



# Removal Proceedings

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This article summarizes removal (deportation) law and procedures, focusing on the more common ways in which non-citizens could become subject to removal, removal proceedings themselves, the intersection of criminal law and immigration law, and recent changes to immigration laws and policies.

First, though, the key players. With some exceptions, removal proceedings are presided over by immigration judges who are part of the Department of Justice's Executive Office for Immigration Review. The administrative appeals court is the Board of Immigration Appeals, and the attorney general also has authority to certify cases to himself.<sup>1</sup> The federal circuit courts of appeals hear petitions for review challenging administratively final removal orders,<sup>2</sup> while removal proceedings are prosecuted by Immigration and Customs Enforcement (ICE), which represents the Department of Homeland Security in removal proceedings.<sup>3</sup>

A noncitizen can be ordered removed without a hearing before an immigration judge in some circumstances, including certain entrants under the Visa Waiver Program, nonpermanent residents convicted of aggravated felonies, and non-citizens subject to reinstatement of a prior removal order.<sup>4</sup> Customs and Border Protection can enter expedited removal orders against certain applicants for admission.<sup>5</sup>

**DEPORTED**

## Grounds of removability

Noncitizens who have been admitted to the U.S.—such as lawful permanent residents, visitors, students, or temporary workers—are

subject to the deportation grounds found in 8 USC 1227. Non-citizens who are applicants for admission are subject to the inadmissibility grounds found in 8 USC 1182. Applicants for admission include noncitizens arriving in the U.S. at a port of entry, those who entered the U.S. without inspection, those paroled into the U.S. (including on advance parole), or those applying to adjust to lawful permanent resident status.<sup>6</sup>

There is some overlap between deportation and inadmissibility grounds and there are also key differences. This article addresses some of the more common ones; a complete discussion of these grounds is beyond the scope of the article.

## Status violations and remaining longer than permitted

Noncitizens who have been admitted in a nonimmigrant, or temporary, status become deportable if they violate their status or remain longer than permitted.<sup>7</sup> Examples include a student who drops out of school, switches schools without permission, or works without permission; a tourist who works or goes to

school; and a temporary worker who quits the sponsoring employer, works for a different employer, or is not working in accordance with the conditions of his or her status.

Nonimmigrants are often admitted to a certain date. F-1 nonimmigrant students and J-1 exchange visitors are admitted for “duration of status” or “D/S” so their status can continue indefinitely if they and their sponsors comply with certain requirements.<sup>8</sup> Noncitizens can apply to change, extend, or adjust their status, but can still become removable if the request is not granted before expiration of their status.<sup>9</sup> In my experience, those with pending requests have historically not been a priority for removal proceedings.

#### Entry without inspection

Noncitizens who entered the U.S. without inspection are inadmissible.<sup>10</sup> It is important to distinguish between noncitizens who were admitted in error with invalid or fraudulent documents from those who entered without inspection. Those in the former group are generally regarded as having been admitted to the U.S., while those in the latter group are inadmissible because they entered without inspection.<sup>11</sup>

#### The criminal grounds of removability

##### Aggravated felonies

Aggravated felonies carry some of the most serious immigration consequences. Aggravated felons may be subject to mandatory detention,<sup>12</sup> declared ineligible for naturalization, asylum, cancellation of removal, and other relief from removal,<sup>13</sup> and permanently barred from returning to the U.S.<sup>14</sup> The aggravated felony deportation ground lacks a directly corresponding ground of inadmissibility.<sup>15</sup> There are more than 23 categories of aggravated felonies.<sup>16</sup>

Aggravated felonies do not have to be felonies or aggravated. For example, misdemeanor shoplifting or assault convictions resulting in a sentence of one year may be aggravated felonies, and a misdemeanor crime involving sexual abuse of a minor, regardless of the sentence, can be an aggravated felony.<sup>17</sup> Other aggravated felonies include trafficking in controlled substances and offenses involving fraud or deceit where the victim’s loss exceeds \$10,000.<sup>18</sup> Some aggravated felonies are tied to convictions under specific federal statutes, others are tied to convictions that are described in specific federal statutes, and some are tied to convictions matching a generic offense like theft.<sup>19</sup>

