Impact of Criminal Convictions

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Specific Resources on Criminal and Immigration Law

• Quick Reference Chart of the Immigration Consequences of California Offenses - [www.ilrc.org/criminal.php](http://www.ilrc.org/criminal.php)

• *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws*, legal treatise by ILRC – [www.ilrc.org/publications](http://www.ilrc.org/publications)
Presentation Topics

• Obtaining criminal records;
• Determining whether your client’s conviction has immigration consequences: The ADIR Analysis;
• Determining whether your client has a conviction; and
• Conducting the immigration consequences of crimes analysis.
Immigration Consequences of Crimes: Analyzing Cases

• Step 1 – Obtain Relevant Information About the Criminal Case
• Step 2 – Analyze Client’s Conviction Under Immigration Statutes
Step 1: Gathering Court Documents for Criminal Record

• If you suspect that your client has had any encounter with the criminal justice system, don’t rely on your client’s memory, but get the court documents.
Step 1: Gathering Court Documents for Criminal Record

It is best to get three records:

• *Get a copy of the FBI report for yourself.* Then you will know what DHS or the consulate will see. FBI Identification Record Request.” Form FD-258. Go to [www.fbi.gov](http://www.fbi.gov).

• Get a copy of the state rap sheet because this is the most thorough. In California, this is LiveScan.

• *Get a complete copy of the record from the court where the client was convicted.* You may have to call the court clerk first to get the requirements. We need court documents because FBI reports are often wrong or do not contain enough detail.
Other Tips for Obtaining Your Client’s Criminal History

• Client may refer you to family members who have documentation of criminal history.
• Some courts have criminal history available online.
• Contact client’s Public Defender or former defense attorney.
Step 1: FOIA Requests

- In addition, you can conduct a Freedom of Information Act (FOIA) request in order to obtain your client’s complete immigration file, which will often contain the FBI “rap sheet.”
- It is wise to submit a FOIA request as soon as you begin working with a client.
- Form G-639 at www.uscis.gov. Fast-track processing is available in certain cases and should be utilized if at all possible (otherwise, your request may take many months or years to process).
Step 2: Analyzing Client’s Conviction Under Immigration Statutes

Three ways to which criminal conviction (or conduct) can have immigration consequences:

1. Trigger removal proceedings as ground of inadmissibility or deportability
2. Trigger statutory ineligibility for an immigration benefit – VAWA, Green Card, Naturalization
3. Even if no statutory ineligibility, every criminal conviction will constitute a negative discretionary factor in any application for an immigration benefit.
Noncitizens & Crimes

ALL non-USC’s regardless of immigration status or equities can be removed for even a minor criminal conviction.

Common ways to be placed into removal proceedings based on a conviction:
• Applying for benefit, e.g., AOS, naturalization
• Renewal of green card
• Travel abroad
• Criminal justice system
Step 2: Analyzing Client’s Conviction Under Immigration Statutes

• Figure out what immigration law provisions are relevant to your client’s situation — e.g., 101(f), grounds of inadmissibility or deportability

• Does the client’s conviction actually fall into the category?
  - This is complex analysis and it is recommended that you consult with an expert. Often there are good arguments that a crime does not fall into a category triggering adverse immigration consequences even if it appears that it should.
Step 2 Cont’d: Analyzing Client’s Conviction Under Immigration Statutes

- What potential relief is available?
- Is the person eligible for the relief sought, or barred from relief for some reason?
- Can the person get rid of the conviction and clear up his or her record by expungement or other means? Will DHS accept this?
LESSON #1: NEVER GUESS

- Which conviction might have less serious immigration consequences?
  - Assault in a bar; broke someone’s jaw, ten month jail sentence
  - Sale of $5 marijuana, no sentence
  - Conviction for helping sick grandmother cross the border illegally so she could see a doctor
  - Consensual sex between a 17-year and 18-year-old
  - Violent Rape
Three Primary Crime-Related Provisions of Immigration Law

