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Don't Gamble With the Future: Immigration Consequences of Drug Convictions

"[A]s a matter of federal law, deportation is an integral part — indeed, sometimes the most important part — of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[1]

The gravity of drug crimes weighs heavily on a client's immigration status. Controlled substance offenses have far-reaching effects that render a noncitizen deportable and ineligible for certain immigration relief. The consequences are vast — drug violations may torpedo a person's chances of obtaining a visa, a green card, citizenship, and just about any other immigration benefit. More importantly, a drug conviction can effectively banish a person from the United States without regard to any rehabilitation or family ties. In some cases, deportation is tantamount to a death sentence as deported individuals face persecution upon returning home. Noncitizen clients and defense counsel must therefore take even the slightest drug-related charge very seriously, as it could have a devastating impact on a defendant's immigration status, family, and life.

But it should be noted that drug offenses do not have the same effect on every noncitizen. The federal immigration statute, the Immigration and Nationality Act (INA), creates a scheme in which there are two sets of lists enumerating conduct — including drug-related offenses — that either make a person deportable[2] or inadmissible,[3] or both. The exact same drug offense will have different effects depending on the noncitizen's current immigration status, and whether one is fighting deportation or seeking affirmative relief.

The complexity of immigration law, however, does not mean criminal defense practitioners should shy away from it or remain silent when advising a client about a guilty plea. In fact, defense counsel has a duty to advise his or her client of immigration consequences stemming from the alleged offenses. Giving the wrong advice, or providing no advice at all, may constitute ineffective assistance of counsel. In *Padilla v. Kentucky*,[4] the Supreme Court stated, "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'"[5]

Criminal defense attorneys are not expected to become experts in immigration law. But they are uniquely situated to aid their clients in avoiding convictions that could have severe immigration consequences. If the client waits to consult with an immigration attorney after the conviction is final, the options are almost always limited by the time the defendant enters deportation proceedings.

BY NICOLAS CHAVEZ AND ANN MILLER

This article gives practical advice on when and how a criminal defense attorney should get an immigration attorney involved, identifies common immigration consequences brought on when a noncitizen defendant faces a drug conviction, and discusses strategies to eliminate or mitigate those risks.

I. Practical Tips for Having an Immigration-Informed Defense

The most basic point here is to know the client and his or her immigration status. Being a lawful permanent resident is not the same as being a U.S. citizen. "Permanent" does not mean permanent in immigration law; while lawful permanent residents possess relatively strong protections, they may lose their legal status at any time based on crimes. And the same protections afforded to green-card holders might not be available to nonimmigrants[6] or undocumented immigrants. To add a layer of complexity, there are two different sets of rules — one enumerating various deportation grounds due to criminal activity and the other containing a broad list of immigration disqualifications. Picking the right set of rules will help form the correct strategy to keep the client from being deported.

Thus, it is important to identify the client's status from the beginning. Ask for documentary proof as some people misunderstand their status. Do not make assumptions based on skin color or absence of an accent. A Jamaican citizen of ours with a very common English last name and no foreign accent was pressured into accepting a plea deal for possessing a small amount of cocaine in her friend's car. She was not a U.S. citizen, but her court-assigned attorney assumed she was and never asked about her immigration status. The resulting conviction has now jeopardized her immigration status and could lead to her physical removal to a country she is not familiar with, away from her family and real home. It turns out there were other avenues that her defense attorney could have pursued to avoid this dilemma.

How does counsel find out a client's immigration status in the first place? Make it a standard question at intake.[7] Adding questions about where they were born can help identify noncitizens and their particular immigration status with follow-up questions about whether they have ever applied for a green card, naturalization, or other immigration benefit. Learning that a client has a green card might change the strategy on how to proceed.

Ask noncitizen clients about whether they have ever been deported or whether they have ever been placed in deportation proceedings. They might not be risking much if they have been deported already. If they are confused or unsure, referring them to a knowledgeable immigration attorney can help sort it out.

Sending a client off with only a general instruction to find an immigration lawyer is not advisable, as the client may struggle to locate a knowledgeable attorney. Develop and update a referral list of reputable immigration attorneys who work specifically in deportation and the intersection of immigration and criminal law (known as "crimmigration"). Consulting an employment-based immigration attorney, for example, might not be productive and could end in frustration because that person would typically not have the necessary knowledge to advise on criminal immigration penalties.

An immigration attorney's advice on an upcoming plea may depend on the client's previous criminal history. Provide the immigration attorney with complete court and police records relating to the present charge and previous offenses, if available. Having this information readily available for review will be helpful to assess the immigration situation and could influence how the client responds to a criminal charge. If the client has a prior conviction, a subsequent criminal charge could render a noncitizen deportable or ineligible for relief, however minor it may seem. In some cases, a client's prior conduct already renders the client deportable. If the client's criminal history already includes an "aggravated felony" conviction, for example, efforts to structure a plea to simple possession would probably make no difference. In such cases, it may be worth prioritizing criminal and penal considerations over immigration penalties.

If a client is not barred from immigration relief based on previous offenses, communicate with the immigration attorney to discuss possible alternate pleas in the instant case. It is always advisable to get a pending criminal case dismissed, but it is not always possible. Creativity in constructing pleas can pay off later in immigration court. Immigration attorneys may be able to suggest immigration-neutral offenses, but it is best to discuss available alternate pleas with an immigration attorney, as he or she will usually not have the same breadth and depth of knowledge of criminal law as a defense lawyer.

