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# 48

## REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

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### ◇ §48.1 I. OVERVIEW

The consequences of criminal proceedings, while always significant, are of special importance to defendants who are not U.S. citizens. The collateral consequences of an arrest or conviction for an alien defendant often exceed the immediate criminal penalty. Deportation from the U.S. and future exclusion

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from entry into the U.S., as well as long periods of civil detention by the Immigration and Naturalization Service (INS), are very real factors to be considered by the criminal defense attorney representing a noncitizen.

The immigration laws of the U.S. are quite complex, especially when they deal with aliens involved with criminal proceedings. This chapter will point out some of the more common situations and strategies, but it must be emphasized at the outset that this is far from an exhaustive discussion. Defense counsel should make use of one or more of the in-depth books on this subject:

- Kesselbrenner & Rosenberg, *Immigration Law & Crimes* (Clark Boardman Co. 1984);
- *Immigration Consequences of Criminal Convictions* (National Immigration Project of National Lawyers Guild, 1984);
- Gordon & Rosenfield, *Immigration Law and Procedure* (Matthew Bender & Co., 2d ed 1966).

It is also advisable to consult a skilled immigration attorney to help evaluate a situation of this type.

## §48.2 II. DETERMINATION OF ALIEN STATUS

The intake interview of any new client in a criminal case should include questions regarding immigration status. Virtually all persons born within the U.S. are citizens. Exceptions to this rule include persons who have expatriated themselves and U.S.-born children of foreign diplomats. While many non-U.S.-born people are U.S. citizens, either through parentage or naturalization, close questioning regarding citizen status should take place to determine whether the client actually is or is not a citizen.

Noncitizens can be present in the U.S. in many types of status, including lawful permanent residents ("green card" holders), persons temporarily in the U.S. having lawful, nonimmigrant status (*e.g.*, students, tourists, business visitors, temporary workers), persons granted asylum by the federal government, and persons here illegally (*e.g.*, overstayed nonimmigrants, individuals who have entered the U.S. without inspection, undocumented workers).

Once it is determined that a defendant is not a citizen, special cognizance must be taken of that fact in terms of bail, plea negotiations, and trial preparation. California law recognizes that the position of aliens in criminal proceedings is a special one and mandates a special advisement of the fact that a plea of guilty not only involves the waiver of several constitutional rights, but also could have a severe negative impact on the defendant's immigration status. Pen C §1016.5; see *People v Aguilera* (1984) 162 CA3d 128, 208 CR 418 (case remanded so that alien defendant would have opportunity to make motion to vacate guilty plea previously entered without Pen C §1016.5 "advice" from trial court).

## III. CONSEQUENCES OF CRIMINAL CONVICTION

### §48.3 A. Deportation

Section 241(a)(4) of the Immigration and Nationality Act (INA) (8 USC

§1251(a)(4)), hereafter called "the Act," makes any alien in the U.S. deportable who:

- Has been convicted of a crime involving moral turpitude within five years after entry and who has been sentenced to confinement or confined for a year or more; or

- Has been convicted at any time after entry of two crimes of moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined for them and regardless of whether the convictions stemmed from a single trial.

Section 241(a)(4) (8 USC §1251(a)(4)) applies to any alien in the U.S. regardless of specific immigration status. The concepts contained in this statute, e.g., "single scheme" and "sentenced to confinement," have been the source of a great deal of litigation and are the subject of numerous administrative and appellate decisions. Counsel should fully research their applicability to a specific situation.

Section 241(a)(11) of the Act (8 USC §1251(a)(11)) makes virtually any alien deportable who would be included within INA §212(a)(23) for narcotic offenses.

#### §48.4 B. Exclusion

Section 212(a)(9) of the Act (8 USC §1182(a)(9)) excludes from admission into the United States any alien who has been convicted of or who has admitted the commission of a crime involving moral turpitude. Moral turpitude is not a clearly defined concept but revolves around notions of baseness, villainess, or depravity; evil intent; and conscious disregard for fairness and responsibility to individuals and to society. In evaluating whether a given crime is one of moral turpitude, counsel should consult administrative and court decisions involving this issue. See 23 ALR Fed 480 for sources of these decisions. The general rule is that any crime containing fraud as an element is a crime involving moral turpitude. *Jordan v De George* (1951) 341 US 223.

The exceptions to exclusion are also contained in INA §212(a)(9). They include juvenile and petty offenses as defined by 18 USC §1.

Section 212(a)(10) of the Act (8 USC §1182(a)(10)) excludes any alien who has been convicted of two or more offenses, whether or not involving moral turpitude, for which the aggregate sentence to confinement actually imposed was five years or more.

Section 212(a)(23) of the Act (8 USC §1182(a)(23)) excludes any alien who is a narcotic drug addict or who has been convicted of a violation of any law relating to the illicit possession of or traffic in narcotic drugs or marijuana or of any law relating to the growing, manufacture, sale, or transport of any narcotic drug or marijuana. Many of the terms used in INA §212(a)(23), e.g., "trafficking," "illicit possession," and "relating to," must be fully understood and correctly applied to protect the client. See 3 Am Jur 2d, Aliens §60 for decisions concerning these terms.

► **Note:** Unlike many criminally related immigration laws, a conviction is not

necessary to exclude an alien who is believed to be a "trafficker" in narcotics. 8 USC §1182(a)(23).

