Crimmigration

Overview of Criminal Grounds of Inadmissibility and Deportability

Speakers:
Patricia S. Cooper, Esq.
Kenneth P. Hassett, Esq.

Moderator: Nicole M. Avila, Esq.

Inadmissibility vs. Deportability

What's the Difference, and Why Do I Care?

INA §101(a)(13) – Defines "Admission" and "Admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

INA §212(a) – Grounds of Inadmissibility

INA §237(a) – Grounds of Deportability

Inadmissibility: Who Is Affected?

- EWI
- AOS applicants
- Applicants for admission at the border (NIV, VWP, IV 1st entry)
- Parolees
  - INA §101(a)(13)(B) refers to parolees, under §212(d)(5), but DHS position is that all parolees are still seeking permission once inside the US
- Alien Crewmen – see INA §101(a)(13)(B)
- Refugees
- *Some* LPRs

When is an LPR Seeking Admission?

- *Matter of Pena*, 26 I&N Dec. 613 (BIA 2015)
- INA §101(a)(13)(C)
  - Abandoned or relinquished status
  - Absent more than 180 days (without reentry permit)
  - Engaged in illegal activity after departure
  - Departed while in removal or extradition proceedings
  - Committed an offense under §212(a)(2), unless granted §212(h) waiver or §240(A)(a) Cancellation of Removal
    - But see *Vartelas v. Holder*, 565 U.S. ___, 132 S. Ct. 1479 (2012) re application of the *Fleuti* doctrine for LPRs with pre-IIRAIRA convictions.
  - Attempting to enter or entered without inspection

Deportability: Who Is Affected?

- NIV holders inside the U.S. after admission
- VWP entrants inside the U.S. after admission
- Visa overstays
- LPRs who do not fall under §101(a)(13)(C)

Criminal Grounds – Similar But Not Identical
Crimes Involving Moral Turpitude

Inadmissibility § INA 212(a)

(a)(2)(A)(i)(I)

- Conviction, admission, or admission of essential elements
- Exceptions under (a)(2)(A)(ii) – Single crime
  - Under 18 and 5 years before date of application
  - Petty Offense – Max penalty does not exceed one year, actual sentence of term of imprisonment less than 6 months

Deportability §INA 237(a)(2)

(a)(2)(A)(i)

- Conviction
  - Within 5 years after date of admission (10 years for LPR through S visa), *and*
  - Convicted of a crime for which a sentence of one year or longer may be imposed
- Causes inequity between states depending on misdemeanor statutes (11/29 or "up to one year") – One day makes a difference!

Multiple Criminal Convictions

Inadmissibility § INA 212(a)

(a)(2)(B)

- 2 or more convictions (other than purely political)
- Aggregate sentence of confinement of 5 years or more
- Regardless of single trial or scheme of conduct
- Regardless of CIMT

Deportability §INA 237(a)(2)

(a)(2)(A)(ii)

- 2 or more convictions for CIMT
- Regardless of confinement
- Not arising out of a single scheme of misconduct
- Regardless of single trial

Controlled Substances

Inadmissibility § INA 212(a)

(a)(2)(A)(i)(II) & (a)(2)(C)

- Violation, conspiracy, or attempt to violate any law or regulation of a state, US, or foreign country relating to controlled substance defined in 21 USC 802
  - 212(h) waiver for single offense of simple possession 30 g or less of marijuana
- Trafficker or certain beneficiaries of trafficking (within 5 years)

Deportability §INA 237(a)(2)

(a)(2)(B)

- Any time after admission
- Violation, conspiracy, or attempt to violate any law or regulation of a state, US, or foreign country relating to controlled substance defined in 21 USC 802
  - Other than single offense of simple possession for personal use of 30 g or less of marijuana
- Drug abusers and addicts

Firearms

Inadmissibility § INA 212(a)

- No specific inadmissibility ground
- May be CIMT depending on conviction

Deportability §INA 237(a)(2)

(a)(2)(C)

- Any time after admission
- Conviction under any law
- Purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying
- Attempt or conspire to any of the above – weapon, part, or accessory which is a firearm or destructive device

Aggravated Felony

Inadmissibility § INA 212(a)

No ground of inadmissibility, but may be a CIMT depending on statute of conviction.

