

# OVERVIEW OF IMMIGRATION LAW RELATING TO CRIMINAL OFFENSES

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Immigration and Customs Enforcement  
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## I. The Law

- The Immigration and Nationality Act
- Title 8 of the Federal Code of Regulations
- Board of Immigration Appeals
- Attorney General Opinions
- 5<sup>th</sup> Circuit Cases
- State Criminal Laws

## II. Definition of Conviction

- INA section 101(a)(48):

(A) “a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”

(B) “Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of 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.

- Deferred adjudication** under article 42.12, section 5 of the Texas Code of Criminal Procedure is a conviction for immigration purposes.

- Harris County **Drug Court** – STAR Program – This appears to be a conviction for immigration purposes, as referral happens post-plea and while the defendant is on probation.

## III. The Initial Encounter

1. Alien is arrested for or convicted of a crime.
2. Jail notifies ICE.
3. ICE lodges a detainer if the alien appears removable.
4. ICE Agent/Officer encounters alien at jail, usually post-conviction. May also encounter through probation.

NOTE: If an alien bonds out of jail and comes into ICE custody before being convicted, the alien may be deported very quickly.

5. ICE Agent determines if alien is subject to removal from the U.S.  
We cannot deport US citizens (born in the US or naturalized).
6. If removable, the Agent prepares:
  - An “A-file” (or locates an existing A-file).
  - I-213. Similar to an offense report.

-A charging instrument in the nature of an indictment.

#### **IV. Methods of Removal**

•Administrative Removal – For non-LPRs with certain criminal convictions categorized as aggravated felonies.

•Reinstatement – For aliens previously deported.

•Expedited Removal – For certain aliens close to the border within a certain time period.

•Immigration Court

-Notice to Appear. An “NTA” is served on alien and filed with Immigration Court.

-Master Calendar. Initial hearing, similar to arraignment.

-Bond hearing. IJ has limited jurisdiction over bond.

- Certain crimes make detention mandatory. When not mandatory, the factors are danger to the community and flight risk.

- “Arriving aliens” cannot seek a bond before the IJ.

- If the alien is not an arriving alien (meaning seeking admission at a port of entry) and he has no criminal convictions, he will likely be bond eligible.

-Removal hearing.

- DHS has the burden of establishing an alien is deportable by clear and convincing evidence. The alien has the burden of showing he is clearly and beyond doubt entitled to be admitted if he is an applicant for admission.

- Similar to Guilt/Innocence.

- Relief hearing – Will the alien, despite being removable, be allowed to remain in the United States or to voluntarily depart?

- Types of relief will be discussed in detail.

-Appeals.

- Board of Immigration Appeals.

- 5<sup>th</sup> Circuit – Petition for Review.

-More About Immigration Court

- Removal proceedings are civil in nature.

- The alien has the right to be represented by counsel, but at no expense to the U.S. Government.

- Removal proceedings can, and often do, extend over a period of several years.

#### **V. Post-Order Obligations**

•When a removal order becomes final, the result is:

- Mandatory detention.

- 90 day removal period.

-Habeas action or release on supervision if continued detention is not allowed as a matter of law after the 90-day removal period or cannot be justified.

## **VI. Crimes for which Aliens may be removed.**

1. Two types of removal grounds for aliens, depending on status in the U.S.:

- Section 212 – Aliens who have not been admitted to U.S.
- Section 237 - Aliens who have been admitted to U.S.

2. Section 212(a)(2). This section covers the criminal grounds of removability for an alien who has not been admitted (EWI) or any other alien seeking admission at the border.

A. § 212(a)(2)(A)(i)(I). Crimes Involving Moral Turpitude.

–Can be a conviction or admits to elements. Includes attempts and conspiracy.

–Examples of CIMTs:

- »Theft
  - »Burglary of a Habitation
  - »Prostitution
  - »Aggravated Assault
  - »Robbery
  - »Forgery
  - »Fraud
  - »Delivery of Controlled Substance
  - »BMV with intent to commit theft
  - »FSRA
  - »Some Family Assaults
  - »Sexual Assault
- Not CIMTS:
- »Child abandonment with intent to return
  - »Gambling offenses
  - »Harassing phone calls
  - »False ID to a Police Officer
  - »UUMV
  - »CAW
  - »DWI
  - »Involuntary Manslaughter

–Crime involving moral turpitude has been defined as an act or omission that is so far contrary to the moral laws, so base or vile as to be contrary to the accepted and customary rule of right and duty between people. Neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. It is more a question of evil intent or corrupt mind. It is morally reprehensible and intrinsically wrong.

