



## Top Ten Things Criminal Defense Attorneys Should Know About Immigrant Survivors<sup>1</sup>

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The legal immigration landscape and its interaction with the criminal justice system are complex and shift often. Please conduct research for each case and consult the linked resources at the end for recent developments and additional information.

While Immigration Law falls under the category of Civil or Administrative Law, not Criminal Law, criminal defense attorneys and advocates for survivors of Domestic Violence and Sexual Assault (“DVSA advocates”) frequently find themselves serving immigrant survivors should have a clear understanding of how criminal charges affect their concerns.<sup>2</sup> This resource aims to provide a starting point for this topic, for criminal defense attorneys and DVSA advocates serving immigrant survivors. It first presents a list of important ways that immigration law impacts criminalized immigrant survivors and ends with a short index of critical resources for additional consideration and research.

- 1. There is generally no guaranteed right to counsel in Immigration Court.** The Supreme Court held long ago that removal (deportation) is not “a punishment for crime” requiring the same due process safeguards as criminal sanctions.<sup>3</sup> Therefore, despite the harsh consequences of being deported, there is not currently a recognized Sixth Amendment right to counsel at government expense in removal proceedings.<sup>4</sup> Defense attorneys should not assume their clients already have

<sup>1</sup> Publication of ASISTA Immigration Assistance. The advisory is intended for authorized legal counsel and DVSA advocates and is not a substitute for independent legal advice provided by legal counsel familiar with a client’s case. Counsel should independently confirm whether the law has changed since the date of publication. Lia Ocasio, Staff Attorney at ASISTA, and Rebecca Eissenova, Senior Staff Attorney at ASISTA, authored this advisory. They thank Cristina Velez, Legal and Policy Director at ASISTA, and the staff of the [Defense Center for Criminalized Survivors](#) at BWJP for their valuable contributions.

<sup>2</sup> As discussed in depth in this resource, criminal charges can lead to deportation and/or visa ineligibility—extreme collateral civil consequences. Notably, immigrant survivors who are Black, people of color, low-income, and/or disabled experience structural inequalities that may make them more vulnerable to criminal legal system contacts which, in turn, can negatively impact their immigration statuses. When working with criminalized survivors, defense personnel are encouraged to be sensitive to this, as well as to cultural stigmas, traumatic life histories, and the language the person feels most comfortable using. This can lead not only to better attorney-client relationships, but often to better outcomes.

<sup>3</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>4</sup> 8 USC §1362. The ramifications of this can be dire, especially for those who cannot afford a lawyer. Per the Congressional Research Service, between FY2013–May 2022, 44% of represented individuals were granted relief in immigration court compared to only 15% of unrepresented individuals. <https://rb.gy/3qtnh>.

immigration counsel to identify or mitigate consequences of a sub-optimal criminal disposition,<sup>5</sup> and should seek to ensure that immigration consequences of criminal convictions are properly analyzed, potential relief assessed, and potential outcomes communicated to clients prior to acceptance of a plea.

- 2. A defendant's current immigration status impacts which pleas and convictions have which consequences.** There are three statutory ways a criminal plea or conviction can affect an immigrant survivor. It can make them (1) "inadmissible," (2) "removable," or (3) ineligible only for a certain immigration benefit. The consequence to focus on depends on the survivor's current immigration status and any status they soon may seek. "Inadmissibility" affects people who currently are undocumented (it can make them deportable) or who wish to seek a new status (it can make them ineligible). "Removability" affects people who already have status or lawful permanent residency (LPR). Specific ineligibility affects only those who hold or intend to seek a particular benefit, or intend to use a particular "waiver" application to overcome a disqualification. The crimes that trigger each consequence are overlapping but not identical. For instance, a single crime involving moral turpitude makes a person inadmissible, but not necessarily removable.<sup>6</sup> An offense qualifying as an "aggravated felony" makes a person removable but not inadmissible (though it also bars many specific waivers or benefits). Multiple DUIs or criminal confinement aggregating at least 180 days within the past three years may make a survivor ineligible for relief under the Violence Against Women Act, while having no effect on admissibility or removability.<sup>7</sup> For this reason, you must know a client's current immigration status and goal to know how a plea will impact them.<sup>8</sup> Alas, there is no finite and universal list of offenses that trigger the different immigration consequences, because crimes and immigration interpretations are ever-changing. However, charts of certain states' crimes exist to serve as research starting points, and those are linked at the end of this resource.<sup>9</sup>
- 3. Even "minor" and non-violent misdemeanors can severely damage immigration prospects.** It is good practice to assume that any criminal conviction could have serious immigration consequences, unless proven otherwise. Critically, the traditional state law indicators of the gravity of an offense, such as the classifications of felony, misdemeanor, or even non-criminal violation,<sup>10</sup> are often red

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<sup>5</sup> Sadly, the number of unrepresented noncitizens increased from 33% in FY2018 to 47% in the first quarter of FY2022. *Id.* A network advocating for a right to counsel in removal proceedings reports that there are now "more than 50 publicly funded local and state deportation defense programs nationwide," but this is far from universal. Vera Institute of Justice, <https://rb.gy/9dc89>.

