WHAT NON-IMMIGRATION LAWYERS NEED TO KNOW ABOUT IMMIGRATION LAW

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I. INTRODUCTION

Like the weather in South Texas, if you don't like Immigration Law the way it is, just wait a few and it will change. With so many regular policy and regulatory changes, Immigration Law is worse than a casual read through the Internal Revenue Code. Immigration Specialists these days are challenged with the myriad changes and keeping up with a deluge of information. This article is intended to provide a few "nuggets" as they relate to immigration law's intersection with other areas of the law. By design, this article should make you, as a non-immigration lawyer, able to spot potential issues in immigration law so that you can either research further or refer those issues to a competent immigration lawyer.

II. IMMIGRATION AND CRIMINAL LAW

The most logical intersection of immigration law and any other area of law is criminal law. More often the immigration consequences of a particular criminal conduct can be much harsher than any maximum sentence a criminal court can enter. It is important to first recognize whether or not these immigration consequences need to be explored further by finding out the citizenship of your criminal clients. If you discover your clients are non-citizens, then it is incumbent upon you as an ethical practitioner to research the immigration consequences prior to agreeing to a plea or deciding to take a case to trial. In fact, a year ago the Supreme Court formalized this ethical duty in its landmark decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla*, the Court held criminal defense counsel's failure to advise about immigration consequences falls below accepted professional norms. Many times pleas or agreements can be made that will avoid or at least lessen the effects of the immigration consequences. By not appropriately advising a non-citizen criminal defendant, attorneys open themselves to ineffective assistance of counsel claims. *Padilla* made clear that silence with respect to immigration consequences simply not enough to pass the standard of care owed to criminal clients. Since the Supreme Court's decision in *Padilla*, many courts have considered whether *Padilla* is to be applied retroactively. The Supreme Court answered that question in the negative in *Chaidez v. United States*.

A. Citizenship Issues

Knowing the citizenship of your criminal client is a key factor in deciding whether to bring in an immigration lawyer to consult on your criminal cases. However, citizenship is not an issue that can be resolved simply by asking your client "where were you born?" However, I would suggest that the previous question is a good start when determining citizenship.

Individuals who were born in the United States (Puerto Rico and certain other U.S. Territories included) are considered to be United States citizens at birth. *See* INA §301(a), §§302-306. Citizenship can also be obtained through Naturalization whereby an individual not born in the United States takes an oath of allegiance to the United States after meeting certain skill requirements such as knowledge of English, History and Government. *See* INA §§310-319.

Large classes of individuals are United States citizens and were neither born in the United States nor naturalized. Most often, these individuals are not aware they are citizens. The "acquisition" or "derivation" of citizenship is a term of art whereby individuals who were not native born United States citizens can obtain citizenship, usually through the acts or status of their parents.

The acquisition and derivation laws have changed over time, and it is important to consult the version of the law, and thus use

those requirements, in effect at the time the non-citizen was born. Some examples of the types of cases where a non-citizen would acquire citizenship include being born to two United States citizen parents (*See* INA §301(c)); being born to one United States citizen parent who had been physically present for a set number of years prior to the birth of the non-citizen (generally 10, 5, or 2 years of physical presence must be proven) (*See* INA §310(g)); or out-of-wedlock birth to a United States citizen (*See* INA §309). Some examples of the derivation of United States citizenship include the naturalization of both parents prior to the non-citizen's 18th birthday or the naturalization of one parent having legal and physical custody of the non-citizen prior to their 18th birthday. *See* INA §320.

Aside from the statutes on citizenship (which may be hard to find if your client was born decades ago), there are many resources available for determining citizenship by acquisition or derivation. *Kurzban's Immigration Law Sourcebook* has an appendix with convenient "Citizenship Charts." Kurzban's is published by the American Immigration Lawyers Association and can be purchased at www.aila.org. The American Bar Association also publishes a booklet and flip-chart entitled "The Citizenship Chart." This publication can also be purchased on the ABA's website.

B. Waivable Crimes v. "Aggravated Felonies"

For immigration purposes, crimes are generally either waivable in the context of a non-citizen who is immigrating or in the context of a lawful permanent resident who is defending against deportation or crimes are not waivable. Obviously, the crimes to stay away from are the ones for which there is no waiver, the "aggravated felonies." But the inquiry into immigration consequences does not stop at a determination a particular crime is not an aggravated felony for immigration purposes, there are issue of eligibility for relief that must be addressed for the non-citizen defendant to fully understand the immigration consequences.