Avoid last minute requests for immigration advice. Immigration attorneys are very much on the hook with criminal defense lawyers for giving wrong advice. Immigration attorneys must investigate the case and review the client's background carefully. Thorough and recent research of pertinent case law is required in all cases. Routine pleas that were previously safe are not guaranteed to stay that way as criminal statutes and court precedents change over time.

Finally, cooperation with an immigration attorney will be most effective if the criminal defense lawyer has a basic understanding of the types of immigration consequences that may result and how to avoid or mitigate them. The rest of this article will give that overview, focusing on the effects of drug offenses on noncitizens.

II. Drug-Based Deportability and Inadmissibility

Deportable Grounds

The INA — the bible for immigration lawyers — lists various drug-related crimes and conduct that serve as the legal basis for deportation in federal immigration proceedings.[8] These are known as the grounds of removability. They generally apply to foreign nationals who currently have legal status in the United States (e.g., lawful permanent residents) or are presently residing in the country after having entered the United States with permission. These groups normally have more protections against deportation than undocumented individuals who are fighting removal or individuals seeking admission into the United States. Notably, the U.S. Department of Homeland Security (DHS) has the burden to establish by "clear and convincing evidence" that a noncitizen is deportable based on a removal ground.[9]

The INA contains varying penalties for controlled-substance offenses depending on a person's immigration status. These offenses include simple possession and possession of drug paraphernalia. The immigration consequences of a drug conviction are particularly harsh, except for a single marijuana-possession offense involving 30 grams or less (which is seen less frequently nowadays).

A state conviction of any drug offense can render a noncitizen

Suggested Immigration-Related Questions for Client Intake

Ask the client the following questions:

- **Were you born in the United States?**
  If yes, then there are no immigration consequences because the client is a U.S. citizen with the extremely rare exception of children born to certain foreign diplomats.

- **What is your nationality/country of citizenship?**

- **Are you a naturalized U.S. citizen?**
  Note: *Naturalized citizens are generally protected from immigration consequences, but de-naturalization is possible in some cases if citizenship was obtained through fraud such as failing to disclose criminal activities that occurred prior to naturalization.*

- **Have you ever had, or do you now have, any immigration legal status, including:**

  - **Lawful Permanent Resident (LPR), aka "green card"?**
    - *Can be deportable from the United States for controlled substance offenses other than a single offense of simple possession of marijuana.*
    - *Can be inadmissible for controlled substance offenses if they travel abroad after the offense.*
    - *Drug trafficking convictions could be an aggravated felony and result in mandatory detention and deportation.*
    - *Does not matter how long they have lived here or had a green card.*

  - **Temporary Protected Status (TPS)?**
    - *Can be prevented from getting a green card based upon a controlled substance offense.*
    - *Can lose TPS status if convicted of any felony or two or more misdemeanors.*
    - *Can lose TPS status for a drug offense.*

  - **Deferred Action for Childhood Arrivals (DACA)?**
    - *Can be prevented from getting a green card based upon a controlled substance offense.*
    - *Can lose DACA status for a DWI/DUI.*
    - *Can lose DACA status for a drug trafficking offense.*
    - *Can lose DACA status for certain misdemeanor offenses.*

  - **Asylee or applicant for asylum?**
    - *Drug trafficking can be an aggravated felony and lose asylum status or eligibility for asylum.*

  - **Non-immigrant Visa (Ex: F-1 student visa, H1B work visa)**
    - *Can be deportable for a drug offense.*
    - *Visas are typically canceled when arrested for DWI/DUI or drug offense.*
    - *Can be inadmissible for drug offense when they travel abroad.*

  Note: *Some people are unclear about their immigration status. Ask to see documentary proof of immigration status. Ex: I-551 card "green card," work permit, or visa.*

- **Any prior arrests or convictions anywhere in the world?**

- **Have you ever been arrested or detained by immigration officers?**

- **Have you ever been deported from the United States?**

- **When was the last time you entered the United States? And under what status?**

- **Do you have a parent, spouse, or child in the United States that has any legal status?**
  If yes, list all such persons:

- **Do you have an alien registration number (also known as the "A-number")?**
  If yes, what is it?
  Note: *The A-number helps track down a person's immigration history or immigration agency file. It can be found on a person's green card or work permit.*

- **Do you have an immigration attorney?**
  If yes, what is the attorney's contact information?

deportable provided that the drug is also a federally defined controlled substance. In pertinent part, the INA provides that an immigrant is deportable if "at any time after admission [he or she] has been convicted of a violation of … any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [section 102 of the Controlled Substances Act (21 U.S.C. § 802)], other than a single offense involving possession for one's own use of 30 grams or less of marijuana."[10] This includes conspiracy or attempts to commit such violations.[11] The Controlled Substances Act (CSA) defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."[12]

Even worse, a state drug-trafficking conviction that may qualify as an "aggravated felony" under immigration law will not only render a noncitizen deportable but can significantly diminish a client's chances of relief in immigration court. The term "aggravated felony" includes a conviction involving the "illicit trafficking in a controlled substance (as defined in [section 102 of the Controlled Substance Act]), including a drug trafficking crime (as defined in section 924(c) of Title 18[of the United States Code])".[13] A drug trafficking crime means "any felony punishable under the Controlled Substances Act."[14] A federal felony is defined as an offense punishable by more than one year under federal law.[15] A common drug trafficking crime under the CSA is the knowing or intentional manufacture, distribution, or possession with intent to distribute a federally defined controlled substance.[16]

A word of caution — the term "aggravated felony" under immigration law could be misleading for practitioners defending against state drug charges. A state drug offense does not have to be classified as a state felony, or contain "aggravating" factors, to qualify as a "aggravated felony" for deportation purposes. It does not matter how the drug offense is classified in state law. A state misdemeanor drug infraction may be classified as a federal aggravated felony if it meets the elements of a federal felony and CSA drug offense.

