

Diversity in the Legal Profession

Baton Rouge, Louisiana

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Representing Foreign Nationals in Criminal Proceedings

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Session Highlights

Who Can Be Deported

Inadmissibility and Removability

Conviction and Sentence

Effective Assistance

Prosecutorial Discretion

Introduction: Who Can Be Deported & Why



Citizens
(Born/Naturalized)

v.

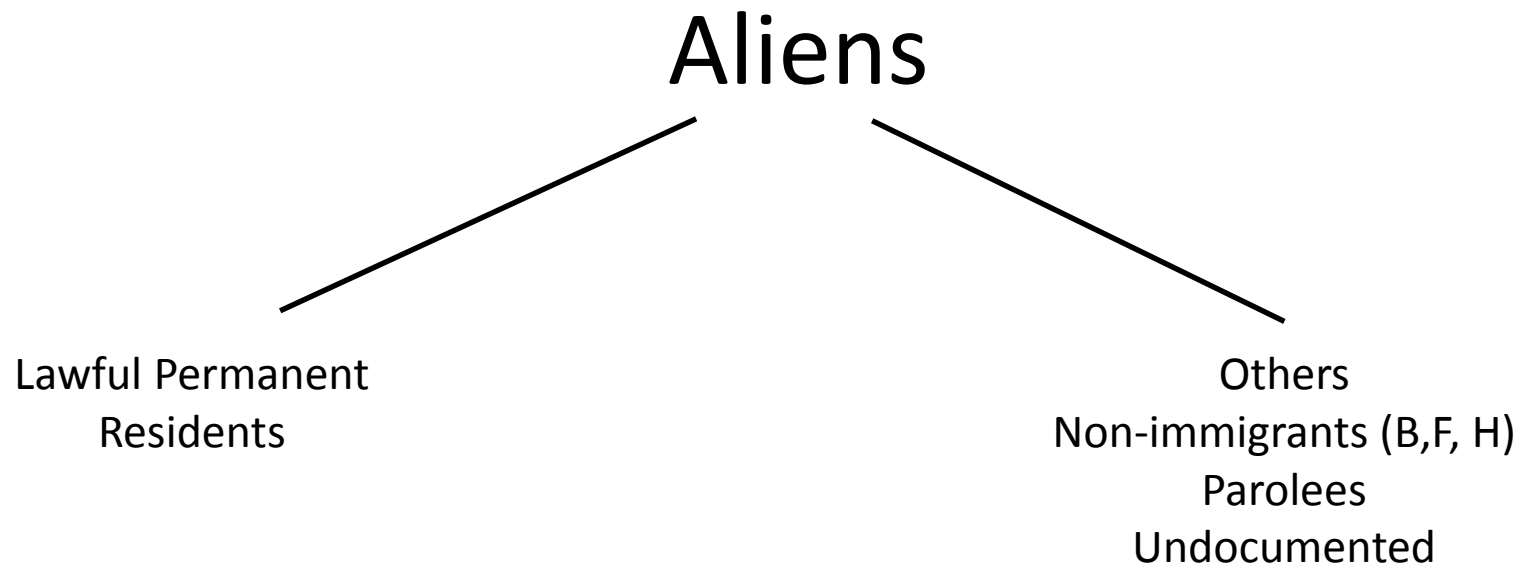
Non-Citizens
(Alien)

Trop v. Dulles
356 U.S. 86 (1958)

**WARNING
DANGER!!**

Who Can Be Deported & Why, cont.

- We can also divide non-citizens who are present in the U.S. into two (2) specific categories:



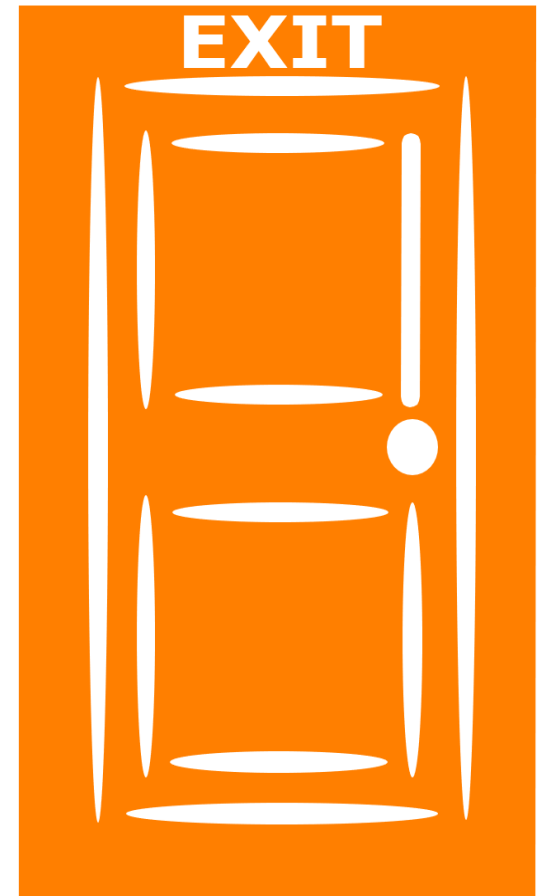
INADMISSIBLE (INS§ 212)



- ← Health Grounds
- ← Criminal Grounds
- ← Security Grounds
- ← Public Charge Grounds
- ← Lack of Labor Certification
- ← Past Immigration Violations
- ← Lack of proper documents
- ← Ineligibility for Citizenship
- ← Previous removal
- ← Miscellaneous grounds

REMOVABLE (INA § 237)

- Violation of Immigration Status —————→
- Commission of Criminal Offense —————→
- Falsification of documents —————→
- Security grounds —————→
- Public charge —————→
- Unlawful voting —————→



Criminal Grounds of Inadmissibility

Crimes Involving Moral Turpitude

“Conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”

Matter of Franklin, 20 I&N Dec. 867,868

(Board of Immigration Appeals)

Therefore, in order to determine if a crime is a CIMT, one has to approach it on a case by case basis.

Criminal Grounds of Inadmissibility, cont.

- Other categories of criminal offenses rendering alien inadmissible are:
 - Offenses involving controlled substances, see INA §212(a)(2)(A)(i)(II);
 - Combination of 2 or more offenses that results in an aggregate sentence of 5 years or more, see INA §212(a)(2)(B);
 - Offenses that deal with prostitution and commercialized vice, see INA §212(a)(2)(D);
 - Offenses or charges against certain aliens that have asserted immunity from prosecution, see INA §212(a)(2)(E);
 - Offenses that involve significant trafficking in persons, see INA §212(a)(2)(H); and
 - Offenses that address money laundering, see INA §212(a)(2)(I).

Criminal Grounds of Removability

- There are several categories of criminal offenses that will render an alien present in the United States subject to removal/deportation:
 - Offenses that are designated as CIMTs, see INA §237(a)(2)(A)(i) & (ii);
 - Offenses involving controlled substances, see INA §237(a)(2)(B);
 - Offenses relating to firearm crimes, see INA §237(a)(2)(C);
 - Offenses relating to domestic violence, see INA §237(a)(2)(E);
 - Offenses that involve significant trafficking in persons, see INA §237(a)(2)(F);
 - Offenses listed as miscellaneous crimes, such as espionage, treason, threats to the President, violation of Military Selective Service Act or Trading with the Enemy Act, see INA §237(a)(2)(D); and

Aggravated Felonies

INA §101 (a) (43), INA § (a) (2) (A) (iii)

- Murder, rape, or sexual abuse of a minor
- Trafficking in a controlled substance
- Money laundering (< \$10,000)
- Trafficking of fire arms
- Crime of violence (imprisonment of at least one year)
- Theft offense (imprisonment of at least one year)
- Child pornography
- Gambling offenses (Imprisonment of at least one year)
- Forgery, counterfeiting, altering passport (imprisonment of at least one year)
- Obstruction of justice (imprisonment of at least one year)
- Failure to appear before court in felony case (sentence of up to 2 years or more)
- Smuggling (Exception being immediate family members)
- Owning, Controlling, managing, or supervising of a prostitution business

Immigration Definition of a Conviction: § INA 101(a)(48)

- 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.
- 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.

Criminal Grounds of Inadmissibility, cont.

- It is worth pointing out that the INA allows for finding of inadmissibility even if there is no conviction! Specifically, if an alien admits to the “essential elements” of the offense, he or she will be found inadmissible based on such admission, see INA § 212(a)(2)(A);
- Similarly, if the Government has “reason to believe” that a person is a drug trafficker, it will also result in inadmissibility finding, see INA §§ 212(a)(2)(A) and (C).

