



## Chapter 10 - Immigration Consequences of Delinquency and Crimes

### **Disclaimer:**

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please be sure to consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator. When dealing with any client's criminal issue resulting from delinquency or adult court, you should seek the help of local experts on the immigration consequences of delinquency and crimes.

### **Why should I be concerned about my client's delinquency record?**

As a general principle, any criminal issue (criminal conduct, arrest, guilty plea, and/or conviction) can affect an individual's ability to obtain immigration benefits and avoid removal. Immigration law provides for certain grounds of inadmissibility at INA § 212 (8 U.S.C. § 1182) and certain grounds of deportability at INA § 237 (8 U.S.C. § 1227) that determine whether a person can gain or retain immigration status.<sup>1</sup> Among these grounds are criminal-related grounds. Most of these criminal grounds are triggered only by a conviction. Since dispositions of juvenile delinquency are not considered to be convictions under immigration law, regardless of the nature of the offense, they do not trigger these conviction-based grounds of inadmissibility or deportability.

This does not mean that there are no consequences to delinquency offenses. Despite the misperceptions of many youth, juvenile delinquency dispositions can often have a significant impact on a noncitizen youth since numerous crime-related grounds of inadmissibility and deportability can be triggered by conduct alone. Drug-related incidents are especially problematic.

Additionally, many forms of relief from deportation are discretionary. As such, even though they may not specifically trigger a statutory ground of inadmissibility or deportability, immigration judges or USCIS examiners may consider them as significant negative discretionary factors in any application for lawful status or other immigration benefit. Furthermore, although

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<sup>1</sup> INA § 212(a), INA § 237(a).  
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your client may not have been charged or adjudicated delinquent, virtually all immigration applications require disclosure of any criminal *activity* whatsoever.

As a general matter *any* contact with the police or law enforcement can significantly complicate your client's immigration case now or in the future. Some of the best advice you can give your client is to stay out of trouble!

## **What is a “conviction” for immigration law purposes?**

Under the INA, “conviction” is defined broadly enough to include some pleas and admissions of unlawful conduct. Specifically, a conviction includes:

“a formal judgment of guilt . . . entered by a court, or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury as 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
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.”<sup>2</sup>

## **Is a juvenile court disposition a conviction under immigration law?**

No. It is well established that adjudication in juvenile proceedings does not constitute a conviction for any immigration purpose, regardless of the nature of the offense. The Board of Immigration Appeals (BIA) has consistently held that “juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.”<sup>3</sup> Some but not all immigration criminal penalties require a conviction. For this reason, having a case handled in delinquency proceedings as opposed to adult criminal court is crucial to noncitizen children. Minors who are tried and convicted in adult court will generally be deemed to have convictions under immigration law, which may trigger the criminal grounds of inadmissibility or deportability and mandatory bars to immigration relief.

### **Child Practice Pointer:**

When determining whether an adjudication was made in delinquency proceedings, you should not go solely by the age of the child, but should check the record of proceedings. If the record of

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<sup>2</sup> INA §101(a)(48)(A), 8 USC § 1101(a)(48)(A).

<sup>3</sup> *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000)(*en banc*), citing *Matter of C.M.*, 5 I&N Dec. 27 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

proceedings indicates that proceedings were in juvenile court, you can be assured that there is no conviction.

### **What delinquency findings will trigger conduct-based grounds of inadmissibility and/or deportability?**

Although not a conviction, a delinquency disposition still can create problems for juvenile immigrants. Certain grounds of inadmissibility and deportability do not depend upon conviction; mere “bad acts” or status can trigger the penalty. The following are commonly applied conduct-based grounds and the juvenile court dispositions that might provide the government with evidence that the person comes within the ground. Each will be discussed in more detail below.

<b><u>Delinquency Disposition</u></b>	<b><u>Immigration Penalty</u></b>	<b><u>Immigration Waiver Available?</u></b>
Prostitution (being the prostitute, not the customer)	Inadmissible for engaging in prostitution	Waivers are often available
Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses	Inadmissible when DHS/ICE has “reason to believe” participation in drug trafficking	No waivers except for the S, T, or U visa.
Repeated drug findings, finding of abuse, addiction to drugs	Inadmissible and deportable for drug addict or abuser	Waivers often available
Suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (showing alcoholism)	Inadmissible for mental disability posing threat to self or others	Waivers may be available
Use of false documents and fraud offenses relating to false claim to citizenship	Inadmissible and deportable for false claim to U.S. citizenship	Waivers may be available, e.g., SIJS and U visa
Violations of protective or “no-	Deportable where court finds	Some waivers are

contact” orders designed to prevent repeated harassment, credible threats of violence, or bodily injury	violation of domestic violence protective order designed to prevent repeated harassment, credible threats of violence, or bodily injury	available
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Of these grounds, the most dangerous to a noncitizen child is the inadmissibility ground that is triggered merely if the government has “reason to believe” (RTB) that the young person is, has been, or has assisted, a drug trafficker. (See next section for in depth discussion about this ground and how to argue against it.) If the child is undocumented, becoming inadmissible for “reason to believe” can be a permanent bar to obtaining lawful status despite significant equities since there are generally no waivers available for this conduct-based ground of inadmissibility.

Other delinquency findings may be amenable to a discretionary waiver of inadmissibility or deportability, depending on the immigration context. For example, an applicant for special immigrant juvenile status may either be exempt from a ground of admissibility or apply for a discretionary waiver of inadmissibility under any of the conduct grounds except for RTB.

Delinquency findings of other activities not listed above such as violent offenses including serious assault or gang-related activity do not trigger automatic immigration bars to obtaining immigration status.<sup>4</sup> Such findings will be considered a negative factor in any discretionary decision, however. This is particularly true for allegations of gang-related activity since targeting noncitizen gangs is a high priority of DHS. Many juveniles have been subject to secure detention pending removal proceedings because of alleged gang activity and affiliations, and for violent offenses.

## **What strategies are available if my client has a criminal record?**

### **Sealing records and obtaining expungements**

DHS/ICE often uses FBI rap sheets as evidence to meet its burden of proof in establishing that a noncitizen is removable as charged (either under the grounds of inadmissibility or deportability) and ineligible for any immigration benefits that would permit the judge to grant relief from removal. Thus, one avenue to avoid this outcome is to get the juvenile record sealed with the relevant state entity (e.g., the juvenile court) where possible in order to prevent the juvenile delinquency findings from appearing on the FBI rap sheet. One problem is that a record in some cases may only be sealed once the minor turns 18; therefore, this will not protect the child if removal proceedings are initiated while still a juvenile. Additionally, even though a child may

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<sup>4</sup> Practitioners should be aware, however, that Congress in 2005 and 2006 actively tried to push gang legislation that would include immigration consequences for juvenile convictions involving gang related activity such as a violent or controlled substance felony. Check [www.ilrc.org](http://www.ilrc.org) and [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org) for updates.

still have to disclose the delinquency on her application for lawful status, sealing the record gives the child much more control over when and how to disclose the information.

