage will not take place within the 90 day period. Please attach a copy of this notice to any correspondence about this case.

Please see the additional information on the back. You will be notified separately about any other cases you filed.
U.S. CITIZENSHIP & IMMIGRATION SVCS
VERMONT SERVICE CENTER
75 LOWER WELDEN STREET
SAINT ALBANS VT 05479-0001
Customer Service Telephone: (800) 375-5283

Notice of Action
Approval Letter



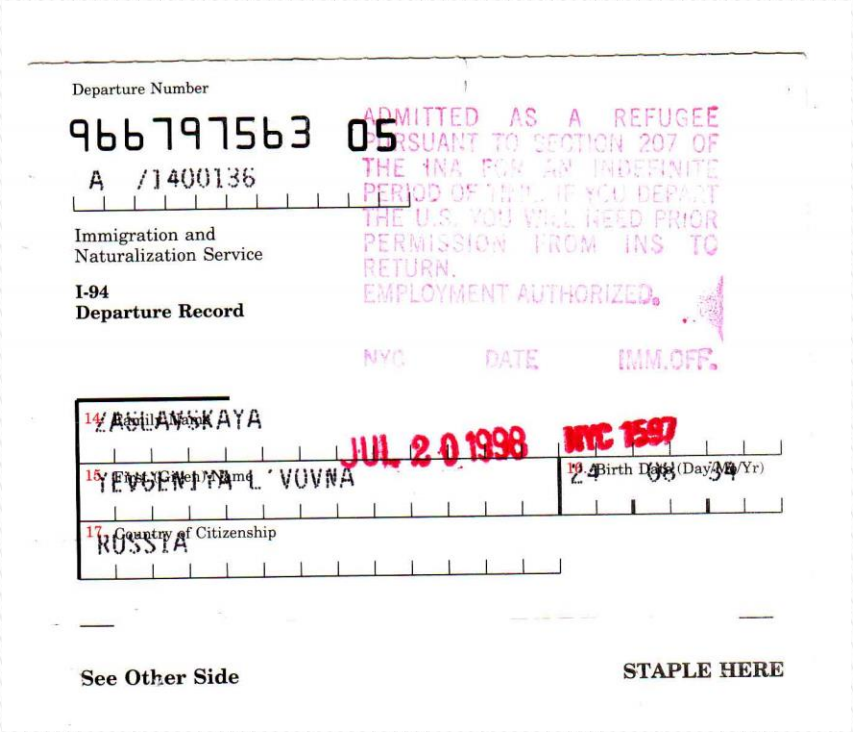
Work Permit

Refugees and Asylees

- Must show a well-founded fear of persecution based upon:
  - Race
  - Religion
  - Nationality
  - Social group
  - Political opinion
- Asylum applicants usually must apply within 1 year of entry
- Refugees enter the U.S. with refugee status

Proof of Asylum/Refugee Status

- I-94, AND
  - Approval letter from asylum office
  - OR
  - Order of Approval from immigration court



Asylum	Refugee

Temporary Protected Status/ Deferred Action Status

- TPS: Temporary safe haven in U.S. based on:
  - Armed conflict
  - Natural disaster
  - Other extraordinary and temporary circumstances

- Deferred Action: temporary stay of removal
  - Prosecutorial discretion
  - Does not grant lawful status (i.e. not a LPR or citizen)
  - Examples: Applicants for Violence Against Women Act Benefits and young people who came to the US as children

Proof of TPS/Deferred Action

THE UNITED STATES OF AMERICA

RECEIPT NUMBER		CASE TYPE
EAC- [redacted]		
RECEIPT DATE: October 12, 2010	PRIORITY DATE	PETITIONER: [redacted]
NOTICE DATE: April 6, 2011	PAGE: 1 of 1	BENEFICIARY: A200 924 059 [redacted]

[redacted]

