

## IMMIGRATION CONSEQUENCES OF NEW YORK CRIMINAL CONVICTIONS

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Not long ago, an immigrant accused of a crime might well wind up avoiding deportation even if he or she pled guilty to a deportable offense if the immigrant had a “green card” signifying that the bearer is a lawful permanent resident of the United States. This is no longer true. Now, in many cases, the green card offers no protection. In these cases, a lawful permanent resident immigrant is in effect agreeing to mandatory deportation the moment he or she pleads guilty to a crime.<sup>1</sup>

About half of noncitizen criminal defendants in New York State are lawful permanent residents. A lawful permanent resident (LPR) is an immigrant who has been lawfully admitted to the United States to live and work here permanently. Most LPRs obtained this status by petition of a U.S. citizen or lawful permanent resident family member, or of an employer. Others may have obtained this status after admission as a refugee or after being granted asylum due to threat of persecution in their country of nationality. Still others obtained this status based on long residence in the United States (e.g., late 1980s amnesty applicants). Although no longer green in color, “green card” remains the popular name for the proof of identity and status issued to LPRs by the Department of Homeland Security (DHS), formerly issued by the Immigration and Naturalization Service.<sup>2</sup>

A lawful permanent resident may apply to be naturalized as a U.S. citizen after having resided in the United States for the requisite number of years. For most individuals, five years of lawful permanent residence is required. However, many LPRs never got around to applying for naturalization or simply chose not to do so for a variety of reasons. Thus, some LPRs have been in the United States for much longer than five years. Nevertheless, unless and until such an LPR becomes a U.S. citizen, he or she is subject to deportation if he or she is convicted of certain criminal offenses.

Up until 1996, a long-term lawful permanent resident who became deportable based on a criminal conviction was usually eligible to apply to an Immigration Judge for a waiver of deportation, known as a 212(c) waiver (based on the former Immigration and Nationality Act statutory authority for the waiver). An Immigration Judge had the discretion to grant a 212(c) waiver if the LPR could demonstrate equities such as long residence in the United States, close family with lawful status in the United States, evidence of hardship to

the individual and family if deportation occurred, service in the armed forces, history of employment, existence of property or business ties in the United States, evidence of value and service to the community, and proof of genuine rehabilitation.

Now, however, many criminally convicted lawful permanent residents are ineligible to have such equities considered by an Immigration Judge prior to entry of a removal order. This is primarily due to two Congressional enactments in 1996: the Antiterrorism and Effective Death Penalty Act (AEDPA), which came into effect on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which generally came into effect on April 1, 1997. These new enactments expanded the types of crimes and dispositions that trigger deportability and, at the same time, dramatically cut back on LPR eligibility for relief from deportation. In addition, recent agency and court interpretations of the law have further extended the negative impact of the new laws for LPR immigrants.

### **Deportability**

The immigration statute subjects a lawful permanent resident immigrant to removal based on an ever-growing list of criminal offenses triggering deportability. The deportability grounds, listed at 8 U.S.C. 1227(a), now include the following:

- Conviction of an *aggravated felony* -- This immigration law term-of-art is a constantly expanding category which now includes not only crimes such as murder and illicit drug or firearm trafficking, but any crime of violence, theft or burglary offense, or obstruction of justice offense for which an individual gets a prison sentence of one year or more, a fraud or deceit offense where the loss to the victim(s) exceeds \$10,000, as well as an expanding list of other offenses. Despite its name, the term may even include misdemeanors, such as misdemeanor sale of marijuana, a second drug possession misdemeanor, and possibly other misdemeanors that may be found to come within the statutory definition of aggravated felony.<sup>3</sup>
- Conviction of a *crime involving moral turpitude committed within five years of admission to the United States and punishable by a year in prison* -- The “crime involving moral turpitude” immigration law term-of-art includes crimes in many different New York offense categories, e.g., crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses); crimes in which bodily harm is caused or threatened by an intentional or willful act, or

serious bodily harm is caused or threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses); and most sex offenses. In New York, Class A misdemeanors as well as felonies are punishable by a year so they could, if deemed to involve moral turpitude, make an LPR defendant deportable if he or she committed the offense within five years after admission.

- Conviction of *two crimes involving moral turpitude*, whether felony or misdemeanor, committed at any time and regardless of actual or potential sentence.
- Conviction of any *controlled substance offense* (other than a single offense of simple possession of 30 grams or less of marijuana), whether felony or misdemeanor.
- Conviction of a *firearm or destructive device offense*, whether felony or misdemeanor.
- Conviction of a crime of domestic violence, stalking, or child abuse, neglect, or abandonment, whether felony or misdemeanor.