Consequences of the Definition of Conviction

- Deferred Adjudication is a Conviction:
 - After 1996, when a new definition of conviction as it is found in the INA § 101(a)(48) was introduced, deferred adjudication in Texas will not save the alien from possible inadmissibility or removability charge based on offense committed. In fact this new definition is applied **retroactively**! See *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999).
- Probation Means Nothing in Immigration Court if Tied to Suspended Sentence
 - It makes no difference if any or even all of the alien's sentence of imprisonment is suspended in lieu of probation. A sentence of one (1) year is considered a sentence of one (1) year, even if the alien never actually served a day in jail.

Sentence May Play a Role but Not Always

- 364 v. 365 Days:
 - Some misdemeanor offenses turn into “aggravated felony” under the INA if sentence imposed is one year. In Texas, maximum sentence for a Class A Misdemeanor is one year. *See* Tex. Penal Code § 12.22.
- Sometimes Jail Time is Better than Probation:
 - If individual is sentenced to a total of 2 years, inadmissibility under the INA §212(a)(2)(B) kicks in, even if crimes in question are not CIMTs or aggravated felonies. It might be worth negotiating a shorter jail time, than a longer probation period, so as to avoid immigration consequences, e.g., so it might be worth taking 30 days jail time instead of 2 yrs. probation.

Sentence, cont.

- Deferred Adjudication is a Conviction But It Imposes No Sentence:
 - There is no mention of a “term of imprisonment” anywhere in the language of the Code. TEX. CODE OF CRIM. P. Art. 42.12, §5(b).
 - The Court may defer adjudication of guilt and place the defendant on probation for a period of up to two (2) years for any misdemeanor, and up to ten (10) years for any felony.
 - But this is NOT a pronouncement of a sentence, since it can come only AFTER an adjudication of guilt, so deferred adjudication can be helpful.

Sentence, cont.

- Sometimes Sentence Does Not Matter:
 - For some criminal offenses presence or absence of a sentence is irrelevant and the person will be subject to removal proceedings regardless, due to the nature of a crime, if convicted:
 - (a) Murder, Rape or Sexual Abuse of a Minor, see INA § 101(a)(43)(A);
 - (b) Controlled Substance Offenses, see INA §§ 212(a)(2)(A); 237(a)(2)(B);
 - (c) Offenses Relating to Firearms, see INA §§ 101(a)(43)(C); 237(a)(2)(C);
 - (d) Domestic Violence Offenses, see INA § 237(a)(2)(E);
 - (e) CIMT committed within five (5) years of admission, if a sentence of a year **may be imposed**, see INA § 237(a)(2)(A)(i).

A Word on Effective Assistance

- The U.S. Supreme Court in its decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), found that the Sixth Amendment of the U.S. Constitution imposes a constitutional duty on attorneys representing noncitizen criminal defendants to advise their clients about the potential removal consequences arising from a guilty plea.
- In a later decision in *Chaidez v. United States*, 568 U.S. ____ (2013), the Supreme Court clarified that decision in *Padilla* announced a “new” rule and therefore is not retroactive.
- The State of Texas concluded the same thing. *See Ex parte De Los Reyes*, 350 S.W.3d 723 (Tex. App.—El Paso 2011), joining about 30 other states.
- In sum: *Padilla* rule applies to all criminal pleas after 03/31/2010.

Obama's Plan

“Deport felons, not families.”

*President Barack Obama
November 20, 2014*

- Prosecutorial Discretion (June 15, 2011)
- Deferred Action for Childhood Arrivals (DACA) (June 15, 2013)
- Deferred Action for Childhood Arrivals (DACA II) (Nov. 20, 2014)
- Deferred Action for Parents of American Children (DAPA) (Nov. 20, 2014)

Conclusion

- Harsh immigration consequences—frequently including deportation and permanent exile from the United States—should be taken into consideration by a non-citizen facing criminal charges.
- Criminal and immigration attorneys representing alien clients, whether prospective immigrants or Legal Permanent Residents, should be aware of aliens' criminal history in order to assure best possible representation and successful outcome of not only the criminal case pending against them, but also of the possible future case before the Immigration Court.
- The Moral of the Story: Immigration and Criminal Attorneys should be the best of friends for the benefit of their mutual clients!!!

Questions



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