• Aggravated Felonies, INA 101(a)(43)
• Grounds of Deportability, INA 237(a)
• Grounds of Inadmissibility, INA 212(a)
• The lists contain different offenses. A conviction may make the person inadmissible but not deportable, or be an aggravated felony but not a ground of inadmissibility.
Grounds of Inadmissibility - (INA 212(a)) Apply To:

- Any noncitizen seeking entry to US
- Any noncitizen applying for lawful status
- When ICE/DHS seeks to remove/deport undocumented persons who illegally entered US
- LPRs who apply for citizenship
Crime-Related Grounds of Inadmissibility

- Admission or conviction of a controlled substance violation
  - Possible waiver for simple poss 30 g or less mj

- Admission or conviction of a crime involving moral turpitude
  - EXCEPTION: Juvenile offense
    - Committed before 18 yrs old and 5 years before admission
  - EXCEPTION: One “petty” CIMT offense
    - Max possible sentence not > 1yr ;
    - actual sentence not > 6 months (including time suspended)
    - Only committed one CMT ever

- 2 or more convictions where aggregate sentence is 5 years or more
Crime-Related Grounds of Inadmissibility

Conduct Based: No Conviction Required

• Engaged in prostitution (but not johns)
• Reason to believe involvement in drug trafficking, or received proceeds from family member who is/was
• Determined to have physical/mental disorder that poses threat to self or others
• Determined to be drug abuser
Crime-Related Grounds of Inadmissibility Review Questions

James is undocumented, but married to a U.S. citizen. He intends to apply for his green card.

- Under what circumstances do the inadmissibility grounds apply to him?
- How will a 3rd theft conviction impact him?
- A domestic violence conviction?
- A conviction for attempted possession of cocaine?
Crime-Related Deportation Grounds (INA § 237(a)) Apply To:

- Noncitizens who were LAWFULLY ADMITTED to US:
  - Anyone with a greencard
  - Anyone with a nonimmigrant visa (even if expired)
  - Persons granted asylum or refugee status.

- These are legal grounds for removing people with lawful status or who were lawfully admitted
  - Do not apply to undocumented people in most circumstances
  - Do not apply to persons applying for lawful status
Grounds of Deportability

Require conviction to trigger

1. One crime involving moral turpitude
   • Committed w/in 5 years of admission
   • Carry maximum POSSIBLE sentence of 1 year or more

2. Two or more CIMTs (not arising out of a single scheme)
   • Regardless of when committed or sentence
Grounds of Deportability

- Aggravated Felony (see next section)

- Controlled substance violations
  - Exception: single offense for simple possession of **30 grams** or less of marijuana or THC

- Firearms convictions
Grounds of Deportation

• Domestic Violence Offense
  • After Sept. 30, 1996
  • Must be crime of violence as defined under 18 USC § 16
  • Committed against person
  • w/whom D has qualifying relationship

• Judicial “determination” of violation of domestic violence restraining order
  • No conviction required
Grounds of Deportation
Review Questions

Tomas is a lawful permanent resident.
• He is convicted of possession of a controlled substance. Do the grounds of deportation apply to him? Why? Which one? How could it be possible that he would not be deportable?
• What if he is convicted of theft? Under what circumstances would he be deportable? Not deportable?

David came to the U.S. on a tourist student visa 6 years ago that expired. He is charged with assault – DV.
• Do the grounds of deportation apply to him?
• What possible grounds of deportation would this conviction trigger?
Aggravated Felony – INA 101(a)(43)

- 21 provisions encompassing hundreds of offenses
- Determines Amount of Due Process
- Most dangerous provision under immigration law for noncitizens
- Under 9th Circuit case law, AF definition includes misdemeanors and non-violent offenses, even if no time is served in jail
Aggravated Felony

