

FILE

Immigration Consequences of Drug Offenses: Handout

Introduction -- Immigration Consequences of Drug Offenses

- Drug offenses have some of the most serious and unforgiving immigration consequences.
- Consequences include: deportation (sometimes mandatory), mandatory detention, ineligibility to get lawful residency, loss of asylum or ability to get asylum, and temporary or permanent bar to citizenship and stiff federal sentences upon illegal reentry (See Chapter 3 of DIP's *Representing Noncitizen Criminal Defendants: A National Guide* for more information.)
- Defense attorneys can use a number of strategies to prevent these consequences or at least give their clients a fighting chance in immigration court. (See Chapter 5 of DIP's *Representing Noncitizen Criminal Defendants: A National Guide* for more information.)

A. Lawful Permanent Resident Clients

Lawful permanent resident clients are primarily concerned about avoiding deportability

Drug-related Grounds of Deportability

Consider:

- Is it a controlled substance offense?
- Is it a drug trafficking aggravated felony?

B. General Drug Deportability INA § 237(a)(2)(B)(i); 8 USC 1227(a)(2)(B)(i)

Elements of general ground of drug deportability

- Noncitizen
- After admission
- Is convicted of
- Violation of (or conspiracy or attempt to violate) law
- Relating to controlled substance as defined in 21 USC § 802
- Not single offense of possession for personal use of 30 grams or less of marijuana

"Controlled Substance" Element

- 21 USC § 802 says that "controlled substance" means "a drug or other

substance, or immediate precursor, included in schedule I, II, III, IV, or V" of the federal Controlled Substances Act.

-- The government has the burden to prove that the substance involved is included in 21 USC 802. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

Conviction of Federally Covered Drug

- Controlled Substance Offense
- Deportable!

Possession Only Conviction

- Controlled Substance Offense
- Deportable!

Possession With Intent to Sell Conviction

- Controlled Substance Offense
- Deportable!

Sale or Distribution Conviction

- Controlled Substance Offense
- Deportable!

Marijuana Possession Conviction

- Deportable!
- BUT – simple possession + 30 grams or less + Personal use + One time is an exception to Controlled Substance Ground, and LPR will not be deportable for only this conviction.
- LPR may still be inadmissible when returning from trip abroad

Paraphernalia Conviction

- Controlled Substance Offense
- Deportable!
- Possession of Paraphernalia is an offense "relating to a controlled substance." *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000).
- BUT - single conviction of paraphernalia relating to simple possession of 30g or less of marijuana falls under exception to deportability

Conviction for drug that is not covered under federal law

- Not Controlled Substance Offense
- Not Deportable!

Exercise

The following acts are hereby prohibited:

- (i) the possession of a small amount of marihuana only for personal use;
 - (ii) the possession of a small amount of marihuana with the intent to distribute it but not to sell it; or
 - (iii) the distribution of a small amount of marihuana but not for sale.
- For purposes of this subsection, thirty (30) grams of marihuana or eight (8) grams of hashish shall be considered a small amount of marihuana.

Does a conviction under this statute make your LPR client deportable?

**C. Drug Trafficking Aggravated Felony Mandatory Deportability
INA § 101(a)(43(B); 8 USC 1101(a)(43(B))**

Elements of drug trafficking aggravated felony ground of deportation

- Noncitizen
- After admission
- Is convicted of
- "Any illicit trafficking
- In a controlled substance (as defined in section 102 of the Controlled Substances Act),
- ***including*** any drug trafficking crime (as defined in section 924(c) of title 18, United States Code)"

"Drug Trafficking Crime"

18 U.S.C. 924(c) states: "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act ... the Controlled Substances Import and Export Act ... or the Maritime Drug Law Enforcement Act"

Drug Trafficking AF:

"Felony" *Lopez Rule*

--A state drug offense is properly deemed a 'felony' within the meaning of 18 USC § 924(c)(2) only if it would be punishable as a felony under federal law.

-- So, a state drug conviction is not an AF simply because it is labeled a felony by the state

-- *Lopez v. Gonzales*, 549 U.S. 47 (2006)

Drug Trafficking AF: The Key Question

Is the state offense punishable as a misdemeanor or felony *under federal law*?

--Federal law generally punishes first-time simple possession as a misdemeanor.

-- Exception: possession of flunitrazepam is a federal felony

-- Federal law allows recidivist possession to be penalized as a felony, with

notice and process requirements

-- Federal law punishes *most* manufacturing, distribution, and possession with intent to do so as felonies

Federal felony drug conviction

- Aggravated Felony
- Deportable – Probably Mandatory!

State drug conviction for offense that federal law punishes as a felony

- Aggravated Felony
- Deportable – Probably Mandatory!

Simple possession – first conviction

- Not Aggravated Felony (unless flunitrazepam)
- But still Controlled Substance Offense, Deportable

Simple possession – second or subsequent conviction

- No finding of prior drug conviction/recidivism: Not Aggravated Felony
- Prior at issue in subsequent case, finding of recidivism: May be Aggravated Felony (prior must be final, courts considering whether/what type of notice and process requirements must be met)

Drug Sale

- Aggravated Felony
- Deportable – Probably Mandatory!

