WHAT EVERY CRIMINAL DEFENSE ATTORNEY SHOULD KNOW WHEN REPRESENTING FOREIGN NATIONALS

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For all practical purposes, Immigration Judges can no longer apply any compassion, equity, or discretion in most removal proceedings concerning foreign national criminals.[1] The criminal judgment itself will determine the final fate of the immigrant, and his family. Therefore, it is essential that as much as possible be done to assist the alien while he or she is still awaiting criminal trial. In all cases, you should refer to the following checklist:

1. Is Your Client a Foreign National? Do not take it for granted that your client is a U.S. citizen. Non-citizens fall into one of several categories: immigrants (holding green card); non-immigrants (holding I-94 or I-797 document); parolee/refugees (holding I-94); Out of Status (a non-immigrant whose authorized stay has expired); or EWI (illegal entry without inspection). Don't assume that permanent residents (i.e. those who have 'green cards') will have any more relief available in subsequent immigration proceedings than non-permanent residents.

2. Seek Immigration Co-Counsel. You must advise you client that criminal proceedings now have severe consequences to all non-citizens. You or your client should obtain advice from a member of AILA (American Immigration Lawyers Association www.aila.org) or a certified immigration specialist both at the start of proceedings and before any plea-bargain is entered. AILA attorneys or mentors may be able to offer pro bono assistance in certain cases.

3. Is a Criminal Bond Practical? Even when a criminal bond is posted the alien may still be held in mandatory detention by INS and given no credit for the custody. INA § 236(c)(1), 8 USC § 1226(c)(1). By applying for bond quickly (2-3 days) you may escape notice of DHS and no detainer may result.

4. Review and shephardize the following critical cases:

In Re Yanez, 23 I & N Dec. 390 (BIA 2002)
Matter of Ozkok, 19 I & N Dec. 546 (BIA 1988)
Matter of Roldan, 22 I & N Dec. 512 (BIA 1999)
Matter of Pickering, 23 I & N Dec. 621 (BIA 2003)
Lujan-Armendariz v. INS, 222 F. 3d 728 (9th Cir. 2000)

All of the BIA's precedent cases may be found at the following link:
www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html

5. Can a plea bargain be structured to take advantage of a misdemeanor or similar exemption? Refer to 8 U.S.C. §. 1182 (a) (2) (A) (ii) (II). Single crimes for which the maximum possible sentence is one year or less, and for which 6 months or less sentence is imposed (whether served or not) are covered under this exemption. Also certain federal first offender sentences imposed for simple drug possession or pardonable offenses may provide future INS defense prospects.

[1] For example, aliens convicted of three or more misdemeanors, and present and former juvenile delinquents are in several cases deprived of being able to unite with their families under the New Law. See INA §245A.

Remember, however, that all plea bargains for non-citizens must *first* take into account immigration consequences; jail time is a *secondary* consideration.

6. Always consider the following plea bargain or sentencing strategies:

a. Stacking sentences of 360 days or less for each count, to preserve possible relief by cancellation of removal;

b. Waiving 'good time' credits (e.g. 1 yr. plus good time) and simply plead to 10 months in order to keep sentencing under one year;

c. Plead to divisible statutes, but keep record and transcripts clear of serious immigration offenses (e.g. in trafficking offenses keep record clear of solicitation so that immigration may be left with simple possession allegations only)

d. Use *Blakely* as a negotiating tool in plea bargains

Remember that suspension of sentence does not reduce a sentence for immigration purposes; Aggravated Felony and Petty Offense Exceptions turn upon the length of sentence involved.

7. Understand the 'Imprisonment' or 'Sentence' Definition under Immigration Law Any reference to a term of imprisonment or sentence under U.S. immigration law includes all periods of incarceration or confinement ordered by a court, regardless of any suspension of the imposition or execution of that sentence in whole or in part.

8. Avoid Aggravated Felony Convictions At All Costs. Refer to 8 U.S.C. § 1101 (a)(43)(A)-(U) *always*. Aggravated Felons have virtually no defense from subsequent removal. Use expert witnesses (e.g. immigration attorneys) to explain the draconian consequences to the court and the prosecutor; try to reduce or rewrite sentences. In INS terms, Aggravated Felonies are capital crimes. Congress frequently adds to this list.

9. Can the Alien Negotiate an "S" visa prior to Testifying for the Government? INA §§ 101(a)(15)(S) and INA §245(j) allows the Attorney General to grant a few "S" non-immigrant visas each year to aliens who are key witnesses to crime or terrorism.

10. Be Careful of Admissions. Be careful not to admit or imply admission of certain character traits or facts which could result in the alien's removal from, or inadmissibility to, the U.S. on some other grounds than a criminal conviction. For example, by agreeing to drug rehabilitation in lieu of sentencing, a client may latter be removed by INS as a habitual drug user. You will need to consult with an immigration attorney on these issues.