##### Crimes involving moral turpitude

Noncitizens convicted of crimes involving moral turpitude (CIMT) can be either deportable or inadmissible. The Board of Immigration Appeals has defined CIMTs as crimes that are vile, base, or depraved and that violate accepted moral standards.<sup>20</sup>

Convictions for multiple CIMTs render a noncitizen inadmissible and deportable, while a conviction for a single CIMT

#### FAST FACTS

Some of the most common ways in which noncitizens become removable are by violating their status, entering the U.S. unlawfully, or being convicted of a crime.

Removal proceedings are administrative proceedings that differ from criminal prosecutions, including in terms of the rights provided to noncitizen respondents.

Because of the grave consequences to noncitizens convicted of crimes, it is essential that they receive advice about potential immigration consequences before proceeding with plea negotiations.

renders a noncitizen deportable if it was committed within five years of admission and is punishable by a maximum of one year or more in jail.<sup>21</sup> A single CIMT renders a noncitizen inadmissible unless it is (1) committed while the noncitizen was under 18 years of age and more than five years before application for admission or (2) punishable by one year or less in jail and the noncitizen received a sentence of six months or less; the inadmissibility grounds can be triggered in the absence of a conviction if the noncitizen admits committing acts which constitute the essential elements of a CIMT.<sup>22</sup>

##### Controlled substances

Like CIMTs, controlled substance convictions carry both inadmissibility and deportability consequences. Any controlled substance conviction, including an admission to having committed such a crime or to committing acts constituting the essential elements of such a crime, triggers a permanent ground of inadmissibility. Applicants for lawful permanent resident status or returning lawful permanent residents can apply for a waiver if they have one such conviction involving personal possession of less than 30 grams of marijuana.<sup>23</sup>

Almost all controlled substance convictions trigger a ground of deportation. As in the preceding paragraph, there is a deportability exception for a single conviction for personal possession of less than 30 grams of marijuana.<sup>24</sup> Critically, lawful permanent residents convicted of personal possession of less than 30 grams of marijuana are not deportable if they remain in the U.S., but they will be inadmissible to the U.S. if they travel abroad.<sup>25</sup> Noncitizens who the government has a reason to believe are involved in drug trafficking are permanently inadmissible. This does not require a conviction.<sup>26</sup>

Noncitizens who have been convicted of drug trafficking are classified as aggravated felons. A controlled substance trafficking offense is, among other things, “any felony punishable under the Controlled Substances Act.”<sup>27</sup> Because the



social sharing of a small amount of marijuana for no remuneration is a federal misdemeanor, a state offense that punishes this conduct is not an aggravated felony controlled substance offense.<sup>28</sup>

#### Firearms offenses

Firearms offenses trigger deportability, and there is no directly corresponding inadmissibility ground. Any firearms conviction occurring after a noncitizen's admission triggers deportability, including misdemeanors or regulatory crimes, although there is an exception for antique weapons.<sup>29</sup> Certain firearms offenses are also aggravated felonies.<sup>30</sup>

#### Crimes of domestic violence

A noncitizen convicted of a "crime of domestic violence" is deportable.<sup>31</sup> There is no directly corresponding inadmissibility ground. A crime of domestic violence is a "crime of violence" that was committed against a protected person, and a crime of violence is determined under the categorical approach by comparing the state offense to 18 USC 16.<sup>32</sup> The Sixth Circuit has found 18 USC 16(b) unconstitutional;<sup>33</sup> this question is pending decision by the United States Supreme Court.<sup>34</sup>

Whether the complaining witness is a "protected person" is determined by the circumstance-specific approach, meaning that an adjudicator can look at the record of conviction, police report, and other reliable extraneous sources to determine the identity of the complaining witness and relationship to the noncitizen.<sup>35</sup> Thus, for a noncitizen defendant who

pleads guilty to a crime of violence that is not a domestic violence offense under state law, adjudicators can look beyond the statutory elements to determine if this deportation ground applies.<sup>36</sup>

#### A brief primer on removal proceedings

The Immigration Court Practice Manual sets forth the rules and procedures for removal proceedings, which are heard in immigration court and begin when ICE files a notice to appear with the court. The notice to appear is the charging document containing ICE's allegations and removal charges. It can be prepared by ICE or another agency like the U.S. Citizenship and Immigration Service or Customs and Border Protection.

