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## Chapter 7

# Immigration Consequences of Criminal Convictions and the Immigrant Rights Project

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Available in the Chapter 7 supplemental folder in the material Dropbox:

- Practice Advisory: Immigration Consequences of a DUI in Oregon
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## **Key Immigration Concepts for Criminal Defense Counsel**

### **Immigration Basics:**

- A “noncitizen” is anyone who is not a United States Citizen by birth, naturalization or parentage. A noncitizen’s “immigration status” depends on several factors, including place of birth, how and when the noncitizen entered the United States, family ties, employment, education, and the paperwork filed with the immigration authorities. Immigration law is very event-specific. Exact dates are important.
- All noncitizens are potentially subject to being “removed” from the U.S. or denied lawful “admission” to the U.S., regardless of immigration status, if they have triggered any ground of “deportation” or “inadmissibility.” The term “removal” covers both concepts.
- A noncitizen subject to removal may have an opportunity to go before an immigration judge in “removal proceedings,” but many do not. Many constitutional rights applicable in criminal proceedings do not apply to “civil” removal proceedings. There are no ex-post facto or double jeopardy protections, no rules of evidence or discovery, and no right to appointed counsel. Hearsay and police reports are allowed (and often submitted). Factual admissions by noncitizens are often admissible against them. ICE very rarely exercises prosecutorial discretion, so legal arguments are crucial.

### **Removability:**

- The grounds of “deportability” apply to noncitizens who have been lawfully admitted to the United States. 8 U.S.C. § 1227(a). The grounds of “inadmissibility” apply to noncitizens outside the U.S. seeking to (re)enter; noncitizens seeking “lawful permanent resident” (LPR) status (i.e. a green card), and noncitizens who entered the U.S. without inspection (aka “EWI”). 8 U.S.C. § 1182(a). While the grounds of deportation and inadmissibility are similar, there are significant differences.
- A noncitizen often needs to avoid *both* deportability and inadmissibility. An LPR may wish to travel, or a noncitizen charged with inadmissibility may need to show she is not deportable to qualify for “relief” from removal and vice versa.
- While most crime-based grounds of deportation are “conviction-based,” many grounds of inadmissibility are not. “Conduct-based” grounds of removal may require a specific factual admission by the noncitizen, or may be triggered where the government has “reason to believe” the noncitizen has engaged in the conduct (e.g. drug trafficking).
- Determining whether a state offense triggers a ground of removal may involve looking only to the statutory elements, only the underlying facts, or a combination of both. The grounds of removal may be defined by reference to federal criminal law, “generic”

definitions created by caselaw (that may differ depending on the jurisdiction), and may be only vaguely defined.

- The “aggravated felony” ground of deportation is often the most serious, since most forms of relief from removal are barred if the noncitizen has an aggravated felony conviction. The aggravated felony definition includes many different types of offenses, and may even be triggered by a misdemeanor conviction. Certain offenses are “aggravated felonies” regardless of the sentence imposed (e.g. sexual abuse of a minor), while some depend on the sentence imposed (e.g. theft with at least 365 days imposed), or loss to the victim (e.g. fraud with a loss in excess of \$10,000). See 8 U.S.C. § 1101.
- Whether conviction of a “crime involving moral turpitude” (CMT) triggers removal may depend on the level of the offense, the sentence imposed, whether the noncitizen has a prior criminal history, and whether multiple charges involved a single scheme of misconduct. The CMT definition is very broad – to the point that it is arguably unconstitutionally vague. Whether an offense is a CMT is usually determined by examining prior caselaw.
- Offenses involving federally controlled substances can trigger several different grounds of removal. Few forms of relief are available. Immigration law does not care that marijuana may be legal in some states – it is still illegal under federal law.
- The definitions of DV and child abuse are very broad, exceeding state criminal standards. Nearly any violation of a no-contact or FAPA order will trigger deportation.
- A DUI conviction or diversion will not trigger removal, but is treated as a severely negative discretionary factor, especially for noncitizens seeking release from detention.
- There are many more grounds of removal than the ones discussed here.

