

## **Criminal Immigration Law**

### **Defending Aliens In Criminal Cases In Iowa - Outline**

#### **Introduction**

- A. Good moral character a requisite for most immigration benefits/privileges
- B. No right to immigration benefits, only those conferred by Congress
- C. Immigration laws designed to exclude criminal element

#### **Working the case**

##### **I. Defending aliens in criminal cases in Iowa**

###### **A. General Considerations**

1. Deferred judgments - not legal bar to deportation - but better than regular conviction
2. Find out client's immigration status
3. Client's need for interpreter
4. Make sure interpreter competent (check with client's family)
5. Separate interpreters for client, court if case goes to trial
6. Talk to prosecutor - work immigration neutral plea bargain
7. Go to trial
8. Appeal - not final judgment until appeal is finished
9. Post conviction relief case not stop immigration deportation
10. Detainers - only 2 days without charging
11. Sentencing - avoid Iowa Dept. of Corrections
12. Reporting to INS - either by county attorney, law enforcement or Iowa Dept of Corrections

###### **B. Check client's immigration status**

1. USA citizen

2. Legal permanent resident

3. Non-permanent resident alien with valid visa (F-1 student, H-1B temporary worker, L-1 intercompany transfer, M-1 (vocational training) application, etc.)

4. In violation of status

a. Status expired

b. No longer attending school (F-1)

c. Working without proper authorization

d. Changed school or job without proper authorization (F-1, M-1, H-1B, L-1, etc.)

**C. Determine whether criminal charge is a deportable or removable offense**

1. Felonies

2. Crime involving moral turpitude

3. Firearms offense

4. Drug offenses

5. Domestic abuse

6. Immigration offenses

**D. Determine whether a conviction will render client inadmissible for future immigration benefits**

1. Crime involving moral turpitude

a. See petty offense exception

2. Drug offenses

3. Immigration violations

4. Aggravated felony (only if client already permanent resident)

**E. Determine if client may be eligible for any relief**

1. INA § 212(c) relief
2. Cancellation of removal under INA § 240A
3. Adjustment of status - INA § 245
4. Waiver - INA § 212(h)
5. Asylum or withholding of removal - INA § 208
6. Suspension of deportation
7. NACARA
8. VAWA
9. TPS
10. Other

**F. Structure plea bargain to take advantage of any potential relief**

1. Avoid aggravated felony
2. Avoid drug conviction
  - a. only exception is single conviction of simple possession of marijuana of 30 grams or less
3. Get sentence of less than one year (avoids aggravated felony)
4. Deferred judgments still count, but generally avoid aggravated felony conviction as no one year sentence
5. Avoid bringing your client to the attention of penal enforcement authorities such as county jail or prison - many probation officers will not report their client to the Immigration Service
6. Advise your client to contact an immigration attorney if he/she has any questions regarding immigration consequences of the criminal process

**II. Immigration crimes divided into several distinct categories, with different consequences:**

**A. Aggravated felonies**

**B. Crimes of moral turpitude**

**C. Domestic abuse assault, child endangerment, violation of no-contact order**

**D. Immigration related crimes**

**E. Other - firearm offenses, possession of controlled substance, etc.**

**III. Aggravated felonies**

A. Review list from INA 101

B. No relief from deportation

C. Permanent exclusion

D. No suspension or cancellation of removal if permanent resident

E. No judicial review except through habeas corpus (still in question/litigation)

F. Permanent bar to re-entry (without special permission)

G. Twenty years in prison for unauthorized re-entry

**IV. Crimes of moral turpitude**

**A. Examples**

1. any crime of dishonesty

2. most sexual offenses

3. crimes with recklessness or willful disregard of rights of others

4. other crimes on an individual basis (arguable)

**B. Not include:**

1. OWI

2. possession of controlled substance

3. criminal trespass

4. public intox (possibly)

5. most traffic offenses
6. other crimes on an individual basis (arguable)

**C. Two sections**

1. convicted of one crime or moral turpitude in 5 years, one year penalty possible
2. convicted of two or more crimes of moral turpitude, not out of single scheme

D. Shows lack of good moral character

E. Eligible for re-entry

F. Ten to twenty year penalty for unauthorized re-entry

G. Eligible for INA 212(h) waiver

**H. Petty offense exception:**

1. Only single conviction for crime involving moral turpitude
2. Total possible sentence a year or less
3. Total actual sentence imposed less than six months (i.e., 180 days or less)
4. Sentence includes any suspended portion, as well as any time actually served

**V. Domestic abuse assault, child endangerment, violation of no-contact order**

**A. Any level of conviction of domestic abuse assault**

1. includes simple misdemeanor
2. no minimum sentence

**B. Child endangerment**

1. no restriction or minimum sentence
2. even if from OWI

**C. Violation of no-contact order**

1. no minimum sentence
2. no requirement of actual harm
3. only against person under no-contact order

D. Eligible for re-entry

E. Eligible for INA 212(h) waiver

## **VI. Immigration related crimes**

A. Illegal entry

B. Alien smuggling

C. Forged immigration documents

D. Waiver - if for spouse or child (must be married at time of incident, not after)

E. INS usually waives immigration forgery on immediate relative petitions as policy -- not bound to do so

F. RICO - 2 or more predicate offenses, 2 or more people

## **VII. Other crimes**

A. Firearms offenses

B. Non-moral turpitude crimes (OWI, traffic, certain property offenses, public intoxication)

C. Possession of controlled substances (deportable offense) - **exception for 30 ounces or less of marijuana - for personal use**