Consequences

- Almost certain deportation
- Permanent exile from the U.S.
- Bar to almost every form of relief from deportation
- Mandatory detention
- Significant due process restrictions
- Increases sentence enhancements in illegal reentry prosecutions under 8 U.S.C. 1326.
AF Definition Applies to ALL Noncitizens:

AF is a ground of deportation, thus:

LPR/Refugee (& others lawfully admitted) will be subject to deportation for conviction for AF

AF is NOT ground of inadmissibility, but AF subjects all non-LPRs to special “expedited removal” process
Conviction-based AFs

Conviction of specified offense

Sentence-based AFs

Conviction of specified offense + sentence of imprisonment of one year or more

Circumstance-specific AFs

Conviction of specified offense + other factor (e.g. >$10k loss to victim)
### Aggravated Felony cont’d

#### Some Common Conviction-based
- Murder
- Rape
- Sexual abuse of a minor
- Drug Trafficking
- Firearm Trafficking

#### Some Common Sentence-based
- Crimes of violence
- Theft offenses
- Burglary
- Obstruction of justice

#### Some Common Circumstance-specific
- Fraud or deceit offense with loss > $10,000
- Certain tax evasion with loss of revenue > $10,000
Grounds of Inadmissibility and Deportability

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<thead>
<tr>
<th>Inadmissibility (INA 1182)</th>
<th>Deportability (INA 1227)</th>
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<tr>
<td>Crimes involving moral turpitude</td>
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<td>Controlled Substance Offense</td>
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<td>Prostitution related offenses</td>
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<td>Conviction of multiple offenses (5 years or more)</td>
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<td>Domestic Violence offenses</td>
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<td>Aggravated Felonies</td>
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Deportability vs. Inadmissibility

• Deportable Persons
  • Those who have been lawfully admitted to the US
  • Green card holders
  • Visa holders

  ➔ Can be deported for a protective order violation

• Inadmissible Persons
  • Those who have not been lawfully admitted to the US
  • Undocumented persons
  • Those who are applying for lawful status
Burden of Proof

- If non-citizen is an applicant for admission, they bear the burden to prove that they are **admissible**.
- The Government has the burden of establishing by clear, convincing, and unequivocal evidence that the non-citizen is **deportable**.
ADIR Analysis

• Aggravated Felony? INA 101(a)(43)
• Deportable? INA 237(a)
• Inadmissible? INA 212(a)
• Relief?
Exercise

Ali is a permanent resident who is inadmissible for crimes but not deportable. Can he:

• Be stripped of LPR status if he remains in the U.S.?
• Travel outside the U.S. and safely return?
• Be granted naturalization?
Exercise, cont’d

Barbara is an LPR who is **deportable** but **not inadmissible**. Can she:

- Be stripped of LPR status and removed if she just remains in the U.S.?
- Apply to “re-adjust status” based on a family visa petition, or for other relief that requires admissibility?
Exercise, cont’d

Carlos has a conviction.

• If he is “merely deportable,” is he automatically barred from asylum or LPR cancellation?
• If he is convicted of an aggravated felony, is he automatically barred from asylum or LPR cancellation?

David is undocumented and has a conviction that comes within the domestic violence ground of deportability. How does that affect his immigration status?
What is a conviction for immigration purposes? INA 101(a)(48)

1) Formal judgment of guilt by court OR

2) Defendant must have:
   • Pled Guilty or No Contest (Nolo Contendere) AND
   • Judge ordered some sort of punishment, penalty or restraint on liberty:
     • Includes probation, fines, community service programs.
     • Defendant does not have to serve time in jail or prison.
What is Not a Conviction for Immigration Purposes

• Juvenile court dispositions
• Pardons for Certain Crimes
• Conviction vacated not solely due to immigration hardship.
• Pre-plea diversion
What is Not a Conviction for Immigration Purposes

Infractions

• These are minor offenses whereby the accused does not have the regular constitutional procedural safeguards such as the right to jury trial and appointed defense counsel.
• A 9th Circuit *unpublished* decision found, however, that California infractions are convictions for immigration purposes. In an abundance of caution, assume CA infractions are convictions for immigration purposes, particularly where Defendant originally charged with misdo/fel, then offered infraction.
First Time Simple Drug Possession Exception