Notice Type: Approval Notice
Valid from

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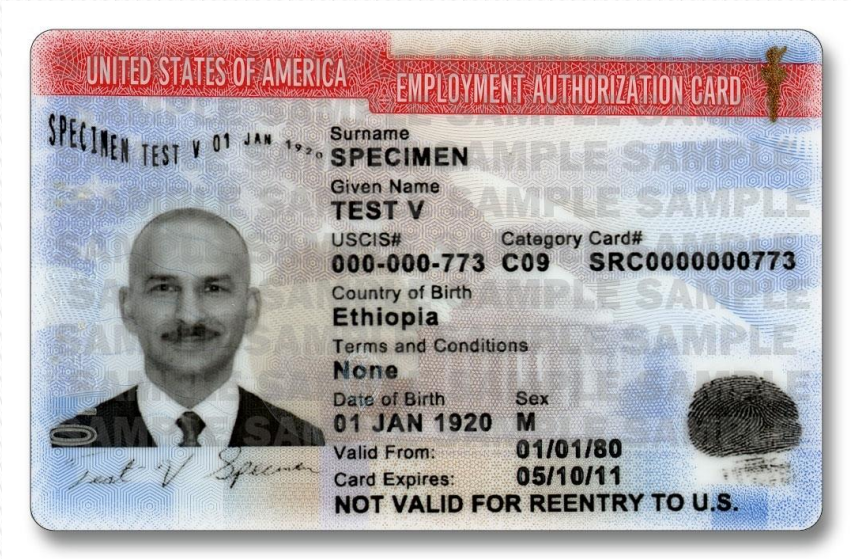

Work Permit

Lawful Permanent Resident (LPR)

- Has a “green card”
- Gets an unrestricted Social Security Number
- Can live in the US indefinitely*
- Can travel outside of the US*
  - *as long as he/she doesn’t become inadmissible or deportable

Proof of Permanent Resident Status

More about “green cards”

- Last 2 years for conditional permanent residents
  - People who become residents through marriage
  - Individual must submit application to remove conditions
  - Failure to apply and remove conditions makes person deportable
- Last 10 years for all other lawful permanent residents (LPR)
  - Even if the card expires, a person does not lose his/her LPR status and become deportable

Immigration Definitions

“Conviction”

- The obvious definitions:
  - The court adjudicated the person guilty after a trial, OR
  - The court entered a formal judgment of guilt against person after a plea

Less obvious definition of "conviction"

- If the court <u>withheld adjudication</u>:
  - The individual was found guilty, entered a plea of guilty/no contest, or admitted sufficient facts to warrant a finding of guilty, AND
  - The judge ordered some form of punishment or restraint on the person's liberty
    - i.e. incarceration, probation, fine, restitution, rehabilitation program, work release or study, community service, deprivation of nonessential activities or privileges

Are “convictions”

- A deferred prosecution agreement (DPA) where adjudication is withheld after a plea and a person must complete certain conditions
  - The only way to avoid the conviction designation is a DPA that does not require an up-front plea

- “Expunged” convictions still count for immigration purposes

Are NOT “convictions”

- Municipal violations in Wisconsin are NOT convictions for admissibility and deportability purposes
- Juvenile adjudications are also NOT convictions
  - BUT a juvenile waived into adult court has a conviction for immigration purposes

Felony v. Misdemeanor

- **Felony**: a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year.
  - Note it is NOT how much time is actually imposed, but how much could be imposed under the statute.
  - So, a misdemeanor conviction with a repeater enhancer (maximum sentence of 2 years prison) would be a felony for immigration purposes

- **Misdemeanor**: a crime for which the maximum term of imprisonment authorized is greater than five days but 1 year or less.

"Significant Misdemeanor"

- Based on category of offense: regardless of the sentence imposed, a conviction for:
  - Domestic violence
  - Sexual abuse/exploitation (i.e. 4th Degree SA)
  - Burglary*
  - Drug Distribution/Trafficking*
  - Unlawful use/possession of a firearm (Ch. 941)
  - OWI (2nd+)

“Significant Misdemeanor”

- Based on length of sentence: any misdemeanor with a sentence of 90+ days (not including time spent in custody on an ICE hold)
  - This includes jail sentences and imposed condition time
  - While immigration officials say they will not count imposed/stayed sentences, probation with a withheld sentence is the safest option

"Sentence" for Immigration Purposes

- "The period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part"

- A "sentence" includes all of the following:
  - Sentence imposed outright
  - Imposed and stayed sentence
  - Condition time imposed outright and imposed/stayed with probation

Analyzing your client’s case

Which set of rules applies?