A less common deportable ground relating to drugs is a conviction for a "crime involving moral turpitude" (CIMT) — a nebulous term of art often used by immigration authorities to describe an offense that society has traditionally regarded as morally reprehensible or vile. While there is room to argue that possession crimes are not CIMTs, trafficking offenses have been considered CIMTs for deportation purposes.[17] Specifically, any noncitizen who is convicted of a CIMT "committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed is deportable."[18] Any noncitizen who is convicted of two or more separate CIMTs after admission is deportable.[19] A trafficking offense may also be a CIMT. However, one can argue that giving away or selling a small amount of marijuana is not a CIMT, given that many states have legalized such use.

An even less applied ground relates to drug abuse or addiction. The INA provides that "[a]ny alien who is, or at any time after admission has been, a drug abuser or addict is deportable."[20] Notably, a conviction is not required for immigration consequences to attach. As such, making a record that the client is a drug abuser or addict in trying to mitigate the harshness of a sentence in the criminal case can backfire in the context of the subsequent immigration proceedings.

Inadmissible Grounds

The INA provides a list of offenses — grounds of inadmissibility — that may disqualify an applicant from applying for legal status or deportation relief.[21] The inadmissibility grounds are more expansive than the deportability grounds and cover individuals who are applying for visas, nonimmigrant legal status, or lawful permanent residency here or outside the country. They also reach situations where an undocumented individual is placed in removal proceedings and seeks relief from deportation.

Like the deportability grounds, the drug-related inadmissibility grounds penalize any controlled substance violation under state or federal law that involves a federally defined controlled substance.[22] The only exception is for a single incident relating to possession of 30 grams or less of marijuana. Unlike the deportability grounds, however, the exception is not applied automatically. A noncitizen who is deemed inadmissible for simple marijuana possession would still have to qualify for a waiver to remove the restriction on obtaining a benefit or relief.[23]

Significantly, the criminal inadmissibility grounds are triggered by both convictions *and conduct*. No arrests, charges, verdicts, or convictions are required for immigration authorities to apply the criminal bars to deny a person's request for a visa, a green card, or other immigration benefit or relief. Unlike its deportability counterpart, the ground of inadmissibility for drug violations may be applied even for conduct not resulting in a conviction. Particularly, a noncitizen "convicted of, or who *admits having committed*, or who *admits committing acts* which constitute the essential elements of" a controlled substance violation as defined by federal law is inadmissible.[24]

An immigrant may also be inadmissible if there is "reason to believe" that the person has engaged in drug trafficking of a federal controlled substance.[25] Again, no conviction is required. An immigration judge or officer may instead rely on facts outside the record such as police reports to determine whether an applicant is a drug trafficker, provided that the information relied upon is substantial and probative. The disconcerting part is there is no waiver for this ground of inadmissibility — it is a permanent and absolute bar. While lawful permanent residents are generally protected from these inadmissibility grounds, a criminal inadmissibility ground could attach to a permanent resident returning from an international trip if an immigration officer has reason to believe the person has since engaged in drug trafficking activities. Again, a final conviction is not necessary for an immigration officer to place the permanent resident in custody upon reentering the country. This explains why a permanent resident is cautioned to not travel outside the United States following a drug arrest or pending an investigation.

The criminal grounds of inadmissibility also include provisions relating to crimes involving moral turpitude (as mentioned above). A noncitizen convicted of, or who admits to having committed, acts that constitute a CIMT is inadmissible.[26] There is a "petty offense" exception for single CIMT offenses that carry a maximum potential sentence of one year or less and for which a sentence of no more than six months is imposed. However, this exception does not exist with controlled substance grounds of inadmissibility.

Finally, a noncitizen may also be inadmissible on health grounds because of a "physical or mental disorder and behavior" that poses a threat to other people or property, or for

being a drug addict or drug abuser.[27] These determinations can be based on police or court records. As with the conduct-based grounds above, no conviction is required.

III. Other Immigration Consequences of Drug-Related Activity

Bond

Release from detention is an immediate concern and may be a priority for clients who risk being detained for weeks, even months, while they await their immigration court hearings. A drug conviction can trigger the federal mandatory detention rules that require Immigration and Customs Enforcement (ICE) to detain an individual without bond pending removal proceedings.[28]

Noncitizens can be detained by DHS agencies at various stages in removal proceedings. They are most often detained following entry into the United States or after release from criminal custody. ICE may also issue a detainer or "ICE hold" on a noncitizen detained in county jail following a criminal arrest. The detainer requests that local law enforcement continue detaining the noncitizen of interest up to 48 hours after a time that a noncitizen would have been released but for the ICE hold, such as when the defendant posts a criminal bond or when criminal proceedings end.[29] If the detained individual posts a criminal bond, ICE has 48 hours (excluding holidays and weekends) to process the detainee and determine whether he or she will be placed in removal proceedings, transferred into ICE custody, or released altogether.