### **Relief from Removal:**

- Effective negotiation at the criminal court level may preserve a noncitizen’s eligibility for relief, even if the plea agreement cannot avoid removability.
- All noncitizens are potentially eligible for some form of relief from removal. Eligibility may depend on criminal history, the nature of the offenses committed, the sentences imposed, family ties, hardship to family, time in the U.S., immigration status, fear of return to the home country or acts that have been committed against the noncitizen.
- Nearly all forms of relief are “discretionary,” (relief can be denied even if the noncitizen is eligible) and many are decided by non-lawyer immigration officials (e.g. asylum, adjustment of status, and consular processing), rather than by an “immigration judge.”
- The form of relief available is often tied to the ground of removal. Some forms of relief only forgive certain grounds of removal, while some grounds of removal bar certain forms of relief.
- Success in seeking relief may allow a noncitizen to keep or obtain a green card, or may only allow the noncitizen to remain in the U.S. and work. Some forms of relief may require the noncitizen to leave the U.S. temporarily (which can cause other problems), and some forms of relief may take years or decades to obtain.

See the “Crimmigration Guide for Oregon Judges” for additional information.

**“Crimmigration” Guide for Criminal Defense Counsel****Every Immigration Case is Unique:**

- **There is no quick guide or list of safe or bad offenses that apply to all noncitizens.**
- Many factors must be weighed to determine if a criminal offense or charge will trigger removal or bar relief. Twin sisters facing identical criminal charges could have very different needs in seeking an immigration-safe disposition.
- A noncitizen defendant may be willing to suffer greater punishment, if imposed in a way that helps to mitigate the immigration consequences.
- The OJRC Immigrant Rights Project works with public defense providers to determine the immigration consequences of an indigent noncitizen’s criminal case.

**Duty of Counsel:**

- *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), held that criminal defense counsel has a 6<sup>th</sup> Amendment duty to competently and affirmatively advise noncitizens on the immigration consequences of a criminal disposition.
- The ABA guidelines, upon which *Padilla* relied, instruct counsel to advise regarding “bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client’s immediate family,” in addition to removability. ABA Standards 4-5.5(c).
- *Padilla* also found that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea bargaining process” and that through this informed consideration the “defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.” *Id.* at 1486.
- Mitigating immigration consequences is not an attempt to avoid “punishment,” but often an attempt to preserve due process and the right to be heard in immigration court.

**What is a “Conviction” Under Immigration Law:**

- The Immigration and Nationality Act (“INA”), defines “conviction” broadly to include either: (1) a judgment; or (2) a finding of guilt (or admission of facts sufficient to warrant a finding of guilt), plus *any* punishment, penalty or fine.
- An Oregon charge that has been expunged (with one minor exception), diverted, discharged, or generally subject to any other *post-plea* disposition is still a “conviction” for immigration purposes.
- Civil compromise, juvenile dispositions (but beware drug trafficking), and *pre-plea* dispositions should not be considered “convictions” for immigration purposes.
- A finding of “criminal contempt” (e.g. for violation of a FAPA order) is also currently considered to be a “conviction” for immigration purposes.

- A “violation” under Oregon law should not be a “conviction,” at least when the offense was initially charged as a violation.
- The only effective post-conviction relief is vacatur on a basis of legal invalidity (e.g., IAC). Oregon currently does not allow PCR for diverted offenses.

### **Restraining Order Violations:**

- Nearly any judicial finding that a DV-related no-contact or FAPA order has been violated will trigger deportability and may bar relief from removal.
- The only exceptions are if the violation was related to child-custody or another provision of the order completely separate from the goal of preventing domestic violence.

### **Plea Language and Factual Basis:**

- Criminal statutes often include several sets of elements and can be committed by different means. A plea to one set of elements may trigger removal, while a plea to another set in the same statute will not. The specific set of elements pleaded to may be crucial. A record unclear on the set of elements pleaded to may be beneficial in some cases, but in others may cause a noncitizen to lose their case or be denied relief.

### **Felonies, Misdemeanors (364 days), Sentences and Loss:**

The elements of a charge are generally more important than the level of the offense, but:

- Conviction of a felony or three or more misdemeanors can bar some immigration benefits (e.g. DACA), but this is *not* a general rule and is not tied to grounds of removal.
- Some (not all) noncitizens may be able to avoid deportability, inadmissibility or many bars to relief if: (1) they have no prior “crime involving moral turpitude” (CMT) convictions, (2) enter a plea to a single CMT, and (3) are sentenced to 180 days or less.
- A sentence of 365 days or more can trigger some grounds of removal or cause an offense to be an “aggravated felony” (e.g. theft with a sentence of 1 year or more).
- Other “aggravated felony” categories may be triggered if the “loss to the victim” exceeds \$10,000, in relation to any one count, conspiracy or scheme.
- A lifetime total of *ordered* incarceration (even if suspended) of five years or more will trigger inadmissibility and may cause other problems as well.
- 180 days *actual* incarceration can also bar relief and benefits, at least temporarily.