A first conviction for simple possession (or a lesser offense) will not carry immigration consequences if:

- Conviction was entered before July 14, 2011, AND
- Is later eliminated under rehabilitative provisions such as DEJ, Prop 36, or expunged

*See Nunez-Reyes v. Holder, 646 F. 3d 684 (9th Cir. 2011).*
Limitations to 1st Time Simple Possession Exception

• Doesn’t work for under the influence
• The existence of a prior pre-plea diversion prevents a first possession conviction from being eliminated.
• The conviction is not eliminated if the criminal court found that the defendant had violated probation.
• It only applies to individuals in removal proceedings within the Ninth Circuit.
IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS ANALYSIS
Hold the Gov’t to it’s Burden!

- Government has the burden of proving deportability by “clear and convincing evidence.” INA 240(c)(3)(A).

- Supreme Court & Courts of Appeal interpret standard as requiring an “unequivocal” showing of deportability. Woodby v. INS, 385 US 276 (1966); Jaggernauth v. U.S. Att’y Gen, 432 F.3d 1346 (11th Cir. 2005) Solis-Muela v. INS, 13 F.3d 372 (10th Cir. 1993); Cheuk Fung S-Yong v. Holder, 600 F.3d 1028 (9th Cir. 2010); Afolayan v. INS, 219 F.3d 784 (8th Cir. 2000); Barradas v. Holder, 582 F.3d 754 (7th Cir. 2009); Hernandez-Garza v. INS, 882 F.2d 945 (5th Cir. 1989); Matadin v. Mukasey, 546 F.3d 85 (2nd Cir. 2008); Campos v. INS, 961 F.2d 309 (1st Cir. 1992).
Proving the Existence of A Conviction

• What documents can be used to prove the existence of a conviction? Governed by INA 240(c)(3)(B)-(C). See also 8 CFR 1003.41.

• Gov’t must produce the “official record” or “certified copies.”
Is Proving the Existence of a Conviction Always Enough?

- Not unless every offense specified by the statute of conviction *categorically* falls within the definition of the generic offense.
Categorical Analysis

• Framework within which immigration adjudicators are to determine what offense an individual was convicted of for purposes of determining immigration consequences of the conviction.

• You cannot effectively hold the government to its burden unless you are clear on the current law regarding application of the categorical analysis.
Moncrieffe v. Holder, 133 S.Ct. 1678 (2013)

• LPR
• Arrested during traffic stop at age 23 yr when police find 1.3 g of marijuana in car.
• Georgia statute makes it unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.
• Plea agreement says Moncrieffe was convicted of possession of marijuana with intent to distribute.
Moncrieffe Holding

If a noncitizen’s conviction for a marijuana distribution offense fails to establish that the offense involved a small amount of marijuana for no remuneration, the conviction is not an aggravated felony under the INA.
Categorical Analysis post-
Moncrieffe

Step One:

Presume that the conviction rests upon nothing more than the least acts criminalized by the (criminal) statute, then ask whether such acts fall within the generic offense (immigration) definition.
Categorical Analysis post-Moncriefe

• In determining what constitutes “the least act” criminalized by the statute, apply the “realistic probability” test.
• There must be a “realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition...”
Categorical Analysis post-Moncrieffe

• If the least acts criminalized by statute fall within the generic offense definition, you have a categorical match.
Categorical Match

State Definition

Immigration Definition
Categorical Analysis post-Moncrieffe

• If the least acts criminalized by the statute do not fall within the generic offense definition, consider whether Step Two applies to the statute at issue.
Categorical Analysis post- \textit{Moncrieffe}

Does Step Two Apply?

Ask whether the statute “contain[s] several different crimes, each described separately...”