ICE Removal Priorities

Grounds of Inadmissibility

Grounds of Deportability

Good Moral Character

ICE Removal priorities

- Published November 20, 2014
- Affect clients with no status and LPRs with a deportable conviction
- Are discretionary guidelines, unlike all of the other sets of rules

Removal Priority #1 (Highest)

Individuals who are:

- Suspected of terrorism or espionage
- Deemed a threat to the public safety
- Convicted of an aggravated felony
- Convicted of any felony offense
- Convicted of any offense in which participation in a gang is an element
- 16 yrs or older who intentionally participated in a gang

Removal Priority #2

Individuals who are:

- Convicted of 3 or more misdemeanors that arose out of separate incidents, excluding minor traffic violations
- Convicted of a “significant misdemeanor”
- Determined to have abused their visa or the visa waiver program
- Present unlawfully in the US and unable to show that they have been in the US since January 1, 2014

Removal Priority #3 (Lowest)

Individuals who have been issued a final order of removal on or after January 1, 2014.

This includes situations in which:

- An individual didn't appeal an immigration judge's decision within the time frame
- The Board of Immigration Appeals or Attorney General dismissed/denied the appeal
- An individual was ordered removed *in absentia* after failing to appear for a removal hearing
- An individual didn't leave the US after receiving voluntary departure
- An individual didn't pay a voluntary departure bond within 5 days of being ordered to pay one

Grounds of inadmissibility

- Section 212(a) of Immigration and Nationality Act
- Applies to clients with no status who want to become permanent residents in the future
- Also applies to permanent residents who are returning from travel abroad

Criminal grounds of inadmissibility

1. Conviction for:
   - A crime involving moral turpitude (CIMT), or
   - ANY controlled substance violation

- Conviction for CIMTs and controlled substances includes:
  - A conviction in court
  - An admission to having committed the crime to immigration officials or in court (think plea hearings)
  - An admission to the essential elements of these crimes (i.e. stipulating to a criminal complaint as a factual basis)

Criminal grounds of inadmissibility

2. Convictions for any of the following:
   - Any two or more offenses, AND the total sentence was 5+ years
     - Offenses do not have to be CIMTs
     - Offenses can be part of single scheme
   - Prostitution

Other Grounds of inadmissibility

3. No conviction or admission required:
   - Reason to believe person is involved in drug trafficking
   - Reason to believe person is involved in human trafficking
   - The person has a physical or mental disorder that may or has posed a threat to the public safety (OWIs)
   - The person is a drug abuser or addict
   - The person has asserted immunity from prosecution

Crime Involving Moral Turpitude

- To qualify as a CIMT, the act must involve:
  - reprehensible conduct, and
  - some degree of *scienter*, which may be specific intent, deliberateness, willfulness, or recklessness (not negligence)
- Common CIMTs:
  - Any charge in WI statutes with an "intent" element
  - Theft/fraud/burglary
  - Obstructing an officer
  - Serious crimes against persons
  - Crimes involving domestic violence
  - Failure to Register as a Sex Offender
  - Drug Trafficking

Waivers for certain convictions

- Petty misdemeanor offense exception:
  - Sentence on 1 CIMT is 180 days or less
- Other waivers for grounds of inadmissibility:
  - Other CIMT convictions
  - Convictions for POCS-THC 30 grams or less
- No waiver available:
  - Reason to believe client is a drug trafficker or human trafficker

Criminal grounds of deportability

- Section 237(a)(2) of Immigration and Nationality Act
- Mainly apply to lawful permanent residents
  - Remove an LPRs' lawful status
- Adds another reason to deport someone who is already in the US without status

Criminal grounds of deportability

- Theme: certain CIMTs convictions
  - Conviction for a felony CIMT within 5 years of date of admission (when person became an LPR)
  - Conviction of two or more CIMTs, NOT arising out of a single scheme

Criminal grounds of deportability

- Theme: drugs and guns
  - ANY controlled substance conviction that isn't possession of 30 grams or less of THC
  - Being a drug abuser or addict
  - Conviction for a firearms offense