### **Immigration Detainers and Detention:**

- Unless obtained by judicial warrant, an “immigration detainer” is only a request; it is not binding on any court, law enforcement agency, or the Department of Corrections.
- Noncitizens may be detained without opportunity for bond pending removal proceedings if they are removable for committing certain removable offenses.
- A DUI does not trigger removal but may cause a noncitizen to be denied bond.

See the “Key Immigration Concepts for Criminal Defense Counsel” for information on basic immigration concepts and common grounds of removal.

### Scope of the *Padilla* Duty in Oregon

Oregon courts are just starting to address the actual scope of counsel's duty under *Padilla v. Kentucky*, 559 U.S. 356 (2010). Below are summaries of recent cases, including a more detailed analysis of *Daramola v. State*, the courts' most in-depth *Padilla* case thus far.

#### **Case capsules:**

*Garcia Navarro v. State*, 290 Or.App. 578 (2018) (failure to advise that a plea would subject a noncitizen to virtually certain deportation, and instead advising that if noncitizen avoids jail time he might avoid ICE, did not meet *Padilla* duty).

*Aguilar v. State*, 292 Or.App. 309 (2018) (informing noncitizen that he would be deported unless ICE chose not to prosecute was both accurate and sufficient; defense counsel was not under a duty to specifically advise on ineligibility for *temporary* relief from removal like DACA)

#### ***Daramola v. State*, 294 Or App 255 (2018):**

"For the immigrant defendant, immigration consequences are as central to the defense function as case investigation, pretrial suppression, evaluating defenses, and calculating sentence exposure." *Daramola*, 294 Or.App. at 464. This should encourage defense counsel and prosecutors to fully consider the immigration consequences of a criminal disposition.

The ultimate burden for providing accurate advice under *Padilla* lies with the defense counsel. Consulting with immigration counsel does not meet defense counsel's *Padilla* duty *per se*, nor does the immigration advisal provided by the court. Rather, the Court saw immigration counsel as part of the defense "team." *Id.*

A noncitizen convicted of an "aggravated felony" should be advised that removal will be "virtually certain," despite a few long-shot chances (i.e. showing she would be tortured if removed) of avoiding deportation. *United States v. Rodriguez-Vega*, 797 F.3d 781 (9<sup>th</sup> Cir. 2015)

The Court explicitly left open the question of whether defense counsel's *Padilla* duty extends to providing accurate advice regarding a noncitizen defendant's ability to seek relief from removal in immigration court. *Daramola*, 294 Or.App. at 468. Still, the Court noted that the United States Supreme Court recognizes that avoiding removal proceedings *and preserving the possibility of avenues for relief from removal* is, "one of the principle benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial." *Daramola*, 294 Or.App. at 462, quoting *INS v. St. Cyr*, 533 U.S. 289 (2001).

Currently, the Oregon court of appeals limits *Padilla* to the accuracy of the advice ultimately given to the defendant, without addressing defense counsel's duty to *investigate* the immigration consequences, or duty to *defend against* adverse immigration consequences. However, the OJRC IRP believes that the duty to properly investigate the immigration situation and defend against adverse consequences is inherent in the duty to advise.