11. Should the Criminal Proceedings be Delayed? In those few cases where a defense or waiver from future removal may be possible (see, e.g. INA §212(h), and INA §240(A)(a)(3)), it will be critical that the alien has resided in the U.S. for a specific time period *prior to* the initiation of removal proceedings by INS. INS cannot initiate removal hearings until criminal proceedings have come to a conclusion. Therefore, in some cases you should attempt to delay criminal proceedings as much as necessary.

12. Avoid "Convictions". Review 8 U.S.C. § 1101(A)(48) which defines "conviction" for INS purposes. Seek orders which impose no final judgment, admission of guilt, or restraint of liberty. Keep the record clean of admissions which warrant a finding of guilt. Use Immigration Lawyers as expert witnesses for the extreme hardships which will result from certain convictions. If an immigration-friendly plea bargain isn't possible, then consider trial. Make the government prove every aspect of their case. Your client has nothing to lose and everything to gain.

13. Suggest that the client move to a 9th Circuit state immediately after his release. Federal laws for immigrants are interpreted much better in the west. Note, for example, that Roldan is not followed in the 9th Circuit.

14. Is the Alien Eligible for Prisoner Transfer or Expedited Removal? . In some states where non-violent crimes are involved, an alien may also be eligible for early release and expedited removal by INS to his home country. Tennessee has not yet confronted this issue, so lobbying ultimately may help. Also Sections 330 and 331 of IIRAIRA, allow qualifying aliens still serving time to be transferred to a prison in their home country. There must be a treaty in effect between the U.S. and the alien's home country for the transfer to occur, and a judicial recommendation for transfer at the time of sentencing. Some aliens serving a U.S. sentence to be followed by certain deportation may wish to serve the sentence in their home country, where arrangements for early release may be possible.

15. Do Not Place Too Much Faith In Immigration Law Research—Encourage Naturalization. Congress has decided that Immigration Law may run backward as well as forward through time. Do not assume, therefore, that an immigration statute, regulation, or judgment effective as of the date of your client's crime, or conviction, may be used as precedent for later relief in removal proceedings. Congress acts impulsively, and its Immigration enactments are often inconsistent, severe, and retroactive. Aliens who have been through any type of criminal proceeding--even where no immigration side effects are likely--should attempt to naturalize to U.S. citizens as soon as possible. This is their only protection from the future tribulations of ongoing "Immigration Reform".

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When the criminal alien enters removal proceedings he can no longer expect the type of Constitutional protection enjoyed by U.S. citizens. He will not necessarily receive a speedy or fair trial. He will not necessarily enjoy the right to due process or equal protection of the laws. Ultimately, he and his family may receive punishments and suffering grossly disproportionate to the crime he committed.

Immigration attorneys will raise Constitutional challenges to the New Law throughout the coming years. But these challenges may come too late for many deserving clients. The most practical line of defense against permanent exile from the U.S. is now to treat the criminal proceeding as an immigration proceeding. Strategic planning, research and negotiation at the criminal stage provide the only real hope to criminal aliens. Ironically, it is very often not the outcome of criminal proceedings aliens fear as much as the outcome of future immigration hearings. Little do they realize, however, that the first proceeding now dictates the outcome of the second.

Supplement to Checklist:

CANCELLATION OF REMOVAL—The Primary Relief from Deportation (8 U.S.C.1229b)

I. A Permanent Resident who is inadmissible or deportable from the United States must prove that he or she:

(1) has been an alien lawfully admitted for permanent residence for not less than five years;
(2) has resided in the United States continuously for seven years after having been admitted in any status; *and*
(3) has not been convicted of any aggravated felony.

II. A Nonpermanent Resident who is inadmissible or deportable from the United States must prove that he or she:

(1) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;
(2) has been a person of good moral character during such period;
(3) has not been convicted of a criminal offense or security or terrorist related crime; *and*
(4) has a U.S. citizen or P.R. spouse, parent, or child, who would suffer *exceptional and extremely unusual hardship* if the alien were deported.

SPECIFIC CASE DISPOSITIONS AND THEIR IMMIGRATION CONSEQUENCES:
N.B. The case law is constantly changing here and can involve complex statutory and constitutional issues. You should review all recent immigration cases or consult an immigration attorney prior to entering any plea bargain. Also, remember that even when convictions do not result there may be inadmissibility consequences or effects upon naturalization eligibility for a client.

