

# MICHIGAN CRIMINAL LAW

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The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



Readers are invited to submit articles, comments, correspondence to Karen Dunne Woodside, Editor, State Bar of Michigan Criminal Law Annual Journal, Wayne County Prosecutor's Office, Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan 48226. The publication and editing thereof are at the discretion of the Editor. A cumulative index of articles will be printed in future journals, and will be available on the Criminal Law website:

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# Criminal Immigration: The Consequences of Criminal Convictions on Non - U.S. Citizens

By Ronald Kaplovitz

The Immigration & Nationality Act (INA) has the potential to create severe consequences for criminal convictions by non-U.S. citizens aliens.<sup>1</sup> “Aliens” are defined as being “any person, not a citizen or national of the United States.”<sup>2</sup> There are three categories of aliens: lawful permanent residents, commonly known as green cardholders;<sup>3</sup> non-immigrants who are legally in the United States in a temporary capacity, such as visitors, students, and non-immigrant workers;<sup>4</sup> and illegal aliens, individuals who entered the country illegally or who entered the country legally and have remained beyond their authorized stay.

## Definition of Criminal Conviction for Immigration Purposes

The Immigration & Naturalization Service (INS) defines a conviction as a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea, and/or admission of facts warranting guilt and the imposition of some type of penalty.<sup>5</sup>

Any type of criminal adjudication, such as Holmes Youthful Training Act,<sup>6</sup> rehabilitative drug dispositions like 7411,<sup>7</sup> domestic violence pleas under advisement,<sup>8</sup> and any other type of criminal plea where a judgment of conviction is withheld, is considered to be a conviction for immigration purposes, and can be used by the INS as grounds for deportation.

The only exception to this rule might involve 17 year old persons who receive Youthful Training Status, as these crimes have been equated to being the equivalent of a federal juvenile delinquent status, and as such, may not necessarily be convictions for immigration purposes. Specifically, the Board of Immigration Appeals in the case of *In Re: Miguel Devison Charles*<sup>9</sup> ruled that if a state youthful status conviction is comparable to the Federal Juvenile Delinquency Act (FJDA),<sup>10</sup> then the alien was not convicted of a crime and is not subject to deportation as the FJDA applies to individuals under 18 years of age. Only those aliens 17 years of age and under would be protected.

## Deportable vs. Inadmissible Crimes

Under the INA, criminal convictions may make an alien ineligible for admission into the United States.<sup>11</sup> Specifically, convictions that are covered under this section apply to aliens who are not permanent residents, such as non-immigrant aliens, illegal aliens as noted above, or individuals outside of the country. These grounds, as covered in the statute will make it difficult, if not impossible, for the aliens above-noted to obtain permanent residency in the United States.

Criminal conviction can make aliens deportable or inadmissible. Deportable aliens are those individuals who the government desires to remove from the United States. Deportation, now referred to as removal, involves the act of placing the alien in proceeding before an Immigration Judge.<sup>12</sup> Inadmissible aliens are aliens who are attempting to obtain entry into the United States or aliens who are in the United States and are seeking permanent resident status (Green Card).<sup>13</sup>

It is not unusual, however, to see an alien who has been admitted in some sort of non-immigrant category, or illegal aliens, to be placed in deportation/removal proceedings. These aliens are both inadmissible, as well as deportable. There are however various differences between these categories. Consideration by criminal practitioners in resolving their criminal cases can affect the future rights of these aliens. Specifically, crimes that subject an alien to deportation may not cause those aliens to be inadmissible.

A prime example of these differences involves the treatment of domestic violence convictions. Domestic violence<sup>14</sup> is a deportable offense. However, it is not an offense that makes an individual inadmissible for admission into the United States.<sup>15</sup> In other words, a person convicted of domestic violence might be deportable or removable from the United States. However it would be possible to have him readmitted to the United States should he be otherwise eligible.

An example of this is a permanent resident alien married to a U.S. citizen. If the alien is not entitled to relief from deportation/removal, the U.S. citizen can reapply to have the alien admitted as a permanent resident.

The two categories of crimes listed above provide for a variety of crimes that can make an alien inadmissible and/or deportable from the United States. While the groups are not identical, there are some similarities. The crimes listed below are the primary crimes that are used by INS and affect the rights of aliens.

