

# RISKS TO IMMIGRANTS FROM DRUG COURT PARTICIPATION

Participation in drug court carries a variety of risks for the immigration status of legal immigrants in the United States. In particular, conviction for a crime related to a controlled substance, conviction of some related crimes committed to enable the person to obtain drugs, or admission of drug abuse or addiction can affect the immigration status of a lawful permanent resident in the following ways.

- The immigrant offender may become deportable, possibly even after having lived many years in the United States as a lawful permanent resident.
- The immigrant offender may become inadmissible, including preventing the defendant from reentry if the defendant leaves the country.
- The immigrant offender may be made ineligible for naturalization as a U. S. citizen. Eligibility for naturalization is conditioned on the applicant's ability to show that he or she is of good moral character, and engaging in certain specified behavior or conviction of certain crimes will negate good moral character.
- The immigrant offender may be ineligible for any type of discretionary relief requiring good moral character for eligibility, such as the cancellation of a removal order or protections for immigrants who are victims of some types of crimes.

## Definition of Conviction of a Crime Under Federal Immigration Law

For the purposes of Federal immigration law, the term "conviction" means, with respect to an alien (i.e. a non-citizen), 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.

Especially important for drug courts, something considered as a conviction under Federal immigration law may not be considered a conviction under state law. For example, the following drug court actions all constitute a conviction under Federal immigration law:

- Guilty plea with sentence to drug court following entry of plea of guilty;
- Sentence to drug court with admission on record of facts sufficient to support a conviction;
- Deferred prosecution or pretrial diversion with admission of responsibility or stipulation of facts that would support a conviction, if coupled with court-imposed conditions for drug court; and
- Adjudication withheld after entry of guilty plea or admission of facts that would support a conviction coupled with sentence to rehabilitative treatment.

There are a number of steps in the drug court process where defendants may be taking actions or making decisions that may affect their immigration status and thus where they may need advice. Some of the key steps include the following:

- Agreeing to diagnosis of drug abuse or addiction to enter program;
- Entering a guilty plea either to crime relating to controlled substance or to some other crime carrying immigration consequences;
- Admitting or stipulating to facts in a charging document or police report that would support a conviction or constitute an admission of drug abuse or addiction;
- Accepting adjudication withheld after entry of guilty plea or admission of facts that would support a conviction, coupled with sentence to drug court;
- Accepting deferred prosecution, if the defendant admits to facts that would support a conviction and court imposes conditions for completion of drug court; and
- Undergoing follow-up drug testing, which may provide continued evidence of addiction.

## Risks Due to Substance Abuse Involvement

Conviction of any crime related to a controlled substance makes an immigrant deportable and, with one limited exception, negates good moral character, making the immigrant ineligible for naturalization or for certain types of discretionary relief.

Being a drug abuser or addict can make a person deportable even without conviction of a crime.

In addition, entry into drug court based on alcohol abuse can be problematical for an immigrant, even though alcohol is not a controlled substance. Federal immigration law provides that

being a habitual drunkard negates good moral character. As a result, an immigrant's eligibility for naturalization or other immigration benefits may be threatened if the defendant admits to alcohol abuse or addiction in order to get into drug court, or if alcohol abuse or addiction is shown through assessment for drug court entry or through follow-up testing.

### Risks From Conviction of Other, Non-Drug, Crimes That May Be Involved in a Drug Court Case

A wide variety of other types of cases might be bundled into a drug court sentence, particularly for crimes that were committed as a result of a drug addiction or under the influence of drugs and drug addiction or abuse is determined to be the underlying cause of the criminal behavior, making drug court a viable option. Conviction of many of those crimes may carry immigration consequences.

In particular, there are three major categories of crimes affecting immigration rights under Federal immigration law that are often involved in a drug court case and bundled into a guilty plea: aggravated felonies, crimes involving moral turpitude, and crimes of domestic violence. Some crimes may fall into these categories even if classified as misdemeanors under state law.

### Aggravated Felony

Federal immigration law contains a long list of crimes that are classified as aggravated felonies, some of which may not be classified as felonies under the laws of some states. Conviction of an aggravated felony makes an immigrant deportable, ineligible for discretionary relief from a removal order, and ineligible for naturalization.

Most crimes defined as aggravated felonies under Federal immigration law are obvious serious crimes, including murder, rape, sexual abuse of a minor, theft, and burglary. Some minor crimes, however, can also meet the definition of an aggravated felony.

A crime that meets the definition of crime of violence under 18 U.S.C 16 is an aggravated felony if accompanied by a sentence of one year or more, and some misdemeanors may meet this definition. Federal law defines a crime of violence as:

- The use, attempted use, or threatened use of physical force against the person or property of another, or
- Any felony that involves a substantial risk that physical force against the person or property of another may be used.

Examples of state court misdemeanors that could be aggravated felonies under Federal immigration law if the actual sentence is one year or more include:

- Offensive touching;
- Reckless endangerment;
- Assault;
- Unlawful imprisonment;
- Menacing or threatening;
- Coercion; and
- Theft.

### Crime Involving Moral Turpitude

Crimes involving moral turpitude are crimes that contain an element of fraud or other behavior considered morally offensive. The courts have interpreted this category to include crimes that involve:

- Evil or malicious intent or inherent depravity;
- Intent or reckless behavior to commit great bodily harm; or
- Intent to defraud, including theft.

In addition, to be deportable, a crime involving moral turpitude must involve a possible sentence of one year (365 days) or more, or two convictions not arising out of the same incident, regardless of possible sentence.

There are some common crimes that are considered minor in state law that can qualify as a crime involving moral turpitude and put a lawful permanent resident at risk of removal. These include misdemeanors that could be crimes of moral turpitude if the possible sentence is one year or more, or if a person commits two of them, such as:

- Petty theft (e.g. turnstile jumping);
- Fraud;
- Perjury; and
- Prostitution.

## Crime of Domestic Violence

A crime of domestic violence can include violation of a civil protection order. Conviction of a crime of domestic violence makes an immigrant deportable. It may also be classified as an aggravated felony or crime involving moral turpitude in certain circumstances. Crimes of domestic violence include the following under Federal immigration law:

- Stalking;
- Domestic violence, if it qualifies as a crime of violence (could also be an aggravated felony, with actual sentence of one year or more);
- Criminal child abuse, neglect or abandonment; and
- Violation of a civil or criminal protective order.

## Should an Immigrant Ever Enter a Drug Court Program?

Meeting the requirements imposed by drug court programs can make lawful immigrants deportable, inadmissible, ineligible for relief from a removal order, and ineligible for naturalization, and it is not possible to fully shield immigrants who participate in drug court programs from those immigration consequences.

Even with those unavoidable risks, however, there may be circumstances in which an immigrant might decide to participate in a drug court program.

- The immigrant may have already become deportable, so the drug court wouldn't make things any worse.
- Even if participation in drug court makes the immigrant defendant deportable, it does not mean that the immigrant will actually be deported.
- Participation in a drug court program can help the offender avoid a state jail term and hopefully overcome his or her drug addiction, both positive outcomes for the offender.
- An immigration court judge may consider successful completion of drug court as a mitigating factor for relief from removal.

Still, the key concern for the courts is to assure that immigrant defendants contemplating entering a drug court program are adequately advised of the immigration-related risks inherent in taking such an action. Defense attorneys have a clear responsibility to do this, and states are increasingly requiring that judges assure defendants are properly advised of the immigration consequences of a plea.