The bond process under immigration law looks very different from criminal proceedings. After ICE assumes custody over the noncitizen, it may lift its hold and release the individual on bond pending removal proceedings unless the individual is subject to mandatory detention based on qualifying criminal conduct.[30] Immigration bond should be granted unless the noncitizen presents a public threat or flight risk. An individual inadmissible or deportable for a drug offense is subject to mandatory detention and will not be granted bond. This explains why it might be a good strategy, in some cases, for a detained client to post the criminal bond to force ICE to decide whether to lift the hold or issue an immigration bond for the person's release. If the client has not yet entered a guilty plea, ICE could not then deny release based on a drug conviction under the mandatory detention rules (unless the person has a prior drug conviction record or is otherwise criminally inadmissible).

If not eligible for a bond, a noncitizen respondent must proceed with removal proceedings while detained. This places the respondent at a considerable disadvantage. Deportation proceedings for detained individuals are expedited through a "rocket docket," which sometimes gives a detainee only a few months to prepare for trial — not sufficient time to thoroughly prepare a defense or file a relief packet. And while immigrants have a right to counsel in immigration court, there is no right to have one appointed to them if they cannot afford to pay a lawyer. Retaining counsel may be cost prohibitive especially while the respondents are detained and unemployed. Immigrant detainees are usually jailed in detention facilities located in isolated areas, far away from family and counsel. With limited resources to fight removal and curtailed access to counsel, it is no wonder why some ultimately choose to sign their deportation orders instead. For this reason, every effort should be made at the criminal proceeding stage to avoid mandatory detention in federal proceedings.

Relief From Deportation[31]

Individuals found deportable or inadmissible by an immigration judge may request discretionary relief from deportation if eligible — a "second chance" to remain in the country. Drug-related convictions and conduct, however, will almost always play a deciding factor as to whether a respondent is eligible for or merits relief. And since the focus shifts from deportability to relief, noncitizen respondents will bear the burden of proving that they meet all the requirements for relief and warrant a favorable exercise of discretion.

A common form of relief is called "cancellation of removal," in which an immigration judge cancels the deportation of a noncitizen. This relief is generally reserved for individuals who have lived in the country for a long period of time and have significant ties to the United States.

For lawful permanent residents seeking cancellation relief, they must show that they have resided in the country for at least seven years and have been green-card holders for at least five years.[32] The residence requirement is not met, however, if the respondent commits an inadmissible or deportable offense before meeting the seven-year period (known as the "stop-time" rule), including drug offenses.[33] Additionally, an aggravated felony conviction will automatically disqualify a respondent from relief, including convictions for drug trafficking as defined by federal law. But a lawful permanent resident may stand a chance to obtain this relief, provided that the stop-time and aggravated felony bars do not apply.

For non-lawful permanent residents with drug convictions, the possibility for cancellation relief is more limited. They must generally show 10 years of continuous residence in the United States and prove exceptional and extremely unusual hardship to qualifying family members, a high burden that most respondents are unable to meet.[34] The stop-time rule also applies to this relief, halting the accrual of residence needed to qualify if a person commits a deportable or inadmissible offense during the requisite period. Moreover, a conviction for a deportable or inadmissible crime will disqualify a noncitizen.[35]

Certain respondents may be able to apply for "adjustment of status" to a lawful permanent resident. This relief is available to noncitizens with an approved visa petition usually filed by a qualifying family sponsor. But such applicants for adjustment are automatically ineligible if they have been convicted, or admit to having committed, a controlled substance violation, except for single offenses involving marijuana possession of 30 grams or less.[36]

Naturalization

After meeting a series of qualifications, lawful permanent residents may apply for the single most important benefit of their lives — U.S. citizenship. A central requirement for naturalization is a demonstration of good moral character during the five-year period prior to filing and throughout the naturalization process.[37] The good moral character period shortens to three years for certain spouses of U.S. citizens.[38]

However, a permanent resident who has been convicted of a controlled substance offense (or has admitted to its essential elements) during the good moral character period is ineligible for naturalization, except for when the

offense is a single incident of possession of 30 grams or less of marijuana.[39]

Even if the drug conviction falls outside the requisite good-moral-character period, certain crimes may result in a permanent bar to U.S. citizenship. A drug trafficking conviction that meets the aggravated felony definition will render the applicant permanently ineligible for naturalization. This means a barred permanent resident will forever lose out on the right to vote, certain federal benefits, and the ability to sponsor certain family members for immigration, among other citizenship benefits.

It should be noted though that denial of the naturalization application is not the worst possible consequence. Nothing prevents DHS from reviewing the record to determine whether the applicant is deportable on criminal grounds. Rather than adjudicate the naturalization application, DHS may decide to place the applicant in deportation proceedings to face the drug removal charges. Thus, a permanent resident with a criminal record would be wise to seek immigration counsel prior to filing an application for naturalization.

Defense Strategies[40]

Just win the case and there will be no deportation. Immigration practitioners wish it were that easy to say. In actuality, a client often is faced with the difficult choice of fighting the criminal case or avoiding hard time. The risk of deportation is sometimes an afterthought. But aside from winning a case outright — which is often difficult to do for various reasons — there are other ways to try and avoid or mitigate immigration consequences with careful planning.

