



DE MOTT • MCCHESENEY • CURTRIGHT & ARMENDÁRIZ, LLP

Immigration Attorneys



DMCA, LLP

Immigration Attorneys

www.demottusa.com

The *Padilla* Rule

“[C]ounsel must inform her client whether his plea carries a risk of deportation.”

Padilla v. Kentucky, 559 U.S. ____, at * 17, No. 08-651 (2010).

Complying with *Padilla*

1. You must know some immigration law;
2. Consult with an immigration lawyer;
3. Check statute, case law, and secondary sources; and
4. Document your investigation in your file.

Padilla's two categories

1. If “the terms of the relevant immigration statute are succinct, clear and explicit,” then you must advise your client regarding the removal consequences.
2. If not “succinct and straightforward,” then your duty is to advise that it might carry adverse immigration consequences.

Padilla's implied presumption

The immigration law is “succinct, clear, and explicit” . . . until you research it and find otherwise!

YOU HAVE A DUTY TO INVESTIGATE AND ADVISE ABOUT IMMIGRATION CONSEQUENCES.

How do you fulfill this duty?

1. Consult with an immigration lawyer.
2. Or, investigate the immigration law yourself and provide the proper immigration advice to your client.

CONSULTING WITH AN IMMIGRATION LAWYER

- Make sure that the immigration lawyer practices in immigration courts.
- Consider contacting board certified immigration lawyers.
- <http://www.tbis.org>

WHAT TO EXPECT FROM AN IMMIGRATION LAWYER

1. Will the plea result in a removal proceeding?
2. Will the plea disqualify your client from applying for relief in the removal proceeding?
3. Will the plea result in your client being placed into immigration custody?
4. Will the plea affect your client's ability to travel?
5. Will the plea affect your client's eligibility to naturalize?

Consulting with an immigration lawyer

- Do not call 5 minutes before the hearing to take the plea to inquire about immigration consequences
- Immigration lawyer will need time to investigate and advise
- Immigration lawyer and you should work together to find plea alternatives

WHAT TO EXPECT FROM AN IMMIGRATION LAWYER

- Assistance in finding plea alternatives.
- Be prepared with answers to the questions on the questionnaire.
- **Make them put their answers in writing.**

Who pays the immigration lawyer?

- Ask the Court to appoint an immigration lawyer as an expert.

So, you decided not to consult with an immigration attorney?

"...we are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say." Yuen Sang Low v. Attorney General, 479 F.2d 820 (9th Cir. 1973)

"It would seem that should be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear." Alanis-Bustamante v. Reno 201 F.3d 1303 (11th Cir. 2000)

Where do you find the immigration laws?

Important immigration statutes:

- 8 U.S.C. Sect. 1101(a)(43) (definition of aggravated felony);
- 8 U.S.C. Sect. 1182(a)(2) ^{S1} (criminal grounds of inadmissibility into the United States);
- 8 U.S.C. Sect. 1227 (grounds of removal from the United States);
- 8 U.S.C. Sect. 1231(a)(5) (Reinstatement statute);
- 8 U.S.C. Sect. 1228(b) (Administrative Removal).

Slide 13

S1

This is just the criminal grounds, but that may be all that matters for purposes of this presentation.

Stephen, 7/1/2010

Case Law

IMMIGRATION COURT



BOARD OF IMMIGRATION APPEALS



5TH CIRCUIT COURT OF APPEALS



UNITED STATES SUPREME COURT

Case Law, cont'd.

- Board of Immigration Appeals, EOIR *Virtual Library*
- <http://www.justice.gov/eoir/vll/libindex.html>
- See the Board Precedents and Related Court Decisions Chart
- Sign up to receive email notifications when new Board decisions are entered

Secondary Sources

- Kurzbhan's Immigration Law Sourcebook
- National Immigration Project
- Norton Tooby on Crimes of Moral Turpitude and Aggravated Felonies
- American Immigration Lawyers Association

What do you need to know?

1. Is your client a non-citizen?
2. Will the plea result in your client being placed in a removal proceeding?
3. If yes, will the plea disqualify your client from seeking any form of discretionary relief in the removal proceeding?

Is your client a U.S. citizen?

- Two ways to be a citizen of the United States:
 - By birth
 - By act of Congress
 - i. Derivative citizenship
 - ii. Parents citizens?
 - iii. If so, how long were they physically present in the US before your client's birth?
 - iv. Born in wedlock.

Is your client a citizen?

- Suppose Julie Kupchek is charged with a misdemeanor drug offense. She tells you that she was born in Poland to a United States serviceman and a foreign born mother.
- Is she a citizen of the United States?

Will the conviction result in a removal proceeding?

