

Presented by  
Western District of Michigan Federal Bar Association

in partnership with  
the Michigan Immigrant Rights Center

and

the Federal Public Defender Office

# IMMIGRATION CONSEQUENCES OF CRIME



# TODAY'S PRESENTERS

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# TODAY'S PRESENTATION

- ***Brief review:*** Immigration status and standards
- Analyzing immigration consequences of criminal activity
- Special forms of immigration relief
- Detention and bond

# DETERMINING IMPACT OF CRIMINAL ACTIVITY ON IMMIGRATION STATUS

- **What is the person's current status?**
  - Has she been admitted?
- **What type of immigration relief may be sought in the future?**
  - Is she seeking a future admission to US?
  - Is she seeking adjustment? Naturalization? Asylum? Etc.
  - Is she seeking relief from potential removal?
- **What was the criminal activity?**
  - When did it occur?
  - Was there a conviction?
  - What was the punishment?
- **Does the criminal activity match a generic immigration consequence?**

# “ALIENS” AMONG US

- Any individual who is not a US citizen is an “alien” under federal law.
- An “alien” includes permanent residents, visa holders, and those without status.
- **Anyone who is not a US citizen is vulnerable to removal.**

# HIERARCHY OF LEGAL STATUS

- **United States citizenship**
  - Have voting rights
- **Lawful permanent residence** (“green card”)
  - Permanent status; does not expire
  - Permission to work inherent to status
  - Cannot vote in Federal elections
  - No English language requirement
- **Forms of temporary status**
  - Limited in duration
  - Usually heavy restrictions with respect to permission to work
  - E.g., student visas, work visas, visitors, temporary protected status
- **No status**
  - Visa overstay
  - Entered without inspection

# WHAT IS A “CONVICTION”?

- **8 USC 1101(a)(48)(A)**
  - A formal judgment of guilt entered by a court.
  - If adjudication has been withheld, where some form of punishment, penalty, or restraint on the alien’s liberty is imposed AND
    - Judge or jury has found the alien guilty,
    - Alien has entered a plea of guilty,
    - Alien has entered a no contest plea, or
    - Alien has admitted sufficient facts to warrant a guilty finding
- **Includes:**
  - Guilty pleas
  - No contest pleas
  - Pleas under advisement
  - Deferred adjudication
  - Expunged convictions

# JUVENILE ADJUDICATIONS

- Adjudications in juvenile proceedings are not considered “convictions” for immigration purposes (civil in nature), provided the offense would have been considered a juvenile offense under federal law (see 18 USC 5032).
- ***Matter of Devison-Charles***, 22 I&N Dec 1362, 1365-66 (BIA 2000); ***In re M-U-***, 2 I&N Dec 92 (BIA 1944)
- But:
  - Holmes Youthful Trainee Act = conviction. ***Uritzky v Gonzalez***, 399 F3d 728 (CA6 2005)
  - Conduct may form basis for discretionary denial or for other grounds of removability not requiring a conviction *per se*

# WHAT IS A “SENTENCE”?

- **8 USC 1101(a)(48)(B)**
  - “[P]eriod of incarceration or confinement ordered by a court of law . . . .”
  - Does not include probation/parole term (unless the original sentence is modified for a probation/parole violation)
  - Pay close attention to the immigration statute’s precise wording.
- A statute may reference **actual, imposed, or maximum possible** sentence. Read carefully!