An immigration judge presides over removal proceedings. The noncitizen, called the respondent, has a right to representation by counsel at no cost to the government. There are no public defenders or appointed attorneys, but immigration courts have increasingly reached out to the private bar and nonprofits to arrange pro bono representation of incompetent and other respondents.

The proceedings are recorded through a digital audio system. The immigration court provides interpreters for respondents and witnesses who are not fluent in English. The Federal Rules of Evidence are not binding, but their principles concerning the admissibility and reliability of evidence remain relevant.

A detained respondent can request bond.<sup>37</sup> However, the immigration judge lacks jurisdiction over bond requests filed by certain respondents, including arriving aliens, Visa Waiver entrants, those in asylum or withholding-only proceedings (including those subject to reinstatement of removal), and certain criminal aliens.<sup>38</sup> Respondents who cannot request bond from the immigration judge may be able to seek relief through a petition for writ of habeas corpus.<sup>39</sup>

Under mandatory detention, noncitizens convicted of certain crimes, including aggravated felonies, firearms offenses, controlled substance offenses, multiple CIMTs, or a single CIMT resulting in a sentence of one year or more, are ineligible for bond regardless of how long they have lived in the U.S., the availability of relief from removal, and other traditional bond factors; this applies to those released from custody after the October 8, 1998, expiration of the Transition Period Custody Rules.<sup>40</sup>

In removal proceedings, the respondent can deny or concede the removal charges. If the immigration judge sustains the charges, the respondent can apply for relief from removal.

After the immigration court proceedings conclude, both sides have 30 days to appeal to the Board of Immigration Appeals, 30 days to file a motion to reconsider, and 90 days to file a motion to reopen.<sup>41</sup> Following the Board's decision, the noncitizen has 30 days to file a petition for review with the Circuit Court of Appeals, 30 days to file a motion to reconsider, and 90 days to file a motion to reopen.<sup>42</sup> There are some exceptions to these deadlines, such as joint motions

to reopen or reconsider, motions to assert claims for asylum or similar relief, or those based on ineffective assistance of counsel.<sup>43</sup>

## Crimmigration: The intersection of immigration and criminal law

Immigration law has its own unique definition of conviction:

[W]ith 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.<sup>44</sup>

Under immigration law, dispositions under the Holmes Youthful Trainee Act, 7411, other deferred adjudication programs, and many expunged convictions remain convictions for immigration purposes.<sup>45</sup>

A conviction that is set aside or vacated to avoid immigration consequences remains a conviction for immigration purposes.<sup>46</sup> However, a conviction that is set aside or vacated because of a defect in the underlying proceeding may no longer carry immigration consequences; a common defect occurs when a noncitizen defendant does not receive the required advice about the potential immigration consequences.<sup>47</sup> The Board of Immigration Appeals gives full faith and credit to a trial court's decision to modify or reduce a sentence.<sup>48</sup>

Counsel should consult with experienced immigration law counsel when representing noncitizens charged with a crime or seeking to vacate or modify a conviction.<sup>49</sup> Immigration counsel can assess the potential consequences and help identify possible "safe harbors" that carry no or reduced immigration consequences. This advice is not only constitutionally mandated, it is essential to good lawyering.