**Links to helpful resources and materials online (free):**

- A. Immigration Legal Resource Center (ILRC) – Warning for Immigrants about Marijuana:  
<https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>
- B. Northwest Immigrant Rights Project (NWIRP) – Know Your Rights Advisories (on several different topics including workplace raids and family safety plans):  
<https://www.nwirp.org/resources/know-your-rights/>
- C. NWIRP Guide to the Northwest Detention Center:  
<https://www.nwirp.org/resources/about-the-nw-detention-center/>
- D. Department of Homeland Security (DHS) Online Detainee Locator:  
<https://locator.ice.gov/odls/#/index>
- E. ICE Out of Courts Coalition report: Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State:  
<https://www.immigrantdefenseproject.org/ice-courts-nys/>
- F. ICE FAQ on Enforcement in “Sensitive Locations” (including courthouses):  
<https://www.ice.gov/ero/enforcement/sensitive-loc>
- G. National Immigration Law Center – Report on Information Sharing with DHS:  
<https://www.nilc.org/issues/immigration-enforcement/untangling-immigration-enforcement-web/>
- H. American Immigration Counsel – Immigrants in Oregon (statistics):  
<https://www.nwirp.org/resources/know-your-rights/>
- I. Denver Colorado D.A.’s Office Policy on Immigration Consequences:  
[https://drive.google.com/file/d/0B\\_6gbFPjVDoxV2pyYzhqX1I4SE5oYjdvXzZjeFlxSGlPVEpB/view](https://drive.google.com/file/d/0B_6gbFPjVDoxV2pyYzhqX1I4SE5oYjdvXzZjeFlxSGlPVEpB/view)  
(last visited May 14, 2019).
- J. American Immigration Lawyers Association – Find an Attorney:  
<https://www.aialawyer.com/>
- K. OJRC Immigrant Rights Project request for assistance (via OPDS):  
<https://www.oregon.gov/opds/appellate/Pages/forms.aspx>
- L. Equity Corps request for pro bono removal defense for those with a concrete connection to Multnomah County  
<https://equitycorps.org/obtain-help/>
- M. ICE Courthouse Survey, to assist with advocacy around ending ICE courthouse arrests (coordinated by ACLU, Innovation Law Lab, MPD, and other allies)  
<https://forms.gle/4G6hQzNm8tmbhXPz6>



## **Criminal Convictions and Immigration**

Part of my job as a criminal defense attorney is to provide the information you need to decide what to do in your criminal case. This includes explaining the immigration consequences to you of a plea or conviction.

To do this, I work with immigration lawyers at the Immigrant Rights Project (IRP), which is part of the Oregon Justice Resource Center (OJRC). The IRP lawyers use their experience to determine your immigration situation and best options in criminal court. You can find more information about the IRP at <http://ojrc.info/irp>.

### **Why am I asking so many personal questions? Why am I asking about your family?**

Your potential options to remain in the United States depend on many factors, including your immigration, family, and criminal history. All the questions asked are for the purpose of providing the most accurate information possible. The more information you provide, the more helpful the IRP can be. The documents IRP asks to see, like a green card or work card, help them obtain more useful information and verify that the information they provide to me is accurate.

### **How can you be sure that your information will not be shared with others, including immigration agencies?**

The IRP lawyers are bound by the same rules of confidentiality that I am. Lawyers in the United States must follow very strict rules about keeping your information secret. We cannot share your information with anyone, including immigration agencies, without your permission. The IRP is considered part of my team, just like my investigator.

### **Can the IRP lawyers be my immigration lawyer if I am placed into deportation proceedings or want to apply for an immigration benefit?**

No. The IRP does not represent people in immigration proceedings. The goal of the IRP is only to help me provide you with the best information I can about the immigration consequences of your criminal case.

## **Condenas Penales e Inmigración**

Parte de mi trabajo como abogado de defensa penal es proporcionar la información que necesita para decidir qué hacer en su caso penal. Esto incluye explicarle las consecuencias de inmigración de una súplica o condena.

Para hacer esto, trabajo con abogados de inmigración en el Proyecto de Derechos de Inmigrantes (IRP), que forma parte del Centro de Recursos de Justicia de Oregón (OJRC). Los abogados del IRP utilizan su experiencia para determinar su situación de inmigración y las mejores opciones en los tribunales penales. Puede encontrar más información sobre el IRP en <http://ojrc.info/irp>.

### **¿Por qué estoy haciendo tantas preguntas personales? ¿Por qué estoy preguntando por su familia?**

Sus opciones potenciales para permanecer en los Estados Unidos dependen de muchos factores, incluidos su historial migratorio, familiar y criminal. Todas las preguntas formuladas tienen el propósito de proporcionar la información más precisa posible. Cuanta más información proporcione, más útil podrá ser el IRP. Los documentos que el IRP solicita ver, como una tarjeta verde o una tarjeta de trabajo, los ayudan a obtener información más útil y a verificar que la información que me proporcionan es correcta.

### **¿Cómo puede estar seguro de que su información no se compartirá con otras personas, incluidas las agencias de inmigración?**

Los abogados de IRP están sujetos a las mismas reglas de confidencialidad que yo. Los abogados en los Estados Unidos deben seguir reglas muy estrictas para mantener su información en secreto. No podemos compartir su información con nadie, incluidas las agencias de inmigración, sin su permiso. El IRP se considera parte de mi equipo, al igual que mi investigador.

### **¿Pueden los abogados del IRP ser mi abogado de inmigración si me colocan en un proceso de deportación o quiero solicitar un beneficio de inmigración?**

No. El IRP no representa a personas en procedimientos de inmigración. El objetivo del IRP es solo ayudarme a proporcionarle la mejor información que pueda sobre las consecuencias de inmigración de su caso penal.