Deportability §INA 237(a)(2)

(a)(2)(A)(iii)

- Any time after admission
- Conviction
- Lots of case law determining what is and is not ag fel

Domestic Violence

Inadmissibility § INA 212(a)	**Deportability §INA 237(a)(2)**
No specific ground, but know your state statute! May be CIMT.	(a)(2)(E) • Any time after admission • Conviction • DV, stalking, child abuse, child neglect or child abandonment • DV statute must meet “Crime of Violence” definition in 18 USC §16 • Violators of Protective Orders

Miscellaneous

Inadmissibility § INA 212(a)

- (a)(2)(D) – Prostitution and commercialized vice
- (a)(2)(E) – Immunity from prosecution for serious criminal offense
- (a)(2)(H) – Human Trafficking – includes reason to believe
- (a)(2)(I) – Money Laundering – includes reason to believe

Deportability §INA 237(a)(2)

- (a)(2)(A)(iv) – High speed flight from immigration checkpoint
- (a)(2)(A)(v) – Failure to register as a sex offender
- (a)(2)(D) – Espionage, sabatoge, treason and sedition, threats against the president, expedition against friendly nation, violation of Military Service Act or Trading with the Enemy Act, violation of INA §215 (travel documents), importing persons for prostitution
- (a)(2)(F) – Human Trafficking – refers to INA §212(a)(2)(H)

What does it mean for your case?

- Holding DHS to its burden: never admit, never surrender!
  - Who has the burden?
  - What documents does DHS need to prove a conviction?
  - Fighting back when DHS has proven the conviction
- No criminal grounds of removability? Not so fast…
  - Criminal bars to asylum, withholding, and cancellation
- Creative solutions to criminal problems in removal proceedings:
  - 212(c), void for vagueness challenges, challenges to domestic violence and controlled substance offenses, challenges to gang allegations, 212(h) waivers

Forcing DHS to meet its burden on criminal grounds of removability

- **DENY DENY DENY**
- If DHS isn't prepared and they have the burden → TERMINATE
- Even if you lose, record preserved for appeal
- (unless detained client "wants to get it over with")

Who has the burden?

- Arriving aliens: **alien** has burden (INA § 240(c)(2)(A))
  - "clearly and beyond doubt entitled to be admitted and not inadmissible" under 212
  - ambiguous record of conviction likely won't support termination, but you can always try!

  BUT
- Returning LPRs: **DHS** has the burden.
  - *Landon v. Plascencia*, 459 U.S. 21 (1982); *Matter of Huang*, 19 I&N Dec. 749 (1988) ("when an applicant has a colorable claim to returning resident status… INS has the burden of proving he is not eligible for admission")
  - *Vartelas v. Holder*, 566 U.S. 257 (2012) (LPR with pre-IIRIRA convictions not "seeking admission" and therefore not "arriving alien" if travel was brief, casual, and innocent – must be charged under 237 and DHS has the burden)

Who has the burden? *(continued)*

- EWI (INA § 212): **burden shifting** as follows: (8 CFR § 1240.8(c))
  - DHS has burden to show alienage
  - Burden shifts to alien to show lawful entry
  - Even if you can't terminate, might be worth denying alienage, and should always deny criminal grounds
- Deportability (INA § 237): **DHS** always has the burden:
  - **"**by **clear and convincing evidence**" that alien is deportable. "No decision on deportability shall be valid unless it is **based on reasonable, substantial, and probative evidence."** INA § 240(c)(3)(A)
  - TERMINATE if DHS cannot meet its burden.
  - Always argue that ambiguous record of conviction → termination