Criminal grounds of deportability

- Theme: protecting people
  - Conviction involving:
    - domestic violence
    - stalking
    - child abuse, neglect, abandonment
    - violating any kind of protection order
    - human trafficking
    - failure to register as a sex offender

Practice pointer

- Crimes that seem insignificant, but make noncitizens deportable
  - Misdemeanor possession of ANY drug other than 30 grams or less of THC
  - Possession of Drug Paraphernalia
  - ANY offense involving a firearm
    - i.e. Carrying a Concealed Weapon or any offense with "use of dangerous weapon" enhancer when the weapon is a gun
  - 4th Degree Sexual Assault
  - Violation of harassment restraining order (doesn't have to be related to DV)

Criminal grounds of deportability

- Theme: aggravated felony convictions
  - Term of art that describes the most serious immigration classification

Aggravated Felonies

- Murder, rape, sexual abuse of a minor
- Drug trafficking
- Firearms trafficking
- State convictions for offenses that parallel federal firearms offenses
- Kidnapping
- Anything involving child pornography
- Re-entry after an aggravated felony conviction
- Bribery or obstruction justice with sentence of at least 1 year
- Crime of violence with a sentence of at least 1 year
- Theft, burglary, or stolen property conviction with sentence of at least 1 year
- Crime of fraud with loss at least $10,000
- Failure to appear in court for case with charge with at least 2 years exposure
- Failure to report for sentence where exposure for the underlying charge was at least 5 years

Consequences of an aggravated felony

- Mandatory detention
- Automatic deportation*
- No hearing in front of an immigration judge
- Inability to request voluntary departure
- Permanent inadmissibility
- Permanent inability to show good moral character
- Unable to apply for asylum
- If client re-enters US, could be charged federally with the re-entry and face up to 20 years prison

Consequences of an aggravated felony

- *Note on automatic deportation with an AF…
  - Client is presumed deportable with an AF conviction
  - ONLY relief from deportation is Withholding of Removal
  - To receive this, client must establish:
    - 1) he has a credible fear that his life or freedom would be threatened because of his race, religion, nationality, membership in a social group, or political opinion, and
    - 2) he has not been convicted of a particularly serious crime. A conviction is "particularly serious" when the defendant's sentence is at least 5 years
  - It is very difficult to receive Withholding of Removal

Good moral character

- Section 101(f) of Immigration and Nationality Act

- Anyone applying for an immigration benefit has to show general good moral character
- The statutory requirements specifically apply to:
  - Applicants for cancellation of removal for non-permanent residents
  - Naturalization applicants
- Applicants must show that NONE of the following pertained to them during the statutory time period

Good moral character

- Lifetime bar to showing good moral character:
  - Any kind of murder conviction
    - Federal definition of murder at 18 USC 1111 refers to intentional homicide, reckless homicide, and felony murder
    - Knowingly Operating with Suspended License Causing Death is arguably not murder
  - Any aggravated felony conviction

Good moral character

- Theme: convictions for undesirable behavior, including
  - Prostitution
  - CIMTs
  - Any controlled substance, except single possession of 30 grams or less of marijuana
  - Multiple convictions with total sentence of 5 years or more
  - Drug trafficking
  - Two or more gambling offenses
  - Polygamy

Good moral character

- Theme: other indicators of a lack of good moral character that don't require a conviction
  - Served 180 days or more in jail
  - Is a habitual drunkard (think OWI convictions!)
  - Failure to support dependents

General Strategies

1. For permanent residents, try to avoid pleading to something that makes them deportable

1. For clients without status, try to avoid pleading to charges that make them inadmissible or ineligible for future benefits

General Strategies

- To avoid a conviction
  - Negotiate a deferred prosecution agreement with no plea
  - Ask for a municipal citation

General Strategies

- To disclose or not disclose your client's status:
  - Many times you need to disclose in order to avoid serious immigration consequences
  - However, there may be good reasons not to
  - Judges cannot ask you about your client's status during a plea hearing (Wis. Stats. Section 971.06(3)) or whether you advised your client of immigration consequences

Contact Information

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