# ADMISSIBILITY

## 8 USC 1182

- The “admissibility” standard applies to those who **have not** been legally admitted.
- INA 212
- **Grounds of inadmissibility include (but are not limited to):**
  - Lack of a lawful admission
  - Unlawful presence in the US >180 days
  - Past immigration violations
  - Possessing a permanent intent but requesting a temporary status
  - Political beliefs
  - Health-related grounds
  - Lack of financial resources
  - Threat to national security
  - *Criminal conduct and criminal record*

# CRIMINAL GROUNDS OF INADMISSIBILITY

- **Convictions** for, or **admissions** to:
  - Crimes involving moral turpitude, controlled substance offenses
- **Convictions** for 2 or more crimes for which noncitizen received, in the aggregate, 5 years' imprisonment
- **Conduct-based grounds** (no admission or conviction required):
  - Prostitution
  - Human trafficking involvement
  - Money laundering
  - Human smugglers
  - Terrorism
  - "Reason to believe" drug trafficking

# COMMON LAW DEFINITION OF MORAL TURPITUDE

- “Nebulous concept which refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one’s fellow man or society in general.”
- “An evil or malicious intent is said to be the essence of moral turpitude.”
- “Basically offense to American ethics and accepted moral standards.”
- “Nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society.”
- *Matter of Flores*, 17 I&N Dec 225 (BIA 1980)
- *In re Lopez Meza*, 22 I&N Dec 1188 (BIA 1999)



# CASES ON “REASON TO BELIEVE”

- ***Castano v INS***, 956 F2d 236 (11th Cir 1992)  
(expungement under Federal Youth Corrections Act sufficient to find “reason to believe”)
- ***Garces v Atty Gen***, 611 F3d 1337 (11th Cir 2010)  
(vacated guilty plea and police reports did not amount to RTB)
- ***Mena-Flores v Holder***, 776 F3d 1152 (10th Cir 2015)  
(acquittal, no eyewitness identification by law enforcement, credibility issues with lay witnesses, still sufficient to find RTB)

# INADMISSIBILITY IN ACTION

- Georgette applied for an immigrant visa in Paris, France, based on her marriage to a United States citizen.
- During her medical examination she told the doctor she occasionally smoked marijuana.
- At her consular interview, she was found inadmissible for admitting to a controlled substance offense and for being a drug abuser.
- Her visa application was denied. *Is Georgette ever able to gain admission?*

# EXCEPTIONS AND WAIVERS FOR INADMISSIBILITY

- Statutory exception for petty offense CIMT. **8 USC 1182(a)(2)(A)(ii)**.
- Waivers:
  - For temporary status, the waivers may be broad, but are nonetheless discretionary. **See, e.g., 8 USC 1182(d)(3)**.
  - For permanent status, the waivers are much more limited. **See, e.g., 8 USC 1182(h) (INA 212(h))**.

# 212(h) WAIVERS FOR IMMIGRANTS

- Only waives criminal grounds of *inadmissibility*.
- Waiver only available for certain crimes:
  - Crimes involving moral turpitude
  - Single offense of simple possession of marijuana of 30 g or less
  - Multiple criminal convictions with aggregate sentence to confinement of 5 years or more
  - Prostitution and commercialized vice
  - Serious crimes in which individual asserted immunity
- Highly discretionary, only granted for “dangerous or violent” offenses in “extraordinary circumstances.” 8 CFR 212.7(d).

# 212(h) WAIVERS FOR IMMIGRANTS

- Applicant must establish she is:
  - A spouse, parent, son or daughter of a U.S. citizen or permanent resident who will face extreme hardship if the applicant is removed;
  - A VAWA self-petitioner;
  - Inadmissible only under the prostitution ground; **OR**
  - Inadmissible based upon a conviction or event that took place more than 15 years before the current application.
- In these last two categories the applicant must prove that she is rehabilitated and her admission is not contrary to U.S. interests.

# DEPORTABILITY

## 8 USC 1227

- The “deportability” standard applies to persons who **have** been lawfully “admitted.” See 8 USC 1101(a)(13) for a definition of “admission.”
- **Grounds of deportability include (but are not limited to):**
  - Inadmissible at time of admission
  - Violated condition of status
  - Marriage fraud
  - Failure to register
  - False claim to citizenship
  - Security grounds
  - Public charge
  - Unlawful voters
  - Drug abuse and addiction
  - Criminal past and record