Further expanding the reach of these criminal grounds for deportation, Congress in IIRIRA expanded the types of criminal case dispositions that may now be considered convictions for immigration purposes. Formerly, the immigration statute did not contain a definition of conviction for immigration law purposes. What state dispositions constituted a conviction was a matter of case law. In IIRIRA, however, Congress for the first time defined “conviction” for immigration purposes. It included not only formal judgments of guilt, but also dispositions where adjudication of guilt is “withheld” but where the following two requirements are met: (1) 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 (2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.<sup>4</sup>

In recent rulings, the U.S. Justice Department has taken a very broad view of the reach of this new statutory definition of conviction for immigration purposes. As a result, many state criminal case dispositions that are not convictions for any other purpose under state law will now be considered convictions triggering deportation. For example, in *Matter of Roldan-Santoyo*, Int. Dec. #3377 (BIA March 3, 1999), the Board of Immigration Appeals found that a noncitizen who had had his guilty plea to the offense of possession of a controlled substance vacated and his case dismissed upon termination of his probation under the criminal laws of the State of Idaho was nevertheless deemed to have a conviction for

immigration purposes. Going further than it needed to decide the case at hand, the Board stated: “We . . . interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of [the statutory definition], and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.”<sup>5</sup>

This and other recent rulings demonstrate that a New York criminal court referral of a defendant to a drug treatment program before final disposition of the criminal charges, but after the defendant enters a plea or admission of guilt, could be considered a conviction for immigration purposes. On the other hand, even under the current statute, a state deferral of adjudication procedure should not constitute a conviction unless there has been some finding, plea, or admission of guilt up front. Thus, a New York adjournment in contemplation of dismissal (ACD), or a drug treatment diversion program that does not require a guilty plea up front, should still not be considered a conviction for deportation purposes.

### **Inadmissibility**

In addition to the grounds of deportability, the Immigration and Nationality Act also contains separate grounds of inadmissibility. Although the inadmissibility grounds apply principally to individuals who have not been lawfully admitted to the United States, they may also be applied to lawfully admitted individuals when such individuals travel abroad and seek readmission. Thus, although a lawful permanent resident immigrant generally needs to be concerned primarily with the deportability grounds, he or she may also need to be concerned with the inadmissibility grounds if he or she may travel outside the United States in the future.

The inadmissibility grounds, listed at 8 U.S.C. 1182(a), include the following:

- Conviction or admitted commission of any *controlled substance offense*, whether felony or misdemeanor (with no exception for one-time possession of less than 30 grams of marijuana), or DHS reason to believe that the individual is a drug trafficker.
- Conviction or admitted commission of a *crime involving moral turpitude*, whether felony or misdemeanor (subject to a petty offense exception).
- Conviction of *two or more offenses of any type with aggregate sentences to imprisonment of at least five years*.
- *Prostitution* and commercialized vice.

The importance for a lawful permanent resident of considering the inadmissibility as well as the deportation grounds is demonstrated by the example of an LPR pleading guilty to possession of a small amount of marijuana. Such a conviction should not make the LPR deportable if it does not involve possession of more than 30 grams of marijuana. Nonetheless, if, at some time in the future, the LPR decides to take his or her family to see the Niagara Falls from the Canadian side or some other trip outside the country, the LPR may be in for a rude shock upon trying to return to the United States. He may be detained and placed in removal proceedings based on the drug inadmissibility ground, which does not have an exception for the possession of a small amount of marijuana.

### **Mandatory Removal**

Under the new laws, if a lawful permanent resident defendant is convicted of certain offenses or receives a jail sentence of a certain length, he or she will not only be rendered deportable or inadmissible but will also be unable to ask for virtually any form of relief that may have been available in the past.

The discretionary form of relief currently in the statute to replace the old 212(c) lawful permanent resident waiver is what is called cancellation of removal.<sup>6</sup> An LPR is eligible to seek cancellation of removal if the individual will have been a lawful permanent resident for at least five years by the time of his or her removal hearing. In addition, the LPR must show that he or she has resided in the United States continuously for more than seven years after lawful admission in any status. The clock for the seven years residence requirement stops at the time of commission of an offense triggering deportability or inadmissibility; however, it appears to do so only if the offense is one of those "referred to" in the INA 212(a)(2) crime-related grounds of inadmissibility.<sup>7</sup> Finally, the LPR must not have been convicted of an aggravated felony.

A lawful permanent resident will therefore be unable to seek this relief if he or she receives one of the following criminal dispositions:

- Conviction of an *aggravated felony* – Thus, for lawful permanent residents who would otherwise be eligible for cancellation of removal, a disposition of the criminal case falling within the aggravated felony deportation ground is worse than falling within any of the other deportation grounds.