<sup>6</sup> *But see* 8 USC § 1227(a)(2)(A) (triggering removability upon two crimes involving moral turpitude, or a single such crime if the sentence is at least one year and it occurs in the first five years of gaining status).

<sup>7</sup> 8 USC § 1101(f)(1) & (7); *Matter of Castillo-Perez*, 27 I&N Dec. 664, 667-71 (AG 2019).

<sup>8</sup> Some noncitizens lack accurate information about their status. If possible, ask their immigration lawyer or ask to view their immigration documents; they may ultimately need to submit one or more Freedom of Information Act (FOIA) requests to gain certainty. See OGIS's FOIA page <https://shorturl.at/ixF45>.

<sup>9</sup> If your state has no chart, you can review a different state's chart for points of similarity and distinction. Consulting an immigration expert who specializes in "cimmigration" is also recommended.

<sup>10</sup> State and local codes use various terms to refer to similar concepts. For instance, a "violation" in one state may be called an "infraction" or "municipal offense" elsewhere. This resource cannot account for

herrings in the immigration realm. Instead, immigration law defines its own categories of removable offenses, with terms such as “crime involving moral turpitude” and “aggravated felony.”<sup>11</sup> For both these terms, a misdemeanor could just as easily meet the definition as a felony.<sup>12</sup> That is because the immigration definitions turn on a crime’s elements, and sometimes its sentencing, but not its state-code classification. For a crime involving moral turpitude, the key is usually an element of fraud, theft, violence (except negligent violence), or sexual misconduct.<sup>13</sup> For an aggravated felony, the statute lists various classes with different required elements,<sup>14</sup> but for none of them does it matter if the state defines the conviction as a felony. To illustrate, a misdemeanor shoplifting offense that, because of an aggravating factor, results in a sentence of over a year, may well be both a “crime involving moral turpitude” and an “aggravated felony.” Having either of these types of convictions on one’s record may cause a survivor to be deported, fail to gain a new, better immigration status, or seek an immigration benefit in the future.<sup>15</sup>

**4. Drug offenses generally also make an immigrant deportable or ineligible for a visa.** This includes simple possession of small quantities of a substance. It also includes cannabis, even where the state has de-criminalized it. There is only one exception to inadmissibility or removability for a single conviction of possession for personal use of under 30 grams of marijuana, and it is not always available.<sup>16</sup>

**5. The definition of “conviction” in immigration law sweeps in participants of many state diversion and intervention programs.** The word “conviction” brings to mind guilty pleas and verdicts, but the definition of “conviction” under the Immigration and Nationality Act (INA) is much broader.<sup>17</sup> It also encompasses *nolo contendere* pleas and admissions of “sufficient facts” to warrant a guilty finding, where the judge

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every variation of its terminology across jurisdictions and encourages users to consider the concepts first and lexicon second, conducting their own research to see where analogies hold.

<sup>11</sup> These are not the only categories of removable offenses, though they are among the most common and most difficult to grasp. Some others include controlled substance offenses, prostitution, failure to register as a sex offender, domestic violence, violation of a protection order, and multiple convictions of any nature, where the aggregate sentence is at least five years of confinement. 8 USC §§ 1182(a)(2)(A)(i)(II) (a)(2)(C), & (a)(2)(D); 1227(a)(2)(A)(iv), (a)(2)(A)(B); & (a)(2)(E); 1182(a)(2)(B). In addition, as discussed further in Item 4, a conviction that is not a removable offense may still make a person ineligible for a particular immigration status, so may be important to avoid for certain clients.

<sup>12</sup> See also *Matter of S. Wong*, 28 I&N Dec. 518, 523-24 (BIA 2022) (holding that a non-criminal offense or infraction can also have criminal immigration consequences, as long “certain minimum constitutional protections” are imposed during adjudication, and listing various of these minimum protections).

<sup>13</sup> A crime involving moral turpitude is often defined by “a reprehensible act with some form of scienter.” E.g., *Matter of Silva-Trevino*, 26 I&N Dec. 826, 828, n.2 (BIA 2016). For most acts, the scienter must be at least “knowing,” but may be “reckless” for more violent acts. This obvious “squishiness” underscores the need to check if a court has already ruled on the immigration consequences of a particular statute.

