Overview of Immigration Law

A very brief exploration of the structure of immigration law, and then greater detail on typical criminal law issues faced by individuals subject to removal (deportation) for criminal convictions and available Waivers or relief from removal

Presented by Farhad Sethna, Esq.
and Elizabeth Knowles, Esq.
The University of Akron
School of Law
© 2017

Overview of immigration law

Immigration law is multi faceted. Many agencies impact immigration law:

- Department of Homeland Security;
- U.S. Department of State;
- Health and Human Services;
- Social Security Administration;
- FBI;
- State and County agencies;
- Local agencies including police departments

Immigrant vs. nonimmigrant status

Immigrants: Individuals coming to live and work permanently in the United States. Also called "Green Card" holders or "Legal Permanent Residents" (LPR's)

Nonimmigrants: Individuals coming to the USA for a defined specific purpose for a temporary defined period. Examples: students, visitors for business or pleasure (tourists), temporary workers, performers, visiting professors or scholars, trainees, etc.

Sources of immigration law

- Statutes
- Regulations
- Case Law

Statutes and Regulations

Immigration and Nationality Act (INA)

8 U.S.C. Code 1101 – 1537

8 Code of Federal Regulations

Administrative Cases

Published Board of Immigration Appeals (BIA) decisions are binding precedent for proceedings in Immigration Court

- BIA precedent decisions are cited as "I & N Dec.."
- More recent decisions are called "Interim Decisions" and have not been placed in bound volumes
- Precedent decisions can be found on the BIA website: http://www.usdoj.gov/eoir/vll/libindex.html

Circuit Court Decisions

- Federal courts have limited jurisdiction in immigration matters, but a circuit court decision will have precedence in administrative proceedings in the circuit in which the matter is being heard
- Where there is a conflict between regional circuit court law and BIA precedent, the decision of circuit court controls in that circuit. Otherwise the BIA controls.

Additional sources of immigration law and policy

- BIA decisions;
- BALCA and other administrative agency decisions;
- Administrative Appeals Office of the USCIS;
- Policies and memoranda issued by various executive branch agencies;
- Emerging trend: state laws regulating immigration – example – Arizona SB 1070
- Immigration Reform on the horizon?
- Executive actions

Priority Date Chart

- What is a "Priority Date"
- Why is it important?
- How is it calculated?
- Why doesn't Congress do something about the backlogs?

What is a "Conviction" under immigration law

Under the Immigration Act:

101(a)(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

101(a)(48)(A)(i) 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

Conviction under immigration law (continued)

101(a)(48)(A)(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

101(a)(48)(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Verifying your client is a U.S. citizen before a guilty plea

In Ohio, the statute requires that the court issue a warning to non-citizens:

ORC §2943.031: "court to advise defendant as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea."

Withdrawing a guilty plea

There must be an underlying issue of law or fact or a constitutional issue that permits the withdrawal of a guilty plea. If a plea is withdrawn purely for immigration purposes it may still count as a conviction for removal or exclusion purposes.

Admission to a diversion program which requires an admission to the elements of the offense can still constitute a conviction for immigration purposes. See the definition of conviction above.

6th Circuit case: Barakat v. Holder

A conviction vacated for rehabilitative or immigration reasons remains valid, while a conviction vacated for substantive or procedural infirmities does not have any immigration consequence.

[Barakat v. Holder, 621 F.3d 398 (2010)]

Crimes specific to immigration law

- Inadmissible at time of entry or of adjustment of status or violates status;
- Present in violation of law (violation of status);
- Violation of condition of entry;
- Termination of conditional permanent residence;
- Alien smuggling (special exemption in case of family reunification);
- Marriage fraud;

Note: Waivers authorized in some cases.