The Oregon Justice Resource Center Immigrant Rights Project is supported by Oregon Public Defense Services. The IRP was created in recognition of the need for public defense providers to provide the most complete and useful advice possible to their noncitizen clients of the immigration consequences of criminal pleas and convictions. At no cost, we help public defense providers meet their constitutional duty by providing as much clarity as possible regarding the immigration consequences of crimes. As a result, the client can make informed decisions about their case.

We serve public defense providers and private counsel with clients who have been found indigent by the court, in the following Oregon state circuit and appellate court proceedings:

- Criminal;
- Juvenile delinquency;
- Contempt; and
- Dependency.

To access our services, complete a short Immigration Referral Form on the OPDS website at <https://www.oregon.gov/opds/appellate/Pages/forms.aspx>. After we receive the referral, we will email a ticket number and link to our full intake and instructions. Questions can be directed to Erin McKee and J.J. Rollin at 503-944-2270 or [irp@ojrc.info](mailto:irp@ojrc.info).

#### **Sample IRP Product**

After we complete our analysis, we call the public defense provider to explain the analysis, answer questions, and brainstorm alternative pleas, if necessary. We follow up the phone call with a written summary of our analysis. Below is an example of the written product.

Thank you for contacting the IRP. To summarize our conversation from today:

1. I understand your client is a citizen of Mexico, who entered the U.S. when he was approx. 3 years old and has never left.
2. I understand that he is in a long-term relationship with a USC, has 2 USC children and LPR parents.
3. I understand that he was subject to juvenile discipline in 2005, for a non-drug offense.
4. I understand that he was placed in removal proceedings in 2009, and filed for “special immigrant juvenile status” (SIJS) as a defense to removal.
5. I understand that his SIJS petition was approved on August 28, 2010, and he became a lawful permanent resident (LPR) on May 16, 2011.
6. I understand that he was convicted in 2016 of carrying a concealed firearm, to which he was sentenced to 2 years’ probation.
7. I understand that he is currently charged with the following:

- a. Ct. 1: Assault III – Intentional injury to a child
  - b. Ct. 2: Criminal Mistreatment I – intentional injury to a dependent
  - c. Ct. 3: Unlawful Use of a Weapon
  - d. Ct. 4: Menacing
8. I understand that Counts 3 and 4 are charged as having occurred on July 14, 2017.
9. I understand that Counts 1 and 2 are charged as having occurred on March 6, 2018.
10. I understand that the current offer is to the following:
  - a. Plea to Ct. 1: AIII – 25 months incarceration
  - b. Plea to Ct. 3: UUW – 30 months incarceration
11. A lawful permanent resident is eligible for a form of discretionary relief from deportation called “cancellation of removal” if:
  - a. The noncitizen has NOT been convicted of an “aggravated felony”;
  - b. The noncitizen has had LPR status for 5 years; and
  - c. The noncitizen has been present in the U.S. after “admission” for at least 7 years prior to being placed in removal proceedings or committing an offense that is (1) listed as a ground of “inadmissibility” and (2) makes the noncitizen “inadmissible” or “deportable.”
12. The goal in this case would be to allow your client to maintain his eligibility for this form of relief. There is no guarantee that he would be granted the relief if eligible, but he would at least be able to ask an immigration judge to weigh the positive and negative factors in his case to determine whether he should be granted the relief as a matter of discretion.
13. For purposes of cancellation of removal, the 7-year clock started on 8/28/10, the date his SJIS application was approved. *Garcia v. Holder*, 659 F.3d 1261, 1264 (9th Cir. 2011). Therefore, to maintain his eligibility, he cannot be convicted of a clock-stopping offense prior to that date.
14. To avoid an “aggravated felony” crime of violence conviction, your client would need to avoid conviction of an offense that involves the intentional use or threatened use of force against a person or property, with a sentence of 365 days or more imposed.
15. Looking to his prior history:
  - a. The juvenile disposition is not a “conviction” for immigration purposes, and does not trigger removal, so is not a factor here.
  - b. The 2016 firearm offense triggers deportability, but not inadmissibility, so does *not* stop the 7-year clock from running. This offense is also not an “aggravated felony,” as a crime of violence, or a firearms offense.
16. Looking to the current charges, I would suggest the following:
  - a. A plea to Ct. 1: AIII, but under subsection (a) [reckless-serious bodily injury] or (c) [reckless-physical injury-indifference], to avoid an *intentional* crime of violence. I would also suggest a sentence imposed of 364 days or less, especially if the plea is to (c).
  - b. A plea to Ct. 2: Criminal Mistreatment I, but under subsection (a) [withholding medical attention]. If under subsection (a), the offense should not be an aggravated felony crime of violence, so the 25 months could safely be applied to this count.
  - c. If necessary, he can also accept a plea to ORS 166.250, carrying a concealed firearm. Avoid “felon in possession,” which could be an aggravated felony.
  - d. Dismiss Ct. 4
  - e. He should also avoid an aggregate sentence to confinement of 5 years or more (across his prior and current charges), which would trigger a ground of inadmissibility that may stop the clock.
  - f. It would be best to avoid mention of the age of the victim.
17. This arrangement should allow your client to remain eligible for cancellation of removal, since none of the offenses would be aggravated felonies, and would not stop the clock because:
  - a. Ct. 1: AIII occurred after 8/28/17, and involves “reckless” intent, and the sentence is less than 365 days;
  - b. Ct. 2: Crim Mis I occurred after 8/28/17, and involves withholding of care, rather than causing injury; and
  - c. Ct. 3: While the CCW occurred prior to 8/28/17, it does not stop the clock because a firearms offense triggers deportability, but not inadmissibility.