## Moral Turpitude Crimes

Crimes involving moral turpitude where the penalty exceeds one year or more<sup>16</sup> can make an alien deportable or inadmissible. Moral turpitude, under immigration law, has been defined by case law and is extremely broad. These crimes include all frauds, thefts, burglaries, robberies, murder, manslaughter, income tax evasion, drunk driving, assaults with weapons, domestic violence, conspiracy related crimes, and drug trafficking.<sup>17</sup>

Moral turpitude crimes that provide for a penalty of less than one year, such as drunk driving, retail fraud, or

simple assaults, generally will not create problems for aliens if there is a single criminal conviction. The sole exception to this rule includes crimes for domestic violence.<sup>18</sup>

### **Domestic Violence**

Domestic violence convictions are deportable, but not inadmissible offenses. Thus your standard, routine domestic violence conviction for a permanent resident, green card holder can and will result in his deportation from the United States regardless as to whether this crime is taken under advisement pursuant to the applicable Michigan<sup>19</sup> or local statutes.<sup>20</sup> For that reason, attorneys representing aliens should avoid pleading their clients to any charge of domestic violence. Disorderly conduct or a like conviction is preferable because it is not the type of crime that automatically makes the alien deportable. These convictions can, however, be considered if there are multiple convictions.

The deportation provision for domestic violence also applies to crimes involving stalking, as well as violation of a Personal Protection Order (PPO).<sup>21</sup> While PPOs are not necessarily criminal in nature, an alien found in violation of a PPO is subject to deportation.

### **Crimes Against Children**

The same statute that involves domestic violence also provides for deportation for crimes involving child abuse, child neglect, or child abandonment. These crimes would include 90-day misdemeanors.

Sexual abuse of a minor is considered an aggravated felony pursuant to statute.<sup>22</sup> These crimes are not only deportable, but as aggravated felonies virtually no relief is available. Immigration Courts have held criminal sexual conduct convictions that are misdemeanors are, in fact, aggravated felonies under immigration law.<sup>23</sup>

### **Miscellaneous Crimes**

Aliens who have multiple convictions involving moral turpitude, not arising out of a single scheme, are deportable and inadmissible.<sup>24</sup> A single scheme has been defined under immigration law as a situation where an alien did not have any opportunity between the commission of two crimes to reflect or think about the crimes, or the crimes occurred as a result of a single action.<sup>25</sup> Two misdemeanor convictions can trigger deportation procedures.

Drug convictions are treated harshly under the INA. Specifically, any drug conviction, other than for the personal use of 30 grams or less of marijuana provides for deportation or lack of admission into the United States.<sup>26</sup> In addition, special provisions relating to drug traffickers provide for deportation and inadmissibility, but are so severe and so harsh that waivers for these types of criminal convictions are not permitted. These aliens are classified as aggravated felons and are not eligible for relief as will be discussed below.<sup>27</sup>

Convictions for firearms offenses,<sup>28</sup> high speed flight offenses,<sup>29</sup> and other types of crimes are listed as crimes that cause aliens to be deported. Keep in mind that these various specified crimes can also qualify as moral turpitude crimes.

“Aggravated felony crimes,” as defined by the INA, are grounds for deportation<sup>30</sup> and for limiting or precluding certain waivers. Examples of the most prevalent aggravated felonies include any type of violence for which a sentence of one year or more is imposed, theft offenses for which a sentence of one year or more is imposed,<sup>31</sup> drug trafficking,<sup>32</sup> sexual abuse of minors,<sup>33</sup> fraud exceeding \$10,000,<sup>34</sup> and obstruction of justice.<sup>35</sup>

It should be noted that the INS will often charge an alien as being deportable under several different sections of the statute, even though only one crime occurred. An example of this would be drug traffickers who are deportable pursuant to “crimes of moral turpitude,”<sup>36</sup> as “aggravated felons”<sup>37</sup> and violation of “controlled substance” provisions.<sup>38</sup>

### **Waivers of Relief From Deportation**

As noted above criminal convictions can make an alien deportable and/or inadmissible. The immigration laws provide aliens the opportunity to seek a waiver that may allow them to remain in, or be admitted to the United States. Conviction for an aggravated felony is an absolute bar to one type of waiver (Cancellation of Removal) and a virtual bar to a waiver of inadmissibility.<sup>39</sup>

Cancellation of Removal<sup>40</sup> is a waiver applicable in two situations. The first is for permanent residents who have resided in the United States for a minimum of seven years, with at least five years in permanent residence status.<sup>41</sup> Although not specifically stated in the statute, hardship to the alien’s relatives may be a factor. This waiver is the most common waiver used today for criminal aliens and is available for most felonies, which are not aggravated felonies. Criminal practitioners must pay special attention to the cancellation of removal rules, as minor adjustments of the nature and/or sentence for a crime can make all the difference.

Sentences for theft or violence offense of even one day less than a year may make an alien eligible for cancellation of removal. Another example would be to plead a defendant guilty to a non-fraud offense when more than \$10,000 is involved. Often when judges or prosecutors are advised of the problem, accommodations can be made to fashion convictions or sentences that allow for immigration relief.

The second cancellation of removal waiver applies to non-permanent residents (illegals) who have been in the U.S. for ten years.<sup>42</sup> Proof of “good moral character” is required. Virtually *any* criminal conviction will prevent a finding of “good moral character”.