Crimes with immigration consequences

Crimes involving moral turpitude:
(a) Single conviction: Two elements- (1) commission within 5 years after the date of admission and (2) sentence of one year or more *may* be imposed (ie, max sentence (even if not imposed) ≥1 year per statute)
(b) Multiple convictions: Two or more crimes involving "moral turpitude" not arising out of a single scheme of criminal misconduct – length of sentence not material

Crimes with immigration consequences (continued)

- Aggravated felonies: as defined under immigration law – see INA § 101(a)(43);
- High Speed Flight from a U.S. immigration checkpoint;
- Failure to register as a sex offender;
- Controlled substance violations: only exception: a single offense for one's own use, of 30 grams or less of marijuana; and
- Firearms offenses

Crimes with immigration consequences (continued)

- Crimes of domestic violence, stalking, violation of a protective order, and crimes against children;
- Human trafficking;
- Failure to register and falsification of documents;
- False claim to U.S. citizenship; and
- Security and related grounds including espionage and terrorism

Critical: the time for vigorous defense is at criminal trial, not in removal proceedings

Defenses under immigration law may present extremely difficult or insurmountable burdens or may be completely unavailable.

Once the alien is convicted, that conviction becomes a matter of record for the immigration court and the alien can then be ordered removed simply by virtue of that conviction. A collateral attack on the underlying conviction is not permissible through immigration court.

Criminal considerations in immigration law: Mandatory Detention

The Attorney General of the United States MUST take into custody any alien who has committed certain crimes. Therefore, if your client has committed certain crimes, upon conviction and perhaps serving his or her prison sentence, he may remain in custody pending deportation proceedings.

DHS' "radar"?

- Report of commission of crime - "secure communities" - INA § 287(g) agreement;
- Applications to a U.S. or state agency for any type of benefit;
- Workforce enforcement or SSA/IRS "no match" letters;
- Report to USCIS or DHS if a student or employee has fallen out of status; and
- Informants including the court system, competitors, family members, disgruntled employees, or ex-spouses

Deportation and exclusion

Deportation applies to individuals already in the United States after illegal entry or violation of status. By contrast, exclusion applies to individuals who never really made an entry to the United States, and could therefore be deported much quicker. Both the grounds of deportation and exclusion were merged into one process called "removal" subsequent to the IIRIRA of 1996, but the separate grounds for deportation and exclusion still apply.

Grounds for exclusion

- Health-related grounds;
- Criminal and related grounds;
- Multiple criminal convictions;
- Controlled substance traffickers;
- Prostitution and commercialized vice

False claim to U.S. citizenship

There are no waivers available for a false claim to U.S. citizenship. In most instances, the alien will be prohibited from ever obtaining any immigration benefit if he or she has made such a false claim. Only relief available: asylum / withholding / Convention Against Torture

Aggravated felonies have immigration consequences

Aggravated felonies are defined as a separate class of crime under immigration law- see INA § 101(a)(43). For example:

- Murder, rape;
- Sexual abuse of a minor;
- Illicit trafficking in a controlled substance, including a drug trafficking crime;

Effect of criminal convictions on naturalization

Conviction for an aggravated felony after November 2, 1990 renders the alien forever ineligible to naturalize. Conviction for certain crimes is a prima facie indicator that the alien lacks "good moral character", which is a prerequisite for naturalization. While the alien may not be removable, the alien may either become barred from naturalization or may be barred until 5 years or more have passed from the disqualifying conviction and the conclusion of any probation.

Post conviction relief

Leading case: Barakat v. Holder, 621 F.3d 398 (6th Cir., 2010);

Holding: Whereas a "conviction vacated for rehabilitative or immigration reasons remains valid," a conviction "vacated because of procedural or substantive infirmities does not." Id. at 403. For the Government to carry its ultimate burden, then, "the government must prove, with clear and convincing evidence, that the [alien]'s conviction was quashed solely for rehabilitative reasons or reasons related to his immigration status." Id.. At no time, however, does the alien bear the burden of proving that his conviction was vacated on a "recognized legal ground." id. At 404.

Lessons learned from *Barakat*

(1) consult with immigration counsel BEFORE entering any plea

(2) entry into a deferred adjudication or rehabilitative / diversionary program which requires admission of the elements of the crime could amount to a guilty plea for immigration purposes;

(3) include the Barakat "magic" language in any post-conviction motion to vacate a conviction and in the related order - "procedural or substantive infirmities". Avoid any reference to vacating the conviction for "rehabilitative or immigration reasons."