Avoid a 'Conviction'

As discussed above, criminal convictions often trigger serious immigration consequences, including deportation and mandatory detention. Most deportable drug offenses will require a "conviction" as defined by immigration law. Its definition takes on a broader meaning than how the term is normally understood in the state court system. A state judgment might not be treated as a conviction under state law, but it could very well meet the elements of "conviction" as defined by the INA.

A conviction for deportation purposes occurs where there is a formal judgment of guilt — whether it be by a judge or jury, a guilty (or "no contest") plea, or an admission of sufficient facts — and some form of court-ordered punishment as a result of the guilty finding.[41] In the first prong, the conviction must take place in criminal proceedings, where the elements of the offense must be proven beyond a reasonable doubt with the attendant constitutional safeguards. To satisfy the second prong, the judge must impose a form of punishment, penalty, or restraint on the defendant's liberty. Court costs and surcharges in a criminal sentence may constitute a "form of penalty or punishment."[42] Furthermore, any reference to a term of imprisonment includes the period of confinement ordered by a court regardless of any whole or partial suspension of the sentence.[43]

Importantly, the definition of a conviction under the INA includes situations in which adjudications are withheld because the defendant still enters a guilty plea and the court imposes a punishment, usually in the form of probation. A good example is a Texas deferred adjudication judgment, which constitutes a conviction for federal purposes. Many states also offer rehabilitative alternatives that offer treatment programs in exchange for a guilty plea. Upon completing the program, the plea is withdrawn or expunged for state purposes. Contrary to common belief, these judgments may still constitute convictions for deportation purposes so long as they meet the two prongs of the federal definition of conviction.[44]

State judgments lacking either of these two elements — formal judgment of guilt and court-imposed punishment — will not qualify as a conviction for removal purposes. Pretrial diversion programs where the defendant neither enters a guilty plea nor receives a court punishment can help avoid immigration consequences. Significantly, the agreement to drop charges is not with the state court, but with the District Attorney's Office. If charges are dropped after the defendant completes a pretrial program pursuant to an agreement with the prosecutor, it will not be considered a conviction for immigration purposes. A caveat here: Written admissions of guilt that are made part of the court record — even if they were made pursuant to an agreement with the government — could satisfy the first prong of the conviction definition.[45] But admissions of guilt made solely to the District Attorney and that are not incorporated into the court record will not constitute a conviction.

Juvenile offenses are typically not considered convictions because they involve civil proceedings. Be aware, however, that the conviction of a juvenile in adult criminal court will be considered a conviction for immigration purposes. Use caution here even with juvenile drug trafficking offenses, as such records could be used in support of a "reason to believe" determination by immigration officials in deciding whether a person is inadmissible for participating in drug trafficking under 8 U.S.C. § 1182(a)(2)(C).

Because a conviction under immigration law is triggered by a finding of guilty plus court-ordered punishment, defense counsel should look at alternative ways to avoid immigration consequences by obtaining a disposition that does not meet the elements of a conviction for removal purposes.

Pleading to Non-Controlled Substance Offenses

Defendants may find themselves in the surprising situation where pleading guilty to a misdemeanor or even felony non-drug offense may be preferable under immigration law rather than pleading to a minor controlled substance possession offense. But it is often difficult, or impossible, to find a "lesser included" offense from a drug charge that is not related somehow to a controlled substance. Even drug paraphernalia crimes fall under the broad rubric of "any law *relating* to a controlled substance." Where possible, pleading to a state offense not related to drugs would be preferable if it is even an option in the defendant's jurisdiction. Of course, it is important to check whether the non-drug offense also forms an independent basis for removal such as a crime involving moral turpitude.

The disposition of a case where our client was originally charged with selling marijuana provides an example of creative pleading. Because he had labeled the packages of marijuana as incense, his defense counsel pursued a plea to an offense related to misbranding food or drugs in interstate commerce, thereby avoiding a drug trafficking conviction with serious immigration implications. More common situations involve defendants pleading to offenses such as DWI, public intoxication, or unlawfully carrying a weapon, in exchange for the dismissal of the controlled substance charges.

Avoid Pleading to a Federally Defined Controlled Substance

If pleading to an offense that does not involve drugs is not an option, consider pleading to an offense that does not involve a federally defined controlled substance because it protects immigrant clients from deportation based on federal controlled-substance charges of deportability and inadmissibility. In some areas, the state definition of a controlled substance may be broader than the federal definition, thus giving options that may avoid immigration consequences.

Immigration law typically requires employment of a "categorical approach" where one looks at the statute rather than the actual underlying conduct. To determine if a state law conviction renders a noncitizen deportable under immigration law, courts compare the applicable state statute under which the defendant was convicted with the corresponding federal generic offense or definition described in the grounds of removability in 8 U.S.C. § 1227.[46] If the minimum conduct required for a conviction under state law is covered within the federal definition or removal ground, then there is a categorical match and a basis for deportation. If the statute, however, penalizes conduct *outside* the federal offense, then there is no categorical match and the inquiry should stop, unless the state law contains divisible parts under which the defendant may have been convicted. In such case, the government may turn to the record of conviction to determine which provision of the law applied to the noncitizen's conviction. If the state statute is overbroad and indivisible, the defendant is not removable under that criminal ground.