- If unlawfully present, they are going to be placed in a removal proceeding.
- If lawfully present, they may or may not be placed in a removal proceeding, depending on the conviction.

Lawful Permanent Residents and Removal

- **You must determine whether plea will result in a removal proceeding.**
- Criminal grounds of removal are located at 8 U.S.C. Sect. 1227(a)(2).
- If your client is here lawfully on a visa, a criminal conviction can result in his or her removal!

Most common criminal grounds of removal relating to LPRs

1. Aggravated felonies
2. Crimes involving moral turpitude
3. Smuggling offenses
4. Offenses relating to controlled substances
5. Certain Firearm offenses
6. Crimes involving domestic violence

Aggravated Felonies

- “Any alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. Sect. 1227(a)(2)(A)(iii)
- Relief extremely limited
- Does not need to be a “felony” conviction in order to be an “aggravated felony” for immigration purposes

What is an Aggravated Felony?

- See handout for statutory definition
- Check Board of Immigration Appeals Precedent
- Check 5th Circuit Court of Appeals Precedent
- **Misdemeanors can be aggravated felonies**
- Deferred Adjudication *may* for certain types of crimes avoid the finding of an aggravated felony

When might a deferred adjudication avoid an aggravated felony?

- When the definition of aggravated felony requires a *minimum term of imprisonment*.
- Examples of aggravated felonies requiring a term of imprisonment:
 - Crimes of Violence
 - (aggravated assaults, injury to a child)
 - Theft and Burglary offenses

Deferred Adjudications are still convictions for immigration purposes!!!

- “Conviction” is specifically defined by Congress. 8 U.S.C. Sect. 1101(a)(48).
- Deferred adjudications only are helpful when the aggravated felony ground requires a minimum term of imprisonment.

Crimes involving moral turpitude

A. Single Conviction

- “Any alien who is convicted of a crime involving moral turpitude *committed within 5 years* after the date of admission, *and* is convicted of a crime for which a sentence of *one year or longer may be imposed is deportable.*”

8 U.S.C. Sect. 1227(a)(2)(A)(I), (II)

Crimes involving moral turpitude, cont'd

B. Multiple convictions for crimes involving moral turpitude:

“Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore . . . is deportable.”

8 U.S.C. Sect. 1227(a)(2)(A)(ii)

WHAT IS A CRIME INVOLVING MORAL TURPITUDE?

- A crime involving moral turpitude (CIMT) “refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se* so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.”

Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994)

So, what is a CIMT?

Fraud

Most sex crimes

Theft offenses

Base, vile, or morally depraved conduct

Case law provides some clarity to the definition of a CIMT

- Board of Immigration Appeals decisions;
- 5th Circuit Court of Appeals precedent decisions.

CIMT, Hypo

- Diego Maradona became a lawful permanent resident in 1980. Recently, Maradona was charged with class B misdemeanor theft. He has no prior criminal history.

If you accept a guilty plea, will he be subject to removal?

CIMT Hypo, cont'd

- Maradona is not deportable
- The crime occurred over five years after his admission
- A class B misdemeanor does not have a maximum sentence of over one year.

CIMT Hypo II

- Suppose Maradona also has a prior conviction for assaulting a police officer for which he received deferred adjudication. This first conviction occurred in 1990.
- If he accepts the plea to class B misdemeanor theft, will this make him subject to removal?

CIMT Hypo II

- Maradona is subject to removal for two CIMT convictions.
- No five year limit.
- Was his conviction for assaulting a police officer an aggravated felony?

CIMT Hypo II, cont'd

- Probably not.
- The applicable definition of aggravated felony concerns “crimes of violence.”
- Aggravated assault is probably a crime of violence. However, the aggravated felony ground requires a minimum term of imprisonment of one year or more. He received a deferred adjudication, which does not include a term of imprisonment.

Crimes relating to controlled substance violations

- Will almost always result in a removal proceeding
- Only exception is for a single offense of possession of less than 30 grams of marijuana for one's own personal use
- **Ground referenced in *Padilla!***
- Supreme Court says it's succinct and straightforward.

Hypo relating to drug convictions

- Landon Donovan, a British citizen, is a lawful permanent resident of the United States since 1972. He received his lawful status when he was just 2 years old. He was recently arrested for possession of a small amount of cocaine. You're his attorney. Will this offense result in Donovan's removal proceeding?

Hypo Cont'd

- Yes. This is a conviction relating to a controlled substance.

Firearms Offenses

- “Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer to sale, exchange, use, own, possess, or carry, any weapon, part or accessory which is a firearm or destructive device is deportable.” 8 U.S.C. Sect. 1227(a)(2)(C).