# CRIMINAL GROUNDS OF DEPORTABILITY

- Conviction for CIMT with possible sentence of 1 year or longer
  - Committed within 5 (or 10) years after admission
- Conviction for 2 or more CIMTs in 2 or more separate “schemes of criminal misconduct”
- Conviction of offense involving controlled substance (as defined by federal law)
- Conviction for firearm offenses, document fraud
- Conviction for domestic violence
- Conviction for aggravated felony
- **No** criminal conviction required for following deportability grounds:
  - Violation of PPO
  - Drug abusers and addicts

# A BRIEF HISTORICAL OVERVIEW OF THE “AGGRAVATED” “FELONY”

- Anti Drug Abuse Act of 1988
  - Murder, drug trafficking, firearm or destructive device trafficking
- IMMACT 1990
  - Added money laundering, COV w/sentence at least 5 years, foreign convictions
  - Repealed JRAD power
- Immigration and Nationality Technical Corrections Act of 1994
  - Theft and burglary of at least 5 years, ransom, child porn, prostitution, RICO, income tax evasion >\$200,000
- AEDPA of 1996
  - Gambling, document offenses, failure to appear, bribery, obstruction, perjury
- IIRIRA of 1996
  - Term of imprisonment dropped to 1 year for COV, theft, RICO, document fraud, forgery, tax evasion and money laundering dropped to >\$10,000
- **(Not an exhaustive list.)**

# AGGRAVATED FELONIES ...

- Alien smuggling
- Bribery if term of imprisonment more than 1 year
- Burglary if term of imprisonment is more than 1 year
- Child pornography
- Counterfeiting if term of imprisonment is more than 1 year
- Crime of violence if term of imprisonment is more than 1 year
- Trafficking in destructive devices
- Drug trafficking offenses
- Failure to appear to hearing on felony offense punishable by 2 years
- Using or creating false documents if term of imprisonment at least 1 year (except if first offense to aid child, spouse, or parent)

# ...MORE AGGRAVATED FELONIES

- Federal firearms offenses and some related state offenses
  - Forgery if term of imprisonment at least 1 year
  - Fraud or deceit if loss >\$10,000
  - Illegal re-entry after removal for aggravated felony conviction
  - Money laundering, fraud, tax evasion >\$10,000
  - Murder
  - Obstruction of justice if term of imprisonment at least 1 year
  - Perjury if term of imprisonment at least 1 year
  - Prostitution offenses
  - Ransom
  - Rape
  - Receipt of stolen property if imprisonment at least 1 year
  - RICO
  - Sexual abuse of a minor
  - Theft if imprisonment at least 1 year
  - Treason
- **(Not a complete list. See 8 USC 1101(a)(43).)**

# CASES TO REVIEW

- ***Dimaya v Sessions***, 584 US \_\_\_ (2018) (COV under 18 USC 16(b) too vague)
- ***Lopez v Gonzalez***, 127 S Ct 625 (2006) (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)
- ***In re Rosa***, 27 I&N Dec 228 (BIA 2018) (in deciding whether state offense is a felony for purposes of the CSC, the court is not limited to looking at solely the provision of the CSC that is most similar to state offense)

# DEPORTABILITY IN ACTION

- LPR Paul, from Ireland, is convicted of delivery of cocaine to a friend.
- As a result of this conviction, Paul is deportable.
- He faces losing his residency.
- *Is Paul able to prevent his deportation?*

# EXCEPTIONS AND WAIVERS FOR DEPORTABILITY

- Statutory exception for one-time personal possession/use marijuana <30g. 8 USC 1227(a)(2)(B)(i).
- Statutory waiver for DV grounds for some DV victims. 8 USC 1227(a)(7).
- 212(c) waivers for aggravated felony offenses committed by LPRs before April 1, 1997 (or April 24, 1996)
- Cancellation of removal. 8 USC 1229a.

# CANCELLATION OF REMOVAL

- **Discretionary** relief under 8 USC 1229a
- For permanent residents:
  - 7 years in lawful status,
  - 5 years as LPR, and
  - No aggravated felony conviction.
- For non-permanent residents:
  - 10 years' good moral character
  - Not inadmissible under 8 USC 1182(a)(2)
  - Not deportable under 8 USC 1227(a)(2)
  - Exceptional and extremely unusual hardship to USC or LPR parent, spouse, or child.