In order to full understand the development of analysis of aggravated felony crimes, one must appreciate the categorical and modified categorical approach to interpreting a specific crime. The Supreme Court has been very active in this regard of late issuing such decisions as *Mathis v. U.S.*, 579 U.S. ___ (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); and *Descamps v. U.S.*, 133 S.Ct. 2276 (2013)

An extremely helpful tool is available for making initial determinations as to the immigration consequences of certain Texas state offenses. Mario Castillo published an article in the Baylor Law Review detailing the types of immigration consequences one can expect as well as how that offense will be treated for Sentencing Guideline purposes. It can be found online at www.ssrn.com.

1. Crimes Involving Moral Turpitude

Non-citizens can be found to be inadmissible for having committed a crime involving moral turpitude. One can also be removed from the United States for having committed crime involving moral turpitude. INA §212(a)(2)(A)(i) and (ii), INA §237(a)(2)(A)(i) There is a statutory exception for "petty offenses" defined as those offenses for which the maximum sentence possible is one year, and the actual sentence imposed was less than 6 months. *See* INA §212(a)(2)(A)(ii).

There is no set list or definition of what crimes are considered to be crimes involving moral turpitude. However, CIMTs have generally thought to be offenses that are "base," "vile," "against the commonly accepted mores' of society." Previously, however, the Board of Immigration Appeals issued a decision expanding what types of evidence can be used to determine whether a crime is a CIMT or not. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (BIA 2008).

Silva-Trevino was overturned by then Attorney General Eric Holder returning the analysis to a much more structured one where the "kitchen sink approach" was flatly rejected. *Matter of Silva-Trevino,* A013-014-303 (A.G. April 10, 2015.)

2. Domestic Violence

Domestic violence offenses must be closely examined to be sure they do not qualify as aggravated felonies. The Immigration and Nationality Act, has a separate section for removability of person who commit acts of domestic violence. INA §237(a)(2)(E). The term is specifically defined to include spouse, children and persons cohabiting. Generally speaking in order to qualify as a crime of domestic violence, the offense must also qualify as a "crime of violence" as that term is described in 18 U.S.C. §16.

Although many domestic violence offenses are nothing more than assault offense with a domestic violence designation, each potential plea to an offense involving domestic violence should be examined carefully to be sure that it neither qualifies as a crime of violence, nor a crime involving moral turpitude. Many domestic violence offenses that involve something more than simple assault have been found to be either crimes of violence or crimes involving moral turpitude.

The Fifth Circuit recently undertook a rather exhaustive look at domestic violence as it relates to removability in *Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010)

3. Firearms

A non-citizen can be removed from the United States for having been convicted of an offense involving a firearm. *See* INA §237(a)(2)(C). Interestingly enough, the Texas statute most often seen as a firearm offense is Unlawful Carrying of a Weapon. Emphasis added. In order to prevail on a charge of removability for a non-citizen, the government must be able to prove the "weapon" involved was a firearm as opposed to a knife or other weapon. Generally, possession of a firearm offense are waivable, but some other firearm offenses are designated as aggravated felonies.

4. INA §101(a)(43): The Laundry List of Aggravated Felonies

The dreaded aggravated felony is defined in INA §101(a)(43) and includes such offenses as: murder, rape, sexual abuse of a minor, drug trafficking, firearms trafficking, money laundering, arson, certain firearms offense, crimes of violence, certain theft or burglary offenses, ransom offenses, child pornography, RICO offenses, prostitution and slavery offenses, offenses relating to National Defense, certain fraud crimes, alien smuggling offenses, passport offenses, certain failure to appear for sentencing offenses, offenses relating to bribery, counterfeiting forgery or trafficking in vehicles with altered ID numbers, obstruction of justice offenses, failure to appear to answer felony charges, an attempt to commit any of the above offenses and aiding or abetting the commission of any of the above offenses.

As one readily sees, the list is quite exhaustive and crafting a plea to avoid one of these aggravated felony designations is certainly an art that requires the combined intelligence of the criminal lawyer and the immigration lawyer.

a. Term of Imprisonment

Several of the aggravated felonies are only designated as such where there is a certain minimum sentence imposed. One such aggravated felony is the theft offense. INA §101(a)(43)(G) In order to qualify as an aggravated felony, a theft offense must have a term of imprisonment of at least one year. Practitioners should keep in mind that "term of imprisonment" is a term of art defined by the INA at §101(a)(48) and includes any restraint on the person's liberty such as any

suspension of a sentence to imprisonment. At times, it is better for a non-citizen to take straight jail time in lieu of a sentence that would result in a suspension of a jail term for more than one year. Deferred adjudication is also considered a conviction, although it will not be considered to be a sentence to a term of imprisonment, because no imprisonment is ever imposed by the court. *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004); *see also Moosa v. INS*, 171 F.3d 994.

b. Loss to Victim

Other aggravated felonies are only designated as such if the loss to the victim is a certain minimum amount. For example, fraud crimes are designated as aggravated felonies only where the loss to the victim exceeds $10,000. INA §101(a)(43)(M). The issue of proving up the amount of loss is one subject of much litigation. The best bet for practitioners is to try to avoid having any information about the amount of loss in the criminal record at all. As with crimes involving moral turpitude, the courts have expanded the types of documents which can be used to establish the amount of loss to the victim. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

D. Types of Waivers Available

The two main waivers available for criminal offenses for permanent residents are Cancellation of Removal (INA §240A(a)) and the Section 212(c) waiver (*repealed, but see, INS v. St. Cyr*, 533 U.S. 289 (2001). There are many other waivers available for non-citizens depending on the crime and their status in the United States and practitioners should be aware that eligibility for each one of those various waivers varies.

