



Proceed with Caution

Immigration Consequences of Criminal Convictions

By David C. Koelsch

Fast Facts:

What you do not know can hurt you (and your client): if your client is accused of a crime and is not a U.S. citizen, your actions may impact whether your client is deported and whether you have committed malpractice or ineffective assistance of counsel.

Do not judge a book (or your client) by its cover.

Do not abandon all hope: if your client is not a U.S. citizen, there are several relatively simple procedures you can incorporate into your daily practice to avoid problems and there are resources to help.

Natalie came to the U.S. when she was just three years old after her family emigrated from the former Soviet Union. Because of an oversight by her father, Natalie did not become a lawful permanent resident of the U.S. One night while on a date, she and her boyfriend were accosted by several members of a gang. Panicked, Natalie grabbed a gun that her boyfriend kept under his car seat and pointed it out the window of the car while screaming at the gang to leave her boyfriend alone. The gun went off and the bullet went over the heads of the men. Just then, the police arrived and broke up the fight. Natalie was charged with felonious assault with a dangerous weapon. Natalie's attorney worked out a plea agreement with the prosecutor to reduce the conviction to intentional discharge of a firearm and Natalie was sentenced to probation. At her final probation appointment, officers from Immigration and Customs Enforcement arrested Natalie and deported her to Russia. Her defense attorney was focused only on avoiding jail time, but her plea to an aggravated felony resulted in Natalie's deportation. She returned to Russia where she no longer had family and knew no one, didn't speak the language, and had few skills needed to survive.

Natalie's plight is not unique. Immigration laws are very tough on crimes committed by immigrants, and many misdemeanors and lesser crimes at the state level are deportable offenses under immigration law. As noted by the United States Supreme Court, "[D]eportation is a drastic measure and at times the equivalent of banishment or exile" and, in many cases, far worse than any criminal sentence.¹ In recent years, Congress has greatly expanded the list of deportable crimes and the U.S. Department of Homeland Security has been given a broad mandate and additional resources to round up and deport immigrants with criminal records. Many defense attorneys, prosecutors, and judges are unaware or misinformed of the immigration consequences of criminal convictions and, if made aware of the consequences, may be inclined to craft pleas and sentences to avoid deportation for immigrants who may deserve a second chance.

A "Conviction" is What Counts

One of the most common misconceptions is that probation or a suspended sentence will not lead to deportation. Not so. All that is required for a conviction under immigration law is a formal judgment of guilt and imposition of a sentence.² If the defendant took a plea or a sentence was held pending compliance with certain conditions, a conviction still occurred and that person is deportable. Another myth is that deferred judgments do not cause immigration consequences. However, all that is required for a conviction under immigration law is an admission of the elements of an offense and imposition of a sentence.³ Probation



Butterflies in Urbia by Daniel Valentine

Intake Checklist for Immigration Issues

- Where was your client born?
- Is your client a citizen of the U.S.?
- If not a U.S. citizen, what is your client's current immigration status?
- When, where, and how was your client last admitted to the U.S.?
- Does your client have any prior criminal history in or outside the U.S.?
- Does your client have any prior immigration history in the U.S.?

counts as a sentence and, in many cases, the maximum sentence that could be imposed under Michigan law—not the actual sentence imposed—determines whether your client will be deported. Juvenile offenses and vacated sentences are not considered to be deportable offenses, yet sentencing under the Holmes Youthful Trainee Act will likely trigger immigration consequences.⁴

Crime Classifications

Crimes are classified under immigration law as either "aggravated felonies" or "crimes involving moral turpitude." How a crime is classified determines whether your client is deported or is entitled to any relief. Persons who are not U.S. citizens—even long-time lawful permanent residents—can be deported if convicted of an aggravated felony. Aggravated felonies are listed at 8 USC 1101(a)(43) and include many crimes that are not considered felonies under Michigan law. In fact, many misdemeanors are also aggravated felonies, depending on the length of the sentence imposed. Crimes involving moral turpitude are not listed in the Immigration and Nationality Act but comprise conduct that is "inherently base, vile, or depraved, and contrary to accepted rules of morality."⁵ For example, theft, larceny, fraud, and other intent crimes are all crimes involving moral turpitude, while simple assault is not. If a crime involving moral turpitude is committed within five years of admission to the U.S. and a sentence of more than one year may be imposed, your client may be deported.