Who has the burden? *(continued)*

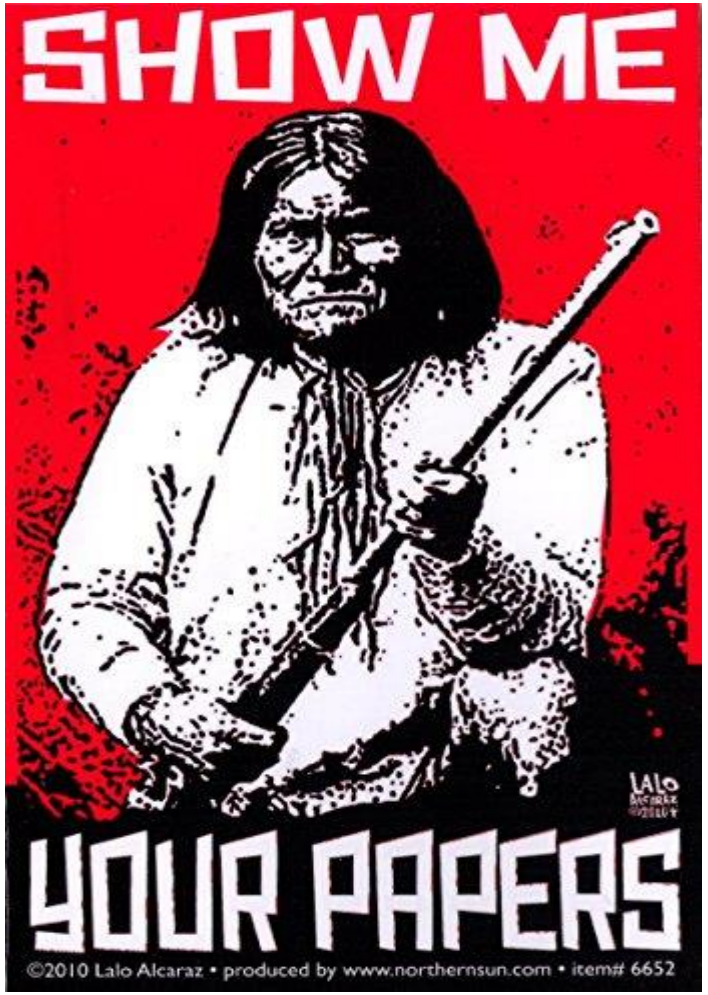
- When applying for relief, **alien** has burden to show eligibility
  - Argue that ambiguous record of conviction doesn't disqualify your client, but be prepared for pushback

How does DHS prove a conviction?

- INA § 240(c)(3) and 8 CFR § 1287.6(a): “any of the following documents or records, or a **certified copy** of such an official document **shall constitute proof of a criminal conviction**”
  - Official record of judgment and conviction
  - Official record of plea, verdict, and sentence
  - Docket entry from court records indicating existence of conviction
  - Official minutes of a court proceeding or transcript from a court hearing in which the court takes notice of conviction
  - Abstract of a record of conviction
  - Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction
  - Any document / record attesting to the conviction maintained by penal institution as basis for custody

How does DHS prove a conviction? *(continued)*

- INA § 240(c)(3)(C): electronic records **shall be admissible as evidence to prove a criminal conviction if**:
  - "certified by a state official associated with the State's repository of criminal justice records as an official record… AND certified in writing by a Service official as having been received electronically from the state's record repository"
- So can DHS just submit photocopies / faxes of a certified court record? Printouts from a state website?



DHS proved the conviction… now what?

- Stay on the defensive!
- Is it really a conviction?
  - INA § 101(a)(48)(A)
- Is it really a removable offense?
  - Is their categorical analysis correct?
  - Was the sentence really imposed?
  - Is OCC impermissibly trying to introduce non-Shephard documents?
  - Is it really within the required timeframe? Date of conviction vs date of plea vs date of completion of sentence

Criminal bars to relief from removal: Asylum

- "particularly serious crimes" (INA § 208(b)(1)(A)(ii))
  - Must be a CONVICTION
  - Aggravated felony is per se particularly serious
  - If it's not an agfel – look to case law and argue hard, IJ has a lot of leeway to look at the record – NOT limited to Shepherd document
  - Grant of asylum is discretionary – non-PSC crimes can still sink you
- "serious nonpolitical crimes" outside US (INA § 208(b)(1)(2)(A)(iii))
  - Need not be a CONVICTION
  - Minitrial –probable cause to believe the applicant committed a crime
  - Look to caselaw on what's "serious" and what's "nonpolitical"

Criminal bars to relief from removal: Withholding

- "particularly serious crime"… same language, different definition
  - Aggravated felony is still a per se bar
  - Felonies with aggregate imposed sentence of 5+ years is per se bar (concurrent sentences not double-counted)
- "Serious nonpolitical crime" … same language, same definition
- Withholding is NOT discretionary
  - → don't let DHS get into why your client "doesn't deserve" withholding. It's just about whether she's barred or not

Criminal bars to relief from removal: 42B (non-LPR cancellation)