EOIR and BIA

- The immigration court system is composed of approximately 260 immigration judges at 59 immigration courts in the USA;
- IJ decisions can be appealed through the Board of Immigration Appeals ("BIA");
- Currently 16 permanent members at the BIA, and 5 temporary appointees;
- BIA decisions can be appealed to a Circuit Court on "questions of law or constitutional issues" – review limited by IIRIRA (1996) and the REAL ID Act (2005)

Immigration court in Ohio

- Federal Courthouse - 801 West Superior Avenue- Cleveland - 13th floor;
- Three Immigration judges (+ 3 more);
- Judges are administrative law appointees through the U.S. Department of Justice;
- Prosecutors are DHS attorneys under US Immigration & Customs Enforcement;
- Cleveland ICE district counsel currently has 7 active prosecuting attorneys and one supervising attorney

Immigration Court Backlog

- **Pending Cases FY 2017**
- **Entire US: 572,608**
- California 104,701 Texas 98,908
- New York 78,288 Florida 37,330
- Virginia 33,449 New Jersey 28,950
- Illinois 24,858 Maryland 19,972
- Georgia 17,157 Massachusetts 16,875
- Tennessee 13,392 Colorado 10,835
- Arizona 10,120 Pennsylvania 8,898

Immigration Court

What are removal proceedings?

- Court proceedings during which the Immigration Judge ("IJ") decides whether an individual will be able to remain lawfully in the US
- Civil rather than criminal proceedings
- No right to counsel at government expense
- Attorney for government prosecutes the case
- Initiated by the filing of a "Notice to Appear," which states charges against the individual

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: FILE # Fin No. AR
DOB: Event No: HRT

In the Matter of:

Respondent: currently residing at

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:
1. You are not a citizen or national of the United States;
2. You are a native of HONDURAS and a citizen of HONDURAS ;
3. You arrived in the United States at or near COLUMBUS, NEW MEXICO, on or about March 28, 2004;
4. You were not then admitted or paroled after inspection by an Officer of the Department of Homeland Security.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:
212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Secretary of the Department of Homeland Security.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
EXECUTIVE OFFICE OF IMMIGRATION REVIEW 8915 BENEDEN AVENUE EL PASO TEXAS 79922

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set at a time to be set to show why you should not be given permission or allowed to remain in the United States based on the charge(s) set forth above.
(Date) (Time)

(Signature and Title of Issuing Officer)

Date: October 12, 2005 Sierra Blanca, Texas

(City and State)

"*In absentia*" order of removal

Many aliens do not receive their Notice to Appear either because they gave an incorrect address to the ICE, or the ICE made a mistake when inputting the address, or the alien has since moved and NOT informed the ICE. If the alien fails to appear at the Individual hearing absent a compelling reason, the alien may be ordered removed in absentia.

Master hearings and individual hearings

- Master and initial hearings are set at the immigration court. A master hearing is similar to criminal court arraignment and plea;
- Individual hearing is similar to a trial. There is no jury. There is no appointed counsel

Merits or Individual Hearing

- May be by televideo from remote location
- Less formal than a civil hearing
- Rules of Evidence do not apply
- Evidence must be relevant, probative and fundamentally fair
- Hearsay is admissible
- Formal record made by digital recording controlled by the IJ
- IJ may question witnesses during direct and cross examination

Appeal to BIA

- Thirty days to appeal following the decision of the IJ. Must file with BIA in Falls Church, Virginia;
- Appeals from USCIS decision on family-based cases are also appealed to the BIA within 30 days of the decision;
- Appeals from USCIS decision in non-family based cases are appealed to Administrative Appeals Office within USCIS

Appeals to federal courts

- Following BIA decision, alien may appeal to the federal circuit if permitted under IIRIRA and the restrictive provisions of the REAL ID Act of 2005;
- May be removed from the United States pending appeal unless appeals court has stayed the alien's removal.

What is relief from removal?

An alien may have no basis for arguing that he or she is not removable (excludable or deportable) from the United States. That being the case, the alien may have some legal options to remain in the USA. Any such option is "relief from removal" and must be presented before the immigration court in order for the court to decide whether the alien qualifies for such relief or not.