1. Cancellation of Removal

Cancellation of Removal pursuant to INA §240A(a) is for legal permanent residents who can show they have been in the United States after a lawful admission for a period of at least 7 years, they have been a legal permanent resident for at least 5 years, and they have not been convicted of any aggravated felonies. The period of continuous residence is "stopped" at the date of the commission of an offense that makes them removable. *See* INA §240(A)(d). This waiver is discretionary and the Immigration Judges will balance all relevant positive and negative factors in making their discretionary decision. For a listing of the positive and negative equities a judge may consider, see *Matter of C-V-T-*, 22 IN Dec. 7 (BIA 1998) and *Matter of Marin*, 16 IN Dec. 581 (1978)

2. I.N.A. §212(c) (repealed)

The waiver formerly found at INA §212(c) is only available to those individuals who have convictions (or have entered into a pleas agreement) on or before April 24, 1996. In order to qualify for section 212(c) relief, a non-citizen must show they have been a lawful permanent resident for a period of at least 7 years prior to the filing of the application for relief. This differs greatly from the 7 year requirement for Cancellation of Removal because for purposes of section 212(c) relief, the period of continuous residence does not "stop" at the date the of the commission of the offense. Just as with Cancellation of Removal, the Immigration Judge must balance positive and negative factors to make a discretionary decision to grant the 212(c) waiver.

III. IMMIGRATION AND FAMILY LAW

The concept of family and what makes up a family is another key issue in immigration law. One of the main goals of the immigration laws is family unity. In keeping with this idea, the immigration laws include various family law concepts and incorporate the state laws where family is concerned in most instances. For example, if a marriage is valid in the jurisdiction where it was contracted, it is valid for

immigration purposes. The same is true with divorce laws. However, there are some aspects of immigration law as it relates to family that are not easily recognizable in the family laws.

A. Marriage

For some immigrants marriage (to a U.S. citizen or lawful permanent resident) means they could potentially benefit from the relationship through a visa petition to allow them to immigrate to the U.S. In the case of a non-citizen who marries a U.S. citizen, they could be classified an immediate relative for immigration purposes and immigrate without regard to the visa quota system. INA §201(b)(2). However, spouses of lawful permanent residents will be subject to the visa quota system. INA §201(a)

Still other immigrants stand to lose certain immigration benefits if they marry. The best example of this concept is the son or daughter (over age 21) of a lawful permanent resident, if they marry, they will no longer be able to immigrate through their lawful permanent resident parents. Likewise, the son or daughter of a United States citizen will become subject to a different preference category in the visa quota system upon marriage and visa availability may become a shorter or longer wait depending on the country of origin.

It is important to note that same-sex marriages are recognized for immigration purposes after the Supreme Court's decision in *Obergefell v. Hodges,* 576 U.S. ___ (2015).

B. Divorce

Divorce affects the ability to immigrate in that the non-citizen will no longer qualify for an immigrant visa, even if the marriage was of long duration and the non-citizen was waiting for a priority date to become current. However, if a son or daughter divorces, they will revert to the preference category for unmarried sons and daughter and retain the right to immigrate (in the case of lawful permanent resident petitioners) or move to the first preference category (in the case of U. S. citizen petitioners.

Most immigrants will be required to have their petitioner file an Affidavit of Support, a contract with governmental entities to repay need-based government assistance. Despite the fact that a married couple divorces the obligations under this Affidavit of Support continue and will survive the divorce. Many ex-spouses have brought enforcement actions pursuant to the contractual obligations of the Affidavit of Support, and some are even winning monies! A search reveals no reported cases in Texas, however at least three actions for enforcement are pending now.

C. Adoption

Non-citizen children who are adopted prior to their 16th birthday will qualify as a child under the immigration laws. In some very rare circumstances involving the adoption of natural-born siblings, immigration benefits can extend to a child that is over 16, but under 18 years of age. INA §101(b)(1)(E).

In order to qualify for immigration benefits, the adopted child will have to be in the physical and legal custody of the adoptive parents for a period of two years prior to filing any such petition to immigrate the child or be adopted pursuant to the Hague Convention on Intercountry Adoptions. INA §101(b)(1)(G).

