

## Chapter 1 -- Introduction and Overview

**NOTE:** This chapter is an in-depth case update. For a concise overview and introduction to immigration law and concepts, created to assist criminal defense counsel, see **Appendix I, § N.1 Introduction and Overview.**

### § 1.1 Criminal Defense: Special Factors in Representing Noncitizens

**The U.S. Supreme Court held that noncitizen defendants have a Sixth Amendment right to be advised of the immigration consequences of a proposed plea. Criminal defense counsel's failure to provide advice will be held ineffective assistance of counsel sufficient to vacate the conviction, if prejudice is shown.** *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S. Ct. 1473 (2010).

Some key points in the decision are:

- **Deportation is a “penalty,” not a “collateral consequence,” of the criminal proceeding.** The Court held that deportation is a “particularly severe ‘penalty’” and made clear that the “direct vs. collateral” distinction does not apply to immigration consequences and does not preclude ineffective assistance of counsel (IAC) claims based upon faulty immigration advice.
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its holding on what is required for an IAC claim, the Court relied on professional standards that generally require defense counsel to **investigate and advise** a noncitizen client regarding the immigration consequences of a criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences. Non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving affirmative misadvice. It thus made clear that a defense lawyer’s silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **Counsel’s duty to advise encompasses how to avoid becoming removable and/or how to remain eligible for status or relief from removal, as appropriate based on the individual case.**
- **The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically

highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

- **Padilla should be applied retroactively at the least to convictions dating from 1996, and probably before.**

**Resource: See Practice Advisories on Padilla in Appendix II.**

**\*\*New Policies in District Attorney Offices.** Two district attorney offices in California created official policies supporting plea-bargaining with immigration consequences in mind in appropriate cases. They are the County of Santa Clara (San Jose, CA) and County of Alameda (Oakland, CA and nearby cities). To see the Santa Clara County document, as well as a model prosecution proposal created by the ILRC, go to [www.ilrc.org/resources/prosecutors-consideration-of-immigration-consequences-in-light-of-padilla](http://www.ilrc.org/resources/prosecutors-consideration-of-immigration-consequences-in-light-of-padilla).

Many thanks to Michael Mehr who worked closely with ILRC in consulting on the Santa Clara County policy, and Raha Jorjani for her crucial work on the Alameda County policy.

**Resource: Working with District Attorneys, Los Angeles.** Back in 2003 the Los Angeles District Attorney's Office, referring to the California Rules of Court requiring the sentencing judge to take account of collateral immigration consequences in deciding whether to grant probation, enacted a Special Directive allowing prosecutors to depart from normal plea bargaining and post-conviction policies where collateral consequences "have so great an adverse impact on a defendant that the resulting punishment may not fit the crime." This provision authorizes a departure from policy when "unusual or extraordinary circumstances exist which demand a departure in the interest of justice." "All departures from policy based on collateral consequences must be approved by the appropriate supervisor." This District Attorney's Office contains some 600 attorneys. These policies may be found on the District Attorney's website at <http://da.co.la.ca.us/sd03-04.htm>.

**Resource: Collateral consequences in general.** For a discussion of the many types of collateral consequences of a criminal conviction (with just a few pages dedicated to immigration consequences), see the American Bar Association Commission on Effective Criminal Sanctions & Public Defender Service for the District of Columbia, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (January 2009), [www.abanet.org/cecs/internalexile.pdf](http://www.abanet.org/cecs/internalexile.pdf).

### **§ 1.3 Removal Proceedings and the Definition of Admission**

#### **B. Adjustment of Status as an Admission or Entry**

**Adjustment of status following an admission does not create a new "date of admission" that re-starts the five-year clock for purposes of the moral turpitude deportation ground.**

***Matter of Alyazji***, 25 I&N Dec. 397 (BIA 2011), overruling in part ***Matter of Shanu***, 23 I&N Dec. 754 (BIA 2005).

A noncitizen is deportable if within five years “after the date of admission,” he or she commits a crime involving moral turpitude that has a potential sentence of at least one year. INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i). For some years the Board of Immigration Appeals (BIA) has disagreed with federal courts on the definition of “date of admission.”<sup>1</sup> Now the BIA has changed its rule to one that is similar to the federal cases and that benefits immigrants. Consider the following example:

Stella is admitted at the border as a tourist in 2002, overstays the visa, and adjusts status to permanent residence in 2006. In 2009, she commits her first and only moral turpitude offense, and the offense carries a potential sentence of a year.

Whether Stella is deportable for a single conviction of a crime involving moral turpitude depends upon when her “date of admission” occurred. She is not deportable if the “date of admission” is the 2002 admission at the border, because she committed the offense more than five years after that date, in 2009. She is deportable if the 2006 adjustment of status is the “date of admission,” because she did not accrue five years before committing the offense.

