

IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS READY-REFERENCE

INTRODUCTION

This ready-reference is formatted to fit in the pocket part to the Virginia Criminal Benchbook for Lawyers and Judges or Section 18.2 of the Virginia Code. The aim of this document is to provide a basic overview of the immigration-related consequences of criminal convictions for individuals who are not citizens of the United States.¹ Specifically, the Immigration and Nationality Act (“INA”)² may render a foreign national deportable as the result of a conviction for a criminal offense.³

The consequences of deportation can have a far greater impact on a foreign national and his or her family than the imposed criminal punishment. On the theory that knowledge advances justice, the purpose of this outline is to assist Virginia trial judges, prosecutors, and defense attorneys in understanding when a criminal sentence imposed on a foreign national may also result in his or her deportation. With this knowledge, judges and lawyers will be better positioned to fashion an appropriate disposition.

Please note that this is not an exhaustive analysis of the grounds of deportability for criminal acts. Instead, it sets forth the application of the INA in situations most likely to be encountered by state trial judges. It should also be noted that immigration laws may apply retroactively and are in a constant state of flux, causing great difficulty in producing predictable results.

DEPORTABLE CRIMES

As discussed in more detail below, foreign nationals convicted of the following criminal offenses are deportable:⁴

1. General Crimes, which are fundamentally crimes of moral turpitude and aggravated felonies;
2. Controlled Substance Offenses;
3. Firearm Offenses; and
4. Crimes of Domestic Violence

The following definitions apply to the discussion below:

1. “Conviction”

¹ Hereinafter referred to as “foreign nationals.”

² Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ 1101 *et seq.*).

³ A criminal conviction may also render a foreign national inadmissible, which means ineligible to legally enter the United States from abroad. Criminal grounds of inadmissibility are located at INA § 212(a)(2), and are similar but distinct to grounds of deportability. Note that grounds of inadmissibility are outside of the scope of this document.

⁴ INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

A foreign national is deemed convicted for immigration purposes if a formal judgment of guilt has been entered by a court or, if adjudication of guilt has been withheld, where:

- a. a judge or jury has found the foreign national guilty or the foreign national has entered a plea of *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and
- b. the judge has ordered imposition of some form of punishment, penalty, or restraint on the foreign national's liberty.⁵

State post-conviction remedies derived from rehabilitative statutes cannot expunge or otherwise remove a record of guilt for immigration purposes.⁶ In other words, although state rehabilitative statutes are beneficial to the foreign national for criminal record purposes, they will not change the immigration consequences of the criminal conviction.

2. "Sentence" or "Term of Imprisonment"

A sentence or term of imprisonment is "deemed to include the period of incarceration or confinement ordered by a court of law regardless of a suspension of the imposition or execution of that imprisonment or sentence in whole or part."⁷ Hence, any reference to a sentence or term of imprisonment in the INA includes the entire period of confinement imposed by the court regardless of any suspension.

GENERAL CRIMES

1. Crimes of Moral Turpitude

A foreign national is deportable if he or she is convicted of a crime involving moral turpitude committed within five years from his or her most recent admission into the U.S., and "a sentence of one year or longer *may be imposed*."⁸ (Emphasis added). In addition, a conviction of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct will render a foreign national deportable, regardless of the sentence imposed or date of admission.

The INA does not define "moral turpitude." Instead, Congress left the term to administrative and judicial interpretation.⁹ This flexibility allows for the accommodation of the law to the changing norms of behavior, but has also created uncertainty in determining whether certain crimes involve moral turpitude.

The United States Court of Appeals for the Fourth Circuit has defined moral turpitude as conduct "that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."¹⁰

⁵ INA § 101(a)(48), 8 U.S.C. § 1101(a)(48).

⁶ See *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).

⁷ INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

⁸ INA § 237(a)(2)(A). The 5-year time period is expanded to 10 years for certain foreign nationals granted permanent resident status under INA § 245(j).

⁹ *Cabral v. INS*, 15 F.3d 193, 195 (1st Cir. 1994).

¹⁰ *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001).

Simple assault or assault and battery are not crimes of moral turpitude. However, the major sex crimes such as rape, adultery, bigamy, and child abuse involve moral turpitude.¹¹ Additionally, property crimes involving fraud, arson, blackmail, forgery, robbery, embezzlement, petit or grand larceny, and burglary are all crimes of moral turpitude.¹² Conspiracy to commit a crime, attempt to commit a crime, or acting as an accessory to a crime involve moral turpitude only if the underlying crime involves moral turpitude.¹³

2. Aggravated Felonies

A foreign national is deportable if he or she is convicted of an aggravated felony.¹⁴ INA § 101(a)(43) defines an aggravated felony to include over 50 classes of crimes, including:

- murder, rape, or sexual abuse of a minor;
- illicit trafficking in a controlled substance;
- illicit trafficking in firearms or destructive devices or in explosive materials;
- crime of violence for which the term of imprisonment is at least one year (regardless of any suspension of the sentence);
- theft offense or burglary offense for which the term of imprisonment is at least one year (regardless of any suspension of the sentence);
- an offense that relates to owning, controlling, managing, or supervising a prostitution business;
- an offense that involves fraud or deceit in which the loss exceeds \$10,000;
- an attempt or conspiracy to commit any of the above-listed offenses.

Note that a person can be convicted of an aggravated felony as defined by the INA even when the criminal offense is a misdemeanor.

In order to be classified as a “crime of violence,” a crime must meet the definition provided in 18 U.S.C § 16:

- a. an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- b. any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Crimes of violence are not limited to crimes requiring specific intent, but at a minimum require reckless behavior.¹⁵

¹¹ *Bender's Immigration Law* § 71.05[1][d][iii][C].

¹² *Bender's Immigration Law* § 71.05[1][d][iii][D].

¹³ *Bender's Immigration Law* § 71.05[1][d][i].

¹⁴ INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

¹⁵ See *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002).

CONTROLLED SUBSTANCES

A conviction involving a controlled substance renders a foreign national deportable, except for a single offense of possession for one's own use of 30 grams or less of marijuana.¹⁶

FIREARM OFFENSES

A foreign national is deportable if he or she is convicted of violating any law relating to purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, carry, any weapon, part, or accessory which is a firearm or destructive device.¹⁷

CRIMES OF DOMESTIC VIOLENCE

A foreign national who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.¹⁸ Furthermore, a foreign national who, at any time after admission, violates a protective order issued by a court to protect against credible threats of violence, repeated harassment, or bodily injury is also deportable.¹⁹

ADVISEMENT OF DEFENDANTS

It is a good practice to advise defendants at arraignment that their charges could carry immigration consequences in addition to the potential punishment within the jurisdiction of the state court. Defense attorneys should either familiarize themselves with applicable laws or advise clients that they should seek the additional advice of an immigration attorney. Prosecutors should include language in plea agreements to the effect that the sentencing Court has no jurisdiction over immigration matters and that conviction may result in deportation and/or inadmissibility.

CONCLUSION

A criminal conviction may have far more severe consequences for a foreign national than for a citizen of the United States. Familiarity with immigration laws and their interplay with the criminal laws of the Commonwealth will assist all involved in the criminal justice system in securing the advancement of the common good, protection of the public, defense of law and order, and fairness to the accused. It is hoped that this outline will provide a starting point in the understanding of the immigration consequences of criminal convictions as it pertains to the deportation of foreign nationals.

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¹⁶ INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

¹⁷ INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

¹⁸ INA § 237(a)(2)(E)(i), 8 U.S.C. § 127(a)(2)(E)(i).

¹⁹ INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).