

CRIMINAL CONVICTIONS THAT CAN CAUSE NON-U.S. CITIZEN REMOVAL FROM THE UNITED STATES

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Since the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, the collateral consequences of a criminal conviction for a non- U.S. citizen have never been harsher than now. For example, a non-U.S. citizen who is convicted of a minor offense, such as jumping the turnstile, may be removed from the United States in a removal proceeding of deportation or inadmissibility.

This article is intended to educate our community on the consequences of criminal convictions for immigration purposes for those of us who are not citizens of the U.S. Our discussion on this very important topic is divided into three parts. The first part will examine the type of criminal convictions that may render a permanent resident deportable from the U.S. in a removal proceeding. The second part will discuss criminal convictions or admissions that will render a non-citizen inadmissible into the United States in a removal proceeding. The third part will discuss possible defenses that may be raised in these removal proceedings.

The word “removal” is a new term in immigration law. The term came out of the IIRIRA in 1996. There are two grounds of removal: deportability and inadmissibility (or exclusion under the old immigration law). Deportability applies to non U.S. citizens who are lawfully admitted to the U.S., such as lawful permanent residents and holders of unexpired non-immigrant visas, while inadmissibility applies to non U.S. citizens who are not lawfully admitted to the U.S., such as those who entered without inspection and those who are out of status. As you may

have noticed, “lawful admission” rather than “mere presence” in the U.S. is what determines whether a non- citizen who is convicted of a crime is removed from the U.S. on the ground of deportability (deported) or inadmissibility (exclusion). Further, any alien who seeks to enter the U.S., including returning permanent resident after a brief trip outside the U.S., will be subject to removal based on inadmissibility if such alien has been convicted of a crime or admitted to a crime anywhere in the world. Thus, a criminal conviction is not limited to a conviction in the U.S. but also applies to the alien’s country. Thus, a non U.S. citizen may be subject to removal on the ground of deportability or inadmissibility.

Having described the distinction between deportability and inadmissibility, we will now turn to the criminal convictions that may trigger removal on the ground of deportability. The first is what is called Aggravated Felony. This is a very important term in immigration law. Any non-U.S. citizen who is convicted of an aggravated felony offense is subject to mandatory detention (detention without bail) and mandatory deportation (deportation without the prospect of any forms of relief from deportation). Further, the term is not limited to felony offenses. There are some misdemeanor offenses which are now classified as “aggravated felony” offenses. Felony offenses are offenses that are punishable by death or imprisonment to a term one year or more, while misdemeanor offenses are offenses that are punishable by fine or imprisonment to a term not exceeding one year.

The list of what constitutes aggravated felony is contained in Title 8 of the United States Code.

§1101(a)(43)ⁱ. Some of them are:

(1) Crimes of violence for which the penalty imposed is at least one year. Under this section, two things must happen: First, the crime in question must be violent in nature. An example of this is the class A misdemeanor assault under New York Penal Law. Second, the penalty or sentence imposed must at least be for one year. Therefore, if you are convicted of a class A misdemeanor assault under New York Penal Code, but the sentence imposed is one year (the maximum sentence for class A misdemeanor offenses in New York), then you will be deemed an aggravated felon for immigration purposes.

(2) Murder, rape or sexual abuse of a minor. With regards to the sexual abuse of a minor, it does not matter whether the crime is a felony or misdemeanor. (See the general definition of felony and misdemeanor above).

(3) Illicit trafficking of a controlled substance i.e. drugs. This includes (a) any sale or attempted sale of a controlled substance, (b) distribution or simple possession of a controlled substance with intent to sell, (c) two or more possessions of a controlled substance even if there is no intent to sell, (d) one possession of a controlled substance if the record established that amount possessed is 5 grams or more of crack/cocaine. Thus, illicit trafficking of a controlled substance is not limited to distribution or conspiracy to distribute drugs, it also involves simple possession of drugs.

(4) Illicit trafficking in firearms or explosives. This also includes distribution and sale of firearms.

(5) Theft or burglary offenses for which the penalty imposed is at least one year. This can also be a felony or misdemeanor. For example, a shoplifting offense which is a class A misdemeanor under New York Penal Code, may be deemed an “aggravated felony” if the sentence imposed is one year.