With respect to controlled substance offenses, turn to the federal statute for its definition of a controlled substance, which, in turn, refers to the drugs listed under the federal drug schedules.[47] Accordingly, an immigration attorney may levy an argument that a state drug offense does not trigger immigration penalties because the overly broad statute contains more substances than those listed on the federal drug schedules.[48]

Be wary that some jurisdictions will require more than a showing that a drug statute is overly broad on its face before dismissing a removal charge. Some courts will also require a showing of a "reasonable probability" that state prosecutors will actually go after conduct that falls outside the federal generic offense.[49] This test has been used to dismiss arguments that certain drug convictions fall outside the federal definition despite the state laws being facially broader than the federal counterpart.

In cases where the noncitizen is a permanent resident, it may be advisable to keep the court record clear of any mention of the specific drugs involved and instead only indicate "a controlled substance." The record of conviction includes the indictment, plea colloquy, plea agreement, and disposition. Creating a vague record may be advantageous if the only removal charge alleged is drug-related and the person has legal status. This is because the government must prove by clear and convincing evidence that the person was convicted for a federal controlled substance. Without an alternate basis for deportation, an inconclusive record would preclude the government from meeting its burden in this situation.

On the other hand, where the drug involved in the offense is not listed on the federal schedules, it would be advisable for the noncitizen defendant's plea to specifically mention the drug involved. This makes it easier for the adjudicator to see that the offense falls outside of the controlled substance definition.

Avoid Pleading to an Aggravated Felony

State drug offenses — even seemingly minor offenses — that are analogous to a federal drug trafficking offense are aggravated felonies in the deportation realm. If a noncitizen defendant cannot avoid a drug conviction, at least try to avoid an aggravated felony conviction. As described above, an aggravated felony is the "kiss of death" for individuals in removal proceedings. It destroys a person's chances to remain in the United States.

If the noncitizen defendant has no other choice but to plead to a state drug offense, the strategy would be to plea to an offense that is not an aggravated felony to mitigate the immigration consequences. So long as the drug offense is not an aggravated felony under immigration law, some noncitizen defendants (but not all) may still have options in removal proceedings with a controlled substance violation.

For permanent residents, a simple possession marijuana offense involving 30 grams or less would not render them deportable if it is only a single incident. Again, such a client must be careful not to travel internationally, which could trigger an inadmissibility ground, which is more expansive than the deportability ground. Other drug convictions might preserve eligibility for cancellation of removal relief so long as they are not drug trafficking crimes that meet the federal definition.

For some non-permanent residents, a conviction for the same simple possession crime would render them deportable and inadmissible, but they would at least have an opportunity to apply for a waiver of inadmissibility if they qualify. It would be prudent for defense counsel to ensure that the record of conviction contains a specific reference to simple possession of 30 grams or less of marijuana for personal use, as a noncitizen has the burden to prove eligibility for relief. Defense counsel may use the same approach for drug paraphernalia offenses to show that its use was intended for a small amount of marijuana (30 grams or less).

For offenses involving controlled substances other than marijuana, the ability to mitigate immigration consequences is more limited. If pleading to a controlled substance offense is unavoidable, defense counsel should make every effort to plead to simple drug possession as opposed to pleading to drug trafficking elements such as drug sale or possession for sale. Generally, simple possession of controlled substances (*e.g.*, cocaine) is treated as a misdemeanor under federal law, and therefore a state conviction for the same would not be classified as an aggravated felony.[50] While such a conviction would render most immigrant clients deportable and ineligible for relief, a permanent resident client would at least be able to request cancellation of removal.

A noncitizen defendant should try and avoid pleading to elements of drug trafficking. Instead, one could propose language such as "giving away" or "offering to give away" a small amount without remuneration, rather than something indicative of a drug transaction. Distributing a small amount of marijuana for social sharing is not an aggravated felony because such offense is a misdemeanor under federal law.[51] In cases arising out of the Ninth Circuit, counsel could possibly structure a plea to "offering to" commit a state trafficking crime to avoid an aggravated felony, because solicitation is arguably outside the federal definition of drug trafficking.[52] But federal interpretations of drug trafficking vary between jurisdictions. It is important to check the jurisdiction gov-

erning the client's case[53] to determine whether certain conduct falls within the aggravated felony definition.

Avoid Admissions to Drug Trafficking Conduct

Avoiding a conviction is an excellent outcome, but some immigration consequences do not require a drug conviction. There are certain conduct-based drug grounds that could lead a noncitizen into immigration trouble even where a criminal case is dismissed or not prosecuted.

A noncitizen is inadmissible — and therefore ineligible for relief or affirmative benefits — if immigration authorities have "reason to believe" that he or she has participated in drug trafficking. Admissions to drug trafficking in court and police records could form a "reason to believe" that a defendant is engaged in drug trafficking. This is particularly damaging for non-permanent residents or undocumented individuals who would eventually need to establish admissibility to apply for an immigration benefit or relief in the future. Permanent residents are generally protected against "reason to believe" claims, provided they do not travel outside the U.S. borders and then seek to reenter the United States.

When possible, counsel should avoid statements on the record, including on pretrial diversion agreements, which admit to a client's participation in drug trafficking activities. If unavoidable, try and minimize the damage by stipulating to language that indicates the client was giving away or sharing the drug without remuneration.

Appeal the Conviction

A conviction for immigration purposes is not final until the time for direct appeal has passed.[54] A direct appeal prevents a conviction from forming a basis for deportation. Consequently, DHS would not be able to initiate deportation proceedings until the direct appeal is over. This strategy would give a noncitizen defendant additional time to prepare for his or her removal defense if necessary.