Obtaining an expungement in the vast majority of cases does not eliminate the immigration consequences of delinquent or criminal conduct. The person must still disclose the offense in her application for lawful status. An expungement, however, is evidence of rehabilitation, which may convince the adjudicator to grant the application as a matter of discretion.

### **How do I obtain juvenile court records?**

In the case of juvenile offenses, certain records may be sealed, and obtaining them may be difficult. This may require going to court and obtaining a court order to obtain the file. If you run into trouble, you should consult with a criminal attorney who practices in the area or, if accessible, the attorney who represented the child in juvenile or criminal court (whether a private attorney or public defender). You will need a consent form signed by the child to obtain these records from the defender. For assistance in obtaining these records you can either contact your KIND pro bono coordinator or contact the juvenile defender in the area where the criminal offense occurred using the National Juvenile Defender Center (call (202) 452-0010 or go to <http://www.njdc.info/>).

### **How should I approach a case in which criminal issues are of concern?**

To analyze a criminal case, you must answer the following questions:

- What ground of inadmissibility or deportability is the client charged with or has to overcome to obtain an immigration benefit?
- Can the government establish that the client is inadmissible or deportable under the ground(s) charged?
- What potential relief is available?
- Is the child for the relief sought, or barred from relief for some reason?
- Can the child get rid of the conviction and clear up her record by expungement or other means? Will DHS accept this?

### **What are the grounds I should be most concerned about for my client?**

#### **Reason to believe the child engaged in or assisted in drug trafficking**

A noncitizen is inadmissible if immigration authorities have *probative* and *substantial* “reason to believe” that she ever has been or assisted a drug trafficker in trafficking activities. INA § 212(a)(2)(C).<sup>5</sup>

### **What are the penalties for reason to believe?**

While a conviction is not necessary, a delinquency adjudication or substantial underlying evidence showing a sale or a related drug trafficking offense will alert immigration officials and serve as a reason to believe. Because “reason to believe” does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports, or use a defendant’s out-of-court statements.

If the youth is undocumented, becoming inadmissible for “reason to believe” can be a permanent bar to obtaining lawful status despite significant equities, such as U.S. citizen family members, dependency determinations of abuse, abandonment, and/or neglect, or a strong claim of persecution that would otherwise qualify for a grant of asylum. Almost the only relief available to such a person would be an application for a U visa (victim/witness to a crime) or T visa (victim of human trafficking). This is a very serious ground that applies to juveniles as well as adults and cannot be waived in an application for SIJS status or any other application for lawful status (except for U visa or T visa applicants as discussed in other chapters).

If the child is a lawful permanent resident, the RTB inadmissibility ground cannot be used as a basis to deport/remove her unless she departs the United States and attempts to reenter, at which points she would be placed in removal proceedings.<sup>6</sup> Additionally, a finding of RTB will impact a permanent resident youth’s application for U.S. citizenship.

### **Are waivers available?**

The U and T visas are the very few forms of relief that waive this ground of inadmissibility. The U visa waiver is located at INA § 212(d)(14) and the T visa waiver is at INA § 212(d)(13). The U visa waiver allows this ground to be waived “if the Secretary of Homeland Security considers it to be in the public or national interest to do so.” The T visa provides a waiver by the Attorney General in his/her discretion provided that the particular inadmissibility ground to be waived was caused by or incident to the noncitizen’s victimization. For criminal activities not incident to the trafficking, the application will only be granted in “exceptional cases.” 8 CFR § 212.16(b)(2).

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<sup>5</sup> Additionally, this ground also applies to the spouse, son, or daughter of a drug trafficker if they received any “financial or other benefit” from the drug trafficking within the previous five years. INA § 212(a)(2)(C)(ii). An important distinction under immigration law is the difference between the statutory definition of a child (a person under 21) and the definition of a son or daughter (person over 21). The RTB family ground at INA § 212(a)(2)(C)(ii) will only apply to persons who received the benefit after reaching the age of 21. See INA § 101(b)(1).

<sup>6</sup> As such, noncitizen youth who are ever implicated in any way in a drug trafficking activity should never leave the United States unless they become U.S. citizens.

## Can I contest a “reason to believe” finding by DHS?

Yes. The standard of what constitutes a “reason to believe” is lower than that required for an admission to an offense. For instance, someone whom USCIS suspected of dealing drugs in the past, even as a juvenile and without a conviction, could be found inadmissible. USCIS, however, must have more than a mere suspicion—it must have “reasonable, substantial, and probative evidence” that the person engaged in drug trafficking.<sup>7</sup> This means that an arrest or charge of drug trafficking by itself should not suffice as substantial evidence to prove inadmissibility under “reason to believe.” The government must support the charge with other evidence such as a police report or other documentation of the drug trafficking, testimony from police, detectives, or other officers, or admissions from the person herself.<sup>8</sup>

The government must also present evidence that shows the applicant was *knowingly and consciously* connected to the drug trafficking in some way (e.g. aider, abettor, or beneficiary) in order to trigger this ground of inadmissibility.<sup>9</sup> They must prove the essential element of intent, which is the specific intent to distribute controlled substances.<sup>10</sup>

The government may argue that an arrest, admission, and/or adjudication in delinquency proceedings to sale or possession for sale will trigger this ground. The BIA and the Eleventh Circuit, for example, have held that the facts underlying drug trafficking offenses even if the

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<sup>7</sup> *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000). See also *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government’s knowledge or reasonable belief that an individual has trafficked in drugs must be based on “credible evidence”); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979).

<sup>8</sup> *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4<sup>th</sup> Cir. 2007)(unpublished)(holding that the drug sale charges for which the petitioner was acquitted were alone insufficient to constitute “reason to believe,” and that the “reason to believe” charge triggering inadmissibility must be based on facts underlying an arrest and those facts must be cited in support of the charge); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (finding sufficient reason to believe the alien had committed illegal acts underlying previous drug trafficking arrest because the government submitted documents describing the police surveillance of the person and the person’s subsequent attempt to escape with 147 pounds of marijuana); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003)(in addition to a previous arrest for drug trafficking, two undercover detectives testified that they had personally arranged drug deals with the petitioner); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979)(applicant admitted to participating in an attempt to smuggle a kilogram of marijuana into the United States); *Matter of Rico, supra* (BIA did not rest on evidence of arrest for drug trafficking, but on testimony of the Border Patrol Agent and the Customs Inspector that he frequently drove the car in which 162 pounds of marijuana was found, as well as testimony of special agents of the Drug Enforcement Administration in the investigation of the incident).