# REPRESENTING NONCITIZENS ACCUSED OF CRIMES

OREGON JUSTICE RESOURCE CENTER  
IMMIGRANT RIGHTS PROJECT

## IMMIGRANT RIGHTS PROJECT

- Project of the Oregon Justice Resource Center
- Funded by OPDS to provide free, individualized “crimmigration” analysis to public defense providers and private counsel with indigent noncitizen clients in the following Oregon state circuit and appellate court proceedings:
  - Criminal
  - Juvenile delinquency
  - Contempt
  - Dependency
- Began January 1, 2018. More than 500 requests received thus far.
- Learn more at [www.ojrc.info/immigrantrights](http://www.ojrc.info/immigrantrights)

## PADILLA V. KENTUCKY IN OREGON

- You don't have to "be an immigration attorney" but you also can't delegate your 6<sup>th</sup> Am. duty to outside counsel. Immigration counsel should be used as a resource to help you understand and communicate the immigration consequences of conviction to client. *Daramola v. State*, 294 Or.App. 255 (2018).
- If immigration consequences are clear from face of statute or case law (BIA or 9<sup>th</sup> Cir.), then those consequences must be clearly communicated. *Daramola v. State*.
- Simply advising client to try to avoid jail and ICE contact in order to reduce risk of removal does not meet *Padilla* duty. *Garcia-Navarro v. State*, 290 Or.App. 578 (2018).
- No duty to specifically advise on ineligibility for temporary relief from removal, like DACA. *Aguilar v. State*, 292 Or.App. 309 (2018).

## The IRP Standard:

"Whether or not deportation consequences are certain or possible under a criminal charge, the specific statutory consequences need to be explained with reasonable clarity so a full and measured decision to plead guilty can be made. This approach is integrated into the ABA guidelines, which instruct counsel to determine and advise of the "potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to client's immediate family." ABA Standards 4-5.5(c)."

*Diaz v. State*, 896 N.W.2d 723 (2017).

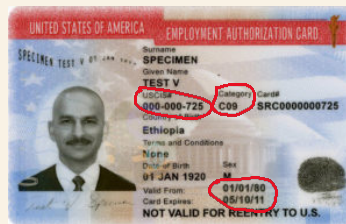
## WORKING WITH IRP/IMMIGRATION COUNSEL:

1. Create a "chronology" with all the relevant information from the IRP intake form, including:
  - a) Key immigration events (date/manner of entry, change of status)
  - b) Full criminal history (including juvie, diversions, violations, out of state)
  - c) Key biographic data (qualifying relatives, hardship issues)
2. Check eCourt, immigration court hotline, etc. for additional information;
3. Determine immigration consequences of all *prior* criminal offenses;
  - a) Deportability;
  - b) Inadmissibility;
  - c) Eligibility for benefits, relief from removal;
  - d) Likelihood of ICE detention;
4. Evaluate current immigration situation and options *but for* current criminal charges;
5. Determine how the *current* charges and offers may affect current situation;
6. Review police reports, etc. to identify potential alternative offenses with better immigration consequences;
  - a) What alternatives may avoid removal completely;
  - b) What alternatives may allow short term benefits or relief from removal;
  - c) What alternatives may allow future benefits or relief;
7. Identify alternatives most likely to be acceptable to the D.A.
8. Drafts summary for the defense attorney;
9. Call and discuss the situation and options with defense attorney;
10. Provide written summary of the analysis to defense attorney;
11. Follow up assistance.