Seek Post-Conviction Relief

For noncitizens with drug convictions already, one possibility is to seek post-conviction relief to eliminate the immigration effects of a drug conviction. However, a court order vacating a conviction will only be given effect in deportation proceedings if it is based on a substantial or procedural defect, such as a violation of constitutional rights.[55] Failure to warn a noncitizen defendant of possible immigration consequences[56] associated with a plea constitutes ineffective of counsel in violation of the Sixth Amendment, and often serves the basis for post-conviction relief.[57] Rehabilitative relief has no effect on the conviction for immigration purposes.[58]

Immigration courts typically request copies of the motion (or writ) and the vacatur order and scour it for any mention of rehabilitative or sympathetic factors that may have persuaded the criminal court to vacate the conviction. Motions to vacate criminal convictions should focus only on the legal or procedural errors and the constitutional claims that resulted in a guilty plea and leave the discussion of humanitarian factors to oral discussions with the judge or prosecutor.

An expungement is another potential post-conviction tool. Sealing a record following acquittal or dismissal is a common occurrence. However, it works better for noncitizens who have legal status than undocumented individuals who still must apply for relief or a benefit. While an expungement does not eliminate the immigration penalties of a conviction, DHS has the burden to produce the conviction records to establish that a person has been convicted of a deportable drug-related ground. But individuals who are deportable on other grounds and must rely on relief to stay bear the burden of showing they are not inadmissible for drug-related reasons, which could be difficult if the record is no longer available. DHS systems will show arrests but not always the disposition, so if a case is dismissed after pretrial diversion, or the record reflects that the amount of marijuana is less than 30 grams, it will be necessary for the noncitizen to obtain court certified copies of the records before the records are sealed or destroyed.

Criminal pardons may eliminate immigration penalties for certain convictions. However, and to the surprise of many practitioners, a pardon will not cure any grounds of inadmissibility or a drug-related ground of deportability.

V. Conclusion

The immigration consequences of drug crimes are particularly harsh — even seemingly minor offenses that are often shrugged off. It is incumbent that defense counsel identify and advise their noncitizen clients of potential immigration ramifications brought on by their pending criminal drug charges. Failure to do so could result in deportation and form a permanent bar to reenter the country — regardless of their longtime residence, significant family ties, and contributions to their communities. Clients must be informed of the immigration penalties and alternatives to be able to eliminate or minimize the immigration consequences associated with drug-related offenses. Working together with immigration counsel to strategize ways to mitigate the immigration effects is a key component of effective representation. In so doing, noncitizen defendants stand a chance to remain in the United States or obtain deportation relief.

Notes

1. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

2. For purposes of this article, we use the term "deportable" or "deportation" interchangeably with "removal" or "removability," which are statutory terms used to describe the legal processes under which a person is deported under immigration law. *See* 8 U.S.C. § 1227.

3. The term "inadmissible" or "inadmissibility" references an enumerated ground upon which a person is found ineligible for an immigration benefit (e.g., visa, green card), or ineligible for deportation relief (e.g., adjustment of status relief, cancellation of removal). *See, e.g.*, 8 U.S.C. § 1182 (enumerating grounds of inadmissibility); § 1255(a) (requiring individual to be "admissible" to adjust status to a lawful permanent resident).

4. *Padilla,* 559 U.S. at 374.

5. *Hill v. Lockhart,* 474 U.S. 52, 62 (1985) (White, J., concurring in judgment).

6. Nonimmigrants are citizens of other countries admitted to the United States on a temporary basis for a specific purpose (for example, tourists, students, or temporary workers).

7. See the intake questionnaire in this article.

8. Removal proceedings commence with the service of a Notice to Appear on the immigrant client (referred to as the "Respondent"), which contains the immigration charges upon which the federal government seeks to deport the individual. *See* 8 U.S.C. § 1229(a); 8 C.F.R. § 1003.14 (2021).

9. 8 C.F.R. § 1240.8(a).