–Petty Offense Exception

»CIMT charge will not apply if the maximum penalty possible for the crime of which the alien was convicted (or admitted to committing) did not exceed imprisonment for one year and, if convicted, the alien was not sentenced to a term of imprisonment in excess of six months.

»No felony conviction in Texas will fall into this category.

–Recent case law from the BIA has changed the scope of what can be considered:

•*Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2009).

•*Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

•*It is more important than ever for the DHS to receive the indictment/information, offense report, and any PSI.*

B. § 212(a)(2)(A)(i)(II). Controlled Substances.

–Conviction for a violation of a State, Federal or Foreign country law relating to a controlled substance as defined in § 102 of the **Controlled Substances Act** (21 U.S.C. 802). Must be for a substance found in the Federal Penalty Groups.

–DHS must show what the controlled substance is, so either we must have the indictment showing the substance or the judgment must include a reference to the substance.

C. § 212(a)(2)(B) Multiple Criminal Convictions.

–Requires conviction for two or more offenses whether or not a single trial or a single scheme of misconduct for which the total sentences to confinement were 5 years or more. Not limited to CIMTS. Felony DWI is perfect example.

D. § 212(a)(2)(C) Controlled Substance Traffickers.

–Reason to believe an alien is a controlled substance trafficker (includes aiding and abetting) whether convicted or not.

E. § 212(a)(2)(D) Prostitution and Commercialized Vice.

–Requires at least two prostitution convictions.

F. § 212(a)(2)(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution.

3. Section 237(a)(2). This section covers grounds of removability for those aliens who have been admitted to the U.S. in some type of status. (LPRs, Non-immigrants)

A. § 237(a)(2)(A)(i) – Crimes Involving Moral Turpitude.

–Any alien who: (I) is convicted of a CIMT within 5 years (or 10 years in the case of an alien given LPR status under § 245(j)) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable. This section requires only one CIMT but with condition that possible sentence be one year or longer.

B. § 237(a)(2)(A)(ii) – Multiple Criminal Convictions.

–Requires two or more CIMT convictions not arising out of the same scheme of misconduct, regardless of whether confined and regardless of whether convictions were in a single trial. Can be two Class B misdemeanor CIMTs.

C. § 237(a)(2)(A)(iii) – Aggravated Felony.

–Any alien who, after admission, has been convicted of an aggravated felony as defined at INA sec. 101(a)(43) is removable. There are 21 categories, many concern federal crimes only and the last concerns attempts and conspiracies of the first 20.

–An alien convicted of a crime considered to be an aggravated felony has little relief available.

–EWI convicted of an aggravated felony is not put into removal proceedings. Placed in administrative removal proceedings instead and will not see an Immigration Judge.

–Some selected aggravated felonies:

»101(a)(43)(A) Murder, Rape, Sexual Abuse of a Minor.

No sentence required. Deferred adjudication is sufficient to sustain this charge.

»101(a)(43)(B) Illicit trafficking in a controlled substance. Must be described in sec. 102 of the Controlled Substances Act, including a drug trafficking crime as defined in sec 924 of Title 18, U.S.C. Delivery of Controlled Sub. is best example. Large amounts of Marijuana count only if convicted of Possession with Intent to Deliver. \*Need language in the indictment that states actual delivery if it existed. \*A second conviction for PCS after the first is final is also an Aggravated Felony.

»101(a)(43)(F) Crimes of violence as defined in sec. 16 of Title 18, U.S.C. for which the term of imprisonment is at least one year.

Must be actual sentence of one year, but can be probation. Deferred does not work.

Section 16 has two parts, a and b.

Section 16(a) - an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or, Section 16(b) - any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Crime of Violence requires intentional act, not a reckless act.

Pleadings: “Intentionally, knowingly and recklessly” creates problem because of reckless allegation.

Texas misdemeanor assault with a sentence of one year or less is not a crime of violence. *U.S. v. Villegas –Hernandez*, 468 F.3d 874 (5th Cir. 2006).

(Misdemeanor assault can be committed without force).

Assault with a sentence of more than a year still treated as a crime of violence because of sec. 16(b) definition.

Examples of crimes of violence (one year sentence required):

UUMV

Robbery

Aggravated Assault

Burglary of a Habitation (not California burglary)

Sexual Assault, even if force used is non-physical

Felony Injury to a Child

DWI is **not a crime of violence**. No mens rea.