Other aggravated felonies include:

- Crimes of fraud or deceit in which the loss exceeds \$10,000.00 e.g. bank or credit card fraud;
- Failure to appear in court or bail jumping if the underlying charge is a felony that is punishable by a sentence of two years or more;
- Crimes related to managing or supervising a prostitution outfit;
- Crimes related to bribery, counterfeiting, forgery or trafficking in cars whose Vehicle Identification Number (VIN) has been altered;
- Crimes involving alien smuggling, where the alien smuggled is not a wife/husband, sister/brother, or child/parent;
- Crimes relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness if the penalty imposed is at least one year.

As is clear from the above discussion, some offenses that we consider minor can now lead to mandatory removal of a legal permanent resident from the United States.

A second, category of crimes is Crimes Involving Moral Turpitude (CMT). Unlike aggravated felony, there are no statutory definitions for CMT . They are derived primarily from

case law. Also, unlike aggravated felony, a person is not subject to mandatory detention and mandatory deportation. Thus, such person may be eligible for some discretionary relief.

Under case law, CIMT can be classified into four categories viz:

- Crimes in which an intent to steal or defraud is an element;
- Crimes in which bodily harm is caused or threatened by an intentional or willful act;
- Crimes in which serious bodily harm is caused or threatened by a reckless act; and
- Sex offenses.

Hence, this category covers crimes such as kidnapping, arson, welfare fraud, criminal possession of stolen goods, aggravated assault, sexual abuse not involving a minor, and they are considered crimes involving moral turpitude.

Any conviction of a crime under this category, if the crime is such that a sentence of one year or more may be imposed and the crime was committed within five years of the person's admission into the United States, will subject a non-citizen to removal proceedings. Under this "one conviction" rule, the sentence of one or more years does not have to be imposed. The mere fact that a sentence of one year may be imposed is sufficient. Thus, the fact that the sentence of one year rather than at least one year may be imposed raises the prospect that any conviction for a Class A misdemeanor under the New York Penal Code will fall under this category since a class A misdemeanors in New York State carry a punishment of up to one year in jail. Likewise, two convictions of any of the crimes under CIMT, regardless the sentence or time of entry, will subject a non-citizen to removal proceedings. Therefore, two class B misdemeanors under New York State Penal Law will subject a non-US citizen to removal proceedings.

A third category is Controlled Substance Offenses. Under this category, any conviction for the sale of a controlled substance or possession of a controlled substance with intent to sell, will trigger removal proceedings. Unlike aggravated felony drug convictions, which must be a felony, a conviction under this category does not have to be a felony. For instance, under New York Penal Code, the sale of several “joints” of marijuana is a Class A misdemeanor, whereas the sale of a little glassine (capsule size) of crack/cocaine is a felony even though both involve sales of controlled substances. But, because one is a felony sale and the other is a misdemeanor sale, conviction under the felony drug sale will be deemed aggravated felony (mandatory detention and mandatory deportation), while conviction under misdemeanor drug sale will not be considered an aggravated felony. Also, if the conviction was for a single possession of less than 30 grams of marijuana, removal proceedings will not be triggered.

A fourth category is Firearms Offences. Under this category, a non-U.S. citizen will be subject to removal proceedings if he or she is convicted of the possession of a firearm. Under the aggravated felony firearms conviction, the conviction must be for illicit trafficking in firearms i.e. sale distribution or conspiracy. However, if the conviction does not involve illicit trafficking in firearms, while the person will still be subject to removal, he or she will not be subject to mandatory detention and mandatory deportation.

A fifth category is Driving While Intoxicated (DWI) offenses. Under this category a non-citizen convicted of a felony DWI, if a sentence of one year or longer is imposed, will be subject to removal proceedings. Likewise, if the conviction is for a misdemeanor DWI, plus driving with a suspended driver's license, the person will also be subject to removal proceedings,

regardless of the sentence imposed. However, neither a misdemeanor DWI conviction nor driving with a suspended driver's license alone will trigger removal proceedings.

A sixth category is the violation of Order of Protection offenses. Under this category, any conviction for violating an Order of Protection will render a non-citizen removable, regardless of the sentence imposed.

Seventh, is the crime of domestic violence. Under this category, any conviction for a crime involving domestic violence, child abuse or neglect, will render a non-citizen removable.

As you may understand from the above discussion, a legal permanent resident may be removed from the U.S. if he or she is convicted virtually of any crime in the U.S.

Please note that this article and the information contained therein are only intended to provide general information. They are not intended to create any attorney-client relationship.

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i For a comprehensive list see: Cornell University Law School Legal Information Institute “US Code TITLE 8 > CHAPTER 12 > SUBCHAPTER I > § 1101 Definitions”
<http://www.law.cornell.edu/uscode/8/1101.html> Accessed 8/4/2010 7:37:51 AM