

**Immigration Consequences Primer**  
**Prepared for Santa Clara County District Attorneys' Office<sup>1</sup>**

**Overview:**

In 1996, Congress transformed the immigration system by passing the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). These laws expanded mandatory detention and deportation laws and limited judicial review of immigration decisions. This has resulted in even minor, first-time, non-violent criminal offenses having severe and permanent immigration consequences, including prolonged detention without bail and automatic deportation from the United States. Contrary to what many believe, both individuals who are unlawfully in the United States and those who are residing here with lawful immigration status can be deported.

Individuals who are present in the U.S. without lawful immigration status may be “removable” on that basis alone. However, these individuals may remain eligible for some relief against removal, unless they are convicted of certain crimes. A noncitizen who has not been lawfully admitted is subject to the *criminal grounds of inadmissibility*. 8 U.S.C. § 1182(a)(2).

Non-citizens who are residing here in lawful immigration status may also become deportable when they suffer certain criminal convictions. A noncitizen who has been lawfully admitted is subject to the *criminal grounds of deportability*. 8 U.S.C. § 1227(a)(2). The term “removability” is an umbrella term that includes both grounds of *deportability* and *inadmissibility*.

**Concerns Of Non-Citizens In Criminal Proceedings:**

A non-citizen in criminal proceedings may have several concerns. Generally, individuals without lawful status may want to preserve statutory eligibility for lawful status in the future. Preserving statutory eligibility *does not mean* that an individual is guaranteed status in the future. Individuals with lawful status will be most concerned with not losing their status. An additional concern for a Lawful Permanent Resident (green card holder) may also be preserving eligibility for a defense to removal or for citizenship. It is important to note that all crimes, even non-removable offenses, will play a role in the consideration of the application of any immigration benefit. Furthermore, noncitizens are almost always required to describe the incidents leading to their arrests. Therefore, even if a plea to a lesser offense is taken, the noncitizen will still usually have to honestly describe his or her conduct. All that is done by preserving statutory eligibility is to preserve a decision maker’s ability to fully consider the facts of a particular case.

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<sup>1</sup> Prepared by Raha Jorjani, UC Davis School of Law and edited by Angie Junck, Immigrant Legal Resource Center (ajunck@ilrc.org). This “primer” is meant to serve only as an introduction to immigration law concepts related to the consideration of immigration consequences during the plea bargaining process in a criminal case. The information here is necessarily limited and seeks to provide the Office of the District Attorney with a general idea of relevant concepts.

In any removal proceeding before an Immigration Judge, there are two key legal questions that must be answered. First, is whether or not the noncitizen is removable as charged by the Department of Homeland Security. If not, removal proceedings must be terminated. If so, the second question becomes whether the removable noncitizen is nevertheless eligible for relief (or a defense) against removal. Within this second inquiry the Court must determine both statutory eligibility for the sought relief and whether the case warrants a grant of such relief. Therefore a finding of removability means that a person *can* be removed but does not necessarily mean that a person *will* be removed.

### **Immigration Consequences are Specific to a Particular Defendant’s Individual Circumstances.**

The analysis of the immigration consequences of a criminal case is highly fact-specific. Any assessment of the immigration consequences of a conviction requires analysis of *several* factors present in each case, including but not limited to an individual’s current immigration status, immigration history, complete criminal history, and particulars about the new charges being faced. Since such factors will vary heavily from case to case, blanket application of general immigration law concepts lead to inaccurate advisals and an individualized analysis is required in each case. Defense counsel is in the best position to do this analysis as s/he possesses the most information regarding the defendant’s background and individual circumstances.

Certain criminal convictions trigger specific grounds of removability, including for example the “Crime Involving Moral Turpitude” ground (*See* 8 U.S.C. 1182(a)(2)(A)(i)(I) and 8 U.S.C. § 1227(a)(2)(A)(i)) or the “Aggravated Felony” ground (*See* 8 U.S.C. § 1227(a)(2)(A)(iii)). These, and other criminal grounds, are defined (and redefined) by constantly changing case law coming out of the Board of Immigration Appeals,<sup>2</sup> as well as the U.S. Court of Appeals. Determining whether a particular conviction constitutes a Crime Involving Moral Turpitude (CIMT) is just one piece of the puzzle when assessing immigration consequences of a criminal conviction. For example, a green card holder who is convicted of committing a first CIMT, for which a sentence of one year *may* be imposed, six years after getting his green card is not removable, whereas a green card holder who is convicted of the same offense within 5 years of getting his green card is not only removable but ineligible for discretionary relief, which for many people means automatic deportation. As such, lists and charts that provide guidance as to whether a crime is or is not a removable offense are of limited use and often cannot be relied upon alone to determine the immigration consequences of a particular conviction.