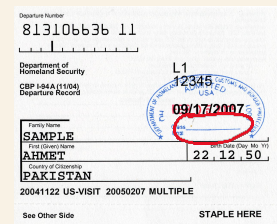
# IMPORTANT DOCUMENTS:



LPR/Green Card



EAD/Work Card



I-94

IDENTIFICATION		INDEX OF AGENCIES	
Subject Name(s) C [REDACTED] (AKA) C [REDACTED] (AKA)		Earliest Event Date: 2017-06-19	
Subject Description FBI Number: J0 [REDACTED] State Id Number: OR [REDACTED] (OR) Miscellaneous Numbers: [REDACTED] Sex: Female Race: White Height: 5'05" Weight: 163 Date of Birth: [REDACTED]		Arrest Date: 2017-06-19 Arrest Case Number: [REDACTED] Arresting Agency: TXCBP9700 CBP-LAREDO-LJB POE LAREDO Subject's Name: [REDACTED] Charge: ALIEN INADMISSIBILITY UNDER SECTION 212 Severity: Unknown	
CCH/FBI/NCIC "Rap Sheet"		Agency: CBP-LAREDO-LJB POE; TXCBP9700; Agency Email Address: [REDACTED] Address: PO BOX 3130 LAREDO, TX 78044	
AR FN		*** END OF RECORD ***	

## IMMIGRATION 101:

**ANY NONCITIZEN  
MAY BE FOUND  
INADMISSIBLE OR  
DEPORTABLE**

# THE TWO LISTS

## “Removability” means:

### Deportability

- Lawfully admitted;
- Still in status or not;
- 8 USC 1227

### Inadmissibility

- Outside the United States & trying to get in;
- Applying for a green card; or
- Present without inspection.
- 8 USC 1182

Most noncitizens need to worry about both lists. Lawful permanent residents want to travel, and undocumented immigrants need to qualify for relief from removal.

There are about 50 different grounds of deportation, and more grounds of inadmissibility.

## CONSEQUENCES OF AN OFFENSE WILL DEPEND ON THE CLIENT'S STATUS, GOALS, PRIOR HISTORY AND FAMILY TIES

### Some Statuses to look out for:

- Secret U.S. citizen (your client may not be aware of their U.S. citizenship)
- Lawful permanent resident (LPR or green card holder)
- Conditional permanent resident (i.e. recently married to a citizen)
- Deferred Action for Childhood Arrivals (DACA)
- Refugee or Asylee
- F-1 Student
- Temporary Protected Status (TPS)
- Habitual Resident (Micronesia)
- Etc.



## UNDOCUMENTED IMMIGRANTS DO HAVE POTENTIAL RELIEF FROM REMOVAL

- **Non-LPR Cancellation of Removal:** 10 years presence + no disqualifying conviction + good moral character + exceptional and extremely unusual hardship to USC or LPR spouse, parent or child
- **Family-based Adjustment or Processing:** USC or LPR family member petitions
- **Asylum** and related relief: Fear of persecution, serious harm or torture upon return
- **U Visa:** Victim of qualifying crime who has suffered physical/mental abuse & been helpful in investigation/prosecution
- **T Visa:** Victim of human trafficking (sex or labor)
- **VAWA:** Abused by USC or LPR spouse or parent, including adoptive, bio or stepparent
- **Special Immigrant Juvenile Status (SIJS):** Child under jurisdiction of state court who cannot be reunited with one or both parents due to abuse, neglect or abandonment and whose return to country of origin is not in best interests of child.

## CRIMMIGRATION: BASIC CONCEPTS

To help you help us...

