

SHARMA-CRAWFORD
Attorneys at Law, LLC

7208 W. 80th • Ste. 202 • Overland Park, Kansas 66204 • 913-385-9821 (ph) • 913-385-9964 (fax)

REPRESENTING NON-CITIZENS IN CRIMINAL CASES

REKHA SHARMA-CRAWFORD
SHARMA-CRAWFORD, ATTORNEYS AT LAW, LLC
7208 W 80th Ste, 202
Overland Park, KS 66204
(913) 385-9821 phone
(913) 385-9964 facsimile
[*rslegal@kc.rr.com*](mailto:rslegal@kc.rr.com)

The effect of criminal convictions on immigration status is a twisted law school exam question. While this article is meant to provide a foundation for representing non-citizen defendants facing criminal charges, it is not exhaustive. Aligning yourself with a competent immigration attorney may be your best defense as you defend a non-citizen client.

To begin a proper analysis one must have a definitional basis. Many of you may understand these basic principles, but it is in these subtleties that an accurate analysis of your client's situation is found. The first step is to define your client. This definition is an exact understanding of their status. The basic questions that should be asked are: Did they make a lawful entry? Have they arrived on a visa? Are they in status or out of status on that visa? Are they a Lawful Permanent Resident? How long have they been a Lawful Permanent Resident?

In today's climate, if your client is illegally present in the U.S., either by an illegal entry or failing to maintain status, any arrest or sentence that results in incarceration can place your client at risk for deportation. Generally, all jails contact Immigration and Customs Enforcement regarding an alien inmate. Immigration Enforcement conducts an interview of the individual regarding their presence in the United States and determines if an Immigration detainer should be placed on the individual.

If your client illegally entered the country without being inspected then he is both "inadmissible" and "deportable." Inadmissibility for criminal grounds is defined at 8 USC §1182(a)(2). Deportability is defined at 8 USC 1227(a)(2). If your client was inspected upon his entry, i.e. he entered on a visa and was inspected at the border or point of entry, then, in most cases he will be only subject to grounds of deportability. However, Lawful Permanent Residents who have departed the United States may, in some instances, upon their re-entry be subject to both grounds of inadmissibility and deportation.

The second step is to define the crime. Crimes bearing immigration consequences are generally divided into two classes: Crimes Involving Moral Turpitude (CIMT) and

Aggravated Felonies. Aggravated Felonies are defined at 8 USC §1101 (a)(43). Crimes Involving Moral Turpitude are not defined statutorily but are loosely characterized as:

Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule or right and duty between man and man.

(9 U.S. Dep't of State, Foreign Affairs Manual (FAM) §40.21(a), N2.2)

In essence, a Crime Involving Moral Turpitude is a crime that is *Malum In Se* as opposed to *Malum Prohibitum*. However, much like everything else in Immigration, it is not that clear. For example, a worthless check charge in one jurisdiction may not rise to a CIMT, however, in another jurisdiction, if the statute contains as an element, fraud, a CIMT may very well be established. Likewise, a DUI conviction is not a CIMT, however a DUI where the driver was also suspended at the time of arrest is a CIMT. The distinction being that since the driver had a suspended license the driver would have been aware he was prohibited to drive. The violation of that prohibition, aggravated by the DUI has been held to meet the threshold for a CIMT. Matter of Lopez-Meza Int. Dec 3423 (BIA 1999). Thus, as a general rule, in determining whether or not a crime is a CIMT, a careful statutory analysis of the elements of the offense is necessary.

A single conviction for a CIMT will make your client inadmissible, but a single, first time, conviction for a CIMT may not necessarily make your client deportable.

Aggravated felony convictions are equally troublesome. Any conviction for a crime amounting to an aggravated felony will make your client inadmissible and/or deportable. There may or may not be a waiver for that crime. A crime may be both an Aggravated Felony and a CIMT, i.e. sexual abuse of a minor, or it may only be either an Aggravated Felony or a CIMT.

Controlled substance convictions will result in removal with one exception. A first time conviction for personal use possession of marijuana, under 30 grams, is subject to waiver. However, possession of drug paraphernalia is a crime “relating to a controlled substance” and as such is a deportable offense. It is important to note that controlled substance violations are some of the most lethal as no waivers are specifically available. Therefore, when evaluating the potential collateral consequences of a controlled substance violation, extra care must be taken in aggressive representation.

Finally, in resolving cases, it is absolutely necessary to make sure that what may not be considered a conviction under criminal statutes, are not considered convictions for immigration purposes. 8 USC §1101(a)(48)(A) defines conviction as follows:

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 - 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 the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Thus, a diversion, which is a contract between the District or County Attorney and the client, without judicial intervention, will likely not be considered a conviction. However, a diversion, or in Missouri, a suspended imposition of sentence, wherein a plea is taken before a judge and that judge has imposed probation-like restrictions which are to be met before the case is dismissed, would be a conviction for immigration purposes. Therefore, careful consideration should also be given to the definition of a “conviction” when disposing of criminal charges.

Alarming, in some cases a conviction is not necessary to trigger an Immigration consequence. 8 USC §1182(a)(2)(A)(i) sets out that an alien is inadmissible “who admits having committed, or who admits committing acts which constitute the essential elements of – a crime involving moral turpitude.” Therefore, a

diversion agreement in which your client admits to the contents of the police report or the affidavit could subject them to removal.

These pieces are just the basics. They can hopefully provide some guidelines to assist you in making critical decisions for your clients. These statutes change frequently. The Supreme Court, all eleven Circuit Courts, and the Board of Immigration Appeals each create new case law on a daily basis that must be entered into this analysis. It is confusing but diligent representation can often help to avoid dire consequences for your non-citizen client.