<sup>14</sup> 8 USC § 1101(a)(43) (defining as “aggravated felonies” murder; rape; sexual abuse of a minor; drug trafficking; and crimes of violence, fraud or theft with certain sentences or dollar losses—among others).

<sup>15</sup> E.g., 8 USC §§ 1101(f)(8) (aggravated felony conviction precludes all immigration benefits that require showing good moral character); 1158(b)(2)(A)(ii)&(B)(i) (aggravated felony conviction precludes asylum).

<sup>16</sup> 8 USC §§ 1182(h); 1227(a)(2)(B)(i).

<sup>17</sup> Note that juvenile dispositions are not convictions in immigration. However, a juvenile tried in adult court may receive a conviction. Further, a juvenile court adjudication may implicate other immigration consequences, such as inability to meet the “good moral character” element in a VAWA application.

also orders a punishment, penalty, or other restraint on the noncitizen's liberty.<sup>18</sup> Per this definition, if a noncitizen participates in a state dismissal or diversion program requiring a guilty plea that is later withdrawn upon completion, they would still have a conviction *for immigration purposes*. Similarly, if the judge orders a sentence suspended in consideration of other conditions, there is also a conviction.<sup>19</sup> This is true even where a court or defense counsel instructed the person that they no longer had a criminal record. As much as possible, you should avoid any formal admission of guilt and seek only *pre-plea* diversion outcomes. In some cases, you might need to evaluate whether pleading guilty to a different offense would involve lesser immigration consequences than a post-plea diversion program that might be otherwise recommendable to people who are U.S. citizens.

- 6. Both records of conviction and arrest records are scrutinized by immigration authorities—but in different ways.** As with federal sentencing, a conviction's effects on *statutory eligibility* for an immigration benefit or waiver are generally assessed using a "categorical approach." This means an immigration authority cannot examine the facts underlying a conviction, just the statute of conviction itself. The question will be whether it is apparent from the record of conviction—the *Shepard* documents of charging instrument, disposition, and sentencing records—that the person was convicted of a statute or subsection that is a categorical match for a generic inadmissible or removable offense.<sup>20</sup> Thus, the precise language a plea contains can be a critical opportunity to protect *statutory eligibility* for immigration.<sup>21</sup>
- 7. Criminal legal system contacts are a negative factor in discretionary decisions even if no conviction resulted.** In addition, once they show they are statutorily eligible, many noncitizens need to separately earn positive *discretion* from an adjudicator to win their case.<sup>22</sup> In discretionary determinations, adjudicators often seek to review the contents of non-*Shepard* documents, like arrest records and police complaints. They may deny relief based in part on facts asserted there, even if no conviction was obtained, and even if the noncitizen is not subject to any formal inadmissibility or ineligibility ground based on this (or any other) criminal charge. Where applicable, those representing immigrant survivors in criminal proceedings should take measures to note on the record if a fact or police report is uncorroborated, or if evidence supporting the allegations is absent or undercut by a recanting witness, racial bias (especially if it led to a suppression motion), lack of appropriate interpreter, or other strong circumstance. This will help a survivor argue

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<sup>18</sup> See 8 USC § 1101(a)(48)(A).

<sup>19</sup> See also Item 9, *infra*. Further, if an immigration consequence turns on the length of a person's sentence, it is generally the sentence imposed that counts, not the one actually served. If a judge orders two years but suspends eighteen months, the imposed sentence is still two years; if the judge orders probation but sets a six-month incarceration as a condition, the imposed sentence is six months.

<sup>20</sup> *Shepard v. U.S.*, 544 U.S. 13 (2005).

<sup>21</sup> Availability of these opportunities varies by state and how broad their statutes are, so refer to the state-specific charts at the end of this resource where possible.

<sup>22</sup> Among others, this is true for survivors seeking a waiver of a crime's inadmissibility effects in an application for a U or T visa, or for an application under the Violence Against Women Act (VAWA). Because waivers of inadmissibility turn on discretion, they should not be understood as a golden ticket out of immigration consequences for a criminal charge: they can be difficult to win, as described herein.

the report or charging document is unreliable and deserves no weight in a discretionary analysis.