## NO ONE-SIZE FITS ALL SOLUTIONS!

### WHAT WORKS FOR ONE CLIENT PROBABLY WON'T WORK FOR THE NEXT

#### JOHN DOE FROM MEXICO:

- 08/01/87: Date of Birth
- 08/01/96: LPR via Step-Father
- 08/01/05: 18 yo.
- 07/13/11: PCS Meth conviction
- 11/17/16: Theft II conviction
- 06/01/19: Charged DUI, REAP

#### JANE DOE FROM MEXICO:

- 08/01/87: Date of Birth
- 08/01/96: LPR via Step-Father
- 08/01/05: 18 yo.
- 07/13/11: Theft II conviction
- 11/17/16: PCS Meth conviction
- 06/01/19: Charged: DUI, REAP

#### JOHN DOE FROM GUATEMALA:

- 08/01/87: Date of Birth
- 08/01/96: LPR via Step-Father
- 08/01/05: 18 yo.
- 07/15/11: PCS Meth conviction
- 11/17/16: Theft II conviction
- 06/01/19: Charged DUI, REAP

One needs to avoid the REAP conviction to avoid an order of deportation.

One does not need to avoid the REAP, but likely cannot avoid an order of deportation.

One does not need to avoid the REAP, and is not removable at all.

## MANY “GROUNDS” FOR REMOVAL

- A single criminal offense can trigger several grounds for removal.
- Many grounds of removal are “conviction” based; others are triggered by conduct alone.
- The “most serious” ground for removal is the “aggravated felony,” a “term of art” that can include misdemeanors, but will trigger virtually mandatory and permanent deportation.
  - The “aggravated felonies” list is at 8 U.S.C. 1101(a)(43), but is subject to caselaw.
- The most common ground is the vaguely defined “crime of moral turpitude” (CMT).
- There are about eight different grounds of removal related to controlled substances.
- Special grounds of deportation exist for “domestic violence” offenses, and child abuse, neglect and abandonment.
- An attempt is generally treated the same as a completed offense.
- Virtually all FAPA and no-contact order violations will trigger deportability.

## **“CONVICTION” DOESN’T MEAN WHAT YOU THINK IT MEANS**

- For immigration purposes, “conviction” includes any plea of guilt or no contest or an admission of facts sufficient to find guilt, plus any punishment, penalty or fine.
- Post-plea diversions are still convictions, even if completed and dismissed.
- Expunged convictions are still convictions (except some pre- 7/14/11 simple CS possessions).
- Findings of “criminal contempt” are convictions (especially FAPA and stay-away orders).
- Post- 10/03/13 “violations” may be convictions if originally charged as misdemeanors.
- Civil compromise, juvenile dispositions, and *pre-plea* diversions are not “convictions.”
- Despite this, Oregon doesn’t currently allow PCR for diversions, etc. *Velasco v. State*.

## **FELONIES, MISDEMEANORS, SENTENCES AND LOSS**

- Generally speaking, the elements of an offense are more important than the level.
- Oregon redefined “misdemeanor” to 364 days to help noncitizens. Effective 8/15/2017.
  - This helps avoid some “aggravated misdemeanors” and removal for some first-time CMT offenses.
- Some “aggravated felony” categories depend on the sentence imposed (i.e. 365 days or more), the maximum possible sentence, or the loss to the victim. There is no one rule.
- Conviction of a felony or 3+ misdemeanors bars some forms of relief (DACA, TPS), but is not a general rule.
- Certain exceptions to removal do exist for conviction of a single misdemeanor offense.
- Reduction of a felony to a misdemeanor can be very helpful in certain situations.
- A noncitizen may be willing to accept more incarceration in order to avoid a plea to a removable offense.

## **CATEGORICAL ANALYSIS & DIVISIBILITY**

**(ALSO USED IN FEDERAL SENTENCING)**

- Used to compare elements of a state offense with the federal grounds of removal.
- Ultimate question: Does the ‘minimum conduct’ punishable under the set of elements to which the noncitizen pleaded ‘categorically’ fall within a ground of removal, or is the set ‘overbroad’?
- Some state statutes are ‘divisible’ - they contain multiple sets of elements, and at least one set categorically triggers removal, while at least one set does not.
- This means a plea to one subsection or set of elements under a given statute will be better than a plea to a different set of elements (e.g. Criminal Mistreatment I, sub (a) vs. sub (b)(A)).
- Elements count, not ‘means’ of commission (e.g. AIV intent, controlled substances).
  - Help us identify which is which!

## **CONTACTING THE IMMIGRANT RIGHTS PROJECT**

- Go to [www.oregon.gov/opds](http://www.oregon.gov/opds) and click on “File a Referral.”
- Click on “Immigration Referrals” and fill out the request form.
- IRP will send an intake form to fill out for your client.
  - Yes, it is a long form. We really do need this information.
  - Email us the requested records. Esp. LPR and work cards!
- After the intake form is submitted & reviewed, IRP will contact you to discuss your client’s situation.