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What Every Maryland Criminal Defense Attorney Should Know About Immigration

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- Presented by:
-
  - Fernando A. Nuñez
  - Maureen A. Sweeney
    University of Maryland School of Law
    Small Firm Practice: Immigration Clinic
  - Laura Kelsey Rhodes
    Albright and Rhodes, LLC
  -

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Consequences and Categories of Convictions (part 1)

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5 **<u>Immigration Consequences of Convictions</u>**

- Removability/Deportability
- Inadmissibility
- Disqualification from showing "good moral character"
- Disqualification from or loss of asylum or refugee status
- Mandatory detention during proceedings
- Expedited removal for aggravated felonies
- Bars to reentry to the U.S.
- Criminal and civil penalties for illegal reentry

6 **Removability/ Deportability**

- INA §237(a)(2): Crimes of moral turpitude, aggravated felonies, controlled substances, firearms, domestic violence, child abuse
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➢ Individual becomes deportable.
➢ Depending on circumstances, may still have a waiver that allows the individual to stay.
➢ If no relief available, will be deported.

7 **Inadmissibility**

- INA §212(a): CMTs, controlled substance offenses (conviction or admission) or trafficking, multiple convictions (sentence >5 years), money laundering, etc.
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  - Ineligible to enter the US
    - Can't get visa overseas to enter US
    - Returning LPR may not be able to enter US
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  - Ineligible to get a green card (adjust status to lawful permanent resident)
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  - Ineligible for Temporary Protected Status (TPS) and NACARA
  - Ineligible to change visa status (from visitor to student, for example)
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- May have a waiver available, may not.

8 **Disqualification from showing good moral character**

- INA §101(f): An individual cannot show good moral character if convicted of CMT, multiple crimes or most controlled substance crimes during the statutory period, or an aggravated felony at any time.
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  - Ineligible for naturalization (citizenship)
  - Ineligible for NACARA
  - Ineligible for voluntary departure (to avoid deportation after a hearing)
  - Ineligible to self-petition as battered spouse, child, or parent
  - Ineligible for cancellation of removal for non-LPRs (10 years presence + hardship to USC/LPR family member)

9 **Disqualification from or loss of Humanitarian Protection**

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  - Ineligible for asylum with a conviction for a "particularly serious crime," including any aggravated felony.
  - Ineligible for withholding of removal/ restriction on removal with a "particularly serious crime."
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- May remain eligible for protection under the Convention Against Torture, but only if it is more likely than not that they will be tortured by their government if they return.

10 **Mandatory Detention**

- INA §236(c): The Attorney General shall take into custody any alien…
  - Inadmissible or
  - Removable

  for having committed a crime.
  - Detained throughout deportation proceedings.
  - DHS also has an automatic stay if it appeals a decision of the immigration judge, extending detention through appeals.

11 **Expedited Removal for Aggravated Felonies**

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- DHS Administrative removal process for those convicted of aggravated felonies.
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- No right to an adversarial removal hearing.

12 **Administrative Removal Orders for Aggravated Felons**

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13 **Administrative v. Court Removal Orders for Aggravated Felons**

14 **Bars to Reentry after Convictions**

- 10-year bar for anyone deported
- Permanent bar for those deported for an aggravated felony

15 **Penalties for Illegal Reentry**

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- Fine for reentry after removal: INA § 276 (a).
- Criminal penalties for reentry after removal because of a conviction: INA § 276 (b).
  - Up to 10 years incarceration
    - felony or 3 misdemeanors
  - Up to 20 years
    - aggravated felony

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"The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lost his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution and even death" *Ng Fung Jo v. White,* 259 U.S. 276 (1922)

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Aggravated Felonies

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- "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe"
- *Nishimura Ekiu v U.S., 142 U.S. 651 (1892)*

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"Trust those who seek the truth – doubt those who say they have found it"
unknown

20 **Consequences of Convictions**

- Section 212(a) of the Immigration and Nationality Act (INA) lists those who are inadmissible.

- Section 237 of the INA provides classes of deportable aliens.

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21 **Criminal offenses > Deportable**

INA § 237(a)(2)

- Aggravated Felonies
- Crimes Involving Moral Torpitude
- Crimes of Domestic Violence
- Certain Firearm Offenses
- Controlled Substances

22 **Deportation grounds – Agg. felonies**
INA § 237(a)(2)(A)(iii)
Any alien who is convicted of an aggravated felony at any time after admission is deportable.

23 **Alien**
- The term "alien" means any person not a citizen or national of the United States. 101(a)(3) of the Immigration and Nationality Act (The ACT or INA)

24 **Deportation grounds – Agg. felonies**
INA § 237(a)(2)(A)(iii)
Any alien who is convicted of an aggravated felony at any time after admission is deportable.

25 **CONVICTION**
- INA § 101 (a)(48)(A)

  The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where
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26 **Conviction**
INA 101(a)(48)(A)(i)
a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

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27 **Conviction**
INA 101(a)(48)(A)(ii)
the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed

28 **INA 101(a)(48)(B)**

Any reference to a term of imprisonment of a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

29 **Not Conviction**
- Not guilty
- Juvenile delinquency
- Pre-plea diversion
- Vacated conviction – under constitutional grounds
- Stet
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30 **Convictions**
- Guilty plea
- Nolo Contendere
- Alford plea with any sentence, even suspended
- Juvenile in adult court
- NCR
- PBJ

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31 **Deportation grounds – Agg. felonies**
INA § 237(a)(2)(A)(iii)
Any alien who is convicted of an aggravated felony at any time after admission is deportable.