Under *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), the BIA held that a person in Stella’s position would be deportable. In *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), the BIA partially overturned *Matter of Shanu*, and held that a person in this position is *not* deportable under the moral turpitude ground. The BIA held that the “date of admission” for this purpose is the admission *pursuant to which the person is in the United States*. It stated:

Thus, to ascertain an alien’s deportability under section 237(a)(2)(A)(i) of the Act, we look first to the date when his crime was committed. If, on that date, the alien was in the United States pursuant to an admission that occurred within the prior 5-year period, then he is deportable. Conversely, the alien is not deportable if he committed his offense more than 5 years after the date of the admission pursuant to which he was then in the United States. Moreover, under this understanding of the phrase “the date of admission,” the 5-year clock is not reset by a new admission from within the United States (through adjustment of status). Rather, such a new admission merely extends an existing period of presence that was sufficient in and of itself to support the alien’s susceptibility to the grounds of deportability.

*Id.* at pp. 406-407. In *Alyazji*, the Board described how it would apply this rule in different scenarios:

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<sup>1</sup> Compare *Matter of Shanu*, 23 I&N Dec. 754, 759 (BIA 2005) (adjustment following an admission and overstay re-starts the five-year clock) with *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4<sup>th</sup> Cir. 2006) (overruling *Shanu* to hold that adjustment did not re-start the five year clock); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7<sup>th</sup> Cir. 2005) (same outcome); *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9<sup>th</sup> Cir. 2004) (adjustment did not re-start the five-year clock where the person remained in lawful status until adjustment); *Zhang v. Mukasey*, 509 F.3d 315 (6<sup>th</sup> Cir. 2007) (similar).

A is admitted to the U.S. on a temporary visa in 2001, overstays, adjusts status to lawful permanent residence in 2006, and commits the moral turpitude offense in 2007. The “date of admission” for purposes of the five years is the date of admission on a visa in 2001, and he is not deportable. See *Id.* at 408; this is the fact situation in *Alyazji*. The same would hold true if A had not fallen out of status, for example had been admitted on a student visa and remained in status until adjustment.

B enters the U.S. without inspection and later adjusts status to lawful permanent residence (for example, pursuant to INA § 245(i) or an asylum application). The “date of admission” for purposes of the five years is the date of adjustment of status. See discussion at *id.* p. 401.

C is admitted to the U.S. as a tourist in 1990 and then leaves the U.S. for several years. He enters the U.S. without inspection in 1998, adjusts status in 2002, and commits a crime involving moral turpitude offense in 2004. The date of the 2002 adjustment of status is the “date of admission” for purposes of the five years.

*Id.* at 407-408.

Consider this situation, which the BIA did not address.

D is admitted to the U.S. as a permanent resident in 2002. After remaining here lawfully, he leaves the U.S. for three weeks to visit his mother in 2008. Upon his return he is classed as a returning permanent resident and does not make a new “admission” under INA § 101(a)(13)(C). In 2009 he commits and is convicted of a crime involving moral turpitude. What is the “date of admission” for purposes of the moral turpitude deportation ground?

While *Alyazji* does not directly address this situation, counsel should argue that under the *Alyazji* test, the date of admission is 2002, not 2008. The person is subject to the grounds of deportability pursuant to his grant of permanent residency in 2002, not pursuant to his processing as a returning LPR in 2008, which was neither an admission nor an adjustment of status. Therefore, he is not deportable because he did not commit the offense within five years after his “date of admission.”

#### **D. The Immigrant Bears the Burden of Proving That a Conviction under a Divisible Statute Is a Bar to Relief**

**\*\*The Ninth Circuit *en banc* reversed its beneficial rule on proving eligibility for relief, and held that where a conviction under a divisible statute is a potential bar to relief the applicant must prove that the conviction is not a bar, and must do this using only the *Shepard* documents permitted under the modified categorical approach. *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*), partially overruling *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9<sup>th</sup> Cir. 2007), *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9<sup>th</sup> Cir. 2011) and similar cases.**

The question in *Young* concerns what happens if the immigrant was convicted under a divisible statute and the record of conviction is not conclusive as to which offense was the subject of the conviction. It is clear that the government has the burden of proving *deportability*. In that case, the government must produce documents that establish that the conviction was for an offense that comes within a deportation ground. If the record is inconclusive or nonexistent, the immigrant is not deportable.

In practice, *Sandoval-Lua* applied this same burden when it came to eligibility for status or relief. Although a noncitizen has the burden of proving eligibility for relief, the Ninth Circuit interpreted the categorical approach to mean that if the potential bar to eligibility is a conviction under a divisible statute, the noncitizen's burden is met if the record is inconclusive. If the IJ had only a record that the person was convicted under the (divisible) statute, or had a vague record that did not identify the exact offense of conviction, the immigrant was deemed eligible for relief.