<sup>9</sup> INA § 212(a)(2)(C)(i), 8 USC § 1182(a)(2)(C)(i).

<sup>10</sup> See, e.g., *Matter of Rico, supra* at 186 (1977) (finding that the petitioner was a “knowing and conscious participant” in an attempt to smuggle drugs into the United States which “brings him within the provisions of section 212(a)(23) of the Act relating to ‘illicit trafficker’”); *Matter of Favela*, 16 I&N Dec. 753, 755 (1979) (upholding the IJ’s finding that the alien was a “conscious participant” in an attempt to smuggle drugs into the United States and thereby excludable under section 212(a)(23)).

offenses themselves no longer trigger immigration consequences, can be used to exclude a person under this ground.<sup>11</sup>

Drug trafficking charges and adjudications are taken seriously by USCIS and often lead to a denial of an immigration benefit and initiation of removal proceedings (if the client was not already in removal proceedings). As always, you should warn your client of the potential risks of applying for an immigration benefit if she is not already in removal proceedings. Nevertheless, you may be able to identify several reasons why the “reason to believe” ground should not apply to your juvenile client.

**Consider whether the conduct meets the definition of drug trafficking.** The U.S. Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006), held that “ordinarily [illicit] ‘trafficking’ means some sort of commercial dealing.” The BIA similarly defined trafficking as “the unlawful trading or dealing of any controlled substance” in *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992). The BIA has explained that the concept of “trafficking” includes, at its essence, a “business or merchant nature, the trading or dealing in goods.” Under the reason to believe standard, DHS must prove the specific intent to distribute a controlled substance.

Where possible, you may use the underlying facts of the case to show that the child did not knowingly and consciously possess drugs with the intent to deliver, distribute, or sell them. In other words, the child did not have the specific intent to sell and/or she did not participate in the drug trafficking. In a case in which the child asserts that she did not participate in the trafficking, credibility is an issue that can and should be addressed by the evidence.<sup>12</sup> If there is significant circumstantial evidence of the trafficking, however, the child might not be able to overcome this ground.<sup>13</sup>

If the child has a delinquency adjudication relating to drugs, make sure that the offense itself meets the definition of trafficking. Many state drug offenses, such as importation or transportation for personal use appear serious, but do not meet this definition. If a child has an arrest for drug trafficking, but pleads to a lesser drug offense that does not meet the definition, you may argue that the judicial proceedings themselves determined that your client did not engage in the activity. Other juvenile delinquency adjudications clearly do not meet the definition of trafficking: e.g., simple possession, under the influence, or possession of paraphernalia; accordingly, these do not necessarily give the government “reason to believe” the

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<sup>11</sup> See *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979) (juvenile convicted under the Federal Youth Corrections Act of a drug trafficking offense, after expungement rendered the conviction itself of no immigration consequence, could still be excluded under the “reason to believe” ground based on facts underlying the expunged conviction); *Castano v. INS*, 956 F.2d 236 (11<sup>th</sup> Cir. 1992)(facts underlying a drug trafficking conviction which had been expunged under the former Federal Youth Corrections Act could still be used to exclude the person under the “reason to believe” ground).

<sup>12</sup> See e.g., *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1052 (9<sup>th</sup> Cir. 2005).

<sup>13</sup> See e.g., *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9<sup>th</sup> Cir. 2004).

child has engaged in trafficking (unless it involved a suspiciously large amount). Also, some drug transactions may be so small that they arguably might not fit the definition of trafficking.<sup>14</sup>

**The evidence must show that the substance allegedly trafficked is prohibited under federal drug schedules.** For immigration purposes, a controlled substance is defined by federal drug schedules (lists of controlled substances) at 21 USC § 802. Often, state drug schedules are broader than the federal drug schedules and penalize offenses relating to drugs that would not be penalized under federal law. In *Matter of Paulus*, the BIA held that if the state definition of controlled substances is broader than the federal definition (as is the case under many state laws, the subject of *Paulus*) and if the substance is not specifically identified, the conviction is not necessarily of an offense “relating to” controlled substances under the federal definition, and therefore, is not a basis for deportability or inadmissibility.<sup>15</sup> Note that the government is not limited to only the official record of conviction under the reason to believe ground, and can consider other evidence. After looking closely at all the evidence, if the controlled substance is not identified in police reports or other reports, the government may not be able to establish reason to believe.

**Juvenile delinquency may be insufficient to trigger inadmissibility under the “reason to believe” standard.** Another line of argument reasons that any alleged trafficking activity suspected of a child cannot constitute “illicit trafficking,” since “illicit” means criminal and the child was not guilty of a crime, but an act of juvenile delinquency. See *Matter of MU*, 2 I&N Dec. 92 (BIA 1944).<sup>16</sup>

**The sale of drugs was committed under duress, making it involuntary.** The underlying facts of your client’s case may show that the child had no choice in selling drugs. One example would be an impoverished child living with an abusive parent who forced the child to deal drugs. Even though the child engaged in trafficking, a showing of duress or coercion may support a favorable decision, especially where other equities exist. You may find it useful to consult the Ninth Circuit’s opinion in *Lopez-Umanzor v. Gonzales*.<sup>17</sup> In that case, the petitioner was a longtime survivor of domestic violence who asserted that, contrary to police detectives’ testimony, she was not a participant in her abuser’s drug trafficking activities.

## What if my client is a drug abuser or addict?

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<sup>14</sup> *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9<sup>th</sup> Cir. 2003)(stating in dicta that a college student selling an ounce of marijuana to a roommate might not trigger the “reason to believe” ground of inadmissibility).

<sup>15</sup> *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9<sup>th</sup> Cir. 2007)(affirming rule in *Paulus* where it found that conviction of possessing a “controlled substance” as defined under Calif. H&S § 11377(a), where the reviewable record did not specify a substance, was not a basis for deportability as a federally defined drug conviction).

<sup>16</sup> Note that this argument is weakened by the fact that delinquency is not considered non-criminal for any purpose. Specifically, delinquency adjudications count towards a defendant’s criminal history under the United States Sentencing Guidelines. See USSG § 4A1.1(c).