32 **Aggravated Felonies**
INA § 101(a)(43)
The term "aggravated felony" means--
(A) murder, rape, or sexual abuse of a minor;

33 **INA § 101(a)(43)**

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

34 ***Lopez v. Gonzales***
Lopez v. Gonzales, 127 S.Ct. 625, Decided December 5, 2006
- illicit trafficking is left undefined by the INA
- § 924(c) of Title 18 of U.S.C. defines "drug trafficking" crime as any felony punishable under the Controlled Substance Act.
- INA §101(a)(43)(U) "term (agg. Felony) applies to an offense described in this paragraph whether in violation of Federal or State Law" ..

35 ***Lopez v. Gonzales***
- State felony conviction that does not proscribe conduct punishable as a felony under the Federal Controlled Substance Act (CSA).
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- State Felony not a Federal CSA = drug trafficking ?

36 ***Lopez v. Gonzales***
Held: a state offense constitutes a "felony punishable under the Controlled Substances Act" only if it proscribes conduct punishable as a felony under that federal law

37 **INA § 101(a)(43)**

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

38 **INA § 101(a)(43)**

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $ 10,000;

39 **INA § 101(a)(43)**

(E) an offense described in

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) sections 922 (g) (1), (2), (3), (4) or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii)section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

40 **INA § 101(a)(43)**

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year;

41 **Leocal v. Ashcroft**

Leocal v. Ashcroft, 543 U.S. 1 (2004)

- Alien convicted for driving under the influence (DUI) and causing serious bodily injury in an accident
- DUI causing bodily injury = a crime of violence ?

42 **Leocal v. Ashcroft**

Title 18 U.S.C. § 16 (a) defines a crime of violence as "an offense that has as an element the use …. Of physical force against the person or property of another

43 **Leocal v. Ashcroft**

- use requires active employment
- You may actively employ something in an accidental manner
- less natural to say that a person actively employs physical force against another by accident

44 **Leocal v. Ashcroft**

Held: "use … of physical force against the person or property of another" suggests a higher degree of intent than negligent or merely accidental conduct.

- DUI offense not a crime of violence under § 16(a)

45 **Leocal v. Ashcroft**

Title 18 U.S.C. § 16 (b) defines a crime of violence as "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"

46 **Leocal v. Ashcroft**

- 16(b) does not encompass all negligent misconduct, such as the negligent operation of a vehicle
- 16(b) covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.
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47 **Leocal v. Ashcroft**

- The reckless disregard in § 16 relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime
- e.g. burglary by its nature involves a substantial risk burglar will use force against victim.

48 **Leocal v. Ashcroft**

Held: DUI not a crime of violence under § 16(b). Physical force need not be actually be applied in the course of operating a vehicle while intoxicated and causing an injury.

49 **Leocal v. Ashcroft**

The Court in construing both § 16 (a) and (b) determined that a "crime of violence" using its ordinary meaning combined with § 16's emphasis on the use of physical force against another person, suggest a category of violent, active crimes that can not be said naturally to include DUI offenses.

50 **INA § 101(a)(43)**

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

51 **Gonzales v. Duenas-Alvarez**

Gonzales v. Duenas-Alvarez, 127 S.Ct. 815, Decided Jan 17, 2007

- Held: The term "theft offense" in INA § 101(a)(43)(G) includes the crime of "aiding and abetting" a theft offense.

- Helpful because it describes the categorical approach (Shepard v.US) and modified categorical approach (Taylor v US)

52 **INA § 101(a)(43)**

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

53 **INA § 101(a)(43)**

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

54 **INA § 101(a)(43)**

(J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses) for which a sentence of one year imprisonment or more may be imposed;

55 **INA § 101(a)(43)**

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

56 **INA § 101(a)(43)**

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);

57 **INA § 101(a)(43)**

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $ 10,000; or

(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $ 10,000;

58 **INA § 101(a)(43)**

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

59 **INA § 101(a)(43)**

(O) an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

60 **INA § 101(a)(43)**

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

61 **INA § 101(a)(43)**

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

62 **INA § 101(a)(43)**

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

63 **INA § 101(a)(43)**

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

64 **INA § 101(a)(43)**

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

65 **INA § 101(a)(43)**

(U) an attempt or conspiracy to commit an offense described in this paragraph. The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

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66 **Aggravated Felonies**

Consequences

- No relief available
- exception INA § 212(c)

INS v. St. Cyr, 121 S.Ct. 2271 (2001)

a) plea agreements - prior to April 24, 1996 and

b) notwithstanding conviction w/h/b eligible for 212(c) relief.

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67 **Aggravated Felonies**

Consequences continued

INA § 236 (c)(1)

The Attorney General shall take into custody any alien who:

(B) is deportable by reason having committed any offense covered in section 237(a)(2)(A) ……(iii)

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Only persons released after October 9, 1998 are subject to mandatory detention. *Matter of Adeniji,*22 I&N Dec 1102 (BIA 1999)

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69 **N.B. - detainers**

8 C.F.R. § 287.7(d) Aliens with detainers shall be maintained in custody for a period not to exceed 48 hours.

70 **Deportation grounds – Agg. felonies**

INA § 237(a)(2)(A)(iii)

Any alien who is convicted of an aggravated felony at any time after admission is deportable

71 **Admission**

101(a)(13)(A) of The ACT defines "admission", with respect to an alien, as lawful entry of the alien into the United States after inspection and authorization by an immigration officer