Trump Administration Series Part 4: The Immigration Consequences of Criminal Activity

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Common Criminal Offenses

- Domestic violence
- Stalking
- DUI
- Public intoxication/underage drinking
- Battery, assault
- Drug offenses – possession, use, sale
- Sexual offenses
- Theft/shoplifting
- Intellectual Property Theft (including illegal downloads of music/movies)
  - Digital Millennium Copyright Act (DMCA)
- Arrest for unpaid traffic tickets

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Inadmissibility Basics

• Foreign nationals are *inadmissible* to the U.S. because they have characteristics or have engaged in conduct which Congress has deemed undesirable. Inadmissible aliens often are ineligible to be issued a visa, be admitted to the U.S., or re-enter after leaving, absent a waiver of inadmissibility.

• See Immigration and Nationality Act Sec. 212(a) – classes of inadmissible aliens.
Concept of Removability

• Foreign nationals become *removable* from the U.S., if, after entry, they exhibit characteristics or engage in behavior which Congress considers undesirable.

• Removal grounds are quite a bit narrower than grounds of inadmissibility: Should be harder to remove persons who have arrived and established roots, than those persons outside the U.S. trying to enter.

• Removal grounds: INA Sec. 237(a).
Overview: Common Criminal Activity with Immigration Consequences

• Admission of, or conviction for, crime or crimes involving moral turpitude (CIMT)

• Conviction of 2 or more crimes; aggregate sentence 5 years or more

• Conviction of domestically related crimes

• Conviction of aggravated felony (particularly heinous crimes)

• Admission of, or conviction of drug-related offenses
Overview: Common Criminal Activities with Immigration Consequences (2)

- Drug-related activities not resulting in a conviction (drug trafficking and drug use/alcohol abuse)
- Security-related offenses, whether or not resulting in a conviction (espionage, sabotage, terrorist activity)
- Prostitution activities, whether or not convicted
- Certain firearms offenses
Domestic Offenses with (Very) Negative Consequences

• Spousal abuse (or abuse of anyone in position of spouse)
• Child abuse, neglect or abandonment
• Stalking
• Violation of protective order
• Simple battery, assault if committed in domestic context
• Many of these offenses can be misdemeanors with minimal punishment, but result in removal with little or no relief available.
EXAMPLES OF CIMT’s

- Aggravated assault
- Spousal abuse
- Manslaughter
- Rape
- Arson
- Extortion
- Forgery
- Child abuse
- Embezzlement
- Robbery
- Burglary
- Theft offenses
- Bribery
- Counterfeiting
- Fraud offenses
EXAMPLES OF CRIMES THAT ARE NOT CIMT’s

- Simple assault or battery
- Misdemeanor DUI
- Urination in public
- Disorderly conduct
- Public drunkenness
- Most traffic violations
- Trespassing
Arrests

• An arrest occurs when an individual is ordered to accompany a police officer against his will, whether or not restrained.

• Must be admitted to in all U.S. immigration contexts and on all applications where question is asked.
  – “Expungement” of arrest is generally irrelevant.

• All arrests generate an NCIC “hit” (National Crime Information Center)
  – may delay visa issuance
  – be a problem at a U.S. port of entry
  – delay approval of other immigration applications.
Arrests with Consequences

- DUI
- Drug use/possession
- Drug trafficking, even if no conviction
- Prostitution, even if no conviction
- Terrorism, espionage, sabotage
Possible Consequences of Criminal Activity

- Inadmissibility
- Removability ("deportability")
- Violation of status (if removable as a result)
- Ineligibility for visas, adjustment of status and other immigration benefits
What is a “Conviction”? 

• *Immigration law* defines conviction as 
  – 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.
  – Generally expungements of convictions and arrests, and most pardons, have no effect on a conviction in the immigration context.
“Convicted”?  

Many times a person will not understand that he or she has a “conviction” particularly after granted:
- a diversion (guilty vs. not guilty pleas)
- fine with no jail time
- or expungement

Convictions, even misdemeanors, can have particularly negative consequences when attempting to obtain a visa or re-enter the US.
Once There Is A Conviction, What Happens?

• Not serious enough for ICE to pick up.

• Serious Crime
  – ICE Hold
  – ICE Custody

• Even though conviction not serious enough to cause immigration consequences, must STILL be admitted in all immigration contexts.
How is criminal activity detected?

- NCIC (National Crime Information Center): used by all consular posts to obtain U.S. criminal records.

- CLASS (Consular Lookout and Support System): computerized name search system.

- Alien’s own admission on application for visa, entry, or for benefits.
Nonimmigrant Visa Revocations: 9 FAM 403.11-5(B)

- Revocation of visa will occur if consular officer determines:
  1. The alien is not eligible for the particular visa classification (this includes ineligibility under INA 214(b));
  2. The alien has been issued an immigrant visa;
  3. The visa has been physically removed from the passport in which it was issued; or
  4. The alien is subject to a “Watchlist Promote Hit” for an arrest or conviction of driving under the influence, driving while intoxicated, or similar arrests/convictions (DUI) that occurred within the previous five years,

- Process:
  • Notify the alien of the intention to revoke the visa;
  • Allow the alien the opportunity to show why the visa should not be revoked; and
  • Request the alien to present the travel document in which the visa was issued.
Prudential Revocations:
9 FAM 403.11-5(B)

- Although consular officers generally may revoke a visa only if the alien is ineligible under INA 212(a) or is no longer entitled to the visa classification, DOS may revoke a visa if an ineligibility or lack of entitlement is suspected, or for virtually any other reason. This is known as a “prudential revocation.”

