

IOWA STATE BAR ASSOCIATION
CRIMINAL LAW SECTION
IMMIGRATION CONSEQUENCES OF
CRIMINAL CONVICTIONS

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I. Section 212 of the Immigration and Nationality Act (INA)

Defines generally classes of aliens who are ineligible to enter the United States or ineligible to receive a visa from the United States and what waivers are available to such aliens.

a. What it means to a person here illegally
i. Section 212(a)(2)(A),(B),(C), and (D)

(2) Criminal and related grounds. (A) Conviction of certain crimes. (i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of--
(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or
(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
(ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if--
(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien

was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions. Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers. Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice. Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

ii. Section 240A: Cancellation of Removal And Adjustment Of Status For Certain Nonpermanent Residents

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

- (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
- (B) has been a person of good moral character during such period;
- (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
- (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

b. Waivers

i. Petty Offense

See Above

ii. Section 212(h)

(h) Nonapplicability of subsec. (a)(2)(A)(i)(I), (II), (B), (D), and (E). The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--
 - (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
 - (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
 - (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien;

(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B); and

- (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's

applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

iii. Section 212(i)

(C) Misrepresentation. (i) In general. Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(i) (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child. (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

II. What is Section 237 of the Immigration and Nationality Act (INA)

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

a. Criminal Conviction Under Section 237(a)(2)

- (2) Criminal offenses
- (A) General crimes
- (i) Crimes of moral turpitude

Any alien who--

- (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and
- (II) is convicted of a crime for which a sentence of one year or longer may be imposed,
is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18, is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--

- (i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;
- (ii) any offense under section 871 or 960 of Title 18;
- (iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or
- (iv) a violation of section 1185 or 1328 of this title, is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and [FN1]

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates 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 is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

b. Impact on LPR or others admitted

i. Section 238

(a) Removal of criminal aliens

(1) In general

The Attorney General shall provide for the availability of special removal proceedings at certain Federal, State, and local correctional facilities for aliens convicted of any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission,

otherwise covered by section 1227(a)(2)(A)(i) of this title. Such proceedings shall be conducted in conformity with section 1229a of this title (except as otherwise provided in this section), and in a manner which eliminates the need for additional detention at any processing center of the Service and in a manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence. Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

ii. Section 240B: Cancellation of Removal For Certain Permanent Residents

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien--

- (1)** has been an alien lawfully admitted for permanent residence for not less than 5 years,
- (2)** has resided in the United States continuously for 7 years after having been admitted in any status, and
- (3)** has not been convicted of any aggravated felony.

c. Waivers

For CIMTs, Multiple Criminal Convictions, Aggravated Felonies, and High Speed flight to avoid an immigration check point are waiveable where a full and unconditional pardon by the President of the United States or by the Governor of any of the several States has been granted subsequent to the conviction. There is not a waiver for failure to register as a sex offender pursuant to 18 USC 2250.

The only waiver available for drug convictions is where the conviction involved personal use of 30 grams or less of marijuana.

III. Classification of Crimes

a. Aggravated Felony

The term "aggravated felony" means—

- (A) murder, rape, or sexual abuse of a minor;
- (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

- (C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);
- (D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;
- (E) an offense described in—
 - (i) section 842 (h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
 - (ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or
 - (iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);
- (F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year;
- (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;
- (H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);
- (I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);
- (J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;
- (K) an offense that—
 - (i) relates to the owning, controlling, managing, or supervising of a prostitution business;
 - (ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed; or
 - (iii) is described in any of sections 1581–1585 or sections 1588–1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);
- (L) an offense described in—
 - (i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;
 - (ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or
 - (iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents);
- (M) an offense that—
 - (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or

(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) [8 USC § 1324(a)] (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(O) an offense described in section 275(a) or 276 [8 USC § 1325 or § 1326] committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph. The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

b. Crime Involving Moral Turpitude (CIMT)

i. Definition

The INA does not define CIMT. What constitutes a CIMT is determined by the particular facts and statutory elements. In some instances, the court has already ruled whether or not a statute is a CIMT. However, since many criminal statutes are broadly written, they leave wiggle room to argue that it is not a CIMT.

“Moral Turpitude” is defined as “conduct that is inherently base, vile, or depraved and contrary to the accepted rules of morality and the duties owed between persons, or to society in general”

Matter of Tran, 21 I&N Dec. 291 (BIA 1996). Moral Turpitude is generally found for crimes that are “malum in se” and not “malum prohibitum”. The elements of the statute greatly control whether a crime is a CIMT. Many times CIMT is found where Specific Intent is present. CIMT is common where “Knowledge” is an element. “Recklessness” may be a CIMT. “Negligence” may not be a CIMT because it lacks a culpability requirement.

ii. Petty Offense Exception, Section 212(a) Only

If the conviction satisfies the petty offense exception as described above then no waiver is necessary. It is important to note that the alien is only entitled to ONE petty offense exception. If more than one conviction exists which would otherwise satisfy the petty offense exception, this conviction will become a CIMT. Therefore, if defense counsel is dealing with a multi-count indictment, care should be taken to avoid a CIMT even if allowing for a petty offense exception. But note, the alien’s prior criminal history may have already used this ONE get out of jail free card.