- Conviction of any *crime involving moral turpitude or drug offense*, even if not an aggravated felony, *if the LPR had not resided in the United States continuously for 7 years after admission and before commission of the offense*.

If the disposition of a criminal case not only makes an LPR defendant deportable or inadmissible but also ineligible for any relief, removal will be mandatory regardless of what U.S. family ties or other equities may be present.

### **Mandatory Detention until Removal**

Removal proceedings before an immigration judge are to take place expeditiously, generally either in the penal institution where the immigrant is serving a sentence of imprisonment, or in a DHS detention facility or DHS contract facility. Since 1998, it has been mandatory to detain most noncitizens convicted of offenses triggering removability, even those who are lawful permanent residents, when the noncitizen is released from criminal custody. There is no longer any statutory right to release on bond pending completion of removal proceedings. Thus, when an LPR becomes removable from the United States, he or she will be subject to the issuance of a DHS detainer on the penal custodian and DHS detention upon completion of prison time. If the LPR is not sentenced to prison time, he or she is subject to immediate DHS arrest and detention. An immigrant may be released pending completion of removal proceedings only if release “is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation.”<sup>8</sup>

Some LPR immigrants subjected to the new mandatory detention policy have successfully brought federal habeas corpus petitions in New York and elsewhere to challenge the policy on various statutory and constitutional grounds.<sup>9</sup> Nevertheless, LPR defendants and their attorneys now need to take into account that, if the defendant is already deportable or inadmissible based on a prior offense, getting out of criminal custody on bail may merely result in being transferred to a DHS detention facility. To make matters worse, such a defendant will not get credit towards any subsequent prison sentence for the time he or she has spent in DHS custody.

## **Consequences of Removal**

The immigration statute now requires that the DHS remove a noncitizen with a final order of removal from the United States within a period of 90 days.<sup>10</sup> If the noncitizen is incarcerated when the removal order becomes final, the 90-day period begins on the date the noncitizen completes his or her criminal imprisonment and is released to DHS custody.<sup>11</sup> Once the removal order is final and the DHS has taken custody, the DHS is required to detain the noncitizen during the 90-day period.<sup>12</sup> And, if the noncitizen is removable for crime-related reasons, the DHS may detain the individual beyond the 90-day period until removal is accomplished.<sup>13</sup>

If an immigrant is removed from the United States, the reality in many, if not most, cases is that the individual will never be able to return to the United States, even if the individual had been a lawful permanent resident. First, in the case of an immigrant removed on the basis of virtually any drug offense, the drug offense makes the individual permanently inadmissible. For admission as a permanent resident after removal, a possibility of a waiver exists only for a single offense of simple possession for one's own use of 30 grams or less of marijuana.<sup>14</sup> A more general waiver exists for admission as a temporary visitor, but this waiver is difficult to obtain and will not allow the individual to reestablish any lawful residence he or she previously had in the United States.<sup>15</sup>

An immigrant who is removed on the basis of conviction of an aggravated felony is also made permanently inadmissible.<sup>16</sup> Although there is an exception to this ground of inadmissibility if the individual obtains the consent of the Attorney General prior to reapplying for admission,<sup>17</sup> such consent is difficult to obtain.

Finally, even if the immigrant does not fall within the drug-related grounds of inadmissibility, or is not removed on the basis of an aggravated felony conviction, he or she may be barred from future admission after removal for 5 years (in the case of a first removal based on inadmissibility), 10 years (in the case of a first removal based on deportability), or 20 years (in the case of a second or subsequent removal).<sup>18</sup> In addition, the individual should not be under the impression that he or she will be able automatically to return once the period of 5, 10, or 20 years has passed. Although the bar on admission based on the prior removal will no longer be present, the individual will still have to establish eligibility otherwise for an immigrant visa. This may very well not be a possibility.

If the immigrant attempts illegal reentry after being removed, he or she will be subject to federal prosecution under federal immigration criminal laws providing now for lengthy federal prison sentences. These laws now provide for a sentence of up to 20 years if the individual had been removed subsequent to conviction of an aggravated felony; up to 10 years if the individual had been removed subsequent to conviction of any felony other than an aggravated felony, or three or more misdemeanors involving drugs or crimes against the person; and up to 2 years in other cases.<sup>19</sup> In recent years, U.S. Attorney's offices have dramatically stepped up enforcement of these criminal provisions.

In short, the laws of removal now make it likely that a lawful permanent resident defendant convicted of an offense triggering deportability or inadmissibility will be permanently separated from home, family, employment, and other ties here in the United States.