<sup>17</sup> *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9<sup>th</sup> Cir. 2005).

Drug abuse and addiction are grounds of inadmissibility and deportability. A noncitizen is inadmissible if the drug addiction or abuse is current, and deportable if the addiction or abuse occurred at any time after admission into the United States, even if she has overcome the problem.<sup>18</sup> The issue of drug abuse and addiction generally arises during a child's medical examination, a requirement for applications for lawful status.

The standard for determining who is a drug abuser or addict for purposes of triggering deportation is not defined in INA § 237(a)(2)(B)(ii). However, it is likely that DHS will use the same standard as the drug abuser or addict health ground of inadmissibility in INA § 212(a)(1)(A)(iv). The inadmissibility statute delegates authority to the Secretary of Health and Human Services (HHS) to define drug addict or abuser.

### **What is the definition of drug abuse?**

The Centers for Disease Control and Prevention (CDC), has created a definition of drug abuse which can be found in its "Technical Instructions for Medical Examinations of Aliens," and 42 CFR §§ 34.2(g) and (h). The CDC has adopted a very strict test for "drug abuse." It states that *any* drug use that goes beyond mere "experimentation" with drugs is drug abuse. The example the CDC gave of experimentation was *taking an illegal drug one time*.

This regulation appears to define abuse as nearly synonymous with use. It is critical information for a noncitizen child who will take a government-ordered medical examination for immigration application purposes. Persons who must prove that they are not inadmissible based on a health ground (for example, SIJS applicants) generally are required to take a medical examination administered by an examining physician who has been certified to perform such tests. The U.S. Public Health Service issues regulations, adopted by the former INS,<sup>19</sup> as well as instructions to such doctors on how to evaluate applicants under the health inadmissibility grounds.

### **What is the definition of drug addiction?**

Drug addiction in the interim Public Health Service regulations is defined to include the non-medical use of a controlled substance, "which has resulted in physical or psychological dependence." A drug addict is defined under 42 USC § 201(k) as a person who has "lost the power of self control" over her addiction, or whose habitual drug use poses a threat to public morals, health, safety, or welfare. A "mere user" is not an addict,<sup>20</sup> but a finding of drug abuse carries separate immigration penalties as described above.

#### **Practice Pointer:**

<sup>18</sup> INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii) (inadmissibility ground); INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) (deportation ground).

<sup>19</sup> Public Health Service regulations are found at 42 CFR Part 34. The PHS regulations are adopted by INS pursuant to 8 CFR § 234.1.

<sup>20</sup> See *In re KCB*, 6 I&N Dec. 374 (BIA 1954)(holding that conviction for use or under the influence does not necessarily show addiction).

If you are representing a permanent resident facing removal for drug addiction or abuse, you should challenge either the regulation or a finding in the case. Noncitizens who contest removability can submit evidence from an independent physician on the issue of drug abuse or addiction.<sup>21</sup>

### **Can any drug abuse or addiction make my client inadmissible?**

No. In order to trigger inadmissibility, drug abuse or addiction must be “current.” “Current” is defined as drug abuse or addiction in the last three years for non-medical purposes. “Non-medical use” is “more than experimentation with the substance (e.g., a single use of marijuana or other non-prescribed psychoactive substances, such as amphetamines or barbiturates).”<sup>22</sup> Thus, a person who has not used drugs at all, or who has not engaged in “more than experimentation” with drugs for the last three years is not inadmissible as an abuser. The medical instructions state that “[w]hen a clinical question is raised as to whether the use was experimental or part of a pattern of abuse, a physician with experience in the medical evaluation of substance abusers should be consulted to assist in making this determination.”<sup>23</sup>

**NOTE:** Alcoholics are inadmissible under a separate ground for having a “physical or mental disorder” that can pose a threat to self or others. See discussion in the next section.

### **What if my client has a physical or mental disorder?**

Noncitizens are inadmissible:

- If they have a “physical or mental disorder and behavior associated with the disorder” that poses “a threat to the property, safety, or welfare of the noncitizen or others,” or
- If they had such a disorder and history of such dangerous behavior in the past, which is “likely to recur or to lead to other harmful behavior.”<sup>24</sup>

The determination of who comes within this definition will be made in accordance with regulations to be issued by the Department of Health and Human Services (HHS), which were not published at the time of this writing.

**Alcoholism** is identified as such a disorder. The “Technical Instructions for Medical Examinations of Aliens,” published online by the Centers for Disease Control and Prevention,<sup>25</sup>

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<sup>21</sup> See *Matter of FSC*, 8 I&N Dec. 108 (BIA 1958) (a noncitizen’s admission of addiction was held to be not sufficient when contradicted by two physician’s opinions and repudiated by the alien).

<sup>22</sup> Amendments to p. III-14, 15 of Technical Instructions for Medical Examination of Aliens.

<sup>23</sup> *Id.*

<sup>24</sup> INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii).

lists alcoholism as a disorder inherently posing a threat to the noncitizen or others. On July 7, 2007, the Department of State issued a cable to provide guidelines to consular officials in handling cases where the applicant's criminal record shows an arrest or conviction for drunk driving or other alcohol related offenses.<sup>26</sup> The cable provides that a record of alcohol abuse or drunk driving is insufficient to automatically find an applicant ineligible under the physical or mental disorder inadmissibility ground and requires a referral to a panel physician who must make certain findings to trigger inadmissibility. The cable provides the updated language for 9 FAM 40.11 N8.3, which states,

While alcoholism constitutes a medical condition, INA 212(a)(1)(A)(iii) does not refer explicitly to alcoholics or alcoholism. Evaluation for alcohol abuse or dependence is included in the evaluation for mental and physical disorders with associated harmful behavior. An alcoholic is not ineligible to receive a visa unless there is harmful behavior associated with the disorder that has posed, or is likely to pose, a threat to the property, safety, or welfare of the alien or others. To ensure proper evaluation, you must refer applicants to panel physicians when they have a single drunk driving arrest or conviction within the last three calendar years or two or more drunk driving arrests or convictions in any time period. You also must refer cases to a panel physician if there is any other evidence to suggest an alcohol problem.

It is unclear whether these instructions will apply for juvenile delinquency adjudications for driving under the influence since they are considered "convictions." You can argue that the cable only intended to use adult convictions as evidence of alcoholism. Nonetheless, under this new guideline, a noncitizen should not be found inadmissible for a record of drunk driving arrests, delinquency adjudications, or adult convictions unless a panel physician has made two findings: (1) that there is a diagnosis or mental disorder (alcohol abuse), and (2) current harmful behavior or a history of harmful behavior related to the disorder that is likely to recur in the future.