# REMOVAL FROM UNITED STATES

- Removability is based on either being inadmissible or deportable.
- Standard applied depends on whether a person has already been admitted.

# LPRS AND ADMISSIBILITY

- 8 USC 1101(a)(13)
- LPRs returning to United States not subject to admissibility unless:
  - Abandoned or relinquished status
  - Absent for >180 days
  - Engaged in illegal activity after departing US
  - Left US while in removal proceedings
  - Tried to EWI
  - **Committed a criminal offense under 8 USC 212(a)(2)**
    - But see *Vartelas v Holder*, 132 S Ct 1479 (2012) for convictions before 4/1/1997.

# NATURALIZATION: GREEN CARD TO CITIZENSHIP

- **Obtaining citizenship is not required.**
- Must demonstrate “good moral character” during 5 year period.
- Person with an aggravated felony conviction on or after 11/29/1990 cannot establish GMC.
- Citizenship may offer protections from removal.
  - *Warning:* If applicant has criminal convictions, process could lead deportation proceedings.

# DEPORTING CITIZENS

- 8 USC 1451 (Revocation of Naturalization)
  - Can only occur in federal court (not immigration court), but DHS can recommend denaturalization.
  - Three general grounds:
    - Illegal procurement, i.e. , not eligible in the first place: criminal bar, GMC, etc.
      - If convicted under 18 USC 1425 of knowingly procuring naturalization in violation of law, court which entered the conviction, “shall” revoke citizenship.
    - Concealment of a material fact or willful misrepresentation.
      - Omissions and affirmative misrepresentations
      - Joining a communist, totalitarian, or terrorist organization within 5 years of getting citizenship is prima facie evidence that she concealed a fact, and also shows a lack of attachment to the principles of the constitution.
    - Citizenship through honorable service in the military, followed by dishonorable discharge within 5 years. See 8 USC 1440.
- Following denaturalization, revert to “alien” (LPR) status and subject to removal proceedings

# CATEGORICAL APPROACH

- How to determine whether a particular offense triggers an immigration consequence (firearms offense, crime of violence, etc.)
  - Your “gut feeling” does not matter!
  - What the client tells you does not matter!
  - What the government says does not matter!
  - **“The key [] is elements, not facts.” - Justice Kagan**
- Dictates which documents may be considered in making the determination of whether an offense renders a foreign national ineligible for relief.

# CATEGORICAL APPROACH

## **STEP 1:**

List the elements of the foreign national's offense

## **AND**

List the elements of the possible grounds of inadmissibility/deportability (e.g., the aggravated felony).

- This step may require reviewing materials to locate the elements of the equivalent offense (or offenses) under federal law outside of the INA (e.g., burglary).

# CATEGORICAL APPROACH

## STEP 2:

Does **everything** the criminal statute describes meet the generic immigration consequence definition (X)? If **yes**, then STOP; the offense is categorically an X.