### **Judge and Defense Counsel Duty**

At the same time as Congress has been making the immigration consequences of criminal convictions ever harsher for lawful permanent residents and other immigrants, the federal government has been devoting greatly increased resources to enforcing these consequences. As a result, more and more removable noncitizen criminal defendants are being identified. DHS deportation statistics demonstrate the effect that the amendments to the law and the increased funding have had. In fiscal year 2004, the DHS removed 202,842 foreign nationals. "Criminal alien" removals reached 88,897, representing an average of about a thousand five hundred such noncitizens removed each week.

Together, the harsher character of the law and the increased enforcement now make it more important than ever for the judge hearing the criminal case to warn, and for the defense lawyer to investigate and advise, regarding the potential immigration consequences of choices that an LPR or other noncitizen defendant will face during criminal proceedings, such as whether to plead guilty to a particular criminal charge. In fact, such duties on the part of judges and defense counsel are increasingly recognized as professional responsibilities. The ethics standards of the American Bar Association (ABA) state that, before accepting a guilty plea, judges should "advise the defendant that by entering the plea, the defendant may face additional consequences including . . . , if the defendant is not a United States citizen, a change in the defendant's immigration status."<sup>20</sup> The ABA standards further provide that, to the extent possible, defense counsel "should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that

might ensue from entry of the contemplated plea.”<sup>21</sup> In addition, the National Legal Aid and Defender Association (NLADA) cites the duty of defense counsel in the plea bargaining process to "be fully aware of, and make sure the client is fully aware of . . . consequences of conviction such as deportation", with the commentary noting that deportation can be a "devastating" effect of conviction for noncitizens and that collateral consequences such as deportation can be greater than direct ones.<sup>22</sup>

For a lawful permanent resident defendant, in particular, the stakes are high. Indeed, for many lawful permanent resident defendants, the immigration consequences of a criminal conviction or other disposition may now be far more severe and lasting than the penal consequences. As U.S. District Judge Jack B. Weinstein has noted: "Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea."<sup>23</sup>

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<sup>1</sup> In the current law, deportation is now referred to as "removal." This article will use the terms interchangeably.

<sup>2</sup> The current version of the "green card" is the pinkish Form I-551. It states "RESIDENT ALIEN" in large block letters on the top of the front of the card.

<sup>3</sup> See United States v. Graham, 169 F.3d 787 (3d Cir. March 5, 1999) (holds that New York misdemeanor petty larceny with a one-year prison sentence is an aggravated felony).

<sup>4</sup> 8 U.S.C. 1101(a)(48)(A) added by section 322 of IIRIRA.

<sup>5</sup> Matter of Roldan-Santoyo, Int. Dec. #3377.

<sup>6</sup> 8 U.S.C. 1229b(a).

<sup>7</sup> See 8 U.S.C. 1229b(d)(1).

<sup>8</sup> 8 U.S.C. 1226(c).

<sup>9</sup> E.g., Velasquez v. Reno, 1999 WL 194198 (D.N.J., April 5, 1999) (statutory grounds); Martinez v. Greene, 1998 WL 879834 (D.Colo., December 14, 1998) (constitutional grounds).

<sup>10</sup> 8 U.S.C. 1231(a)(1)(A).

<sup>11</sup> 8 U.S.C. 1231(a)(1)(B).

<sup>12</sup> 8 U.S.C. 1231(a)(2).

<sup>13</sup> 8 U.S.C. 1231(a)(6).

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<sup>14</sup> See 8 U.S.C. 1182(a)(2)(A)(i)(II) & (C) in combination with the waiver provision located in 8 U.S.C. 1182(h).

<sup>15</sup> See 8 U.S.C. 1182(d)(3).

<sup>16</sup> 8 U.S.C. 1182(a)(9)(A).

<sup>17</sup> 8 U.S.C. 1182(a)(9)(A)(iii).

<sup>18</sup> 8 U.S.C. 1182(a)(9)(A).

<sup>19</sup> 8 U.S.C. 1326.

<sup>20</sup> ABA Standards for Criminal Justice, Pleas of Guilty, Std. 14-1.4 (3d ed. 1999).

<sup>21</sup> ABA Standards for Criminal Justice, Pleas of Guilty, Std. 14-3.2 (3d ed. 1999).

<sup>22</sup> NLADA Performance Guidelines for Criminal Defense Representation (1994), Guideline 6.2(a)(3) and commentary.

<sup>23</sup> Mojica v. Reno, 970 F.Supp. 130, 177 (E.D.N.Y. 1997).