*Young* reversed the *Sandoval-Lua* rule. It held that the *immigrant* must prove that a conviction under a divisible statute is *not* a bar to eligibility for relief. To prove this the immigrant may use only the *Shepard* documents acceptable under the modified categorical approach, e.g., a plea transcript, written plea agreement, charging paper with proof that he pled to a particular charge, or other evidence from the reviewable record of conviction. This decision won by only one vote, and dissenting judges pointed out that this burden will be impossible for many immigrants.

*Young* has taken away much of the usefulness of the modified categorical approach for persons who are applying for relief from removal or for some lawful status. Limitations as to what documents can be used to prove the offense of conviction, and rules that no inferences may be used, will work against immigrants who are trying to establish eligibility. Moreover, in the real world, the majority of immigrants in removal proceedings with criminal convictions are low-income, unrepresented, and held in detention centers –with very few resources to enable them to obtain exculpatory documents that do exist.

These immigrants should receive some help if the Supreme Court decides to overturn the Ninth Circuit's holding in *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 943-944 (9th Cir. 2011) (*en banc*) in the pending case *Descamps v. United States* (No. 11-9540) (certiorari granted Aug. 31, 2012). See discussion of these cases in § 2.11(E), *infra*. If the Court re-imposes the so-called “missing element” rule, at least some statutes will be held to automatically not carry an immigration consequence and the immigrant will not be required to produce documents to prove this.

*Young* made a few holdings that are good for immigrants and defendants. It held that where a statute lists multiple offenses in the disjunctive (e.g., burglary of a “building, car or boat”) and the charge lists the offenses in the conjunctive (e.g., burglary of a “building, car and boat), a plea to the charge in the conjunctive does not prove that the defendant pled to all of the offenses. This overturned a ruling to the contrary in *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (*en banc*). *Young* also reaffirmed that the same strict categorical approach applies in immigration proceedings as in federal criminal prosecutions. In 2012 a

three-member panel of the BIA asserted that a less strict version of the categorical approach applies in immigration proceedings, and that federal courts should defer to the BIA in this matter. See *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012) and discussion at § 2.11, Part E, *supra*.

For further discussion of *Young*, see Practice Advisories for immigration and criminal defense counsel in **Appendix II** and at [www.ilrc.org/resources/ninth-circuit-decides-key-issues-about-categorical-approach-overturms-sandoval-lua](http://www.ilrc.org/resources/ninth-circuit-decides-key-issues-about-categorical-approach-overturms-sandoval-lua).

## § 1.4 Rules for Permanent Residents Who Travel Abroad

**\*\*In order to establish that a returning lawful permanent resident alien is to be treated as an applicant for admission to the U.S., DHS must prove by clear and convincing evidence that one of the six exceptions to the general rule for lawful permanent residents set forth at INA § 101(a)(13)(C), 8 USC 1101(a)(13)(C), applies. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).** Here the BIA found that DHS must prove that the conviction at issue was a crime involving moral turpitude, making the LPR inadmissible.

**\*\*A lawful permanent resident who is returning from a trip abroad may be treated as an applicant for admission in removal proceedings if DHS proves by clear and convincing evidence that the LPR engaged in “illegal activity” at a U.S. port of entry. “Illegal activity” includes attempting to smuggle a non-citizen. *Matter of Guzman Martinez*, 25 I&N Dec. 845 (BIA 2012).** A returning LPR is presumed not to be making a new “admission” to the U.S. unless he or she comes within one of the exceptions at INA § 101(a)(13)(C), 8 USC 1101(a)(13)(C). The BIA held that attempting to alien-smuggle at the border comes within the exception pertaining to an LPR who “engages in illegal behavior after departing the United States.” If DHS proves the smuggling by clear and convincing evidence, the respondent will be put in removal proceedings as an alien seeking admission rather than as an admitted alien charged with being deportable for smuggling.

**\*\*When DHS paroles a returning lawful permanent resident for prosecution, it need not have all the evidence to sustain its burden of proving that the person is an applicant for admission but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings. *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012).**

**\*\*The Supreme Court held that if a lawful permanent resident who is returning from a trip abroad is inadmissible based upon a conviction from before April 1, 1997, then whether that person is seeking a new admission is determined by the legal standard that was in place before April 1, 1997, and not the current standard at INA § 101(a)(13)(C). *Vartelas v. Holder*, 132 S. Ct. 1479 (2012).** Before the IIRIRA legislation took effect on April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility—then called excludability—if their trip was brief, casual and innocent. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Since April 1, 1997, whether an LPR returning from a trip abroad faces the inadmissibility grounds is determined by INA § 101(a)(13)(C), 8 USC

§ 1101(a)(13)(C). That section provides in part that commission of a criminal offense identified in INA § 212(a)(2), 8 USC § 1182(a)(2), constitutes an exception to the presumption that an LPR returning from abroad is not seeking admission. The BIA held that this statutory provision eliminated the *Fleuti* exemption for LPRs. See *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (*en banc*).