Other persons who might be charged under this ground include persons who are suicidal, psychopathic, or show a history of sexual predator crimes. Children with a series of sexual offenses on their juvenile record (arrests and adjudications) will likely trigger this ground. Children who only have a single adjudication for a sexual offense (especially against a minor) will have additional difficulties as a matter of discretion to obtain immigration relief such as SIJS. In these cases, you should gather as many equities in the case as possible.

## **Is a waiver available for physical and mental disorders?**

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<sup>25</sup> Go to <http://www.cdc.gov/ncidod/dq/technica.htm>; or go to [www.cdc.gov](http://www.cdc.gov) and use the search function for "technical instructions aliens."

<sup>26</sup> This cable can be obtained at [http://travel.state.gov/visa/laws/telegrams/telegrams\\_3267.html](http://travel.state.gov/visa/laws/telegrams/telegrams_3267.html) or in *Interpreter Releases*, 84 No. 27 Interrel 1610 (July 16, 2007).

Yes. A waiver is available for most of the conduct or conditions related to this ground at INA § 212(g). Note, however, that INA § 212(g) does not waive all parts of the health-related grounds of inadmissibility. Specifically, there is no waiver for an alien inadmissible as a drug abuser or addict. For additional information on filing for a § 212(g) waiver, consult the regulations at 8 CFR § 212.7(b).

### **Practice Pointer:**

Expert statements by medical or mental health professionals regarding current and potential danger should be used as where appropriate in order to provide a statement that the child is not an alcoholic or sexual predator. Since this is a health-related ground of inadmissibility, government-appointed doctors may make the evaluation of the child's condition. For example, a child applying for SIJS will have a medical examination with a DHS-approved doctor, who will make a determination.

### **What about prostitution?**

A noncitizen is inadmissible, but not deportable, if she comes to the United States to engage in prostitution or has “engaged in prostitution” within the last ten years. INA § 212(a)(2)(D)(i). While no conviction is required for this finding, one or more delinquency adjudications for prostitution will serve as evidence. This includes prostitutes and people who work with them in the business, but not customers. *Matter of R.M.*, 7 I&N Dec. 392 (BIA 1957). This provision will apply even if the person engaged in prostitution in a country where it is legal. 22 CFR § 40.24(c).

A single act of prostitution does not amount to engaging in prostitution under this provision. *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008); *Matter of T-*, 6 I&N Dec. 474 (BIA 1955). Rather, “prostitution” is defined as engaging in a pattern or practice of sexual intercourse for financial or other material gain.<sup>27</sup> Engaging in prostitution also does not encompass sexual conduct that falls short of intercourse.<sup>28</sup>

**NOTE:** A minor involved in a commercial sex trafficking act may be eligible for a T visa as a minor can't consent to commercial sex.

A noncitizen is also inadmissible, but not deportable, if she attempts to procure or import prostitutes, or receive the proceeds of prostitution. INA § 212(a)(2)(D)(ii). Solicitation of a prostitute by a customer does not fall within a ground of inadmissibility for procuring a

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<sup>27</sup> *Matter of Gonzalez-Zoquiapan*, *supra*. See also State Department regulations at 22 CFR § 40.24(b) which defines prostitution as “engaging in promiscuous sexual intercourse for hire . . . that must be based on elements of continuity and regularity, indicating a pattern of behavior of deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts.”

<sup>28</sup> *Matter of Gonzalez-Zoquiapan*, *supra*. See also *Kepilino v. Gonzales*, 454 F.3d 1057 (9<sup>th</sup> Cir. 2006)(holding that prostitution for immigration purposes only encompasses offering sexual intercourse for a fee, as opposed to other sexual conduct).

prostitute. This ground only applies to persons who engage in the business of obtaining prostitutes for use by others, not to isolated incidents of people hiring a prostitute. *Matter of Gonzalez-Zoquiapan, supra*.

## **What if my client has a finding of a violation of a domestic violence protective order?**

Under INA § 237(a)(2)(B)(ii), any noncitizen who violates a court ordered protective order designed to protect someone against threats of violence, repeated harassment, or bodily injury is deportable, but not inadmissible. A protective order under this ground is defined as “any injunction<sup>29</sup> issued for the purpose of preventing violent or threatening acts of domestic violence.” Therefore, if you are representing a child who has a protective order issued against her, the government will have to prove, by clear and convincing evidence, first that the protective order was a domestic violence protective order, and secondly that it was violated.

**Example:** Edward got into a fight with his girlfriend Sally’s brother, Mike. Edward is a much larger and stronger man than Mike. Mike is afraid of him, so he got a court to issue an injunction against Edward. Edward goes to Sally’s house a week later to pick her up for a date and Mike is there. Mike calls the police and Edward is arrested.

Is Edward deportable for violating a protection order under INA § 237(a)(2)(B)(ii)? No. First of all, the protective order is for Mike, not Mike’s sister, and is therefore not a domestic violence protective order. Secondly, it’s not clear that Edward violated the order if he did not have any reason to believe that Mike would be at Sally’s house when he came to pick her up (we don’t know in this example if a court found that Edward violated the protective order).

It is arguable that a noncitizen is deportable only if a state court determines that she has violated “*the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.*” A noncitizen who is found to have violated a different portion of the protection order, not related to the designated acts, is arguably not deportable. In a 2008 Ninth Circuit court case, however, the court held that where a protection order can be issued only upon a showing of reasonable proof of a past act of abuse, any violation of such protection order will trigger removal, even if the act that violates the protection order is not itself a domestic violence offense.<sup>30</sup>

This ground of deportability can only be triggered by an act that takes place *after admission*. However, note that this ground *does not require a conviction*, though a court would have to make a finding that the protective order in question had in fact been violated.

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<sup>29</sup> For example, a temporary restraining order or TRO.

<sup>30</sup> *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008).

## **Making a false claim to U.S. citizenship**

A person who falsely represents, or has falsely represented, herself to be a U.S. citizen for any purpose or benefit under the INA or any other federal or state law is inadmissible and deportable. INA § 212(a)(6)(C) and INA § 237(a)(3)(D). The language in these two provisions of the law is identical. These provisions only apply to false claims of U.S. citizenship made on or after September 30, 1996.<sup>31</sup> No conviction is required.

