Crimes and Immigration:
Understanding the Immigration Consequences of Criminal Offenses and Convictions

ABA Commission on Immigration

Pro Bono Training:
The Essentials of Immigration Court Representation

Wednesday, February 1, 2012
New Orleans, LA
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Overview

- The impact of criminal convictions on noncitizens seeking immigration “relief” in immigration court.
- Basic concepts of conviction and sentence, and analysis of criminal offenses under immigration law.
- Aggravated Felonies – Immigration law’s death penalty.
- Criminal grounds of deportability and inadmissibility.
Some Crimmigration Acronyms

- **Ag Fel or AF** = Aggravated Felony
- **CIMT** = Crime Involving Moral Turpitude
- **CSO** = Controlled Substance Offense
- **GMC** = Good Moral Character
- **LPR** = Lawful Permanent Resident
Immigration Consequences of Criminal Convictions

- May make your client removable under criminal grounds of deportability or inadmissibility.
- Even if a crime does not make her removable, it may affect your client’s ability to travel.
- May affect your client’s ability to show GMC for Naturalization.
- May make your client subject to mandatory detention.
- May make your client ineligible for “relief” from removal (Asylum, Adjustment, Cancellation, etc.) or ineligible to immigrate in the future.
Criminal Bars to Relief from Removal in Immigration Court

- **Cancellation of Removal for LPRs**
  - Conviction of Ag Fel anytime or “commission” of inadmissibility crime w/in 7 years of admission bar relief.

- **Cancellation of Removal for Non-LPRs**
  - Conviction for deportability or inadmissibility crimes or Ag Fel bars relief.

- **Asylum, Withholding and CAT**
  - Conviction for Ag Fel or “Particularly Serious Crime” bars asylum and withholding relief.

- **Family or Employer Petition + Adjustment + Waiver**
  - 212(h) cannot waive some crimes, esp. CSO except a single conviction for simple possession of <29 g of marijuana.
  - Conviction for Ag Fel bars INA 212(h) crimes waiver for some LPRs.

- **Voluntary Departure**
  - Ag Fel or terrorism will bar VD and lack of GMC may bar VD.
Immigration Consequences, Part I:

Immigration law concepts of conviction and sentence and a basic overview of categorical analysis of criminal offenses.
Immigration Impact Begins with “Conviction”*

INA § 101(a)(48) [8 USC §1101(a)(48)] defines conviction:

- Formal judgment of guilt; or
- Adjudication withheld, but
  - Pleads guilty or *nolo*, or admits sufficient facts to establish guilt AND
  - Some form of punishment, penalty or restraint of liberty is imposed.

*Some criminal activity may carry immigration consequences without a conviction.
Not a conviction:

- Juvenile adjudication
- Pre-Trial Diversion – no admission of guilt or entry of judgment.
- Federal adjudication of juvenile transferred to adult court – 18 USC 5032
- Federal First Offender Act – 18 USC 3607
Vacated Convictions and Sentence Reductions


Impact of Sentence

- Immigration consequences for several crimes (some Ag Fels and some CIMT’s) depend on the length of sentence.
- Imprisonment includes period of incarceration “ordered” by court “regardless of suspension of the imposition or execution...”
- Does not include commitment to youth facility or mental institution if purpose is not punishment.
Analysis of Criminal Convictions

- **Categorical Analysis** – Immigration Court does not look to Defendant’s “conduct”, but to whether the “full range of conduct” proscribed in the criminal statute of conviction corresponds with the generic definition of the crime used for immigration purposes. *U.S. v. Taylor*, 495 U.S. 575 (1990).
Categorical Analysis – Con’t

- If the conduct proscribed in the statute of conviction is broader than the generic definition – if there is a way to violate the state statute that wouldn’t violate the federal generic crime – then the conviction is not “categorically” a deportable conviction under the INA.

- *Duenas-Alvarez (S.Ct.)* requires realistic possibility that state law offense would reach the alleged “minimum conduct” that is beyond that proscribed by the federal generic crime.
Categorical Analysis Example: Burglary

- Generic burglary Ag Fel under INA §101(a)(43)(G): “An unlawful or unprivileged entry into, or remaining in, a building or other structure, with the intent to commit a crime.” *US v. Taylor*, 495 US 575 (1990).

- Cal. Penal Code § 459, prohibits entering a building with the intent to commit larceny or any other felony.

- Would a Cal. conviction for burglary constitute an Ag Fel?
Divisible Statutes

- Multiple sections or broadly defined offenses that include offenses that do and do not fit federal generic crime definition.
Divisible Statute Example: Louisiana Simple Burglary

LA R.S. 14:62 Simple Burglary -- the unauthorized entering of any **dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery**, with the intent to commit a felony or any theft therein....

Fed. Generic: “An unlawful or unprivileged entry into ... a **building or other structure**, with the intent to commit a crime.”

LA burglary includes some lesser offenses NOT proscribed in federal generic crime....
Divisible Statutes
Modified Categorical Approach

- If the IJ cannot determine from statute alone whether offense is categorically “deportable” because the offense is divisible,
  - the judge may look to the “record of conviction” to determine offense of conviction.

- LA burglary → IJ may look at “record of conviction” to determine if conviction was for burglary of a “building” (clearly deportable) or of a “cemetery” or “watercraft” (clearly not deportable).
Modified Categorical Approach

- “Record of Conviction” includes charging document, plea, plea colloquy, judgment and sentence.
  - Does not include police report or PSI unless client adopts or stipulates in plea.

