

OVERVIEW OF IMMIGRATION CONSEQUENCES OF STATE COURT CRIMINAL CONVICTIONS

This bench card is designed to provide quick access for state court judges on the possible consequences of state court criminal convictions for a non-citizen's immigration status. These consequences apply to all non-citizens, including lawful permanent residents, unauthorized immigrants, and temporary visa holders.

For state criminal court judges, this bench card is designed to help them identify circumstances before them in which a state criminal conviction or sentence might have possible collateral immigration consequences, to assure that alien litigants have been properly advised by their attorneys of the possible immigration implications of entering a guilty plea or going to trial. For state family and juvenile judges, the card should alert them to possible risks that a non-citizen party might be facing for past criminal convictions.

This bench card is designed to help judges spot issues and is not meant to be an in-depth treatise on immigration law or intended to provide definitive answers regarding immigration rights. Judges using this bench card should also be aware that immigration law is constantly changing, and electronic statutory materials on which the bench cards are based may not be up to date.

GROUNDINGS FOR DEPORTATION

The following state court criminal actions are grounds for deportation of any alien.

- Was in an inadmissible category at time of entry.
- Has been convicted of one of the following types of crimes.
 - Crime involving moral turpitude with possible sentence of one year or more, committed within five years of entry to the U.S.
 - Two crimes involving moral turpitude not arising out of a single scheme of conduct.
 - Aggravated felony.
 - Crime relating to controlled substance, encompassing any violation of a law relating to a controlled substance, with exception for a single offense of simple possession of 30 grams or less of marijuana.
 - Firearm offense.

- Crime of domestic violence.
- Crime of child abuse, neglect, or abandonment. Under Federal law a child is anyone under the age of 18.
- Violation of a civil or criminal protection order.
- Failure to register as an alien or falsification of immigration documents.
- Document fraud, including civil document fraud.
- High-speed flight.
- Failure to register as a sex offender.
- Terrorist activity.
- Engaging in espionage, treason, or sedition.
- Violation of the Selective Service Act.
- Illegal Travel.
- Illegal Activity not requiring a Criminal Conviction.
 - Drug abuse or addiction.
 - Alien smuggling.
 - Violation of a civil protection order.
 - Civil document fraud.
 - Falsely claiming U.S. citizenship.
 - Illegal voting.

Note that there is no time limit on the effect of a criminal conviction on deportability.

INADMISSIBLE ALIENS

The following can make an alien inadmissible, which can make the alien removable and can prevent the alien from reentering the country after leaving and from adjusting to lawful permanent resident status.

- Conviction or admission to having committed acts constituting the essential elements of a crime involving moral turpitude, subject to petty offense exception.
- Conviction or admission to having committed acts constituting the essential elements of a crime relating to a controlled substance, with exception for single offense of simple possession of 30 grams or less of marijuana occurring more than 15 years prior to the application for admission or adjustment of status.
- Two convictions with aggregate sentence of five years or more.

- Known or reasonably believed to have engaged in trafficking in a controlled substance.
- Coming to the U.S. to engage in prostitution or having engaged in prostitution in the 10 years prior to application for admission, with exception that one act of soliciting prostitution for oneself does not preclude admissibility.
- Known or reasonably believed to have engaged in trafficking in persons.
- Known or reasonably believed to have engaged in money laundering.
- Known or reasonably believed to have engaged in or come to the U.S. to engage in terrorist activity.
- Known or reasonably believed to have engaged in or come to the U.S. to engage in various acts of espionage, treason, or sedition.
- Illegal voting.

Note: Conviction of an aggravated felony is not automatic grounds for inadmissibility.

There is a petty offense exception for crime involving moral turpitude.

- One conviction of a crime involving moral turpitude with a maximum sentence of one year or less and actual sentence of six months or less does not make an alien inadmissible.
- The court looks to actual sentence imposed, not the possible sentence.
- If the imposition of the sentence is suspended, the sentence is not “imposed”, but if the execution of the sentence is suspended, the sentence is considered “imposed”.

WHAT IS A CONVICTION?

For the purposes of Federal immigration law, the term “conviction” means one of the following, arising from a criminal proceeding with appropriate constitutional protections and required proof beyond a reasonable doubt:

- A formal judgment of guilt of the alien entered by a court, or
- If adjudication of guilt has been withheld, where (1) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or admitted sufficient facts to warrant a finding of guilt, and (2) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The following are examples of convictions.

- Expungement does not erase the conviction for immigration purposes.
- A presidential or gubernatorial pardon can eliminate deportability for conviction of a crime involving moral turpitude or aggravated felony.
- Deferred prosecution if there is an admission of facts supporting a finding of guilt and some form of punishment or restraint on liberty is imposed by the judge.
- Deferred adjudication if the defendant enters a plea of guilty or nolo contendere or admits facts sufficient to support a finding of guilt, and some form of punishment or restraint on liberty is imposed by the judge (this is common for drug courts).
- A suspended sentence.
- A conviction vacated solely to alleviate immigration consequences. (A conviction vacated for legal insufficiency is not a conviction for immigration purposes.)

A juvenile delinquency determination is not considered an adult criminal conviction.