### **The U.S. Supreme Court Has Recognized That It Can Be Both Appropriate and Beneficial for the Prosecution & Defense to Work Together Toward Pleas that Mitigate Immigration Consequences.**

In 2010, the U.S. Supreme Court held in *Padilla v. Kentucky* that criminal defense counsel has a duty under the 6<sup>th</sup> Amendment to competently and affirmatively advise noncitizens in criminal proceedings as to the immigration consequences of a particular conviction. *Padilla v.*

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<sup>2</sup> Administrative review of decisions by Immigration Judges are handled by the Board of Immigration Appeals. Like the Immigration Court, the Board of Immigration Appeals falls under the Department of Justice’s Executive Office for Immigration Review.

*Kentucky*, 130 S. Ct. 1473 (2010). The Supreme Court unequivocally stated 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. The Supreme Court has recognized repeatedly that deportation is a “harsh consequence[]” and “drastic measure.” *Id.* at 1478 (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). Although deportation is not legally considered punishment (*Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)), severe immigration consequences are increasingly tied to criminal convictions. As such, it is important for prosecutors to take immigration consequences into consideration as they strive for proportionality in punishment and a just settlement during the plea bargaining process.

**Four examples illustrating disproportionate consequences commonly imposed under current immigration laws:**

1. A Lawful Permanent Resident<sup>3</sup> (LPR) who has been convicted of two California petty theft convictions after obtaining the green card, arising from 2 different incidents, is subject to detention without the possibility of bail and is removable from the United States, regardless of how long she has been an LPR. Even if she has no other convictions, has resided in the U.S. legally for decades, and has U.S. Citizen minor children in the U.S., she can still be placed into removal proceedings and detained by DHS based on 2 crimes involving moral turpitude. This is true even if one or both of the convictions were to be expunged.
2. An LPR of 25 years and U.S. veteran is deportable on the basis of a plea to a *single misdemeanor* possession for controlled substance offense (other than first time possession of 30 grams or less of marijuana), even if he is granted a deferred entry of judgment. Not only is this individual deportable, but he is also subject to detention without the possibility of bail. While this person may be eligible for relief from deportation, depending on the timing of his conviction, this veteran would likely be detained for several months without bail waiting for a hearing in which relief could be granted.
3. Any noncitizen convicted of a *misdemeanor* theft offense where a sentence of 365 days jail is imposed, even if that sentence is suspended, has been convicted of an *Aggravated Felony* and is therefore barred from nearly all forms of relief from removal, including Asylum. *See* 8 U.S.C. § 1101(a)(43)(G); 8 U.S.C. § 1158(b)(2)(B)(i). An aggravated felony will similarly automatically disqualify an LPR from eligibility for discretionary relief. 8 U.S.C. § 1229b(a)(3). This means that such an individual would never be afforded a hearing where s/he can present favorable equities or extraordinary circumstances for the court’s consideration.
4. An undocumented immigrant with a single possession of a controlled substance offense (other than for 30 grams or less of marijuana) is permanently barred from applying for a green card through her US citizen spouse. 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C. § 1182(h). Even an individual whose only conviction is possession of 30 grams or less of

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<sup>3</sup> A U.S. Lawful Permanent Resident is someone who has a “green card” in the United States.

marijuana would need to meet a heightened, and for some unattainable, burden of establishing extreme hardship in order to have her conviction waived.

Working with defense counsel who is informed of the immigration consequences of a plea can mean working to “craft a conviction and sentence that reduces the likelihood of deportation” while satisfying the interests of the prosecution. *Padilla* at 1486. A noncitizen’s attempts to mitigate immigration consequences are not attempts to avoid “punishment,” rather they are often attempts to preserve due process and a right to be heard in immigration court. Many noncitizens defendants are willing to suffer greater punishment, if imposed in a way that alleviates the threat of deportation where possible.