#### IV. IMMIGRATION-RELATED CRIMINAL DEFENSE STRATEGIES

##### §48.5 A. Acquittal or Dismissal

An acquittal or dismissal will eliminate a criminal charge as a basis for deportation or exclusion, except when the defendant is suspected of being a trafficker in drugs or admits the elements of the offense. 8 USC §§1182(a)(9), (a)(23).

A plea of *nolo contendere* is the equivalent of a plea of guilty for purposes of deportation. *Qureshi v INS* (5th Cir 1975) 519 F2d 1174; *Matter of Rodriguez* (BIA 1974) 14 I&N 706.

##### §48.6 B. Judicial Recommendation Against Deportation (JRAD)

Under Section 241(b)(2) of the Act (8 USC §1251(b)(2)), a properly executed order from the trial or sentencing court will eliminate an underlying conviction of a crime of moral turpitude (INA §241(a)(4)) as a basis for deportation and/or exclusion. However, JRADs have *no* effect on narcotics offenses specified in 8 USC §1251(a)(11) (8 USC §1251(b)(2)) or on alien-smuggling offenses (*Jew Ten v INS* (9th Cir 1962) 307 F2d 832; *Matter of Corral-Fragoso* (BIA 1966) 11 I&N 529). The court in *Delgado-Chavez v INS* (9th Cir 1985) 765 F2d 868 held that §241(b)(2) does not preclude consideration of the conviction as an adverse factor in connection with an application for voluntary departure.

To be effective, a JRAD must be issued at the time of imposition of judgment or sentence or within 30 days thereafter. INA §241(b)(2) (8 USC §1251(b)(2)). The 30-day limit is absolute and will not be extended, even with a *nunc pro tunc* order. *Marin v INS* (9th Cir 1971) 438 F2d 932. The INS is entitled to notice of the JRAD hearing at least five days before the hearing and to be given an opportunity to address the court on the issue of the JRAD. 8 CFR 241.1.

See 8 CFR §241.1 for the procedures for JRAD motions.

##### §48.7 C. Expungement

Expungement of a conviction of a crime of moral turpitude under Pen C §1203.4, §1203.4(a), or §1203.45 will nullify the conviction for purposes of deportation or exclusion proceedings. *Matter of A.F.* (1959) 8 I&N 429; see *Garcia-Gonzales v INS* (9th Cir 1965) 344 F2d 804, 808 (citing Attorney General opinions that have taken this position); *Matter of Lima* (BIA 1976) 15 I&N 661. An expungement of a narcotics-related conviction pursuant to Pen C §1303.4 or §1203.4a will *not* nullify such a conviction for deportation or exclusion purposes. Such an expungement will also *not* affect the ability of the INS to deport or exclude a person when "the consular officer or immigration officers know

or have reason to believe" the person is trafficking in specified drugs. 8 USC §1182(a)(23). See *Garcia-Gonzales v INS*, *supra*. For discussion of expunging a conviction, see chap 39.

#### §48.8 D. Confinement as a Condition of Probation

Confinement as a condition of probation (as opposed to a simple sentence) will prevent the use of the sentence as conviction of a crime of moral turpitude under INA §241(a)(4) (8 USC §1251(a)(4)). Section 241(a)(4) requires a sentence or "confinement . . . in a prison or corrective institution for a year or more." *Matter of V.* (1957) 7 I&N 577.

#### §48.9 E. First Offender Statutes

Dismissal of a first offense of simple possession of a controlled substance under the diversion-type procedures of 21 USC §844(b)(1) or a state equivalent (see §§9.8–9.21) may not be used for purposes of deportation or exclusion because a dismissal is not a conviction. See §48.3 on the requirement of a conviction. See also *Matter of Seda* (BIA 1980) 17 I&N 550; *Matter of Werk* (BIA 1977) 16 I&N 234.

► **Note:** Defense counsel should obtain a certificate from the court or prosecutor indicating successful completion of diversion as well as a certified order of dismissal of the charges.

#### §48.10 F. Writ of Error Coram Nobis

A writ of error coram nobis is effective for vacating a judgment for all immigration-related purposes. *Matter of Sirhan* (BIA 1970) 13 I&N 592.

For discussion of the procedures for seeking a writ of coram nobis, see §35.23.

#### §48.11 G. Pardon

Full and unconditional pardon by the U.S. President or a state governor of conviction of a crime of moral turpitude will prevent its use for deportation or exclusion purposes. 8 USC §1251(b). It will not nullify a narcotics-related offense as described in §48.7. 8 USC §1182(a)(23).

#### §48.12 V. INTERPRETERS

Criminal defendants are entitled to an interpreter throughout the proceedings. Cal Const art I, §14. The interpreter must be available exclusively for the defendant; the defendant cannot be required to share an interpreter with others, *e.g.*, witnesses. *People v Aguilar* (1984) 35 C3d 785, 200 CR 908.

#### §48.13 VI. AVAILABILITY OF NONCITIZEN WITNESSES

When a defendant's witnesses are noncitizens, the People cannot make ma-

terial witnesses unavailable by assisting in their deportation before trial. *Cordova v Superior Court* (1983) 148 CA3d 177, 185, 195 CR 758, 762. In *Cordova*, the prosecution had dismissed charges against four defense witnesses and turned them over to federal immigration authorities knowing the witnesses would be deported. The appellate court ordered the trial court to grant the defendant's motion to dismiss. It rejected the prosecutor's argument that *U.S. v Valenzuela-Bernal* (1982) 458 US 858, which requires a stricter showing of materiality than California law, is now controlling in California, and remarked in a footnote that neither party claimed that Proposition 8 required a different result.