IV. What is a Criminal Conviction

INA Section 101(a)(48) [8 USC 1101(a)(48) defines “conviction” as follows:

- (A) The term “Conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilty has been withheld, where --
 - i. A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty, and
 - ii. The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.
- (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by the court of law regardless of any suspended or the imposition or execution of that imprisonment or sentence in whole or in part.

V. Bonding Issues

a. Who Can Bond, Section 236

The Attorney General shall take into custody any alien who: (A) is inadmissible by reason of having committed any offense covered in Section 212(a)(2); (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or; (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237 (a)(4)(B), when the alien is released, without

regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

b. Bonding Before A Conviction

Mandatory detention is based upon conviction of a CIMT under section 212(a)(2) or under section 237 upon conviction of a CIMT, multiple criminal convictions, aggravated felony, drug conviction, certain firearms offenses, and others.

Where possible, it is always best to secure bond for the criminal charge before allowing the alien to plead or before a finding of guilt is determined by a jury. The effect of bonding prior to the conviction forces ICE to take custody of the alien. Where no conviction exists and only criminal charges are pending, section 236(c) does not apply. As a result a bond may be secured either with ICE or through the immigration judge.

If you can bond a client out of state or federal custody before ICE takes notice, you may be able to avoid an ICE detainer and the need for an immigration bond.

VI. Plea Agreement & Sentencing

Plea deals often determine the long term fate of the alien. Plea deals provide a certain or sure determination of whether or not an alien will maintain, lose, or acquire legal status. Among the many benefits of a plea deal, they can take advantage of overly-broad and divisible statutes.

Overly-broad statutes provide a mechanism that may prevent the government from meeting its burden of proving a conviction by clear and convincing evidence. Clear and convincing is the standard by which the government must prove an alien is removable from the United States.

Divisible statutes contain a variety of subsections some of which may be CIMTs, other which are clearly not. A plea agreement affords the Defense attorney a mechanism for applying the factual basis to the elements of a given subsection in such a way as to avoid falling under a CIMT.

a. Creative Pleas & Diversion

Under this scenario the alien does not enter a formal plea of guilt. Rather, she is placed under some form of probation while the criminal case is held in abeyance. If she successfully completes this probationary period, the charges are dismissed.

Mechanically speaking, the alien will normally need to waive speedy trial and in some cases waive the mandatory one (1) year rule for completing a criminal case. The alien may need to enter into an informal plea agreement admitting guilt. This informal plea agreement will only be filed with the court in the event the alien violates her pretrial probation period. Such an informal agreement will not be viewed as a conviction unless it is formally entered into the courts file.

In some scenarios the county attorney's office may request that in addition to the pretrial probationary agreement, the alien formally admits guilty to a lesser, less grave, criminal

conviction. Such an action must fit the actual factual scenario, but an attempt should be made to plead as a simple misdemeanor.

b. Deferred and Alford Plea

Section 907.3 allows the court to defer judgment. The court may place the defendant on probation. It is mandatory for the court to impose a civil penalty. It is clear the court can only impose deferred judgment where there is a finding of guilt. This satisfies the first prong of a conviction as discussed above. For immigration purposes the question becomes whether or not the court has imposed some sort of restraint.

Probation is not mandatory under section 907.3. If no probation is ordered it becomes much easier to argue that the court has not restrained the alien's liberty in any way. However, where probation is imposed, the question becomes has the judge ordered some form of punishment, penalty, or restraint. Presumably, defense counsel can negotiate the terms of probation with the county attorney and eliminate any outward forms of restraint. For example, the defendant cannot leave the state of Iowa or must secure employment. Nevertheless, many of the conditions of probation such as do not engage in any illegal activity, do not use controlled substance, etc. are arguably not restraints on the alien's liberty since they should not be engaged in the type activity anyway.

A larger problem with deferred judgment is the mandatory civil penalty which must be assessed. The question becomes whether this is a form of punishment or penalty. For immigration purposes we must argue that a civil penalty does not constitute punishment or penalty upon the alien's liberty.

c. Drug Court

This is a useful tool where the drug court allows the alien defendant to complete the requirements without having to admit guilt or where the court withholds making a finding of guilt. If the court must make a finding of guilt prior to enrolling in drug court, the issue becomes similar to that of deferred judgment.

d. Juvenile Court

If your client will qualify as a juvenile, but is charged as an adult, you should attempt a motion to remove the case to Juvenile Court. In Juvenile Court the defendant is not convicted. Rather she is adjudicated guilty. Adjudications of juvenile delinquency are not considered criminal convictions under immigration law.

e. Post Conviction Relief

A vacated conviction that is not vacated pursuant to a rehabilitative statute is not a conviction for immigration purposes. Matter of Pickering, 23 I&N Dec. 621 (BIA 2003) requires the vacated conviction not be "solely related to rehabilitation or immigration hardships." Pickering goes on

to note the vacated conviction should be based upon “procedural or substantive defect.” *Id.* Therefore defense counsel should seek to vacate based upon constitutional error.