- LA Burglary → If ROC show charge and plea that simply track disjunctive terms of R.S. 14:62 then conviction is not “categorically” a burglary for purposes of immigration.
Going beyond the “Record of Conviction”

- IJ may consider other evidence beyond the record of conviction to establish non-offense related elements required for immigration consequences, e.g.:

- *Matter of Silva-Trevino* (A.G. 2008) – If a statute regarding a CIMT is divisible and the record of conviction is ambiguous, the IJ may consider evidence beyond the record of conviction.
  - Limited to CIMTs, not Ag Fel or CSO.
Immigration Consequences, Part II:

Aggravated Felonies – Immigration Law’s Death Penalty.
Aggravated Felonies

- Immigration law term of art. May even include some misdemeanors.
- Aggravated felonies carry most serious immigration consequences. In addition to making your client deportable, they destroy almost all immigration "relief."
- Immigration impacts of Ag Fel are very "clear" – per Padilla counsel must advise of consequences, not just say maybe....
Aggravated Felonies -- INA §101(a)(43)[8 USC § 1101(a)(43)]

- Based on type of crime regardless of sentence (murder, rape, child sex abuse, drug trafficking, firearms trafficking)
- Based on sentence (e.g. crime of violence, bribery, obstruction of justice, burglary or theft offense + 1 yr sentence.)
- Other (money laundering, fraud, or tax evasion+ $10,000 loss to victim)
- Conspiracy or attempts of listed offenses.
- See list in INA §101(a)(43)(A-T)
Aggravated Felonies

- Most common Ag Fels:
  - Crimes of Violence
  - Theft/Burglary
  - Fraud
  - Drug Trafficking
Crime of Violence Aggravated Felony – INA §101(a)(43)(F)

- Crime of violence as defined in 18 USC § 16
- AND one year sentence imposed
Crime of Violence Ag Fel – 18 USC § 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

(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.*
Leocal: Mens Rea Matters

- Supreme Court unanimously held that Florida offense of DUI + causing serious bodily injury was NOT a crime of violence. *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
- Applies to both 18 USC § 16 (a) and (b)
- Negligent mens rea $\neq$ COV
Leocal Cont.

- Substantial risk that force will be used -- not that harm may result.

- Mens rea – not negligence, probably not recklessness. See, *Larin-Ulloa*, 462 F.3d 456 (5th Cir. 2006)

- Force must be violent.
Aggravated Felony -- Drug Trafficking

- 8 USC §1101(a)(43)(B) defines a drug trafficking aggravated felony to include "any illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime (as defined in 18 USC §924(c)(2)."
Aggravated Felony Drug Trafficking – Defined

- "illicit trafficking" = offense is a felony and contains a trafficking element
- or
- “drug trafficking crime” = punishable as a felony under federal drug law.
Lopez S. Ct. Clarifies “Felony” Drug Trafficking

- Under federal law, first offense possession is a federal misdemeanor (regardless of amount) with two exceptions:
  - possession of flunitrazepam or >5 g of crack
Fraud or Deceit – 8 USC §1101 (a)(43)(M)

- **Elements:**
  - Offense involves fraud or deceit.
  - Lost to victim or victims exceeds $10,000.
Aggravated felony theft offense -- 8 USC §1101 (a)(43)(G)

- **Elements:**
  - Conviction for burglary or theft offense, or receipt of stolen property.
    - Unlike CIMT ground, temporary non-permanent taking or use of property is considered theft offense.
    - So joyriding + 1 yr. Sentence = Ag Fel
  - **Sentence of a year or more.**
Other criminal removal grounds, CIMTs, controlled substance offenses, and safe haven alternatives.
Criminal Deportability Grounds INA § 237(a) (8 USC §1227(a))

- Aggravated Felonies
- CIMTs (1 w/in 5 years or 2 any time)
- Domestic Violence, stalking, child abuse.
- Firearms offenses
- Controlled Substances Offenses (except a single offense for possession of ≤30g marijuana).
- Others – (see 8 USC § 1227 (a))
Criminal Inadmissibility, INA § 212(a) (8 USC §1182(a))

- Conviction or “admitted commission”...
  - CIMT (at any time) except a single
    - Petty offense -- offense not punishable >1 yr + sentenced ≤6 mos., or
      - Juvenile offense -- >5yrs ago and <18 yrs old at time of commission.
  - Controlled Substances Offenses (*including* simple possession of marijuana).
  - Two or more offenses of any kind + aggregate sentence ≥5 yrs.
Criminal Inadmissibility, INA § 212(a)(2) [8 USC §1182(a)(2)]

- Conduct-based criminal inadmissibility – does not require conviction or admission:
  - Prostitution or commercialized vice.
  - AG knows or has reason to believe alien is illicit drug trafficker, significant trafficker in persons or money launderer.
  - Others... immunity from prosecution or violators of religious freedom.
A noncitizen convicted of an offense "related to" a “listed” controlled substance is deportable and inadmissible.
  
  - Deportability ground has marijuana poss. <30g exception.
  
Includes paraphernalia offenses.
Crime Involving Moral Turpitude Ground

- Analysis of CIMT is caselaw-dependent.
- Can include both misdemeanors and felonies.
- Mens rea is critical – DUI is generally not CIMT.
Crimes Involving Moral Turpitude

- Crimes with intent to steal or defraud (theft or forgery)
  - Theft CIMT requires intentional permanent taking

- Crimes in which *bodily harm* is caused or threatened by intentional act, or *serious bodily harm* is caused or threatened by a reckless act.

- Most sex offenses.
Questions....

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