Offer to sell

Possible Aggravated Felony safer haven

- Does ROC establish actual sale?
- Burden of proof unresolved
- Safer in some Circuits
- But still Controlled Substance Offense = Deportable!

Gratuitous distribution of small amount of marijuana

Possible Aggravated Felony safer haven

- Definition of “small amount” is unresolved
- Burden of establishing exception unresolved
- Safer in some Circuits
- But still Controlled Substance Offense = Deportable!

Review: Possible Drug AF Safer havens

- Type of drug is not in the record
- Sale, manufacturing or distribution not in record
- Possession case and prior not at issue

- Offer to sell only
- Gratuitous marijuana distribution (small amount)
- But remember to analyze whether it's still a controlled substance offense!

Exercise

The following acts are prohibited:

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board.

Will a conviction under this statute make your LPR client deportable under controlled substance ground?

Will a conviction under this statute make your LPR client deportable/ineligible for relief under AF ground?

Exercise

Same LPR client

Charge: Possession with intent to deliver

Statute doesn't cover small amount of marijuana

Strategies?

D. Strategies to Counter Drug Deportability

Avoid "controlled substance offense" deportability:

- Avoid any drug-related conviction.
- Specify a substance that is not covered under 21 U.S.C. 802. If impossible, then keep record clear of substance involved (if your state punishes non-CSA drugs. Compare).
- If cannot avoid drug conviction in marijuana case and client has no prior drug convictions, take a possession for personal use of 30 grams or less of marijuana (preferably on record, else leave record ambiguous).
- See Chapter 5 of DIP's *Representing Noncitizen Criminal Defendants: A National Guide* for more information.

If cannot avoid CSO, avoid drug aggravated felony (to possibly preserve relief):

- Plead/limit record to simple possession (except flunitrazepam) instead of distribution/intent to sell.
- If client has prior final drug conviction, avoid recidivist finding – especially if state has notice/process requirements similar to federal (opp. to challenge fact, finality, validity of prior). See Immigrant Defense Project's Practice Advisory "Multiple Drug Possession Cases after *Carachuri-Rosendo v. Holder*" at www.immigrantdefenseproject.org.
- If cannot plead/limit record to simple possession, plead/limit only to offer to

sell (risky, but leaves opening)

- If cannot avoid distribution in marijuana case, plead/limit to gratuitous distribution of small amount of marijuana. (risky, but may leave opening)
- See Chapter 5 of DIP's *Representing Noncitizen Criminal Defendants: A National Guide* for more information.

E. Undocumented Clients

Undocumented clients are primarily concerned about avoiding inadmissibility Drug-related Grounds of Inadmissibility

Consider:

- Is it a controlled substance offense?
- Does it trigger "reason to believe drug trafficker" ground?

F. General Drug Inadmissibility

INA § 212(a)(2)(A)(i)(II); 8 USC 1182(a)(2)(A)(i)(II)

Elements of general ground of drug inadmissibility

- Noncitizen
- Convicted of or admits
- Violation of law
- Relating to controlled substance as defined in 21 USC § 802
- Note: No exception for 30 grams or less of marijuana – but a person with a single conviction of 30g marijuana possession may be able to apply for a "waiver of inadmissibility" if he can show hardship to certain relatives.

G. Drug Trafficking Inadmissibility

INA § 212(a)(2)(C)(i); 8 USC 1182(a)(2)(C)(i)

Elements of drug trafficking inadmissibility ground

- Noncitizen
- Whom the consular or immigration officer knows or has reason to believe
- Is or has been an illicit trafficker in any controlled substance or in any listed chemical in... 21 USC 802 OR a knowing aider, abettor, assister, conspirator, or colluder.
- Also applies to above's spouse or child who obtained benefit from this activity within the previous 5 years and knew or should have known that benefit was the product of activity.

Exercise

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 - (iii) the distribution of a small amount of marihuana but not for sale.
- For purposes of this subsection, thirty (30) grams of marihuana shall be considered a small amount of marihuana.

Will a conviction under this statute make your undocumented client inadmissible?

H. Strategies to Counter Drug Inadmissibility

- Best practice is to avoid any drug-related conviction. Period.
- Specify a substance that is not covered under 21 U.S.C. 802.
- If client with citizen/LPR parent/spouse/child is facing a marijuana charge and you absolutely cannot avoid conviction, it *may* help to limit conviction to simple possession of 30 grams or less of marijuana – check with immigration practitioner!
- See Chapter 5 of DIP's *Representing Noncitizen Criminal Defendants: A National Guide* for more information.

I. General Strategies to Counter Immigration Consequences of Drug Offenses

- Negotiate diversion *without* a guilty plea (to avoid “conviction”)
- Offer alternate plea to free-standing accessory offense
- In some cases, plea to accompanying non-drug charge may be better
- See Chapter 5 of DIP's *Representing Noncitizen Criminal Defendants: A National Guide* for more information.