D. Waiver available (INA § 212(h))

## **VIII. Sentencing considerations**

A. Under immigration law "sentence" means any sentence actually imposed by the court, regardless of all or a portion is suspended

B. "Sentence" under immigration law includes the full terms set forth in the record, regardless of whether it is actually indeterminate or whether there is automatic time off for good time (i.e., Iowa's Class C felony sentence of five years is indeterminate, but is considered a full five year sentence for

immigration law purposes)

C. A **deferred judgment still counts for immigration law purposes**, but it will avoid most aggravated felony definitions that require a term of imprisonment to be imposed

D. Generally speaking, obtaining a sentence of less than one year is beneficial

#### **PETTY OFFENSE EXCEPTION:**

E. Crimes involving moral turpitude must have a maximum total sentence possible of one year and a maximum actual sentence imposed of less than six months (i.e., 180 days or less) (INA § 212(a)(2)(A)(ii)(II)).

F. If your client may possibly violate terms of probation, it may be better to get actual sentence imposed rather than deferred judgment to avoid the possibility of the aggravated felony requirement of a one year actual sentence; the court will often impose a determinate sentence for a term of days rather than a deferred judgment if requested at sentence, and then suspend the same

G. Penal institutions, including state and federal prisons, are required to report your client to the Immigration Service - avoid them if possible

H. Jails frequently will also report your client to the Immigration Service, but are not required to do so

#### **I. AVOID ALL PENAL INSTITUTIONS IF POSSIBLE**

J. Probation officers frequently do not report their clients to the Immigration Service

K. Judges should not report your client to the Immigration Service - this is a law enforcement requirement, i.e., an action of the executive branch

L. Tell your clients to avoid alcohol and drugs - these are the quickest ways for aliens to get in trouble

#### **IX. Immigration detainers**

##### **A. Order to detain, Form I-203A**

1. Alien is in custody of federal ICE

2. An immigration arrest warrant may also be issued

3. This is an actual "hold" detainer, and the alien may not be released unless bond is set with by ICE, immigration court, or federal court in a habeas proceeding

## **B. 48 hour "notice" detainer, Form I-247**

1. These are requests that state officials notify ICE 48 hours prior to the actual release of alien by state officials
2. Alien remains in state custody
3. This detainer is authorized pursuant to 8 C.F.R. § 247.7, and is enforceable for only 48 hours
4. The 48 hours starts after the alien posts bond on the state charges or has completed time of incarceration order or is ordered released by a state judge on the pending state charges
5. Bond may be posted with the clerk of court, as many sheriffs will not accept bond if there is an INS detainer
6. As the person is still held under the color of state law, habeas should be available in state court
7. Habeas may be necessary in federal court, as the state court may not wish to deal with the federal detainer
8. 48 hours does not include weekends or federal holidays
9. If ICE does not issue I-203A or otherwise take alien into custody at the end of the 48 hours, the state institution must release alien
10. A violation of this is actionable under 48 U.S.C. § 1986 as a violation of constitutional rights under color of state law

## **X. Federal habeas**

1. Obtain release of alien held in violation of constitutional or statutory authority
2. Must name the custodian (generally the local district director having direct control over alien's custody)
3. Must be filed in the district having jurisdiction over the district director
4. Only available if exhausted administrative remedies
5. May be last resort for alien with criminal conviction
6. If you have not done federal habeas work in immigration, contact an immigration lawyer or refer the case out

## **XI. Deportation proceedings**

- A. Initiated by service of a Notice to Appear on alien
- B. The time and place for hearing will be listed on the Notice to Appear or will be sent by mail to the alien separately
- C. If alien is incarcerated, ICE will transport to Immigration Court
- D. Iowa and federal prisons have video link up for remote Immigration Court hearings at penal institution
- E. Have your clients at least contact an immigration attorney if only to determine if nothing can be done in their case
  - 1. Be careful in choosing an immigration attorney

## **XII. INA 212(h) waiver or other relief (cancellation, etc.)**

- 1. Waives inadmissibility
  - 2. Any other relief of benefit subject to usual rules regarding exercise of discretion (most petitions are discretionary)
  - 3. Hearing on waiver
  - 4. Outstanding equities
    - a. family ties
    - b. community ties
    - c. work history
    - d. business ties
    - e. education
    - f. service to community
    - g. length of residence in U.S.
    - h. other positive factors

5. Unfavorable equities

- a. criminal history
- b. immigration crimes/violation
- c. other factors (failure to pay child support, etc.)

**XIII. Iowa's criminal immigration law (for false documents) (Iowa Code § 715A.2(2)(a)(4))**

- A. Supremacy Clause consideration
- B. Forgery - aggravated felony
- C. Possible defenses: Client not sure papers were false; bought them for a fair price; that is the way things are done in their country.

**XIV. Federal Sentencing**

- A. Possible decrease if permanent legal resident waives deportation hearing
- B. Possible decrease due to condition of incarceration
- C. Possible downward departure due to "cultural assimilation" *United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001)
- D. "S" visa possible if witness in criminal (drug trafficking) case

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