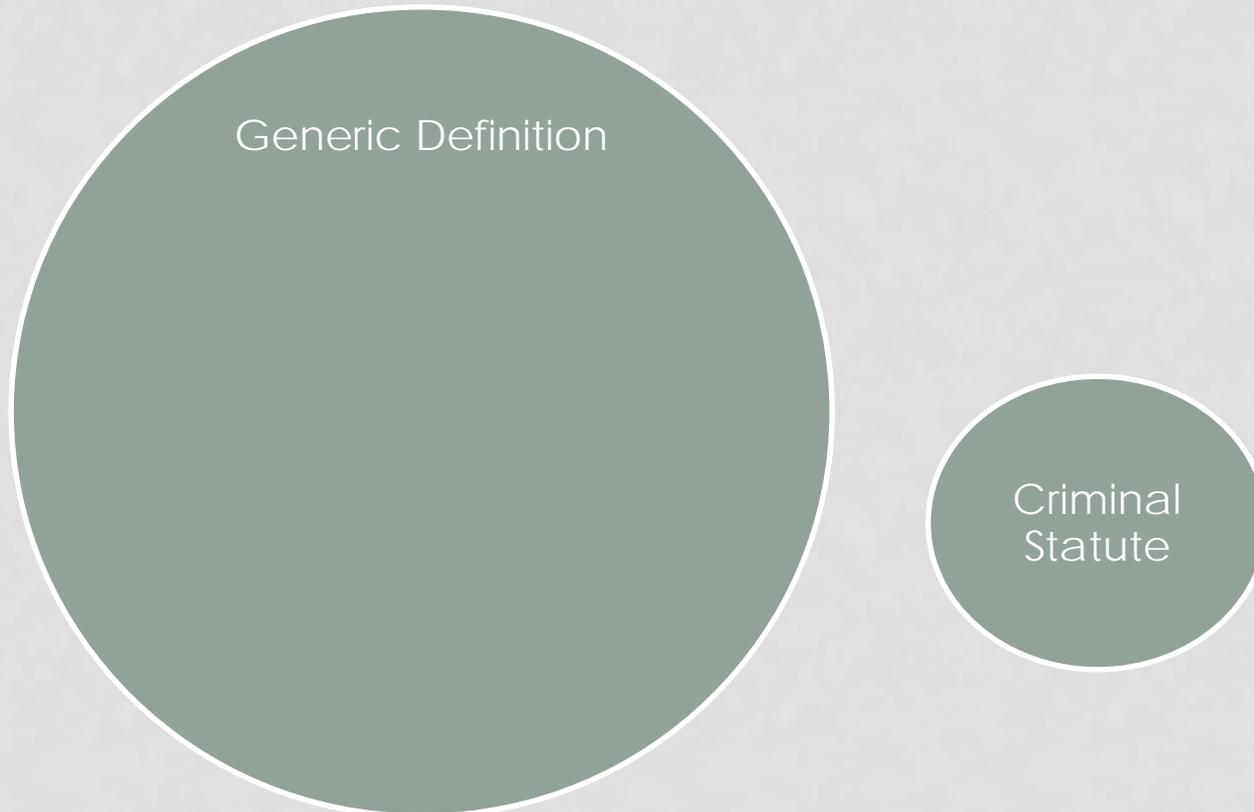
Create a list or some type of graphic to help you compare the elements:



# CATEGORICAL APPROACH

## STEP 3:

Does **nothing** the criminal statute describes meet the definition of X ? If **yes**, then STOP; the offense is categorically NOT an X.



# CATEGORICAL APPROACH

## STEP 4:

Is the statute **overbroad**?

- Does the statutory language describe a **general class of behavior**, only some of which possibly could be X?
- Is there a **realistic probability** that the non-triggering conduct would be prosecuted?
- If **yes**, STOP; the offense is overbroad, and does not trigger immigration grounds.

# MODIFIED CATEGORICAL APPROACH

## STEP 5:

### Is the statute **divisible**?

Does the statute describe several separate crimes?

Does the statute list alternative elements, each of which must be found beyond a reasonable doubt? (**means v. elements test**)

If **yes**, use the **modified categorical approach** to figure out what the actual offense is. This means you go outside the language of the statute, and you examine the record of conviction in this case (e.g., charging document, plea transcript, findings by judge to which defendant assented), to determine the offense of conviction.