Some Forms of Relief

- U.S. Citizenship
- Asylum, Withholding of removal and Convention Against Torture
- Cancellation of Removal for lawful permanent residents
- Cancellation of Removal for certain non-lawful permanent residents

U.S. Citizenship

- A person is a U.S. citizen if she is born in the United States, but not always simple to prove.
- A person may also be a U.S. citizen if she is born abroad to a U.S. citizen parent (depending on year of birth, length of residence of citizen parent in United States, legitimacy, etc.).
- A person may be a U.S. citizen if parent naturalized during person's childhood while person was "green card holder" (depending on year of birth and other factors).

Asylum

An individual may be granted asylum under INA 101(a)(42), 208 if s/he shows:

Past persecution or a well-founded fear of persecution by the government or a group the government is unable/unwilling to control on account of the individual's:

- Race
- Religion
- Nationality
- Membership in a particular social group
- Political opinion

Withholding of Removal

- Prevents removal to an individual's home country where the individuals has a clear probability of persecution by the government or a group the government is unable/unwilling to control, based on one of the 5 protected grounds (race, religion, nationality, social group, etc.)
- "More likely than not" that the individual's life or freedom is threatened (51% or more)
- Not discretionary like asylum

Convention Against Torture

- UN treaty obligation that prohibits the U.S. from removing an individual to a country if it is "more like than not" that the individual would be tortured by a public official or person acting in an official capacity
- Defined at 8 CFR 208.18(a)(1), 1208(a)(1)

Cancellation of Removal for LPRs

Eligibility:

- Lawfully admitted as permanent resident for at least 5 years
- Has resided continuously in the U.S. for at least seven years in lawful status
- Has not been convicted of aggravated felony
- Has not been previously granted cancellation of removal

Cancellation for non-LPRs ("10 year cancellation")

Eligibility:

- Ten years of continuous physical presence
- Have a U.S. citizen or lawful permanent resident spouse, child, or parent who would suffer 'exceptional and extremely unusual hardship' if the individual is removed from the United States
- Good moral character

Temporary Protected Status (TPS)

- The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately.
- USCIS may grant TPS to eligible nationals of certain countries (or parts of countries), who are already in the United States. Eligible individuals without nationality who last resided in the designated country may also be granted TPS.

Expedited Removal

- Created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, expedited removal allows the federal government to remove, or deport, an undocumented immigrant on an expedited basis.

Expedited Removal Cont'd.

- INA 235 (b)(1) authorizes the expedited removal of undocumented immigrants who enter without inspection and are not "physically present in the United States continuously for the 2-year period" immediately before contact with immigration authorities at the border or anywhere in the nation's interior.

Expedited Removal Cont'd.

- Individuals in expedited removal proceedings are not entitled to a hearing before an immigration judge or any review process.

Detention of aliens during course of proceedings

Aliens detained by ICE are set for hearings on an expedited track. Since there is an urgency to process detained cases as quickly as possible, this represents a substantial push or even a burden to attorneys to be able to interview their client, identify applicable grounds for relief and to identify and prepare witnesses in a very limited time.

Immigration Detention across U.S.

- Approximately 400,000 non-citizens are detained annually by Immigration and Customs Enforcement
- There are more than 250 detention facilities nationwide, including intergovernmental services agreement facilities, private contract facilities, and dedicated ICE processing centers.

Detention in Ohio

- IGSAs (Intergovernmental Service Agencies)
  - Butler County Jail (male): approx. 120
  - Seneca County Jail (male): approx. 100
  - Geauga County Jail (male and female): approx. 70
- Contract Detention Facility
  - Northeast Ohio Correctional Center (NEOCC)
  - Operated by Core Civic (formerly CCA)
    - Male only
    - Approx. 250

Questions / Comments?

Presenters:

Elizabeth M. Knowles, Esq.
Assistant Clinical Professor Of Law, Immigration & Human Rights Clinic, The University of Akron School of Law

(Office): (330)972-7898

and

Farhad Sethna, Esq.
Adjunct Professor of Immigration Law, The University of Akron School of Law

(Office): (330)384-8000

Your feedback will improve the quality of subsequent presentations! Please send your honest comments to:

fsethna@immigration-america.com

or

eknowles@uakron.edu