Special rules exist for orphan children and the two year physical and legal custody requirement as set out in the above paragraph are not applicable. INA §101(b)(1)(F).

IV. IMMIGRATION AND CIVIL LITIGATION

As a litigator, one must deal with a diverse set of parties and witnesses. Largely due to the rise in immigrant population, there is no

doubt practitioners will come across a non-citizen in the course of litigation.

A. Undocumented Parties or Witnesses

One of the thorniest issues in dealing with non-citizens and litigation is what to do about an undocumented party. Many times the issue may be as simple as how to keep a client in the United States for purposes of litigation or as complicated as how to use the undocumented status to impeach a potential witness or party.

With respect to trying to keep a party or witness in the U.S., the best practice is have the client or witness consult with an immigration attorney early on in the litigation so all potential avenues of relief can be explored and developed. Many benefits under the immigration laws have time limitations and only after a careful consultation and analysis of the facts specific to each party or witness are developed will an immigration lawyer be able to express an opinion as to the options.

Another issue arising often is how to use the immigration status, or lack thereof to impeach a witness. Taken to its extreme, some litigators even resort to informing the immigration authorities as to parties' or witnesses' undocumented status in an effort to have the individual removed from the United States. The author does not believe the latter practice is a desirable one, though.

B. Public Benefit Parole

In the midst of litigation, you realize that one star witness actually resides outside of the United States and has no visa to allow him or her to enter the country. There is a mechanism whereby practitioners can apply for a special permit for an individual to enter the United States to appear in court or at a deposition. In filing a request for Public Benefit Parole, practitioners will be asked to provide an order from the court directing the appearance of a party or a witness for a specific date and location. The parole, if granted, will be issued for a very short amount of time and for the purposes as stated on the order requiring their appearance in court. The request is made by filing with the Citizenship and Immigration Service's headquarters in Washington, D.C.

V. OTHER AREAS WORTH MENTIONING

A. Juvenile Law

Juveniles hold a special place in immigration law just as in other areas of law. Some of the more important issues relating to juveniles in immigration law are: findings of juvenile delinquency do not qualify as convictions for immigration purposes (INA §101(a)(48)); certain juveniles dependant on the courts (wards of the court) are eligible for Special Immigrant Juvenile status which allows an otherwise undocumented child to obtain permanent residency (INA §101(a)(27)(J); the definition of a child for immigration purposes includes children under the age of 21, adopted children, and certain step-children. INA §101(B(1)(E-G).

B. Tax Law

The applicability of the Internal Revenue to Code to immigrants is extremely important. For many benefits under the Immigration and Nationality Act, the non-citizen must prove they have reported their income to the IRS each year. In addition, for naturalization purposes, a non-citizen can be found to lack the requisite good moral character if they have not paid all of the taxes owed to the U.S. government.

In addition, the use of income tax records to prove physical presence in the United States is common. Also the use of corporate income taxes to show the solvency of a company petitioning for a non-citizen worker is widely accepted. Among professional accountants, the specialization in tax law as it relates to immigration law

has become a niche filled by very few accountants.

C. Employment Law

Aside for the typical wage and hour disputes, or the occasional Social Security mismatch, employers have a new enemy: Workplace Enforcement! Immigration and Customs Enforcement (ICE) substantially increased its use of Worksite Enforcement in the past four years, and most significantly, the use of I-9 Inspections in the last year.

Generally, employers have been enlisted in the enforcement of immigration laws since the passage of the Immigration Reform and Control act of 1986. Specifically, employers are not to knowingly hire or continue to hire "unauthorized aliens." INA §274A(a)(1)(A). There are both civil penalties (fines) and criminal liability for the hiring of unauthorized aliens. Those fines can run from $539 to $4,313 per violation. Upon a second violation fines run from $4,313 to $10,781 per violation. INA §274A(e)(4). And criminal liability comes in the form of a federal felony with a maximum sentence of five years if an employer knowingly hires more than 10 unauthorized aliens in a twelve month period. INA §274(a)(3).

In addition to the "knowing hire" violations discussed above, an employer can be held liable for "paperwork violations" or to put another way, technical violations of the I-9 reporting requirements. INA §274A(a)(1)(B). Such technical violations bring in a penalty of $216 to $2,156 per violation. INA §274A(e)(5).

Implementing a regular interval of internal immigration audits is a "best practice" suggested by ICE as well as implementing standard policies with respect to immigration record keeping.

VI. CONCLUSION

Immigration law plays a major role in American jurisprudence and intersects with many areas of law, some of which are not covered in this paper. Whether your practice is a criminal defense one, a family law practice, a labor and employment practice, or civil litigation, during your career you will come up against an issue relating to immigration law. The demographics of the immigrant make-up of the United States foretell the rise in a need for awareness of immigration law issue.