Mr. Vartelas was convicted of a counterfeiting offense in 1994, and had travelled abroad numerous times prior to being placed in removal proceedings in 2003. He asserted that based upon a retroactivity analysis, the Court should apply the *Fleuti* exemption for returning LPRs—which was the rule in place when he was convicted—rather than § 101(a)(13)(C). His trips outside had been “brief, casual and innocent.” The Court upheld his claim. This decision essentially upheld *Camins v. Gonzales*, 500 F.3d 872, 885 (9th Cir. 2007). See an excellent Practice Advisory on *Vartelas* by several advocacy organizations.<sup>2</sup>

### § 1.6 Verifying Immigration Status; Immigration and Criminal Records

**New Resource: Online Guide to FOIA Requests.** The Commission on Immigration of the ABA published an excellent guide to filing FOIA requests for immigration purposes. See *A Guide to Filing Freedom of Information Act (FOIA) Requests and Privacy Act (PA) Requests* at [www.americanbar.org/content/dam/aba/administrative/immigration/FOIAguide.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/immigration/FOIAguide.authcheckdam.pdf).

**The government must provide a noncitizen in removal proceedings with his or her immigration file (“A-file”), without the noncitizen having to file a FOIA request.** *Dent v. Holder*, 627 F.3d 365 (9<sup>th</sup> Cir. 2010). In a constitutional avoidance opinion based on the Fifth Amendment due process right to a full and fair immigration hearing, the Ninth Circuit construed INA § 240(c)(2)(B), 8 USC § 1229a(c)(2)(B), to require DHS to provide petitioner with his A-file. Section 1229a(c)(2)(B) provides:

- (2) Burden on alien. In the proceeding the alien has the burden of establishing-- ...  
(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to ... any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien’s admission or presence in the United States.

The government took the position that petitioner was only entitled to get the A-file through a FOIA request pursuant to 8 CFR § 103.21.<sup>3</sup> The court rejected this argument, holding

<sup>2</sup> See Vargas et al., “Vartelas v. Holder: Implications for LPRs” (April 5, 2012) at [http://nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Vartelas\\_Practice\\_Advisory.pdf](http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Vartelas_Practice_Advisory.pdf).

<sup>3</sup> Section 103.21(a) provides: “(a) Access to available records. An individual who seeks access to records about himself or herself in a system of records must submit a written request in person or by mail to the Freedom of Information/Privacy Act Officer at the location where the records are maintained....”

that to avoid a due process failure it would construe the regulation to govern request in general, but the statute to govern requests of person in removal proceedings.

The regulation does not purport to address removal hearings specifically. It is a general regulation governing records requests. If it applied to removal proceedings, a serious due process problem would arise, because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed.

The doctrine of constitutional avoidance requires us to construe the statute and the regulation, if possible, to avoid a serious constitutional question. We construe the ‘shall have access’ statute to provide a rule for removal proceedings, and the regulation to apply generally in the absence of such a more specific rule. It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it. ... Prejudice here is plain, because the A-file, when it is fully examined and this case adjudicated on all the facts, may show that Dent is a naturalized citizen of the United States.”

*Dent v. Holder*, 627 F.3d at 374 (footnotes omitted).

Although petitioner had requested his A-file and been denied, the Court expressly declined to reach the issue of whether a request would be necessary in every case: “We do not imply that Dent’s request for help getting records was a necessary precondition to the government’s obligation, nor do we imply that the government would have no obligation if Dent had not asked, because those cases are not before us. We are unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it.” *Id.* at 375.

**Comment.** This is a landmark decision that addresses a terrible government practice of requiring noncitizens it is removing to obtain their own government file by FOIA request, when the file may contain helpful information but is likely to not arrive until after the person is removed. As Judge Kleinfeld said, “It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it. That would unreasonably impute to Congress and the agency a Kafkaesque sense of humor about aliens’ rights.” *Ibid.*

**Resource:** [Online results of FOIA requests](http://www.uscis.gov) can be obtained by going to [www.uscis.gov](http://www.uscis.gov) and clicking on “About USCIS” and then “Freedom of Information and Privacy Act (FOIA).”

## **B. Obtaining Criminal Records**

Instructions for obtaining FBI report/rap sheet and a California state rap sheet are at **Appendix II**.