

SBOT 29TH ANNUAL INTERNATIONAL LAW INSITUTE

What every Lawyer should know about Immigration Consequences and Remedies of U.S. and International Criminal Convictions

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INTRODUCTION

- ▶ Prior to 1996, immigration law provided for two types of processes to eject noncitizens from the U.S.: “deportation” and “exclusion.”
- ▶ The Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) ended the distinction and created a single process now called “removal proceedings.”
 - ▶ Aliens in removal proceeding are charged with inadmissibility or removability.
- ▶ Removal is generally not automatic. The majority of noncitizens receive a removal hearing before an immigration judge.

INADMISSIBILITY VS. REMOVABILITY

▶ General Legal Distinction

- ▶ Grounds of *inadmissibility* apply to individuals who have not been “admitted” and are viewed as seeking admission to the U.S. or adjustment to a lawful permanent resident status.
- ▶ On the other hand, grounds of *removability* apply to noncitizens who have been lawfully “admitted”, i.e., noncitizens who have entered the U.S. after inspection and authorization by an immigration officer.

▶ Criminal Grounds for Inadmissibility and Removability

- ▶ Criminal grounds of inadmissibility and removability can be found in INA § 212, 8 U.S.C. § 1182 (grounds of inadmissibility) and INA § 237, 8 U.S.C. § 1227 (grounds of removability). These grounds overlap somewhat, but they are not the same and do not have the same impact.

Definition of the term “Conviction” for Immigration Purposes

- ▶ It is set out in INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), as follows:
- ▶ “The term ‘conviction’ means, with respect to an alien, 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 the alien has entered a plea of 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.”

Definition of Conviction (cont'd.)

- ▶ Exceptions:
 - ▶ Juvenile dispositions
 - ▶ MUST BE DISPOSED OF IN JUVENILE COURT!
 - ▶ Pretrial diversion/deferred *prosecution* (KEY--no plea entered)
 - ▶ Vacated convictions - if vacated on substantive, procedural, or constitutional grounds and not for equitable immigration purposes

Examples of Crimes that Could Effect Someone's Immigration Status:

- ▶ Crimes Involving Moral Turpitude
 - ▶ Theft offenses
 - ▶ Fraud
- ▶ Drug Crimes
- ▶ Domestic Violence Crimes
 - ▶ Stalking
 - ▶ Violation of Protective Order
- ▶ Fire Arm Offenses

Foreign Convictions

- ▶ A foreign conviction is “a conviction” for immigration purposes.
- ▶ When reviewing the consequences of a foreign conviction, the sentence imposed by a foreign court does not govern.
- ▶ Rather, U.S. standards govern in assessing whether an offense committed in a foreign country is a felony or a misdemeanor within the meaning of the INA.
- ▶ The foreign offense is examined in light of the maximum punishment that may be imposed for an equivalent crime according to the U.S. Code, or if there is no federal counterpart, a comparable offense in the District of Columbia Code.

Foreign Convictions (cont'd.)

Examples:

- ▶ A conviction for a burglary by a 13-year old in Cuba, would not be considered a “conviction” for immigration purposes in the United States, because a 13-year old charged with burglary in the United States would have been adjudicated as a juvenile delinquent. *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).
- ▶ An individual’s Italian conviction for “aggravated embezzlement” was not treated as a misdemeanor under the INA, notwithstanding sentence given, because pursuant to the District of Columbia Code the comparable crime of “embezzlement by executors or other fiduciaries” was punishable by a potential sentence of ten years in jail. *Matter of Adamo*, 10 I&N Dec. 593 (BIA 1964).

INADMISSIBILITY VS. REMOVABILITY (cont'd.)

- ▶ Immigration Consequences of Criminal Convictions
 - ▶ Immigration law is complicated and the consequences of a criminal conviction in the immigration context can be extremely confusing.
 - ▶ As an initial matter, when a client has a criminal history of any kind, an immigration attorney has to assess all of the possible consequences from an immigration standpoint.
 - ▶ This is true regardless of whether their criminal offense occurred in the past or they are facing current charges which could lead to a future conviction.
 - ▶ A conviction can cause a person to be inadmissible but not removable, removable but not inadmissible, or both inadmissible and removable.

AVENUES OF RELIEF FROM INADMISSIBILITY AND REMOVABILITY

▶ Nonimmigrant Waiver

- ▶ INA § 212(d)(3) provides for a broad waiver allowing applicants for admission as nonimmigrants to overcome almost any ground of inadmissibility, if Attorney General chooses to exercise its discretionary authority to grant it.
- ▶ The waiver must be anchored to a nonimmigrant visa, such as a tourist, student, H-1B, L visa, etc.
- ▶ The Board of Immigration Appeals (BIA) has set forth criteria to be evaluated by the AG in making a discretionary determination for this waiver:
 - ▶ (1) the risk of harm to society if the applicant is admitted; (2) the seriousness of the applicant's prior immigration law, or criminal law, violations, if any; and (3) the reasons for wishing to enter the US.
- ▶ However, these waivers are not always easy to obtain, particularly in the case of individuals with criminal convictions, because they have a very heavy discretionary element tied to them.

AVENUES OF RELIEF FROM INADMISSIBILITY AND REMOVABILITY (cont'd.)

▶ Immigrant Waiver

- ▶ There are basically two waivers available to immigrants with criminal convictions that may render them inadmissible or removable.
- ▶ An inadmissible immigrant may qualify for a waiver under INA § 212(h) and a removable immigrant may qualify for a waiver under INA § 237(a)(1)(H).
 - ▶ A waiver under INA §212(h) can be granted only if the immigrant falls into one of three statutory subsections.
 - ▶ The waiver under INA §237(a)(1)(H) is available to immigrants who have been admitted but were not actually eligible for admission.

AVENUES OF RELIEF FROM INADMISSIBILITY AND REMOVABILITY (cont'd.)

▶ Post-conviction Relief

- ▶ Post-conviction relief refers to instances where an individual attempts to collaterally challenge a judgment or conviction on their record, which has otherwise become final in the normal appellate review process.
- ▶ The goal here is to remove the legal impediment, i.e. criminal record that causes a person to be inadmissible or removable under the INA.
- ▶ An action for *post-conviction relief* should be brought in the court in which the applicant's conviction and sentence was rendered.
- ▶ The most common ground for post-conviction relief stem from an ineffective assistance of counsel claim.

Questions?

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