- INA § 240A(b)(1)(C): “the kitchen sink” : “has not been convicted of an offense under
  - 212(a)(2) [all inadmissibility crimes],
  - 237(a)(2) [deportability crimes], or
  - 237(a)(3) [false documents, failure to register”
- 10 years good moral character: § 101(f) definition includes offenses that aren’t § 212 / § 237 bars and don’t require convictions:
  - 101(f)(1) habitual drunkard
  - 101(f)(4) income derived principally from illegal gambling
  - Remember GMC counts from date of final hearing, NOT service of NTA
- Discretion… know your judge

Criminal bars to relief from removal: 42A (LPR cancellation)

- INA § 240A(a): the only criminal bar is **aggravated felony conviction**
- But fear the dreaded

stop time rule…

Criminal bars to relief from removal: 42A (LPR cancellation) *(continued)*

- The stop time rule:

INA §240A(d)(1): "any period of continuous residence or continuous physical presence in the United States shall be deemed to end… when the alien has **committed** an offense referred to in

  - section 212(a)(2)[criminal grounds of inadmissibility] or
  - 237(a)(2) [criminal grounds of deportability] or
  - 237(a)(4) [security & related grounds]

  whichever is earliest."

Criminal bars to relief from removal: 42A (LPR cancellation) *(continued)*

- 237(a)(2) and 237(a)4) crimes don't actually stop time!

Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2000)

  - Firearms offenses, domestic violence & child abuse
  - Violations of restraining orders
  - Aggravated felonies without a 212 equivalent

- Sadly, no such argument for marijuana under 30 grams
  - *Calix v. Lynch*, 784 F. 3d 1000 (5th Cir. 2015)
  - *but see Moncrieffe v Holder*, 569 U.S. __ (2013)
- What about pre-IIRIRA crimes? BIA case law is bad, but circuits are split
  - When in doubt, always argue retroactivity is unfair

When all seems hopeless: creative solutions to criminal problems in removal

Former INA § 212(c): Zombie relief!

- Repealed by IIRIRA but revived by *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).
- Like 42A but better:
  - aggravated felonies are not a per se bar
  - no stop time rule
- LPR with 7 consecutive years of lawful unrelinquished domicile in the US before applying
- Pled guilty or nolo to a deportable offense before 4/1/1997
  - → note, does NOT appear to apply to conviction after trial
- Otherwise eligible for 212(c) at the time of plea
- Three criteria for how to treat aggravated felonies, depending on the time of the plea

“Void for Vagueness” challenges

- “Crime of violence” = 18 USC § 16:
  - (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
  - (b) any other offense that is a felony and that, by its nature, involves a **substantial risk that physical force** against the person or property of another may be used in the course of committing the offense.
- *Johnson v. United States*, 135 S.Ct. 2551 (2015): § 16(b) is unconstitutionally vague in the criminal context

“Void for Vagueness” challenges *(continued)*

- *Dimaya v. Sessions*: apply *Johnson* in the immigration aggravated felony context
- Reading the flames:
  - Gorsuch: “Due Process Clause speaks of the loss of life, liberty, or property. It doesn’t draw a civil/criminal line, and yet, elsewhere, even in the Fifth Amendment, I do see that line drawn, the right of self-incrimination, for example.”
  - Alito and Ginsburg: is CIMT any clearer?
- Could also apply in the domestic violence context

Domestic violence: defenses to § 237(a)(2)(E)

- Is it really a “crime of violence?”
  - Categorical match? What mens rea is required?
  - What does the record of conviction say?
  - Remember DHS has the burden in 237!
- Is it really a “domestic” offense?
  - Is the record of conviction clear on who is the victim?
- Void for vagueness if DHS argues “substantial risk of force”
- Don’t forget 237(a)(7) waiver:
  - Applicant “has been battered or subject to extreme cruelty” & “is not the primary perpetrator of violence in the relationship” if:
    - Acting in self-defense
    - Violating protective order intended to protect the alien, not the family-member, OR
    - Crime didn’t result in SBI and there was a connection between the crime and the abuse the alien experience
  - “court shall consider any credible evidence,” not limited to the court record

Controlled substance offenses

- Is it really categorically a trafficking / distribution offense?
  - *Moncrieffe v. Holder,* 569 US ___ (2013): social sharing of a small amount isn't an aggravated felony distribution offense
- Is it really categorically a controlled substance offense?
  - *Melouli v. Lynch*, 575 US ___ (2015): is there are substance on the state list that doesn't fit the federal CSA?
- Does DHS really have "reason to believe" client is a trafficker?
  - INA § 212(a)(2)(C)
  - Must be supported by "reasonable, substantial, and probative evidence." *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

Gang membership

- Not actually a ground of removability
- DHS may allege gang membership triggers INA § 212(a)(3)(B) (TRIG)
- Demand to see the evidence and confront all witnesses
- ILRC practice advisory

INA § 212(h) waivers

- CIMTs, multiple convictions,
- prostitution / commercialized vice,
- single offense of under 30 g marijuana
- No waiver for murder or torture

INA § 212(h) waivers *(continued)*

3 waivers in one!