These provisions punish people for claiming U.S. citizenship for entry into the United States, and any other purpose under any federal or state law. Thus, in theory, DHS could apply these provisions to someone who is under age and uses the U.S. passport of an older friend to get into a bar and have a drink, someone who votes in an election not realizing that she's not permitted to vote, or even someone who came to the United States as a baby and believes herself to be a U.S. citizen. Although this does not appear to be the current practice, you should be wary and counsel clients to exercise caution.

## **What constitutes a false claim to citizenship?**

By its plain language, the false claim to U.S. citizenship ground enacted in 1996 requires a showing that the false representation was made for a specific purpose—to satisfy a legal requirement or obtain a benefit that would not be available to a noncitizen under the INA or any other state or federal law. This requirement also suggests that the individual must have knowledge that the representation is false. However, the Fifth Circuit held that a false claim to citizenship under the INA does not require the same level of intent as the federal crime of false claim to citizenship under 18 USC § 911, which expressly requires a willful misrepresentation.<sup>32</sup>

According to several circuit courts and a 1998 INS memorandum, the person to whom the false claim to citizenship is made does not have to be a U.S. government official, but can be any private individual.<sup>33</sup> The example provided is a private employer who receives a Form I-9 (Employment Eligibility Verification).

Courts have found the following acts to constitute false claims to U.S. citizenship:

- Falsely representing oneself as a U.S. citizen to obtain a U.S. passport.<sup>34</sup>
- Using a false U.S. passport to enter the United States.<sup>35</sup>

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<sup>31</sup> IIRIRA § 344(a).

<sup>32</sup> *Theodros v. Gonzales*, 490 F.3d 396, 402 (5<sup>th</sup> Cir. 2007).

<sup>33</sup> *Theodros*, *supra*. See also *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8<sup>th</sup> Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10<sup>th</sup> Cir. 2007); and *INS Memorandum regarding Section 212(a)(6)(C)(ii) Relating to False Claims to U.S. Citizenship*, April 6, 1998.

<sup>34</sup> *Jackson-Omier v. Gonzales*, 246 Fed. Appx. 1 (1<sup>st</sup> Cir. 2007)(unpublished); *Suarez v. Attorney General*, 2008 U.S. App. Lexis 24013 (3d Cir. 2008)(unpublished).

<sup>35</sup> *Almendarez v. Mukasey*, 282 Fed. Appx. 326 (5<sup>th</sup> Cir. 2008)(unpublished).

- Using a false U.S. passport to obtain a state driver’s license.<sup>36</sup>
- Claiming U.S. citizenship on a job application for private employment,<sup>37</sup> and
- Submitting fraudulent identification, e.g., social security card or driver’s license, with an I-9 form to obtain employment.<sup>38</sup>

Some other examples of false claims to citizenship that the government may also charge include: oral statements made in response to questioning by an officer to obtain a benefit such as entry into the United States, a signature on a voter registration card that specifically asked the question “Are you a U.S. citizen?,” false declarations of citizenship to obtain a credit card, bank financing, a mortgage, student financial aid, or health insurance, and any other declaration under oath or penalty of perjury, in writing or orally, that the noncitizen was a U.S. citizen in order to obtain a benefit under the INA or other state or federal laws.

**Example:** Martha claimed U.S. citizenship so that she could get in-state tuition at her state university. DHS could assert that she is inadmissible for a false claim to citizenship. If she made this claim before September 30, 1996 she would not fall within INA § 212(a)(6)(C)(ii).

**Example:** Silvia always thought she was a U.S. citizen, until she finally learned she had been born in Mexico. Practitioners should argue that she is not inadmissible for any false claims to citizenship that she made because she did not know they were false.

**Example:** Joaquin intentionally represented himself as a U.S. citizen at the border in San Diego on January 12, 2000 in order to gain admission to the United States. Because he willfully misrepresented a material fact to a government official in order to gain a benefit under the INA and it took place after September 30, 1996, he is inadmissible for a false claim to U.S. citizenship under § 212(a)(6)(C)(ii), as well as misrepresentation of a material fact under INA § 212(a)(6)(C)(i).

## **What if my client’s parent made the false claim of citizenship?**

A false claim to U.S. citizenship does not apply if someone else made the false claim on behalf of the applicant, such as a parent making the claim for a child.<sup>39</sup>

## **Can children make false claims of citizenship?**

<sup>36</sup> *Lara-Rivas v. Mukasey*, 270 Fed. Appx. 526 (9<sup>th</sup> Cir. 2008)(unpublished).

<sup>37</sup> *Theodros, supra*.

<sup>38</sup> *Kirong v. Mukasey*, 529 F.3d 800 (8<sup>th</sup> Cir. 2008) and *Rodriguez, supra*.

<sup>39</sup> Cable, Albright, Sec. of State, DOS-17342, 96 Stat. 239978 (Sept. 17, 1997) *reprinted in 74 Interpreter Releases*, p. 1483-85 (Sept. 29, 1997).

Some consulates have made exceptions for children, though recently they have been backtracking from that position,<sup>40</sup> and some advocates are arguing that minors lack the legal capacity to make false claims to U.S. citizenship.<sup>41</sup>

### **Are there any exceptions to making false claims of citizenship?**

There is a narrow exception to both the inadmissibility and deportability provisions. The person must meet the following requirements to not be inadmissible or deportable for a false claim to citizenship (INA § 212(a)(6)(C)(ii)(II) and INA § 237(a)(3)(D)(ii):

- Each natural or adoptive parent of the person is or was a citizen.
- Person began to reside permanently in the U.S. before the age of 16.
- Person reasonably believed at the time of such statement, violation, or claim that she was a citizen of the United States.

### **Child Practice Pointer:**

This exception does not apply to children of lawful permanent residents or undocumented immigrants, or children with only one U.S. citizen parent, even if they really believed themselves to be U.S. citizens.

### **Is a waiver available?**

It depends. These provisions are harsh, both because they are broadly written and because generally there are no waivers. For children seeking legal status, however, these provisions do not apply in many different applications for benefits. There is an exemption for Special Immigrant Juvenile Status applicants<sup>42</sup> and a waiver is for U and T visas. In addition, a false claim to U.S. citizenship is not a bar to asylum and restriction on removal. You should look closely at the benefits the child is applying for to see if the false claim to citizenship ground applies. In any application, it will be considered as a matter of discretion.

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<sup>40</sup> For example, in 2007 the U.S. Consulate in Ciudad Juarez, Mexico had a policy that, if a child is age 15 or younger, the child would not be considered to have the mental capacity to have made the false claim, and thus would not be found inadmissible. However, that policy seems to have been revoked, according to reports by practitioners.