- DOS may revoke a visa when it receives derogatory information directly from another U.S. Government agency, including a member of the intelligence or law enforcement community.

- With the exception of DUIs, a consular officer may not revoke a visa when an alien is present in the U.S.

- Why the exception for DUIs?
  - Driving under the influence is indicative of a possible INA 212(a)(1)(A)(iii) ineligibility for a possible physical or mental disorder with associated harmful behavior.
Prudential Revocations for Driving Under the Influence: 9 FAM 403.11-5(B)

- Consular officers have authority, without referring case to DOS, to prudentially revoke a visa on the basis of a potential INA 212(a)(1)(A) ineligibility when a “Watchlist Promote Hit” appears for an arrest or conviction of driving under the influence, driving while intoxicated, or similar arrests/convictions (DUI) that occurred within the previous five years.

- Does not apply when
  - the arrest has already been addressed within the context of a prior visa application, or
  - to other alcohol related arrests such as public intoxication that do not involve the operation of a vehicle.

- For individuals in the U.S., revocations based on DUI arrests are effective immediately upon the alien's departure from the United States.
DUI – Prudential Revocations

RESULTS

- Nonimmigrants arrested for a DUI offense, whether or not ultimately convicted, will be notified by the consular post that issued the visa that it has been cancelled. The issuing post will attempt to contact the nonimmigrant through the phone numbers listed on the DS-160, followed by e-mail, followed by snail mail as a last resort.

- ICE is Notified but DOS does not recommend action.

- Person is ineligible to return to the U.S. until cleared by a U.S. designated civil surgeon abroad (but will consular officer refer case, or just deny?)

- Consular officer unlikely to issue a visa when there is a pending criminal case

- State judges hearing DUI cases need nonimmigrant to be present, will issue warrant for failure to appear
Visa Revocation - Effect on Status

  - Revocation does NOT mean you should terminate the SEVIS record.
  - Revocation of the principal’s visa does not necessarily affect dependents, unless the principal is unable to return to the US.
  - Revocation of the visa does not affect status in the U.S., despite this provision of the immigration laws:
  - Revocation takes effect once departure from U.S.
Visa Revocation – Status?

- Denial of benefits by USCIS due to DOS visa revocation:
  - OPT applications denied due to visa revocation
  - apparently a fluke which USCIS says has been fixed.

Both CIS and DOS have stated that such revocations do not impact nonimmigrant status nor eligibility for student benefits

- (B) 2b/ Present in violation of law.-Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i), is deportable.

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Process at the Consular Post: Alcohol or Drugs

- If the visa applicant has any arrest or conviction within the prior 5 years (or two in past 10) for alcohol or drug-related offense or exhibits other evidence of abuse:
  - He or she is referred to a Panel Physician (PP), who assesses for alcoholism or drug abuse. Many times, PP’s will make a finding of “Class A” health condition. Person will have to remain abroad for at least one year, proving during that time he or she is “clean.”
  - PP’s are appointed and controlled by USPHS; appeal extremely difficult.
  - Medical Brief Could Be Helpful

- If the applicant admits illegal drug use, even once:
  - He or she will be required to remain abroad one year, minimum.
  - Could be found that he or she admitted commission of crime under oath.

- If the consular officer has any reason to believe applicant is an abuser, can order testing for drugs, alcohol abuse.

- If the applicant has ever had any involvement with drug dealing, or support from home is shady, consular officer could find “reason to believe.”
When Else Does The Issue Of Criminal Conduct Arise?

• **At the CBP Port of Entry**
  - CBP should not refuse admission unless inadmissible
    - usually drug conviction or felony DUI.
    - Reports of CBP canceling visas for DUI Arrest/Conviction
  
  - Arrest or other conviction will likely either result in:
    - Secondary inspection at Port of Entry, or
    - Deferred Inspection at CBP office nearest applicant’s residence.
    - Attorney representation advisable—CBP makes mistakes.
Process at POE/CBP After Arrest/Conviction

– CBP Officer can ask questions and will often go fishing for confessions of “other” crimes

– If serious enough, will refuse entry or take student into custody. Will be classified as an arriving alien—fewer rights, including no right to bond hearing.

– Should always travel with certified copies of court records and attorney prepared legal brief.
Recreational/Medical Marijuana Use?

- State laws authorizing use/possession of marijuana, even if used for medicinal purposes do not change the fact that marijuana use is an offense under federal law
- Conviction not required – use/possession is enough
- Limited waiver if has ‘single offense of simple possession of 30 grams or less’ and denial will cause extreme hardship to a ‘qualifying relative’ (or 15+ years prior)
- Drug abuser/addict – can be deportable (even if LPR)
- CBP can search all persons/baggage/cell phone, etc.
- Become a U.S. Citizen FIRST!
INA §212(d)(3) Waivers

• For applicants who overcome 214(b) and have a separate inadmissibility

• Step 1: Applicant requests a discretionary waiver from Consular Officer

• Step 2: Consular Officer determines next step, weighing key factors – how recent? how serious? Remorse/recidivism?
  – If waiver is not recommended, can request Consular Officer to seek advisory opinion from the Visa Office, Washington DC
  – If waiver is appropriate, Post requests INA Section 212(d)(3) waiver from CBP/ARO

• Process typically takes 6-8 months