Hypo

- Ronaldo, a citizen of Portugal, and longtime permanent resident of the United States, borrowed his cousin's car. He was stopped for running a stop sign. He consented to a search of his car and the officer found a gun under the seat. He was charged with unlawful possession of a firearm. His criminal lawyer never read *Padilla* and advised him to accept a guilty plea for this offense. Is he subject to removal?

Hypo

- Yes. It's a conviction for unlawful possession of a firearm.
- Actual guilt or innocence is not relevant in the removal proceeding.

Crimes involving domestic violence

- Any alien who at any time after admission who 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.

8 U.S.C. Sect. 1227(a)(2)(E)(i).

Hypo relating to crimes involving domestic violence

- Cuauhtemoc Blanco, a citizen of Mexico, and long-time resident of the United States was fighting with his wife, a citizen of France, over a recent World Cup soccer game. After France lost, his wife was upset and called the police on Blanco. He is arrested and charged with assault, bodily injury, married, a class A misdemeanor. You're his attorney. Is this a removable offense?

Hypo

Maybe.

- It might be considered a crime involving domestic violence. This is an issue that is litigated in immigration courts.
- It might also be considered a crime involving moral turpitude.
- If the law is unclear, you must advise them that the offense may result in their removal.

Hypo

- David Beckham, a long-time lawful permanent resident, and British citizen, is involved in the trafficking of drugs into the United States. In return for snitching on his fellow narcos, the district attorney decides not to prosecute him. Is he subject to removal for being a drug trafficker?

Hypo

- No. Beckham was not convicted. The ground of removal requires an actual conviction.
- What if Beckham received a deferred adjudication?

Hypo

- He would be subject to removal if he received a deferred adjudication.
- Remember: A deferred adjudication is a conviction for immigration purposes.

Hypo

- Zinedane Zidane, a 14 year old lawful permanent resident, and citizen of France, is arrested for headbutting an old lady and mugging her. He is quickly caught. He is put in delinquency proceedings and they throw the book at him.
- Is he subject to removal for this?

Hypo

- No, unless he was charged as an adult, a finding of juvenile delinquency is not a conviction.

Relief in removal proceedings before an IJ

Padilla **requires** you to advise how a plea will affect your client's eligibility for discretionary relief.

“[W]e have recognized that ‘preserving the possibility of’ discretionary relief from deportation . . . would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.’”

Padilla, 559 U.S. _____, at *17 (quoting *INS v. St. Cyr*, 533 U.S. 239, 323 (2001)).

Relief in removal proceedings cont'd

1. Cancellation of Removal;
 2. Adjustment of Status; and
 3. Asylum and related forms of relief
- * IJ nearly always has discretion to grant or deny.
 - ** There are other forms of relief; however, these are the most common forms when dealing with immigrants with criminal convictions.

Cancellation of removal

- Two forms of cancellation.
 1. One is for lawful permanent residents
 2. The other is for everyone else.

Cancellation for lawful permanent residents

- The LPR must show the following:
 1. Seven years of residency after lawful admission.
 2. Five years as a LPR.
 3. No aggravated felony conviction.

8 U.S.C. Sect. 1229b(a)

Hypo

- Ronaldinho, a citizen of Brazil, became a lawful permanent resident in 2006. He had never been to the United States before 2006. He falls in with the wrong crowd and is convicted twice for crimes involving moral turpitude. He is placed in a removal proceeding. Does he qualify for cancellation of removal?

Hypo

- No. Ronaldhino did not reside in the United States for over 7 years after being admitted in 2006.
- Suppose Ronaldhino was admitted in 1990. He has 10 misdemeanor convictions relating to theft, assault and DWI from 1999 through 2010. Will he receive cancellation?

Hypo

- Maybe. He is statutorily qualified. However, given his extensive criminal history the immigration judge might deny the application as a matter of discretion.

Cancellation for non lawful permanent residents

- Must show the following:
 1. 10 years of physical presence in the United States;
 2. A person of good moral character;
 3. No convictions for CIMTS, firearms offenses, drug offenses, document fraud, trafficking in persons, or aggravated felonies; and
 4. The applicant's USC or LPR spouse, child or parent will suffer exceptional and extremely unusual hardship

Hypo

- Hugo Sanchez and his mother, Evelyn, entered the United States illegally in 1985, when Hugo was just one year old. Hugo graduated from Harvard University, but returned to San Antonio to care for Evelyn who was diagnosed with terminal cancer. He is her primary caretaker. Neither Hugo nor Evelyn ever received status. Hugo never married and has no kids. His father is dead. Does he qualify for cancellation of removal?

Hypo

- No. He does not have a qualifying relative to show hardship. Evelyn is not lawfully present in the United States.

Adjustment of Status

- The status of an alien who is inspected and admitted or paroled into the United States . . . may be adjusted . . . to that of an alien lawfully admitted for permanent residence . . . If the alien is admissible to the United States for permanent residence.
- 8 U.S.C. Sect. 1255(a).