- 8. There is no statute of limitations for how long a conviction will affect immigration prospects.** The INA sections relating to criminal grounds of inadmissibility generally do not limit the impact of any consequences based on *when* the ground was triggered.<sup>23</sup> In other words, a decades-old criminal offense can still affect a survivor's eligibility for immigration relief. Because of changes to the immigration law over time, different consequences may flow from older convictions, but they remain discoverable in immigration background checks and may trigger additional scrutiny, bars to relief, or deportation. Defense counsel should be cognizant of old convictions when advising clients on the effects of a plea.<sup>24</sup>
- 9. Only limited types of post-conviction relief (PCR) can cure immigration consequences – even sealed or expunged cases must be disclosed to immigration authorities.** Alongside defining “conviction” with surprising breadth, immigration law also narrows when a vacatur, expungement, or sentence reduction is effective. To “erase” a conviction for immigration purposes, the conviction must be vacated for *legal or procedural defect*.<sup>25</sup> Vacaturs based on rehabilitation or for the purpose of avoiding adverse immigration or other civil consequences are not sufficient and the underlying conviction will remain a conviction for immigration purposes.<sup>26</sup> Pardons and PCR premised on a defendant’s inability to form the *mens rea* due to coercion from a trafficker, or an attorney’s failure to accurately advise them of the consequences of their pleas often will be helpful. Sealing virtually never erases a conviction, but may be helpful for other reasons as described in Item 5, *supra*.
- 10. Otherwise “immigration-safe” convictions can make international travel risky.** Typically, an LPR can only be deported for crimes categorized as “removable” offenses in the INA. However, if they voluntarily leave the U.S. and attempt to return, they may be assessed for inadmissibility, too.<sup>27</sup> For this reason, if your client has a green card, you should assess them for both removability and inadmissibility. To start this assessment, please find resources below.

**The Good News: Some criminalized immigrants can preserve immigration opportunities based on family, humanitarian, or public interest considerations.**

Do not despair if there is no way to avoid a conviction that has negative immigration consequences. A criminalized survivor seeking immigration status through a

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<sup>23</sup> For questions of discretion and eligibility for particular relief (especially those involving “good moral character” for a certain period before receiving a benefit), more recent convictions have more consequences.

<sup>24</sup> Beware, for instance, that a second crime involving moral turpitude will make a person removable, regardless of how long ago the first occurred. 8 USC § 1227(a)(2)(A)(ii). A history of convictions of any classification and age will make a person inadmissible once the aggregate sentences of confinement reach five years. 8 USC § 1182(a)(2)(B).

<sup>25</sup> See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). See also *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019) (sentence reductions also effective only if based on legal or procedural defect).

<sup>26</sup> See *id.*

<sup>27</sup> 8 USC § 1101(a)(13)(C)(v).

family member or humanitarian grounds may still obtain relief in limited circumstances. This option comes in the form of a “waiver” of the ground of inadmissibility or removability triggered by the offense.

Unfortunately, as noted above, waivers are discretionary and are commonly denied where there is anything but the most minor criminal history or the most compelling humanitarian factors. For this reason, a defense attorney’s aim should always be to avoid records and convictions that could affect a survivor’s immigration prospects in the first place. Early and candid discussions with your client’s immigration attorney, if they have one, are also highly encouraged.

**Additional information and resources:**

ASISTA, Practice Advisory:

[Representing Criminalized Survivors: Impact of Criminal Inadmissibility on Survivor-Based Immigration Remedies](#)

Congressional Research Service, [Immigration Consequences of Criminal Activity](#)

National Immigration Project, [Practice Pointer: Matter of Castillo-Perez](#) (regarding how criminal justice system contacts can impact good moral character element in VAWA)

National Immigrant Justice Center, [Prejudicial And Unreliable: The Role Of Police Reports In U.S. Immigration Detention & Deportation Decisions](#)

ILRC, [Immigration Consequences of Pretrial Diversion and Intervention Agreements](#)

ILRC, [How to Use the Categorical Approach Now](#)

[Matter of Pickering, 23 I&N Dec. 621 \(BIA 2003\)](#) (regarding post-conviction relief for immigrants)

IDP, [Beyond Roldan and Pickering: Arguing that All Post-Conviction Relief Must Be Recognized by Immigration Law](#)

ACLU, [“Know Your Rights” Explanation](#)

ILRC, [“Know Your Rights Cards” for Immigrants](#)

IDP, [“Defender Resources,”](#) including Criminal-Immigration Helpline, and charts for state crimes’ immigration consequences, for NY, AL, AZ, CT, MA, NC, PA, VT

ILRC [Chart for Immigration Consequences of California Crimes](#)

IDP [Chart for Immigration Consequences of Illinois Crimes](#)

Project Citizenship [Chart for Immigration Consequences of Texas Crimes](#)

Some states offer free *Padilla* consultations to public defenders and court-appointed lawyers, e.g., [Massachusetts](#).

AIC, [Access to Counsel in Immigration Court](#)