<sup>41</sup> In an unpublished decision, an immigration judge held that a 16-year-old minor unaccompanied by her parents who presented her U.S. citizen sister's birth certificate to inspectors at the border, but then later revealed her actual identity and status, lacked the capacity to make false claims or misrepresentations. To see all the individual arguments she raised, read "Children Lack Capacity to Make False Claims or Misrepresentations, IJ Holds" in 83 *Interpreter Releases*, 775-776 (April 24, 2006).

<sup>42</sup> The Trafficking Victims Protection Reauthorization Act of 2008 provides an automatic exception to inadmissibility for special immigrant juvenile applicants of the false claim to citizenship ground of inadmissibility. [www.supportkind.org](http://www.supportkind.org)

## What if my client admits to having committed certain conduct as a minor?

Under the INA, a noncitizen who pleads or formally admits all of the elements of a controlled substance crime or a crime involving moral turpitude can be found inadmissible.<sup>43</sup> Furthermore, inadmissibility applies if the noncitizen admitted to the essential elements of either of these types of crimes. An admission occurs when: (1) the conduct in question involves a crime, (2) the government provides a plain language description of the crime, and (3) the admission is voluntary.

**These provisions, however, do not apply to minors or adults who merely admit to committing acts of juvenile delinquency.** The Board of Immigration Appeals held that an admission made by a minor or adult about such an offense committed when the person was a minor does not trigger inadmissibility under these grounds because the admission is of committing juvenile delinquency, not a controlled substance or moral turpitude “crime.”<sup>44</sup> This is in keeping with consistent holdings of the BIA “that acts of juvenile delinquency are not crimes ... for immigration purposes.”<sup>45</sup>

### **Practice Pointer:**

#### **Answering criminal questions on the I-485**

There are three pertinent questions on the I-485, adjustment of status application, relating to crimes.

*Have you ever, in or outside of the U.S., knowingly committed any crime involving moral turpitude or a drug-related offense for which you have not been arrested?* While there is no case law on point, if the juvenile has only a record of delinquency, there is a strong argument that the answer to this question is no because it applies to crimes, and the BIA has held that acts of delinquency are not crimes.

*Have you ever, in or outside of the U.S., been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance excluding traffic violations?* If your client has ever been arrested, even as a minor and even if the case was dismissed, she must answer yes to this question.

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<sup>43</sup> INA § 212(a)(2)(A)(i), 8 USC § 1182(a)(2)(A)(i).

<sup>44</sup> *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility); but see *United States v. Gutierrez-Alba*, 128 F.3d 1324 (9<sup>th</sup> Cir. 1997) (without discussion of issue of juvenile delinquency, juvenile’s guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant’s minority status).

<sup>45</sup> *Matter of Devison*, Int. Dec. 3435 (BIA 2000)(*en banc*), citing *Matter of C.M.*, 5 I&N Dec. 327 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

*Have you ever illicitly trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance?* There are several arguments, e.g., the underlying offense did not meet the definition of drug trafficking, which would allow you to answer no to this question if applicable. You need to weigh the strength of your argument against the need to disclose all of the relevant evidence in the application because the issue may come up during the interview based on evidence in the officer's possession. It would also be wise to learn about local practices in your jurisdiction on this issue.

## **What are the other potential consequences of juvenile dispositions?**

### **Certain juvenile dispositions can bar family unity**

In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, 1996 legislation barred family unity benefits to persons who “commit an act of juvenile delinquency, which if committed by an adult” would be a felony involving violence or the threat of physical force against another person.<sup>46</sup> Although the statute does not require that a juvenile court have found that the person committed such an act, you should argue this. “Family unity” is a benefit for relatives of participants in the amnesty programs of the late 1980s, which currently affect few persons. The rule applies to family unity benefits “granted or extended” after September 30, 1996.<sup>47</sup>

### **Certain juvenile dispositions can bar a U.S. Citizen or LPR from petitioning a family member**

Effective July 27, 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 to prevent both U.S. citizens and lawful permanent residents convicted of certain crimes against minors from filing family-based petitions, unless they qualify for a narrow exception. If they are denied this narrow exception, there is no judicial review of this denial. These offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct. Certain serious juvenile delinquency dispositions also will be considered “convictions” for this purpose.

Whereas under the Immigration and Nationality Act, juvenile adjudications do not count as convictions for immigration purposes, section 111(a) of Adam Walsh includes juvenile delinquency adjudications as convictions if two criteria are met: (1) the offender is 14 years or older at the time of the offense, and (2) the offense was the same as or more severe than aggravated sexual abuse described in 18 USC § 2241 or was an attempt or conspiracy to commit such an offense. 18 USC § 2241 criminalizes someone who crosses a state border to engage in a sexual act with a child under the age of 12 or someone who knowingly engages in sexual

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<sup>46</sup> IIRIRA § 383 amended the Immigration Act of 1990 § 301(e)(3) to bar from family unity a person who “(3) has committed an act of juvenile delinquency which if committed by an adult would be classified (A) a felony crime of violence that has as an element the use or attempted use of physical force against another individual, or (B) a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense.”

<sup>47</sup> IIRIRA § 383.

conduct with a child between the ages of 12 and 15 by using force or threatening the child with serious bodily harm.

The only exception to this entire provision is if the Secretary of Homeland Security decides in her “sole and unreviewable” discretion that the citizen or permanent resident petitioner poses no risk to the relative.

## **What if my child client is tried as an adult?**

Minors who are tried as adults and those who have just become adults and enter the adult criminal justice system face devastating immigration consequences if a conviction results. Even minor non-violent offenses such as theft can have serious consequences. In fact, the Department of Homeland Security prioritizes immigration enforcement against people who have had contact with the criminal justice system. If your client has an immigration application pending, this can result in its denial based on statutory ineligibility or as a matter of discretion. If the person is not already in removal proceedings, it can also lead to removal being initiated.

The intersection between criminal law and immigration law is extremely complex and constantly changing. For one thing, Congress, the Board of Immigration Appeals, and the circuit courts of appeals frequently make significant changes in the law and/or decide new interpretations of the law. In addition, each state has its own criminal laws; therefore an individual analysis of how federal law applies to state criminal laws must be conducted. Because this area is so complicated, an in depth discussion is beyond the scope of this chapter.

### **Child Practice Pointer:**

A child who has a criminal offense adjudicated in juvenile court does NOT have a conviction on her record. This will only be considered a delinquency adjudication. This is an important distinction because the immigration consequences analysis for delinquency differs significantly from the consequences of a criminal conviction resulting from adult court.