AGGRAVATED FELONY

Conviction of an aggravated felony includes conviction of the crime itself, conviction of attempt to commit the crime, or conviction of conspiracy to commit the crime. The following crimes are specifically identified as aggravated felonies by Federal immigration law:

- Murder;
- Rape;
- Sexual abuse of a minor, including indecent exposure to a child and statutory rape. It can include offenses classified as misdemeanors under state law;
- Crime of violence, as defined in Federal law, with a sentence of one year or more;
- Theft or burglary with a sentence of one year or more;
- Drug trafficking;
- Sale, possession for sale, or manufacture of a controlled substance;
- Trafficking in firearms;
- Trafficking in persons;
- Dealing in stolen explosive materials;
- Demand for or receipt of ransom;

- Owning, managing, or supervising a prostitution business;
- Sexual exploitation of children;
- Racketeering, as defined in Federal law;
- Money laundering if the amount exceeds \$10,000;
- Tax fraud in excess of \$10,000;
- Fraud with loss to victim exceeding \$10,000;
- Forgery of an immigration document with a sentence of one year or more;
- Crimes compromising national security or intelligence;
- Failure to appear for service of sentence where the underlying offense is punishable by imprisonment for 5 years or more;
- Commercial bribery, counterfeiting, or forgery, including trafficking in vehicles with an altered Vehicle Identification Number, with a sentence of one year or more;
- Obstruction of justice or perjury; and
- Failure to appear to answer a felony charge with a possible sentence of two years or more.

The immigration court must take the crime as charged and convicted in the state court, even if the prosecutor's charge was initially fashioned or later modified, even retroactively, to minimize immigration consequences.

Where the length of sentence is a part of the definition of an aggravated felony, the sentence as modified by the trial court nunc pro tunc is the effective sentence for immigration purposes without regard to the trial court's reasons for the modification, even if the sentence was modified solely to mitigate immigration consequences for the defendant.

Crime of Violence

Federal criminal law defines a crime of violence as:

1. An offense that involves the use, attempted use, or threatened use of physical force against the person or property of another, or
2. Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The following have been found to be crimes of violence.

- Stalking when under a temporary restraining order.
- Unauthorized use of a motor vehicle in that it involves a substantial risk of the use of force.
- Manslaughter in the first degree that requires intent to cause death or serious harm.

Misdemeanors as Aggravated Felonies

Examples of misdemeanors that could be aggravated felonies as crimes of violence if the actual sentence is 1 year or more

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

CRIME INVOLVING MORAL TURPITUDE

The term "crime involving moral turpitude" is not defined in the Federal immigration statutes. As a result, the following discussion is based entirely on case law from Board of Immigration Appeals decisions.

Definition from case law

- A crime involving moral turpitude is one that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between persons, either to individuals or society in general.
- The crime must involve evil or malicious intent or inherent depravity.
- The statute and not the actual behavior controls: the aspect of moral turpitude must be a necessary element of the crime as defined by state statute. If a person could be convicted of the crime, as defined by statute, without an aspect of moral turpitude, it is not a crime of moral turpitude.

Where the crime as defined by statute includes both crimes that qualify as moral turpitude and crimes that do not, the record of conviction, including indictment, plea, verdict, and sentence, may be considered.

- Neither the seriousness of the crime nor the severity of the sentence is determinative of whether a crime is a crime of moral turpitude.

Types of crimes that have been found by the courts to involve moral turpitude include the following.

- Crime involving specific intent to cause physical injury or reckless behavior causing serious bodily injury. Knowing gross deviation from reasonable standard of care constitutes reckless behavior.
- Crimes involving an intent to defraud, such as theft, fraud, or perjury.
- Prostitution.
- Possession of child pornography.
- Money laundering.
- Concealing a Federal felony committed by another, where there was active intent to conceal the crime.
- Trafficking in counterfeit goods.
- Willful failure to register as a sex offender.

The following are rules regarding DUI cases, as determined by Board of Immigration Appeals decisions.

- Simple DUI is not a crime involving moral turpitude.
- A conviction of DUI coupled with knowingly driving while license suspended or revoked due to a prior DUI conviction is a crime involving moral turpitude.
- Multiple convictions of simple DUI, where none of the convictions alone constitutes a crime involving moral turpitude, are not considered a crime involving moral turpitude.

Crimes that have been found not to involve moral turpitude include the following.

- Unauthorized use of a motor vehicle.
- Joyriding.
- Simple assault without intent to cause serious bodily harm.
- Domestic assault is not a crime involving moral turpitude if committed without intent to cause serious bodily harm, or if defined by state law to include just unwanted or offensive touching.

Misdemeanors as Crimes Involving Moral Turpitude

Examples of misdemeanors that could be crimes involving moral turpitude if the possible sentence is one year or more, or if a person commits two of them.

- Theft.
- Fraud.
- Perjury.
- Prostitution.

CRIME OF DOMESTIC VIOLENCE

Conviction of a crime of domestic violence is grounds for deportation. The following are categories of crimes of domestic violence that can affect immigration status.

- Stalking.
- Domestic violence.
 - Must qualify as a crime of violence under Federal criminal law.
 - Must be committed by an individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.
- Criminal child abuse, neglect or abandonment.
 - The statute does not include civil child abuse and neglect.
- Violation of domestic violence protective order.

Domestic violence can also be an aggravated felony if it meets the requirements of an aggravated felony with an actual sentence of one year or more.