Who qualifies to adjust?

- In general, the person must have been lawfully admitted to the United States AND have a qualifying relationship with an immediate relative.
- An immediate relative includes a spouse of a U.S. citizen, a parent of an adult US citizen child who is over 21.

Adjustment of Status

- Available to both lawful permanent residents and non lawful permanent residents who have been allotted a lawful permanent visa.
- Must be not be inadmissible under 8 U.S.C. 1182(a)(2). **YOU MUST KNOW THE GROUNDS OF INADMISSIBILITY RELATING TO CRIMINAL ACTIVITY!!!**

Others who may qualify to adjust

- Non-immediate relatives who have been the beneficiary of a visa petitions filed long ago.
- Some people who entered illegally might qualify for adjustment. *See* 8 U.S.C. Sect. 1255(i).
- In these situations, you really need to seek qualified immigration counsel.

Common grounds of inadmissibility relating to criminal activities

- Crimes involving moral turpitude
- Drug offenses
- Multiple criminal convictions and aggregate sentences of 5 years or more.
- Prostitution
- Terrorist activity
- Money laundering
- No NAZIs or Commies.
- Some of these require convictions others do not.

Waiver to certain criminal grounds of inadmissibility under 1182(h)

- Some, but not all, of the grounds of removal can be waived under 8 U.S.C. Sec. 1182(h)

CIMTs as a ground of inadmissibility in more detail

- No conviction necessary if the client admits to committing the offense.
- Exceptions
 - Petty offense exception: Applies if the maximum penalty possible does not exceed one year and the person did not receive a sentence of more than six months incarceration.
 - Minor exception: if the offense occurred when the person was under 18 years of age and more than 5 years have passed.

More on CIMTs

- If a person is inadmissible for CIMT convictions, they might qualify for a waiver under 8 U.S.C. Sect. 1182(h).

Hypo

- Pele, a citizen of Brazil, lawfully entered the United States on a student visa in 2001. His visa expired, but he is married to a United States citizen. He was recently charged with stealing soccer balls from Academy. They put him in removal proceedings for overstaying his visa. Can he adjust his status?

LPRs and traveling abroad after a conviction.

- Different rules apply for those LPRs who are physically present in the United States and those who are applying to re-enter after a trip outside of the country.
- See 8 U.S.C. Sect. 1182.

LPRs and traveling abroad after a conviction.

Hypo 1:

Suppose Lionel Messi, an LPR, and citizen of Argentina, is convicted of a single offense of possession of marijuana of less than 30 grams.

-- Not subject to removal under 8 U.S.C. Sect. 1227 so long as he stays in the country.

-- What happens when he returns to the US after traveling abroad?

Hypo

- He will be placed in a removal proceeding.
The grounds of inadmissibility apply regardless if the conviction only involves a single offense for one's own personal use or not.

LPRs and traveling abroad after a conviction.

Hypo 2:

Argen Robbin, a citizen of Netherlands, has been an LPR for over 20 years. He is charged with a theft offense. Theft offenses require a one year term of imprisonment in order to be considered an aggravated felony. You obtain him a 364 day sentence of imprisonment.

-- What happens when Client returns the United States after a trip abroad?

LPRs and traveling abroad after a conviction.

Answer:

Robbin will be placed in a removal proceeding.

What if you obtained him a deferred adjudication?

LPRs and traveling abroad after a conviction.

Answer:

No difference. He's still subject to a removal proceeding.

Does it matter that Client has been an LPR for 5 years?

LPRs and traveling abroad after a conviction.

Answer:

No. The rules governing admission do not have a 5 year limitation.

Mandatory Immigration Detention and Naturalization

- May not be covered by *Padilla*;
- Criminal conviction may result in mandatory detention throughout the duration of a removal proceeding;
- Might result in disqualifying them from naturalization.

A conviction might result in an **automatic removal** for certain people unlawfully present

- Administrative Removal for aggravated felons
- Reinstatement of Removal
- Unlike most people, these few individuals do not have the right to see an immigration judge.

Administrative Removal under INA Section 238(b)(1)

- Applies to those here unlawfully and who were convicted of an aggravated felony.
- No right to see an IJ.
- No right to seek discretionary relief.
- Depending on the offense, it may or may not be succinct and clear that an administrative proceeding will occur.
- **Know the definition of aggravated felony!**

Reinstatement of Removal

- Applies to those who entered the United States illegally after a prior deportation.
- No right to see an IJ.
- Relief extremely limited.
- **It is succinct and clear when this will apply.**
- **Know your client's immigration history!**

“The importance of accurate legal advice for noncitizens accused of crimes has never been more important.”