CONVICTION DEFINED: 8 U.S.C. §1101(a)(48)
A formal judgment of guilt entered by the court, *or if withheld*:

(1) judge/jury finds guilt or alien enters a guilty plea or nolo contendere or has admitted sufficient facts to warrant a finding; AND
(2) judge order some form of punishment, or restraint on alien's liberty

Also remember, that for a conviction to be considered a criminal one, the standard of proof must be 'beyond a reasonable doubt' and Blakely considerations taken into account.

EXAMPLES CONSIDERED:

1. **Pretrial Intervention or Diversion**: Generally no plea entered, therefore no conviction. But not all counties or states have a formal procedure for this, and in such cases there is a risk that the BIA will find that a conviction has occurred for immigration purposes.

2. **Expungement & Record Sealing**: A conviction that has been expunged, dismissed, canceled, vacated (sometimes ?), or otherwise removed pursuant to a post-rehabilitative statute procedure is STILL A CONVICTION. *Matter of Roldan*, supra. (1st time offender who pleaded guilty to simple possession of controlled substance, and conviction subsequently vacated & case dismissed upon termination of probation pursuant to Idaho Code 19-2604(1) was still 'convicted' for immigration purposes). Sealings also don't help. N.B. CIS routinely requests records be unsealed for adjudicators; failure to do so results in denial of immigration benefits for which an alien may apply.

3. **First OffenderAct/Youthful Offender Provisions**: BIA announced in Roldan that it would no longer recognize state rehabilitative actions in the context of immigration proceedings or otherwise apply a FOA exception to the definition of "Conviction". Therefore, a state FOA holding that results in the vacatur and perhaps even expungement of a criminal judgment does not eliminate the "conviction" for immigration purposes. C.f. Yanez, *supra (simple possession of cocaine under state statute is considered an 'Aggravated Felony' under immigration law even though it would not necessarily be so under an analogous Federal Act provision)* Federal FOA generally will not result in a conviction.

4. **Post Conviction Relief on Merits (Vacaturs)**: Unlike the ameliorative procedures described above, a conviction that has been vacated on the merits, rather than sealed or expunged, is not a conviction for immigration law purposes. However, the courts are in a state of flux now after the BIA's *Matter of Pickering* decision, supra. A vacating order can't be based upon equities of immigration hardships, but must cite a specific statute and constitutional or procedural defects with the conviction. Pickering was set in a foreign country; and no statute was cited. It contained skimpy facts and, therefore, makes bad precedent. It opens a pandora's box: Is the intent of the defendant in obtaining a vacatur relevant? or is the applicable vacatur statute relevant? We still don't know.

5. **Juvenile Delinquincy:** Not a conviction for removal purposes. But in subsequent inadmissibility cases, the judgment could be critical. Inadmissibility will act as a bar to permanent residence, or U.S. citizenship, and requires only a "reason to believe" standard of proof. Consider crimes such as drug trafficking, and money laundering which could have immigration consequences even in juvenile cases.

6. **Foreign Convictions**: It is a conviction as long as the conduct involved would be deemed criminal in the U.S. In calculating timeframes for potential sentencing, U.S. law, not the foreign law is used. If no federal law is available, then the law of the District of Columbia is consulted. Felonies are construed by the U.S. standards, not the foreign ones. Also immigration courts do not consider the constitutionality or due process of the foreign system.

<u>Documents Generally Considered in Determining Whether a Conviction Occurred</u>

- official record of judgment & conviction
- official record of plea, verdict, & sentence
- a docket entry from court records
- official minutes of a court proceeding or transcript of a court which takes note of the existence of a conviction

- abstract of a record of conviction prepared by the court, or by a state official associate with state's repository of criminal justice records
- any document prepared by a court or under direction of a court in which the conviction was entered that indicates existence of a conviction
- state official records of a state penal institution which reflect the institution's authority to assume custody of the alien
- certified electronic records with computer generated signature
- police reports are generally inadmissible for immigration purposes

Special Convictions to Avoid:

- Aggravated Felonies 8 U.S.C. § 1101 (a)(43)(A)-(U) Virtually no immigration relief available;
- Crimes involving "Moral Turpitude" While this phrase is used throughout the INA, there is no definition offered. Generally the cases cited conduct that is *malum in se* such as crimes that reflect conduct "inherently base, vile, or depraved, and contrary to accepted rules of morality and duties owed between persons, or to society in general." Degree of punishment is unimportant, a 10¢ theft may be considered 'moral turpitude'; underlying circumstances or even the title of the offense are not relevant. However, offenses that are licensed or regulated are not generally M/T crimes. Usually M/T requires intent or criminally reckless conduct.
- M/T crimes include larceny but not all thefts (e.g. when taking isn't permanent); fraud; crimes of violence; DUI with aggravating factors (e.g. driving while license revoked) Leocal v. Ashcroft, 03-583