10. 8 U.S.C. § 1227(a)(2)(B)(i).
11. *Id.*
12. 21 U.S.C. § 802(6).
13. 8 U.S.C. § 1101(a)(43)(B).
14. 18 U.S.C. § 924(c)(2).
15. *See* 18 U.S.C. § 3559(a).
16. 21 U.S.C. § 841(a)(1).
17. *See, e.g.*, *Matter of Khorn*, 21 I. & N. Dec. 1041 (BIA 1997).
18. 8 U.S.C. § 1227(a)(2)(A)(i).
19. 8 U.S.C. § 1227(a)(2)(A)(ii).
20. 8 U.S.C. § 1227(a)(2)(B)(ii).
21. *See* 8 U.S.C. § 1182, *et seq*.
22. 8 U.S.C. § 1182(a)(2)(A)(i).
23. 8 U.S.C. § 1182(h). Generally, applicants for a waiver of a criminal ground of inadmissibility must establish extreme hardship on certain qualifying family members and prove that they warrant a favorable exercise of discretion. Undocumented family members are not considered to be qualifying family members for the waiver.
24. 8 U.S.C. § 1182(a)(2)(A)(i). An "admission" to a crime must satisfy a three-prong test to have any effect for immigration purposes: (1) The conduct must meet the essential elements of the criminal offense; (2) the applicant must be given the statutory definition and the elements of the criminal offense; and (3) the admission must be voluntary. *Matter of K*, I. & N. Dec. 594, 598 (BIA 1957).
25. 8 U.S.C. § 1182(a)(2)(C).
26. 8 U.S.C. § 1182(a)(2)(A)(i)(I).
27. 8 U.S.C. § 1182(a)(1)(A)(iii), (iv).
28. 8 U.S.C. § 1226(c)(1).
29. *See* 8 C.F.R. § 287.7(g).
30. Under the Biden administration, DHS shifted its priority enforcement policies to take on a more flexible stance regarding deportable immigrants found within the United States. Current policies allow ICE officers to exercise discretion and release even some individuals who would otherwise be subject to mandatory detention. This policy is currently being challenged in federal court.
31. Discussion is limited to certain common forms of relief. Eligibility for humanitarian relief (*e.g.*, asylum, TPS, VAWA, U visas) is beyond the scope of the article.
32. 8 U.S.C. § 1229b(a).
33. 8 U.S.C. § 1229b(d)(1). A discussion of the "stop-time rule" is beyond the scope of this article. A careful analysis of the facts and issues must be conducted to determine whether the rule applies to a particular case.
34. *See* 8 U.S.C. § 1229b(b).
35. 8 U.S.C. § 1229b(b)(C).
36. 8 U.S.C. § 1255(a), 8 U.S.C. § 1182(a)(2)(A)(i).
37. 8 U.S.C. § 1427.
38. 8 C.F.R. § 316.2(a)(7).
39. 8 U.S.C. § 1101(f)(3).
40. The strategies below are not exhaustive. It is advisable to consult with an immigration lawyer with expertise in "crimmigration" to determine the full spectrum of options based on the issues and facts of a particular case.
41. 8 U.S.C. § 1101(a)(48)(A).
42. *Matter of Cabrera*, 24 I. & N. Dec. 459 (BIA 2008). *But see Retuta v. Holder,* 591 F.3d 1181 (9th Cir. 2010) (indicating that an unconditional, suspended, non-incarceratory sanction is not a punishment to satisfy the meaning of conviction under the INA).
43. 8 U.S.C. § 1101(a)(48)(B).
44. There is a very narrow exception to the general rule that a withdrawal of plea for rehabilitative purposes is still a conviction in removal proceedings. A first-time conviction for minor drug violations before July 14, 2011, will not be given any effect for deportation in the Ninth Circuit. *See Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000), *reversed by Nunez-Reyes v. Holder,* 646 F.3d 684 (9th Cir. 2011) (reversing as to only drug convictions after July 14, 2011).
45. *See Matter of Mohamed*, 27 I. & N. Dec. 92 (BIA 2017).
46. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Moncrieffe v. Holder*, 569 U.S. 184 (2013).
47. 21 U.S.C. § 802(6).
48. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015).
49. *See*, *e.g.*, *Alexis v Barr*, 960 F.3d 722 (5th Cir. 2020); *Vetcher v Barr*, 953 F.3d 361 (5th Cir. 2000).
50. *Lopez v. Gonzales*, 549 U.S. 47 (2006). The current exceptions are convictions for possession of flunitrazepam (the "date rape" drug) and recidivist crimes.
51. *See Moncrieffe v. Holder*, 569 U.S. 184 (2013).
52. *See United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).
53. Please note that jurisdiction for immigration court may be different than jurisdiction for a criminal case. For example, New Mexico is in the Tenth Circuit of the U.S. Court of Appeals, but New Mexico immigration cases are handled out of El Paso, Texas, so Fifth Circuit law applies for immigration issues arising out of that court.
54. *Matter of J.M. Acosta*, 27 I. & N. Dec. 420 (BIA 2018).
55. *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).
56. Likewise, a lawyer cannot assume a client's immigration status and must affirmatively make inquiry about status. *State v. Paredez*, 2004-NMSC-036, ¶ 19, 136 N.M. 533, 539, 101 P.3d 799, 805. No longer can a lawyer assume that a client who speaks good English is a U.S. citizen.
57. *See Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). Motions to vacate convictions based upon failure to advise on immigration consequences have been successful, however, the Supreme Court ruled that *Padilla* is not retroactive, so it cannot be used to vacate a decision finalized prior to March 31, 2010. In contrast, some states have ruled that their equivalent of *Padilla* is retroactive. *See, e.g.*, *Ramirez v. State*, 2014-NMSC-023, 333 P.3d 240 (holding that its *Paredez* decision is retroactive to 1990).
58. *Matter of Roldan*, 22 I. & N. Dec. 512 at 528 (BIA 1999). ■

About the Authors

Nicolas Chavez is a co-founding partner of Chavez & Valko, LLP. He is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. In addition, he has litigated before the U.S. immigration courts as well as the federal appellate courts and the Board of Immigration Appeals.

Nicolas Chavez
Chavez & Valko, LLP
Fort Worth, Texas
817-332-1100
EMAIL nchavez@keyvisa.com
WEBSITE www.keyvisa.com
TWITTER @chavezandvalko

Ann Miller is certified as a specialist in United States Immigration and Nationality Law by the State Bar of California, Board of Legal Specialization. She handles various immigration matters, including family and employment-based immigration, asylum law, and deportation defense.

Ann Miller
Chavez & Valko, LLP
Dallas, Texas
214-251-8011
EMAIL amiller@keyvisa.com
WEBSITE www.keyvisa.com
TWITTER @chavezandvalko