If No $\rightarrow$ Inquiry ends.
If Yes $\rightarrow$ Move to Step 2.
Does the Statute Describe Different Crimes Separately?

Arizona Revised Statute 13-1405.

A. A person shall not knowingly:
   1. Possess or use marijuana.
   2. Possess marijuana for sale.
   3. Produce marijuana.
   4. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana.
Does the Statute Describe Different Crimes Separately?

• California Penal Code 242.

Battery defined.

A battery is any willful and unlawful use of force or violence upon the person of another.
**Categorical Analysis post-Moncrieffe**

**Step Two:**

Apply the Modified Categorical Approach.

“...a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea.”
What Did the Court Do in Moncrieffe?

- Moncrieffe pled to a statute that described different crimes separately.
- Least act covered by that statute did not constitute an aggravated felony so Court went to Step 2.
- Plea agreement can be examined under the Modified Categorical Approach under *Shepard & Moncrieffe*.
- Plea agreement said Moncrieffe pled guilty to possession with intent to distribute marijuana.
- Court found that the offense did not constitute an aggravated felony because it did not specify the amount of marijuana or require remuneration.
What the Court didn’t do in Moncrieffe

- The Court did not look to the ROC to determine whether Moncrieffe actually possessed more than a small amount of marijuana or whether there was remuneration.
- Court did not look to the ROC to determine whether the Defendant had been convicted of having possessed more than a small amount of marijuana w/remuneration.
- Inquiry ended when the offense specified by statute didn’t require a specific amount of marijuana or the presence of remuneration.
Impact of *Moncrieffe*

- *Moncrieffe* allows for the application of the modified categorical analysis only to statutes that specifically enumerate different offenses.
- This arguably overrules *Matter of Lanferman* where the BIA held that the modified categorical approach applied to *any statute* that could be satisfied by removable or non-removable conduct, *regardless of structure.*
Who has the burden at the Relief stage?

- *Moncrieffe* undermines the rationale underlying the BIA’s decision in *Matter of Almanza-Arenas* and the 9th Circuit’s holding in *Young v. Holder*.
- *Moncrieffe* supports the proposition that once a conviction is deemed to *not* constitute an aggravated felony for purposes of deportability, it is not an aggravated felony for purposes of eligibility for relief.
- In *Moncrieffe*, the burden did not shift to Respondent to show that his conviction was *not* an aggravated felony. *Moncrieffe* at 1692.

- Divides statutes into two categories: Divisible and Indivisible statutes. Same definition of “divisible” statute as Moncrieffe.
- Affirms Moncrieffe’s holding that the modified categorical approach only applies to a divisible statute.
- Overruled the 9th Circuit’s en banc decision in Aguila Montes de Oca saying that it improperly turned an “elements-based inquiry into an evidence based one.”
Descamps v. U.S, continued...

- Under *Descamps*, a conviction for 459 *categorically* does not fall within the generic definition of burglary, even where the plea colloquy establishes that the Defendant pled to facts constituting the generic offense.
- Why? Because under an elements-based inquiry, the statute is not divisible with respect to what type of “entry” was required.
Hypo

- Client became an LPR in 2011.
- Client convicted pursuant to CPC § 243(e)(1) in 2012.
- 2013 NTA charges him with being deportable under INA § 237(a)(2)(A)(i)(I) [one convicted of a CIMT within 5 years of admission].
1

- What is the generic definition of “crime involving moral turpitude” for immigration purposes.
  - BIA case law
  - 9th Circuit
  - Supreme Court
• What is the “least act” criminalized by the statute of conviction, in this case 243(e)(1)?
  • California case law
  • 9\textsuperscript{th} Circuit case law

Look at whether the 9\textsuperscript{th} or BIA have already issued decisions as to whether or not a conviction under CPC 243(e)(1) constitutes a CIMT or not.
• Apply the categorical analysis.
• Do not move to the modified categorical analysis unless you have a clearly divisible statute that describes separate offenses, at least one of which would trigger the immigration consequence at issue.