- 212(h)(1)(A):
  - only prostitution / commercialized vice OR
  - Offense over 15 years ago, rehabilitated, not contrary to national interest
  - NO qualifying relative or hardship required!
- 212(h)(1)(B): most common, requires extreme hardship to USC / LPR parent, spouse, or son/daughter (includes adult children!)
- 212(h)(1)(C): VAWA self-petitioners (no hardship requirement)

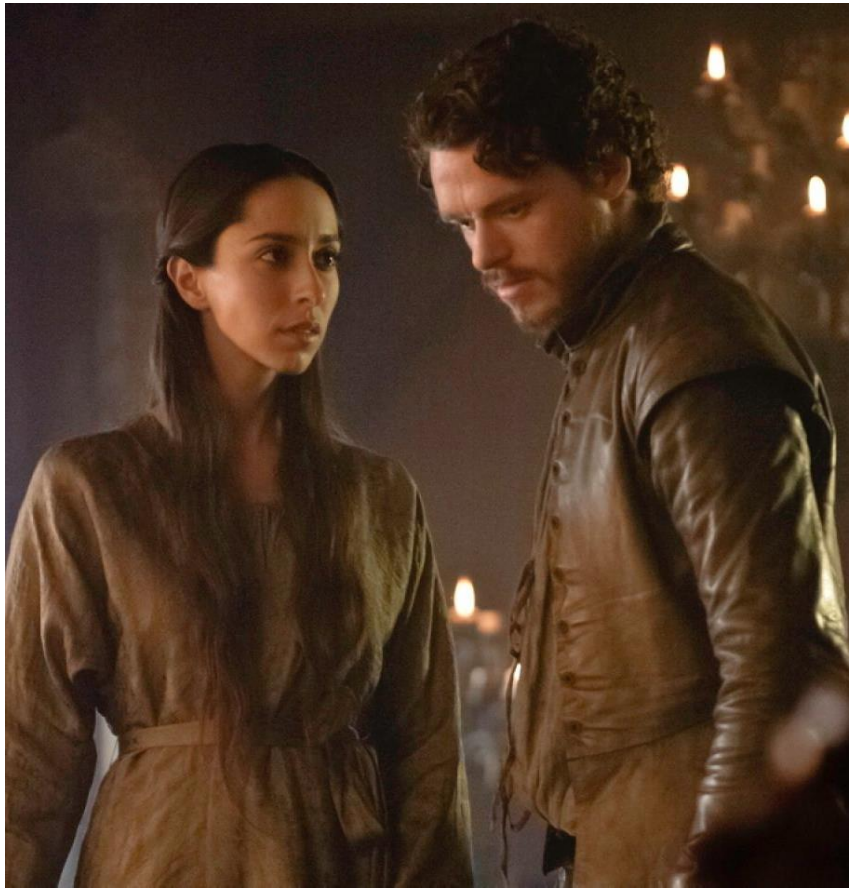
INA § 212(h) waivers *(continued)*

- The LPR bar: "no waiver shall be granted… in the case of an alien who has previously been **admitted** to the US as an alien **lawfully admitted for permanent residence" if:**
  - Aggravated felony conviction after date of admission
  - Less than 7 years residing lawfully in the US before initiation of proceedings
- LPRs who AOS are eligible, those who consular proceed are not
  - *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015)
  - What about an LPR who adjusts, then travels? Generally LPR bar doesn't apply unless the entry is an "admission"

INA § 212(h) waivers *(continued)*

When can you use it?

- Generally, only with an application for adjustment of status
- LPRs eligible for "standalone" waiver if charged as an arriving alien. *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007)
- No "stacking" with cancellation of removal (you can't have your cake and eat it too)




ANY QUESTIONS?
Shappie112