**Remember: YOU ARE NOT TRYING TO DETERMINE WHAT ACTUALLY HAPPENED.**

# EXAMPLE 1: LYDIA

- A DHS Trial Attorney (TA) wishes to initiate removal proceedings against Lydia, a student visa holder from Ukraine who was admitted to the United States in August 2016.
- Lydia was convicted in September 2016 in the state of Superior of a state crime – she was unlawfully carrying a handgun, without a permit, in her handbag, while she was at class in her community college.
- The statute of conviction states:
  - **“It is punishable by 180 days’ imprisonment if a person possesses a weapon in a community college.”**

## EXAMPLE 2: LYDIA

- Instead, let's say that the statute of conviction states:
  - "It is punishable by 180 days' imprisonment if a person possesses a firearm in a community college."
- *Is she removable based on her conviction?*

## EXAMPLE 3: LYDIA

- Now, let's say that the statute of conviction states:
  - "It is punishable by 180 days' imprisonment if a person possesses brass knuckles, a shotgun, or a handgun in a community college."
- *Is she removable based on her conviction?*

# CATEGORICAL ANALYSIS OF CIMTS

- For CIMT **convictions**, see *Matter of Silva Trevino*, 26 I&N Dec 826 (BIA 2016).
- For **guidance** on CIMT **admissions**, see 9 FAM 302.3-2(b)(4). Generally:
  - (1) The crime admitted must appear to constitute moral turpitude based on the statute. It is not necessary for the alien to admit that the crime involves moral turpitude.
  - (2) Must give the applicant an adequate definition of the crime, including all of the essential elements. Must explain the definition to the applicant in terms he or she understands; making certain the explanation conforms carefully to the law of the jurisdiction where the offense is alleged to have been committed.
  - (3) Must give the applicant a full explanation of the purpose of the questioning. Applicant must be placed under oath and the proceedings must be recorded verbatim.
  - (4) Applicant must then admit all of the factual elements which constituted the crime (*Matter of P--*, 1 I&N Dec 33).
  - (5) Applicant's admission of the crime must be explicit, unequivocal and unqualified (*Howes v Tozer*, 3 F2d 849).

# CASES TO REVIEW

- ***Descamps v United States***, 570 US \_\_\_ (2013) (ACCA)
- ***Mellouli v Lynch***, 135 S Ct 1980 (2015) (possession of paraphernalia was not an offense “relating to a controlled substance” because Kansas’ list had at least 9 substances not on CSA)
- ***Mathis v United States***, 136 S Ct 2243 (2016) (Iowa burglary statute set out alternative means that were broader than generic definition, which required entry into a building or structure), so no ACCA
- ***Matter of Ribeiro Ferreira***, 26 I&N Dec 415 (BIA 2014) (must be a realistic probability that state would prosecute conduct under the statute that falls outside the generic definition of the offense)

# ASYLUM

- Must be able to show (through credible testimony or extrinsic evidence):
  - A **well-founded fear of persecution** if returned to his or her country of origin on account of his/her:
    - Race;
    - Religion;
    - Nationality;
    - Political opinion; or
    - Membership in a particular social group.
  - Must be unable to relocate within home country.
  - Generalized violence in the country is not enough.
  - No “particularly serious crime”

# PARTICULARLY SERIOUS CRIME (PSC)

- **Asylum:** An aggravated felony of any length deemed a PSC. 8 USC 1158(b)(2)(B)(i).
- **Withholding of Removal:** Aggravated felony deemed a PSC if sentenced to 5 years or more total, 8 U.S.C. 1231(b)(3)(B); drug trafficking presumed PSC by case law regardless of sentence. *See Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec 270 (AG 2002)
- **Generally:** *In re N-A-M-*, 24 I&N Dec 336 (BIA 2007) (Colorado menacing); *Matter of C-*, 20 I&N Dec 529 (BIA 1992) (murder)
- **Analysis:** Case by case, considering nature of conviction, circumstances and underlying facts, sentence, danger to community. *See Alphonsus v Holder*, 705 F3d 1031 (CA9 2013)

# U VISA

- Pathway to potential green card for victim of qualifying criminal activity
- Must have suffered **substantial physical or mental abuse** as a result of having been a victim of criminal activity
- Requires a law enforcement certification showing helpfulness
- Crime occurred in the United States or violated US laws
- Admissible (generous waivers available)

