

DEFENSE COUNSEL'S OBLIGATIONS TO NON-CITIZEN CLIENTS

"To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any guilty plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." See *ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (4th ed. 2002)*.

SPECIAL CONSIDERATIONS FOR CERTAIN CLASSES OF NON-CITIZEN CLIENTS

● Non-citizens with Temporary Protected Status ("TPS") can lose their status with either two (2) misdemeanor convictions or (1) felony conviction in the U.S. See 8 CFR §244.4(a) ● Undocumented persons are immediately deportable, but can also be deported for immigration offenses stemming from a criminal case as well as for their unlawful presence. ● Legal Permanent Residents can be subject to removal proceedings for certain immigration offenses regardless of the length of lawful presence in the U.S., and hardship to US citizen children and/or spouse is only one factor in cancellation of removal.

JUDICIAL OBLIGATIONS TO NON-CITIZEN DEFENDANTS

Before accepting a guilty plea or plea of nolo contendere, the court should also advise the defendant could face addition penalties including, but not limited to[,] if the defendant is not a United States citizen, a change in the defendant's immigration status." See *ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-1.4(c) (4th ed. 2002)*. Failure to give a judicial advisement can be grounds for withdrawal of the guilty plea. See *In re Adamiak*, 23 I&N Dec. 878 (BIA 2006). **IMPORTANT:** The judicial advisement should not require clients to reveal immigration status.

CONVICTIONS FOR IMMIGRATION PURPOSES

A conviction occurs pursuant to 8 U.S.C. §1101(a)(48) when:

- 1) A client enters a plea of guilty or an *Alford* plea or plea of no contest (nolo contendere) admitting facts sufficient to warrant a finding of guilt by a judge, or a finding of guilt after a trial by either judge or jury.
- 2) The judge imposes some form of punishment, penalty or restraint on a non-citizen's liberty as a sentence.
- 3) The conviction must be final. See *Pino v. Landon*, 349 U.S. 907 (1955); see also *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998).

There are five (5) categories of deportable offenses: Aggravated felony, Crime involving Moral Turpitude, Firearms, Drugs and Domestic Violence. An offense can be classified under more than one category of offenses. See other side of this sheet for more details on each category.

AGREEMENTS NOT CONSTITUTING CONVICTIONS

- Stet Docket Agreements
- Juvenile Adjudications (this does not apply juvenile clients who are tried as adults). See *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).
- Diversion Agreements with Office of United States Attorney (Be sure that the client does not make any admissions of guilt as those admissions can be used in removal proceedings.)

AGREEMENTS CONSTITUTING CONVICTIONS

- Any guilty plea, plea of nolo contendere or *Alford* plea, straight probation, regardless of whether the sentence is suspended or imposed. See 8 U.S.C. §1101(a)(48)(B).
- Deferred sentencing, such as the Domestic Violence Intervention Program ("DVIP"), requiring a guilty plea. See *Matter of Roldan*, 22 I&N 512 (BIA 1999).
- Drug Convictions with expungement provisions such as first-time drug offender provisions are still convictions for immigration purposes, except in the 9<sup>th</sup> Circuit. *Ibid*; see also 8 U.S.C. §1101(a)(48)(A).

PLEA NEGOTIATIONS

- ✓ **Avoid a conviction for a deportable offense.**
- ✓ **Negotiate for a plea to a lesser-included offense that does not involve a crime of violence or other element that renders it a deportable offense.** *Example:* Burglary will not be a CIMT unless the record reflects that the breaking and entering was done to commit a CIMT, i.e. theft. See *Matter of G*, 1 I&N Dec. 403 (BIA 1943).
- ✓ **Negotiate for pleas that are binding upon the court.** A binding plea can ensure that the court does not impose a sentence with potentially damaging immigration consequences for the client.
- ✓ **Negotiate for a sentence just below one year if the one-year sentence is the "triggering effect" for an aggravated felony.** Stack counts consecutively so that no one conviction carries a sentence of more than one year if plea negotiation involves a judge and/or AUSA who desires the client to serve more than one year in prison. When fashioning a plea agreement in which the client may serve time, be sure to advise the client that s/he will be rendered deportable if: If the client is convicted of two (2) or more CIMT, that do not arise out of a single scheme or criminal misconduct or from a single trial. See INA §237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii). When fashioning a plea agreement in which the client may serve time, be sure to advise the client that s/he will be rendered inadmissible if: s/he is convicted of two (2) or more offenses, arising from a single scheme of misconduct or from a single trial, regardless if the offenses involved moral turpitude, and, if the aggregate sentence to confinement is five (5) years or more. See INA § 212(a)(2)(B); 8 U.S.C. §1182(a)(2)(B).
- ✓ **Sanitize the record during any plea colloquy.** Ask the prosecutor to issue a new charging document so that the contents of the new charging document do not trigger immigration consequences. Make sure that the plea colloquy does not contain any references to offenses that would result in immigration consequences. Ask the prosecutor to omit from the factual proffer all references to other charges to which the client is not pleading guilty.

SENTENCING

- ✓ **Urge the court to impose more straight probation, as probation is not a term of imprisonment for one year for immigration purposes.** Remember to ask for a sentence in terms of days instead of months because 12 months equals one year in immigration court.
  - ✓ **If the non-citizen client has been detained pre-trial, then waive credit for time-served in order to obtain a lower jail sentence.** Advise the client to spend more time in jail instead of having a suspended sentence of over one year. In many cases, serving more time can prevent adverse consequences in immigration court. Incarceration for a period of 180 days or more at a time for a conviction(s) results in a loss of Good Moral Character for the client. See 8 U.S.C. §1101(f)(7).
  - ✓ **Seek to vacate the conviction.** Look for flaws in the trial record as a basis to vacate the conviction. File an appeal if possible. Make sure that the judge's order to vacate does not state immigration consequences as the only reason to vacate the conviction, i.e. language in the order implying social stigma or inability to find employment is beneficial. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).
  - ✓ **Seek modification of the original sentence.** File a Motion to Reduce Sentence if the triggering effect results from the length of the sentence. The immigration court will recognize the sentence reduction even if the sentence reduction is solely for immigration purposes. See *Matter of Cota-Vargas*, 23 I&N 849 (BIA 2005); see also *Matter of Song*, 23 I&N 173 (BIA 2001).
  - ✓ **Probation Revocation:** Revocation of probation may result in a sentence that renders the client deportable if the court orders additional time to be served for the probation violation. To avoid a sentence that triggers removal, waive credit for time already served. **IMPORTANT:** Non-citizen clients cannot apply for naturalization while on probation or parole. See 8 C.F.R §316.10(c).
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