## **What strategies should I employ when working with my child client?**

### **Warn your client to stay out of trouble**

Due to the serious immigration consequences of crimes, it is essential to counsel young clients to stay out of trouble now and in the future. That is, while the application for relief is pending, as well as after the relief has been granted. For example, if your client’s application for relief is pending, a criminal arrest or conviction may result in a longer application process as well as a denial of the application and removal from the United States. Also, if your client wins a form of relief, a criminal arrest or conviction may have an impact on her current status, eligibility to travel abroad, become a citizen, or even stay in the United States. For example, if your client is granted asylum and she is subsequently convicted of certain crimes as an asylee, she may not be eligible to adjust to lawful permanent residence (LPR), and later obtain citizenship. In addition, certain offenses may make it possible for DHS to terminate your client’s status as an asylee and

seek her deportation. Lastly, even if your client is or becomes an LPR, she can still be deemed inadmissible or deportable for certain offenses. In fact, many LPRs who do not become citizens and are subsequently convicted of crimes that make them deportable are subject to detention and deportation. If they are deported, many are permanently barred from ever coming back to the United States.

For all of these reasons, it is important to caution your client to stay out of trouble, and to provide her with basic information about the possible risks and consequences of committing a crime – even if she already has legal permanent residency.<sup>48</sup>

### **Mitigate the consequences of the criminal case**

If your client is arrested while an application is pending or just before you file for an immigration benefit, it is imperative that you be in touch with your client’s criminal defense attorney to mitigate the immigration consequences of the case. Many criminal attorneys are unaware of the immigration consequences of criminal convictions and could advise your client to do something that will make her deportable or inadmissible. You need to advise the attorney that immigration concerns are a priority. There are many resources to assist defenders in obtaining an immigration safe plea.

In addition, should you become involved in a case after a disposition in your client’s criminal case, it may not be too late to withdraw the plea, appeal, vacate, or expunge the disposition. In fact, it is essential that you pursue these remedies as soon as possible because there are often strict statutes of limitations as to when you can file these motions in state court. A conviction that a trial or appeals court vacates because it was legally defective is not a conviction for immigration purposes.<sup>49</sup> Post-conviction relief can be a complicated matter that you may or may not consider pursuing depending on how the conviction will affect your client’s immigration case, but these alternatives should be kept in mind.

### **Child Practice Pointer:**

If your client is facing charges in juvenile court it is imperative that you work with criminal defense counsel to avoid transfer of the case to adult court even if the potential charges and sentence are lesser in adult court. If the transfer to adult court absolutely cannot be avoided, defense counsel should arrange for an adult conviction of an offense for which the juvenile *could not have been* transferred to adult court under the Federal Juvenile Delinquency Act, so that you at least can argue that this disposition does not constitute a “conviction” for immigration purposes. See *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

### **Gather the facts of an existing adult criminal case to analyze the consequences**

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<sup>48</sup> A know your rights and responsibilities guide for immigrant youth entitled *Living in the United States: A Guide for Immigrant Youth* in English, Spanish, and Korean can be found at

[http://www.ilrc.org/immigration\\_law/remedies\\_for\\_immigrant\\_children\\_and\\_youth.php](http://www.ilrc.org/immigration_law/remedies_for_immigrant_children_and_youth.php)

<sup>49</sup> *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970).

If there is *any* chance that your client has been arrested or convicted of a crime as an adult, you must find out all the facts in order for an expert to assist you in analyzing the potential consequences of the case. Don't rely on the client's memory. Often those who go through the criminal justice system do not understand or are not told what has happened, particularly children. They do not recall or never understood whether they were convicted, of what crime they were convicted, whether or how they pled, and the length of their sentence. Also, many people are embarrassed about criminal problems and may understate what really happened.

### **How can I get the facts about my client's criminal history?**

To properly analyze the case and determine whether your client is removable as charged or ineligible for an immigration benefit, you need to see the client's official criminal records. Generally DHS will have the person's complete criminal record. DHS will obtain this record by sending the person's fingerprints to the FBI. You need to have at least as much information as DHS in order to prepare a defense.

Three records are most important:

1. *Get a copy of the FBI rap sheet for yourself.* Then you will know what DHS sees. The rap sheet is often inaccurate and incomplete. For example, it may not include every offense your client has committed, but it is a helpful cross-reference to be certain there are not additional offenses of which you are not aware. See instructions on FBI fingerprint charts, below.
2. *Client's State Rap Sheet.* Each state has a different procedure to obtain criminal records. You need state rap sheets because FBI reports are often wrong or do not contain enough detail. This document will ensure that you get your client's entire criminal record in a particular state.
3. *Get a complete copy of the record from the court where the client was convicted.* You may have to call the court clerk first to get the requirements. In many states, superior courts handle felonies and municipal courts handle misdemeanors. Many courts allow you to retrieve adult criminal records so long as you have the individual's name and date of birth. If the child or a family member lives near the court, you could also give the child or family member a letter signed by the child requesting the entire file and ask the child or family to get the file. The record will help to determine the immigration consequences of the conviction(s). In addition, if you or another attorney are going to try to clear up the criminal record, you will need a copy of the court papers.

### **FOIA requests**

In addition, you can conduct a Freedom of Information Act (FOIA) request to obtain your client's complete immigration file, which will often contain the FBI "rap sheet." It is wise to submit a FOIA request as soon as you begin working with a client, form G-639. Fast-track

processing is available in certain cases and should be utilized if at all possible (otherwise, your request may take many months or years to process).

### **How do I request a copy of the FBI record on my client?**

To get your own copy of the child's criminal record, send a cover letter which includes a release from the child, a completed FD-258 fingerprint form,<sup>50</sup> and the correct fee payment in the form of a certified check (no personal checks) or money order made out to the Treasury of the United States, or pay by credit card (fill out the credit card payment form) to FBI CJIS Division: Record Request, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.<sup>51</sup> There is a space on form FD-258 to indicate the reason for requesting the record. In this space the applicant should write something like "record check" but should not use the word "immigration." You should expect that upon receipt by the FBI it will take 8 to 10 weeks to process the request.

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<sup>50</sup> The FD-258 is the fingerprint card that applicants formerly submitted to DHS prior to the institution of the Application Support Centers.

<sup>51</sup> To check for a sample request and updates in instructions, go to [www.fbi.gov](http://www.fbi.gov) and search for "FBI Identification Record Request."