# U VISA

- Rape
- Torture
- Trafficking
- Incest
- Domestic violence
- Sexual assault
- Abusive sexual contact
- Prostitution
- Sexual exploitation
- Female genital mutilation
- Being held hostage
- Peonage
- Involuntary servitude
- Slave trade
- Kidnapping
- Abduction
- Unlawful criminal restraint
- False imprisonment
- Blackmail
- Extortion
- Manslaughter
- Murder
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury
- Attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

# S VISA

- Pathway to potential green card for **informant**
- Annual limit: 200
- Must be admissible, but waivers available
- Need approval of multiple law enforcement agencies/officials

# REVIEW: ELIGIBILITY FOR IMMIGRATION BOND

- Aliens who have been **ordered removed** are not eligible for release in immigration proceedings. (However, some courts have held that if the alien applies for withholding of removal, he may be eligible for bond under 8 USC 1226(a).)
- Aliens subject to **mandatory detention** under 8 USC 1226(c) are not eligible for release in immigration proceedings.

# MANDATORY DETENTION FOR CRIMINAL OFFENSES

- 8 USC 1226(c)
- Question of whether an offense triggers MD may be reviewed by immigration court.
  - *In re Joseph*, 22 I&N Dec 799 (BIA 1999) (not properly included under MD when court finds it is “**substantially unlikely**” government will prevail on charge removability specified in 1226(c))
- Subject to MD if released from criminal custody for the offense triggering MD after October 8, 1998.
  - *Matter of Kotliar*, 24 I&N Dec 124 (BIA 2007)

# DETERMINING IMPACT OF CRIMINAL ACTIVITY ON IMMIGRATION STATUS

- **What is the person's current status?**
  - Has she been admitted?
- **What type of immigration relief may be sought in the future?**
  - Is she seeking a future admission to US?
  - Is she seeking adjustment? Naturalization? Asylum? Etc.
  - Is she seeking relief from potential removal?
- **What was the criminal activity?**
  - When did it occur?
  - Was there a conviction?
  - What was the punishment?
- **Does the criminal activity match a generic immigration consequence?**

# CASE EXAMPLE 4: CORNELIA

- Cornelia is an 80-year-old Dutch citizen and LPR since 1955. She is suffering from leukemia.
- She inherited a strip club from her deceased husband in 2017.
- On May 4, 2018, she pled guilty to and was sentenced for promoting prostitution, a felony under Ohio law. Her sentence was 1 day jail (time served) and fines and costs.
- Immigration authorities are trying to deport her.
- **Is she subject to mandatory detention?**

# CASE EXAMPLE 4, CONTINUED

- Review: 8 USC 1226(c) Mandatory detention
  - *AG shall take into custody anyone deportable for an aggravated felony conviction. 8 USC 1227(a)(2)(A)(iii).*
- What if she was sentenced to probation only?
  - *Mandatory detention provisions may only apply to someone **physically** confined or restrained as a result of conviction. See *In re West*, 22 I&N Dec 1405 (BIA 2000)*
- What if her conviction was in the year 1987 and she received 1 day?
  - *Release from criminal custody must have been **after October 8, 1998**, when the mandatory detention law went into effect. See *Matter of Adeniji*, 22 I&N Dec 1101 (BIA 1999)*
- What if her conviction was in the year 2007 and she received 1 day?
  - *TBD: *Nielsen v Preap**

# SUGGESTED RESOURCES FOR CRIMINAL LAWYERS

- Hard copy of INA, CFR compiled statutes and regulations
- BIA Precedent Headnote Charge (compilation of noteworthy BIA cases, sorted by topic).
  - <https://www.justice.gov/eoir/bia-precedent-chart>
- Kurzban's Immigration Sourcebook
- American Immigration Lawyers Association (AILA)
  - Comprehensive annual conference, online resources
  - Message board / attorney referral page
- Immigrant Legal Resource Center ([www.ilrc.org](http://www.ilrc.org))
- Michigan Immigrant Rights Center
- Immigration clinics at Wayne State, MSU, UM, UD-Mercy