Waiver of Inadmissibility<sup>43</sup> is applicable to non-permanent residents who have a criminal conviction

rendering them inadmissible. An example of such a person would be a non-permanent resident who is currently married to a United States citizen, but who has previously been convicted of a theft crime. The requirements for this type of waiver are different from those of the cancellation waivers in two significant ways: no residency requirement is necessary, and conviction for possession of controlled substances cannot be waived unless the conviction is for possession of less than 30 grams of marijuana. A waiver is not required for a single 90-day misdemeanor.

### Strategies

The immigration consequence of a criminal conviction of an alien often far outweighs the criminal punishment imposed. By carefully evaluating the immigration consequences, criminal practitioners can often mold a resolution that will allow an alien to avoid deportation/removal or to be eligible for a waiver or readmission into the U.S. As noted above, judges and prosecutors may work with criminal attorneys to create circumstances that may allow aliens to remain in the U.S.

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### Endnotes

- 1 8 USC section 1182 (a)(2) INA section 212(a)(2); 8 USC section 1227(a)(2), INA section 237(a)(2)
- 2 8 USC section 1101(a)(3); INA section 101(a)(3)
- 3 8 USC section 1101(a)(20); INA section 101(a)(20)
- 4 8 USC section 1101(a)(15)(A-V); INA section 101(a)(15)(A-V)
- 5 8 USC section 1101(a)(48); INA section 101(a)(48)
- 6 MCL section 762.11

- 7 MCL section 333.7411
- 8 MCL section 769.4(a)
- 9 *In Re: Miguel Devison Charles*, Executive Office for Immigration Review (B.L.A. #3435, 2001).
- 10 18 USC section 5031-5042 (1994 & Supp II 1996)
- 11 8 USC section 1182(a)(2); INA section 212(a)(2)
- 12 8 USC section 1227(a)(2); INA section 237(a)(2)
- 13 8 USC section 1182(a); INA section 212(a)
- 14 8 USC section 1227(a)(2)(E)(i); INA section 237(a)(2)(E)(i)
- 15 8 USC section 1182(a)(2); INA section 212(a)(2) (Note, it is specifically absent)
- 16 8 USC section 1182(a)(2)(i)(I), INA section 212(a)(2)(i)(I); 8 USC section 1227(a)(2)(i); INA section 237(a)(2)(i)
- 17 Extensive case law from the Executive Office of Immigration Review (B.L.A.)
- 18 8 USC section 1227(a)(2)(E)(i); INA section 212(a)(2)(E)(i)
- 19 MCL section 769.4(a)
- 20 Varies by local jurisdiction
- 21 8 USC section 1227(a)(2)(E)(i)(ii); INS section 237(a)(2)(i)(ii)
- 22 8 USC section 1101(a)(43)(A); INA section 101(a)(43)(a)
- 23 *In Re: Anderson Davis Justin Small*, 23 I & N Dec (448)(B.L.A. 2002)
- 24 8 USC section 1182(a)(2)(B); INA section 212(a)(2)(B); 8 USC section 1127(a)(2)(A)(ii); INA section 237(a)(2)(A)(ii)
- 25 *In Re: Matter of Adetiba*, 20 I & N Dec 506 (1992)
- 26 8 USC section 1227(a)(2)(B); INA section 237(a)(2)(B); 8 USC section 1182(a)(2)(B); INA section 212(a)(2)(B)
- 27 8 USC section 1101(a)(43)(B); INA section 101(a)(43)(B)
- 28 8 USC section 1227(a)(2)(C); INA section 237(a)(2)(C)
- 29 8 USC section 1227(a)(2)(A)(IV); INA section 237(a)(2)(A)(IV)
- 30 8 USC section 1101(a)(43); INA section 101(a)(43)
- 31 8 USC section 1101(a)(43)(F)(G); INA section 101(a)(43)(F)(G)
- 32 8 USC section 1101(a)(43)(B); INA section 101(a)(43)(B)
- 33 8 USC section 1101(a)(43)(A); INA section 101(a)(43)(A)
- 34 8 USC section 1101(a)(43)(M)(i); INA section 101(a)(43)(M)(i)
- 35 8 USC section 1101(a)(43)(S); INA section 101(a)(43)(S)
- 36 8 USC section 1227(a)(1); INA section 237(a)(i)
- 37 8 USC section 1227(a)(iii); INA section 237(a)(iii)
- 38 8 USC section 1227(B); INA section 237(B)
- 39 8 USC section 1182(h); INA section 212(h)
- 40 8 USC section 1229(b); INA section 240(A)
- 41 8 USC section 1229(b)(a); INA section 240(A)(a)
- 42 8 USC section 1229(b)(b); INA section 240(A)(b)
- 43 8 USC section 1182(h); INA section 212(h)

# Notes