

Padilla in Practice Series

Immigration Consequences of Drug Offenses: Overview and Strategies

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**National Association of Criminal Defense Lawyers
and the Defending Immigrants Partnership**



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Drugs offenses ➡ Immigration consequences

Lawful permanent residents



Undocumented immigrants





Safer Havens



Less Risk

Fighting Chance

Review

Deportability vs. Inadmissibility

Lawful Permanent Resident



Undocumented





Lawful Permanent Resident Clients:

Avoid Deportability!

**(If Cannot: Avoid Mandatory
Deportation/Preserve Relief)**



Deportability

- Controlled substance offense?
- Drug trafficking aggravated felony?

Controlled Substance Offense

INA § 237(a)(2)(B)(i); 8 USC 1227(a)(2)(B)(i)

- Conviction
- Relating to
- Controlled substance (21 USC § 802)

Exception: one 30g marijuana poss



“Controlled Substance”

- Schedule I, II, III, IV, or V of federal Controlled Substances Act



Conviction for Federally Covered Drug

Controlled Substance Offense

Deportable!



Possession Only

Controlled Substance Offense

Deportable!



Possession With Intent to Sell

Controlled Substance Offense

Deportable!



Sale or Distribution

Controlled Substance Offense

Deportable!

Marijuana Possession Conviction

- Simple
- 30 grams or less
- Personal use
- One time

Exception to Controlled Substance Ground

Not Deportable!



Paraphernalia Conviction

Controlled Substance Offense

Deportable!



Exception:

One time + relating to 30 grams marijuana



Conviction for drug that is not covered
under federal law

Not Controlled Substance Offense

Not Deportable!



Exercise

The following acts are hereby prohibited:

- (i) the possession of a small amount of marijuana only for personal use;
- (ii) the possession of a small amount of marijuana with the intent to distribute it but not to sell it; or
- (iii) the distribution of a small amount of marijuana but not for sale.

For purposes of this subsection, thirty (30) grams of marijuana shall be considered a small amount of marijuana.

Does a conviction under this statute make your LPR client deportable?

Review: Record of Conviction Includes

- ☐ Elements of offense (statute & case law)
- ☐ Criminal charge (information, complaint, etc.
if incorporated into plea – i.e. pled as charged)
- ☐ Written plea agreement
- ☐ Transcript of plea hearing
- ☐ Transcript of judgment
- ☐ Sentence
- ☐ Jury instructions

Review: Record of Conviction Does NOT Include:

- ❑ Police reports, probation or pre-sentence reports
- ❑ Statements by non-citizen outside of judgment and sentence transcript (to police for example)
- ❑ Information from co-defendant's case

WARNING: Stipulating to facts in a document not otherwise part of the ROC incorporates them by reference into the ROC (i.e., stipulation to police reports)

Drug Trafficking Aggravated Felony

INA § 101(a)(43(B)

- “Any illicit trafficking
- In a controlled substance (as defined in section 102 of the Controlled Substances Act),
- **including** any drug trafficking crime (as defined in section 924(c) of title 18, United States Code)”

“Drug Trafficking Crime”

18 U.S.C. 924(c):

- felony punishable under the Controlled Substances Act ... the Controlled Substances Import and Export Act ... or the Maritime Drug Law Enforcement Act”



Drug Trafficking AF: “Felony” *Lopez* Rule

felony
under federal law

State felony drug conviction
not always drug AF!



Drug Trafficking AF: The Key Question

Is the state offense punishable
as a misdemeanor or felony *under federal law*?

- first-time simple possession = federal misdemeanor
Exception: flunitrazepam
- recidivist possession = sometimes federal felony
- *almost all* manufacturing, distribution, PWID = federal felony



Federal felony drug conviction

Aggravated Felony

Deportable – Probably Mandatory!



State drug conviction for offense that
federal law punishes as a felony

Aggravated Felony

Deportable – Probably Mandatory!