Long-term Implications

If your client is not deported, a criminal conviction may impede his or her ability to become a U.S. citizen. If deported, it may determine if and when your client is allowed to return. To naturalize, a lawful permanent resident must show good moral character for five years before applying for citizenship. A criminal conviction—no matter how minor—may prevent your client from voting and qualifying for certain federal and state programs, and eliminate his or her ability to sponsor family members to come to the U.S. Similarly, even the admission of criminal activity can render an alien inadmissible to the U.S. and a conviction

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can forestall a client's ability to obtain a waiver to rejoin his or her family members. The stakes are high, both in terms of deportation and the long-term effects on your clients and their families.

Professional and Ethical Duties

The American Bar Association and the National Legal Aid & Defender Association urge defense counsel to determine and advise clients about collateral consequences in advance of the entry of any plea.⁶ The Commentary to Standard 14-3.2(f) specifically mentions that a client's greatest priority may be the immigration consequences of a conviction. While lacking the force of law, this guidance clearly signals to attorneys their ethical and professional duties to clients. Additionally, in what appears to be a growing trend, several states require attorneys to discuss immigration consequences with their clients before entry of a plea.⁷

Failure to advise clients about immigration consequences could also be the basis for a malpractice claim if such advisals are a generally recognized and accepted practice. Michigan law does not yet require defense counsel to inquire about immigration status or advise clients regarding immigration consequences. As the list of aggravated felonies grows and the U.S. Department of

Homeland Security devotes additional resources to deporting immigrants with criminal convictions, it is likely that Michigan—by statute, caselaw, or malpractice insurance carrier rules—may require such inquiries and advisals.

What to Do

Are you confused? Nervous? Scared? While immigration law is complex, you do not have to go it alone and, in fact, you probably should not in most cases. If you had a tricky forensic issue in a criminal case, you would hire an expert to analyze the evidence. Addressing immigration issues is no different: consult with a competent attorney who specializes in immigration law as soon as possible in your representation. Look for an attorney who is a member of the American Immigration Lawyers Association (AILA). AILA makes it easy for you: visit www.aila.org and click "find an attorney" to view a list of experienced immigration attorneys in Michigan, along with their subspecialties. Additionally, my students and I have compiled an Excel spreadsheet listing Michigan criminal violations, their classification as aggravated felonies or crimes involving moral turpitude, and potential immigration consequences. The spreadsheet is available at the Michigan ReEntry Law wiki at <http://reentry.mplp.org/reentry/index.php/Immigration> or by contacting me at koelscdc@udmercy.edu. ■



David C. Koelsch is a professor at the University of Detroit Mercy School of Law where he directs the Immigration Law Clinic. He is also an officer of the Michigan Chapter of the American Immigration Lawyers Association and lectures and writes extensively on immigration and criminal law issues.

Resources for Criminal Defense Attorneys

- American Immigration Lawyers Association—www.aila.org
- National Lawyers Guild/National Immigration Project—www.nationalimmigrationproject.org
- Immigrant Legal Resource Center—www.ilrc.org
- Immigration Law Clinic, University of Detroit Mercy—www.udmercy.edu

FOOTNOTES

1. *Fong Haw Tan v Phelan*, 333 US 6, 10; 68 S Ct 374; 92 L Ed 433 (1948).
2. 8 USC 1101(a)(48)(A).
3. *Matter of Chairez-Castaneda*, 21 I&N Dec 44 (BIA, 1995).
4. *Matter of Devison*, 22 I&N Dec 1362 (BIA, 2000).
5. *Coykendall v Skrmetta*, 22 F2d 120 (CA 5, 1927).
6. ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f), available at <http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#3.2>; NLADA Performance Guidelines for Criminal Defense Representation, Guideline 6.2(a)(3), available at <http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixtwo> (both websites accessed October 14, 2008).
7. *United States v Kwan*, 407 F3d 1005 (CA 9, 2005); *People v Soriano*, 240 Cal Rptr 328 (Cal App, 1987); *People v Pozo*, 746 P2d 523 (Colo, 1987).