i. Constitutional Error

Iowa Code Section 822.2(1)(a) provides a basis for post conviction relief where the alien was convicted in violation of the Constitution’s of the United States or Iowa.

ii. Sample Errors

1. Failure to Advise of immigration consequences

Iowa Rule of Criminal Procedure 2.8(2)(b) requires the court to determine that the plea is made voluntarily and intelligently. The court must also determine that the defendant understands: (1) the nature of the charge to which the plea is offered; (2) the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered; and (3) that a criminal conviction, deferred judgment, or deferred sentence may affect a defendant’s status under federal immigration laws. IRCP § 2.8(2)(b)(1)(2)(3). The alien defendant may waive this procedure for a non-felony offense through a written plea document. However, within the body of the plea document the alien defendant must sign acknowledging that a conviction may adversely affect her immigration status. IRCP § 2.8(b).

iii. Governor Pardon

As discussed above a governor’s pardon may qualify a lawfully admitted alien to receive a waiver for an Aggravated Felony or CIMT conviction, but not a drug-related conviction.

VII. Common convictions

a. Iowa

i. Forgery

This is not a good alternative. It is treated as an aggravated felony. ICE will deny bond and attempt to deny a hearing before the immigration judge. The alien will be subject to administrative removal under Section 238 of the Act. A conviction under this statute whether it be a misdemeanor or felony will render the alien removable with no form of relief (except in the rare circumstance of a credible fear of returning to the alien’s home country).

ii. Identity Theft

This is not a good alternative. ICE will treat this as an aggravated felony. ICE will deny bond and hearing before the immigration judge. The alien will be subject to administrative removal under Section 238 of the Act. A conviction under this statute whether it be a misdemeanor or felony will render the alien removable with no form of relief (except in the rare circumstance of a credible fear of returning to the alien’s home country).

iii. Tampering with Records

An adequate alternative when plead as an aggravated misdemeanor. Thus far the immigration judge has not found this to be an aggravated felony. It is still questionable whether or not it is a CIMT. We have had mixed success as relating to bond.

iv. False Application for Driver License/ identification 321.216A

This is a very good alternative. This is a serious misdemeanor conviction which is arguably not a CIMT. Even if it were a CIMT defense counsel can negotiate a sentence which fits the petty offense exception. It is best to use subsection (4) “Use a false or fictitious name in any application for a driver’s license or nonoperator’s identification card or a nonoperator’s identification card or to knowingly make a false statement or knowingly conceal a material fact or otherwise commit fraud on an application.” Iowa Code §321.216A(4).

v. Assault

1. D Felony and C Felony is a CIMT, Crime of Violence or Sexual Assault because “who causes serious injury” 708.2(4) and “who uses any object to penetrate the genitalia or anus of another person” 708.2(5).
2. Aggravated Misdemeanor is a CIMT because of “intent to inflict injury upon another” 708.2(1). Or crime of violence because “uses or displays a dangerous weapon in connection with the assault.” 708.2(3)
3. Serious Misdemeanor may be CIMT or crime of violence because of does “cause bodily injury or mental illness.” 708.2(2). Be aware of how broadly the prosecutor defines 708.1 in the trial information. Likely to be CIMT if prosecutor narrowly defines it.
4. Simple Misdemeanor not a CIMT because a catchall for lack of clear definition because “except of otherwise provided” 708.2(6).

vi. Domestic Assault

1. INA 237(a)(2)(E), an individual who at any time after admission is convicted of one or more of the following offenses is deportable: (a) a crime of domestic violence, (b) stalking; (c) child abuse; (d) child neglect; or (e) child abandonment.

vii. Drugs

Unless 30 grams or less of Marijuana for personal use, drug convictions are the kiss of death.

b. Federal

i. Aggravated Identity Theft 1028A

Considered an Aggravated Felony

ii. False claim to citizenship

No waiver available. Permanent bar unless the alien has bona fide basis for believing he/she is a U.S. Citizen (USC). For example, if the alien's parents are USCs.

iii. Misrepresentation

18 USC §1546 is generally viewed as a CIMT. However, in the context of misrepresentation of a material fact to a government official, a waiver is available under Section 212(i).

iv. Drugs

Kiss of death. After prison the alien is going home unless 30 grams or less of marijuana for personal use.

VIII. Becoming a U.S. Citizen after a conviction

United States Citizenship and Immigration Service (CIS) will review the alien's criminal history for a minimum of five (5) years. If any conviction exists CIS will generally look beyond five (5) years to see prior conviction. If a pattern exists, the likely scenario is CIS will find the alien lacking in good moral character. Some examples include: one or more OWI convictions, one or more citations (i.e., no insurance, no registration, no drivers license, speeding, etc), one or more shoplifting convictions.

IX. Disclaimer

Please note, while I appreciate the opportunity to present this material it should be noted the above is a simplistic outline intended to provide only a general knowledge of immigration consequences of criminal activity. This outline should not substitute counsel's own due diligence. It is always good advice to discuss the consequences of criminal activity of an alien with an attorney who specializes in immigration.