For the most part, the adjudicator applies the categorical approach to determine if a criminal conviction triggers a ground of removal. This analytical framework ignores the circumstances of the noncitizen's conduct and focuses solely on the statutory elements of the crime. If those elements are the same as or narrower than the removal category, the criminal statute is a categorical match and every conviction under the statute qualifies as a removable offense.<sup>50</sup>

On the other hand, if the criminal statute is broader than the removal ground—meaning that it is possible to violate the criminal statute in a way that falls outside of the removal ground—then no conviction under that statute triggers removal. If the statute is divisible, the adjudicator can look beyond the statute to the record of conviction to determine which portion of the divisible statute the defendant was convicted of violating. A statute is divisible if it defines alternate elements, as opposed to means, of the offense.<sup>51</sup> Elements are the things that the prosecution must prove and the trier of fact must find beyond a reasonable doubt.

Some criminal removal grounds are analyzed, in whole or in part, under the circumstance-specific approach. Under this analytical framework, the adjudicator looks beyond the statutory elements and record of conviction to the factual admissions or findings.<sup>52</sup> This very limited exception has been applied to, among other things, the amount of loss for the aggravated felony fraud or deceit provision (fraud or deceit must still be an element of the offense); the amount of marijuana to determine if a removability exception applies; and the identity of the victim and relationship to the defendant for a crime of domestic violence.<sup>53</sup>

## Recent developments under the Trump administration

These have been interesting times for attorneys practicing immigration law. Any new administration brings changes to immigration policies and procedures, and the current one has been no exception.

One of the most notable changes has been the winding down of the Deferred Action for Childhood Arrivals (DACA) program. In a nutshell, this Obama-era program allowed non-citizens who came here as children, met certain educational requirements, and did not have a serious criminal record to receive deferred action—an act of administrative grace that permits otherwise removable noncitizens to remain here temporarily.<sup>54</sup> DACA recipients could obtain employment authorization. Deferred action is not a permanent status and can be taken away at any time for any reason. The most prominent recipient of deferred action was musician John Lennon.<sup>55</sup>

President Trump is ending DACA.<sup>56</sup> Current DACA holders will keep this status until it expires. No new applications were accepted after September 5, 2017. Those whose DACA statuses expire between that date and March 5, 2018, had until October 5, 2017, to file one last extension.

Another change is an increase in enforcement actions and the aggressiveness with which immigration agencies pursue enforcement actions. Prior administrations have tried to effectively manage the oversight and removal of millions of unlawfully present noncitizens by focusing scarce resources on those who pose the most risk.<sup>57</sup> On February 20, 2017, the Department of Homeland Security rescinded those prior memos, making every potentially removable noncitizen a priority.<sup>58</sup>

The Trump administration has released three versions of a travel ban, all of which have been subject to extensive litigation.<sup>59</sup> The most recent one, Presidential Proclamation 9645, limits the entry of certain immigrants and nonimmigrants from Chad, North Korea, Venezuela, Iran, Libya, Somalia, Syria, and Yemen, and provides enhanced screening of Iraqis.<sup>60</sup> On November 13, 2017, the Ninth Circuit stayed a preliminary injunction against nationals of six Muslim-majority countries, except as to individuals who have a credible claim of a bona fide relationship with a person or entity in the U.S.; on December 22, 2017, on the basis that the Presidential Proclamation exceeds the authority delegated to the president by Congress, the Court

enjoined the enforcement of several provisions of the Proclamation as it relates to foreign nationals who have a bona fide relationship with a person or entity in the United States.<sup>61</sup> ■



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## ENDNOTES

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- 8 USC 1227(a)(1)(B) and 8 USC 1227(a)(1)(C).
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- 8 USC 1182(a)(2)(A)(i)(1), 8 USC 1227(a)(2)(A)(iii), and 8 USC 1227(a)(2)(A)(i)(1).
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- 8 USC 1182(a)(2)(A)(i)(1) and 8 USC 1182(h).
- 8 USC 1227(a)(2)(B)(i).
- Compare 8 USC 1227(a)(2)(B)(i) (single conviction for personal possession of less than 30 grams of marijuana not a deportable offense) to 8 USC 1182(a)(2)(A)(i)(1) (all controlled substance offenses trigger ground of inadmissibility).
- 8 USC 1182(a)(2)(C).
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