

Basic Facts About Removal (Deportation) Because of a Criminal Record

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(Updated) Recently, the Immigration and Naturalization Service (“INS”) reported that it has been deporting more than 1,000 aliens each week because of criminal convictions. This handout answers some basic legal questions for greencard holders who might be facing deportation (now formally known as “removal”) proceedings because of a past criminal conviction. You should get legal advice from an experienced immigration lawyer if are an alien with a criminal record, even if the offense might appear to be a minor one.

Q: I have been arrested many times, but have never been convicted. Should I be worried?

A: Generally, no. Only convictions will be used by the INS to deport you. One exception is if the INS believes that you are a drug abuser because of a long record of drug arrests, or a prostitute because of prostitution arrests. Juvenile convictions handled in juvenile court do not count as a basis for deportation.

Q: During my first year in the U.S. after immigrating, I was convicted of a crime, but did not go to jail. Can I be deported?

A: Possibly. **Conviction of a crime involving “moral turpitude” during the first five (5) years after being admitted to the U.S. is a common reason for deportation.** “Moral turpitude” crimes include theft crimes such as burglary and possession of stolen property, or violent crimes such as assault and battery. There are many others. Even if you were not sentenced to jail time, you may be deportable if the crime you committed *could have* resulted in a sentence of one year or more in jail.

Q: What are the other common reasons for deportation due to criminal records?

A: In addition to the above situation, greencard holders could encounter deportation problems if they are convicted of the following crimes:

1. **Two or more crimes involving** moral turpitude at anytime; or
2. **A drug-related crime;** or
3. **A crime considered an “aggravated felony,”** which includes things like murder, rape, drug trafficking, fraud (over \$10,000); and crimes involving theft or violence (*including drunk driving*) where a judge sentenced you to one year or more of jail time (regardless of your actual time spent in jail).

Criminal convictions that fall within the last group are especially bad because many common types of legal relief such as asylum, family petition and cancellation of removal are not available to aggravated felons.

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Q: I have a hearing with the immigration court. Do I need an attorney? What if I can't speak English?

A: You will need an attorney to explore the possible ways to avoid deportation. However, because this is not a criminal process, you *will not* be assigned a free attorney. If you do not feel comfortable using English, you do have the right to a translator at the hearings. When you go find an attorney, you will need to bring the INS letter informing you of the hearing. It is called a “Notice to Appear” and lets you know why the INS wants to deport you.

Q: How can an immigration lawyer help me?

A: Especially with new changes in the immigration laws that limit who is eligible to apply for immigration relief, not everyone will be able to avoid deportation. An experienced immigration lawyer can tell you whether anything can be done in your case. The following is a brief summary of the kinds of immigration relief possible:

1.1. (1) Cancellation of Removal

Greencard holders wanting to apply for *Cancellation of Removal* must meet three requirements: (a) you must be a greencard holder for at least five years; (b) have been continuously living in the U.S. for a total of seven years before your conviction; and (c) have not been convicted of an aggravated felony. Because relief is discretionary, you generally need to show that you have reformed, or that you and your family in the United States will suffer extreme hardship if you had to leave the country.

1.2. (2) Withholding of Removal / United Nations Torture Convention

For persons convicted of an aggravated felony, this category of relief might be all that is available.

To apply for Withholding of Removal, you must show that: (1) your jail sentence was less than five years, (2) your crime is not a “serious crime,” (3) you are not a danger to the community, and (4) there is a strong likelihood that you will be persecuted because of your race, nationality, religion, political opinion or membership to a social group if they returned you to your home country. Unlike political asylum or cancellation of removal, restriction on removal will not fully restore your greencard status. However, you will be permitted to stay in the U.S. and be authorized to work.

You can also apply for a related type of relief called Withholding of Removal under the United Nations Torture Convention. You will need to show that if you are returned to your home country, you will more likely than not be physically or mentally tortured. It is important to understand that you will not be able to prove that you are likely to be tortured simply because you previously fled your country as a refugee. Both forms of Withholding of Removal require a higher level of proof of future persecution or torture.

1.3. (3) Re-immigrate to the U.S. under a family-based adjustment

You must be married to a U.S. citizen, or the parent of a U.S. citizen who is 21 years or older. You will probably need to show that your family members will suffer extreme hardship if you had to leave the country in order to obtain a waiver for your past crimes.

1.4. (4) Re-immigrate to the U.S. through political asylum

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To establish a case for political asylum, you must prove that you have a well-founded fear of being persecuted because of race, religion, nationality, political opinion or membership in a particular social group. Note that even if the judge denies your application, an appeal might allow you to stay in the U.S. during the appeal process. You would be able to work during that time.

Warning: If you are deportable because of an aggravated felony, you are *not* eligible for cancellation of removal, family petition, asylum or naturalization.

1.5. (5) Citizenship/Naturalization

Because U.S. citizens cannot be deported, you can avoid deportation if you can show that you are already a citizen, or can qualify to become a naturalized citizen. You might be a U.S. citizen but not know it if one parent or grandparent was a U.S. citizen when you were born, or if your parents naturalized when you were under 18 years old and a greencard holder.

On the other hand, even if you are not a U.S. citizen now, you might be able to apply for naturalization if you have been a greencard holder for at least five years and have not had any convictions during the last five years.

Q: Is it too late to eliminate my convictions in criminal court in order to avoid removal?

A: You might be able to “vacate” your sentence and get a new trial if you were not given proper advice by your attorney regarding the effect of a guilty plea on your immigration status. For many years, immigration courts would not deport someone for a conviction that had been “expunged” or erased pursuant to a state rehabilitation statute. Recently, the Board of Immigration Appeals reversed that policy and ruled that expungements would not eliminate a conviction for immigration purpose.

Post-conviction relief examples described above will likely require help from an experienced attorney working in the location you were sentenced because you will have to go back to criminal court for that relief.

Q: My brother recently completed a jail sentence and was immediately taken into custody by the INS. Will he be released?

A: In October of 1998, the INS began implementing a mandatory detention policy so that immigrants who are about to be released from serving their jail sentence are immediately taken into INS custody, and held without the possibility of bail throughout the deportation process. Although this policy is being challenged in federal court as violating the Constitution, there are now thousands of immigrants being detained in INS jails because of this policy.

Q: If I have already been ordered for removal, but the INS cannot remove me because my home country will not accept me, what will happen?

A: According to INS regulations, they have 90 days in which to carry out a removal order. In practice, the INS might take much longer. If you originally came from a country such as Vietnam, Cambodia or Cuba which refuses to accept persons deported from the U.S. because of a criminal record, the INS has the discretion to release you

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under an Order of Supervision. If granted, you will be released and permitted to live and work in the U.S. until country conditions change. You will be required to report regularly to the INS, and obtain prior approval if you want to travel outside of your geographic area. Persons in this situation should contact the Federal Public Defenders Office for possible legal representation in seeking release.

The Asian Law Caucus is a non-profit legal service and civil rights organization based in San Francisco. We can be reached at (415) 391-1655 for more informatio about our services. The Caucus thanks Kathy Brady of the Immigration Legal Resource Center for technical assistance for this handout.