»101(a)(43)(G) A theft offense including receipt of stolen property or burglary offense for which the term of imprisonment is at least one year.

»101(a)(43)(M) An offense that involves fraud or deceit in which the loss to the victim exceeds \$10,000 or is described in sec. 7201 of the IRS Code of 1986 relating to tax evasion in which the govt. loss exceeds \$10,000.

Insurance fraud under TX Penal Code 35.02 where loss exceeds \$10,000.

*Martinez v. Mukasey*, 519 F.3d 532 (5<sup>th</sup> Cir. 2008).

»101(A)(43)(R) An offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year.

»101(a)(43)(S) An offense relating to obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year. Retaliation is an example (obstruction of justice).

»101(a)(43)(U) An attempt or conspiracy to commit an offense described in this paragraph.

D. § 237(a)(2)(A)(iv) – High speed flight.

– A conviction for a crime related to high speed flight from an immigration check point.

E. § 237(a)(2)(B) – Controlled Substances.

–Any alien who at any time after admission has been convicted of a violation of (or conspiracy or attempt) any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance (as defined by § 102 of the Controlled Substances Act), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

–Drug abusers and addicts. No conviction needed, but almost impossible to prove.

F. § 237(a)(2)(C) – Certain Firearm Offenses.

–Carrying a Weapon, firearm, is most common in state court.

–Important to note on the Judgment and Conviction record that the weapon is a “firearm” or that it is reflected in the information or indictment. If not, ICE cannot sustain charge against alien.

G. § 237(a)(2)(D) – Miscellaneous Crimes.

–Espionage, sabotage, treason, sedition.

H. § 237(a)(2)(E) – Crimes of Domestic Violence, Stalking, or Violation of a Protective Order, Crimes Against Children, and: (i) Domestic Violence, Stalking, and Child Abuse.

–Any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.

–For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in § 16 of title 18, U.S.C.) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the U.S. or any State, Indian tribal government, or unit of local government.

VII. Relief from removal

1. Asylum, Withholding of Removal, Convention Against Torture:

–Even an alien with the most egregious criminal record is eligible to apply for some form of fear-based relief. Aggravated felons cannot seek asylum. Those convicted of “particularly serious crimes” are barred from asylum and withholding. All aliens are eligible to apply for protection under the Convention Against Torture, though it will not given them any permanent lawful status.

2. Adjustment of Status (or Re-adjustment of Status):

–An alien with a USC or LPR relative (such as a spouse, parent or adult child) may petition for an alien using a Form I-130. If approved, the alien may go on to request adjustment of status.

•CIMTs (other than murder) may be waived if hardship is shown to a qualifying relative.

- Drug convictions, other than one for possession of marijuana less than 30 grams, are not waivable.
- There are others limitations to this relief for LPRs.

### 3. Cancellation of Removal for LPRs

- LPR for not less than 5 years (alien is an LPR until a final order of removal)
- Continuously residing in the US for not less than 7 years after admission (certain crimes break residence)
- Not convicted of an aggravated felony

### 4. Cancellation of Removal for Non-Permanent Residents

- 10 years of continuous physical presence (certain crimes break presence)
- Good moral character for the 10 year period before the application
- Not convicted of crime under 212(a)(2), 237(a)(2), or 237(a)(3)
- Exceptional and extremely unusual hardship to an LPR or USC spouse, parent or child.

### 5. Voluntary Departure

### 6. NACARA Suspension/Cancellation – For registered class members and dependants

### 7. 212(c) Waiver – Now repealed but available to certain LPRs for older convictions.

### 8. TPS – A stay of removal.

## **Special Criminal Issues**

•Indictment shows that the defendant “intentionally, knowingly, and recklessly” committed an act.

•Indictment shows that the defendant “intentionally, knowingly, or recklessly” committed an act.

•Fraud offenses: It is important for our purposes to have the amount of the loss in the judgment or the restitution amount in the plea paperwork.

•Vacating Convictions: If there is a problem with the conviction, it will be vital for the motion and/or judgment to state that procedural or substantive problem. If the conviction was vacated for immigration purposes, it will still be valid.

•Reducing / Reforming Sentences: Note that it may be to the alien’s benefit to violate his probation. For example: An alien is convicted of felony assault and is initially sentenced to 1 year, probated. He may benefit from violating his probation if then he is sentenced to actually serve 180 days in jail. He then is not an aggravated felon because he does not have a 1-year sentence to imprisonment.

## DHS Contacts

•If you have questions, please contact any of the following:

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