Simple possession – first offense

Not Aggravated Felony
(unless flunitrazepam)

(but still Controlled Substance Offense,
Deportable)

Simple possession – second or subsequent

- No finding of prior drug conviction/recidivism

Not Aggravated Felony

- Prior at issue in subsequent case, finding of recidivism

Maybe Aggravated Felony

finality of prior?

notice?

process requirements?



Drug Sale

Aggravated Felony

Deportable – Probably Mandatory!



Offer to sell

Possible Aggravated Felony safer haven

- Does ROC establish actual sale?
- Burden?

(But probably still Controlled Substance
Offense = Deportable!)

Gratuitous distribution of small amount of marijuana



Possible Aggravated Felony safer haven

- What is “small amount?”
- Burden?

(But still Controlled Substance Offense =
Deportable!)



Review: Possible Drug AF safer Havens

- Type of drug is not in the record
- Sale, manufacturing or distribution not in record
- Possession case and prior not at issue
- Offer to sell only
- Gratuitous marijuana distribution (small amount)

...but remember to analyze whether it's still a controlled substance offense!



Exercise

The following acts are prohibited:

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board.

LPR client deportable under controlled substance ground?
LPR client deportable/ineligible for relief under AF ground?



Exercise

- Same LPR client
- Charge: Possession with intent to deliver
- Statute doesn't cover small amount of marijuana

Strategies?

Drug Offense Deportability – Strategies

Avoid “controlled substance offense” deportability:

- Avoid any drug-related conviction.
- Specify a substance that is not covered under 21 U.S.C. 802. If impossible, then keep record clear of substance involved (if your state punishes non-CSA drugs. Compare).
- If cannot avoid drug conviction in marijuana case and client has no prior drug convictions, take a possession for personal use of 30 grams or less of marijuana (preferably on record, else leave record ambiguous).

Deportability Strategies, cont'd

If cannot avoid CSO, avoid drug aggravated felony (to possibly preserve relief

1. Plead/limit record to simple possession (except flunitrazepam) instead of distribution/intent to sell.
2. If client has prior final drug conviction, avoid recidivist finding – especially if state has notice/process requirements similar to federal (opportunity to challenge fact, finality, validity of prior).

Deportability Strategies, cont'd

3. If cannot plead/limit record to simple possession, plead/limit only to offer to sell (risky, but leaves opening)
4. If cannot avoid distribution in marijuana case, plead/limit to gratuitous distribution of small amount of marijuana. (risky, but leaves opening)

Undocumented Clients

Inadmissibility



Inadmissibility

- Controlled substance offense?
- Reason to believe drug trafficker?

Controlled Substance Offense

INA § 212(a)(2)(A)(i)(II); 8 USC 1182(a)(2)(A)(i)(II)

- Conviction or admission
- Relating to
- Controlled substance (21 USC § 802)

No 30g marijuana exception!

(But may be give fighting chance for some with relatives in US)

Controlled Substance Trafficker

INA § 212(a)(2)(C)(i); 8 USC 1182(a)(2)(C)(i)

Government knows or has reason to believe

- Illicit trafficker

Controlled substance/listed chemical in 21
USC 802

OR

- a knowing aider, abettor, assister,
conspirator, colluder

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Undocumented client: Inadmissible?

Drug Offense Inadmissibility – Strategies

- Best practice is to avoid any drug-related conviction. Period.
- Specify a substance that is not covered under 21 U.S.C. 802.
- If client with citizen/LPR parent/spouse/child is facing a marijuana charge and you absolutely cannot avoid conviction, it *may* help to limit conviction to simple possession of 30 grams or less of marijuana – check with immigration practitioner!



Drug Offenses – General Strategies

- Negotiate diversion *without* a guilty plea (to avoid “conviction”)
- Offer alternate plea to free-standing accessory offense
- In some cases, plea to accompanying non-drug charge may be better



Exercise

- Undocumented client
- Charged with drug possession and gun possession

Strategy?



Exercise

- LPR client
- Charged with drug possession and gun possession

Strategy?



Review