

**Exercises for Defending Immigrants Partnership**  
**California Seminar, Day 1**

**Exercise 1. Deportability, Inadmissibility, Aggravated Felonies**

1. True or false: A permanent resident of twenty years can lose her status and be removed (“deported”) if she becomes *deportable* for a crime. Explain your answer.
  
2. True or false: A permanent resident who becomes *inadmissible* (but not *deportable*) for a crime will not lose her status. However, she should not travel outside the United States or she might be refused admission at the border and lose her status in that way. Explain your answer.
  
3. Who would be most hurt by becoming *deportable* based on a crime? Why?
  - a. A permanent resident
  - b. Someone who entered without inspection and is undocumented
  
4. Your client is undocumented but is trying to immigrate through a family member. You could plead to a crime that would make her *deportable but not inadmissible*, or a different offense that would make her *inadmissible but not deportable*. Which should you choose? Why?
  
5. One of your clients is a permanent resident who is already deportable but hopes to apply for a waiver called “cancellation of removal.” Another client may be eligible to apply for asylum. Will conviction of an aggravated felony pose a problem?
  
6. Your client is undocumented and has no current way of applying for lawful status. She is offered a plea to an offense that is an aggravated felony. Is there any problem in accepting this plea?

**Exercise 2**  
**Immigration Questionnaire and**  
**Determining Client's Immigration Status**

1. Read over the Facts below.
2. Using them, fill out the Basic Immigration Status Questionnaire.
3. Complete a "Chronology" integrating the facts relevant to both immigration and criminal law.

Facts: Juan Primo was born in Bogota, Colombia. He entered the United States illegally in 1983. He married a United States citizen in 1984, and they now have three children, each of whom is a United States citizen. On May 1, 1985, he was granted Lawful Permanent Resident status, upon a petition filed by his wife. He has never left the U.S. since his arrival in 1984, except for a two-week vacation in 1989. He has no other family in the U.S., and neither his parents nor grandparents was born in the United States or granted naturalization. When you ask, Juan says he is a "citizen."

On September 1, 1990, he was arrested for simple possession of methamphetamines, after which he was placed on diversion, without entry of a guilty plea, which he successfully completed on September 1, 1991, at which time the charge was dismissed.

On September 1, 1993, he was arrested again for possession of speed, and entered a guilty plea on November 1, 1993, receiving a sentence of 30 days in custody as a condition of three years probation, which he successfully completed.

On September 1, 1997, he was arrested for a third time for possession of methamphetamines, entered a guilty plea a month later, and the same day received a sentence of 90 days custody as a condition of three years probation.

On April 1, 2000, he was arrested while driving his car, with his friend Enrique Segundo in the passenger seat. Under the front passenger seat, police found one baggie containing two grams of methamphetamines, a razor blade and a mirror each containing trace amounts of speed. The police concluded that both occupants of the vehicle were under the influence of a controlled substance.

Both Juan and Enrique were charged with (1) transportation of methamphetamines, in violation of Health & Safety Code § 11379, (2) possession of paraphernalia, in violation of Health & Safety Code § 11364, and (3) being under the influence of a controlled substance, in violation of Health & Safety Code § 11550(a). The INS has lodged an immigration hold against Juan.

**Exercise 3: Finding an Immigration-Safe Plea  
in a Controlled Substance Case**

1. Does the no-plea diversion dismissal of the 1990 simple possession charge constitute a conviction under immigration law?

2. Would an expungement under Penal Code § 1203.4(a) of Juan's 1993 conviction protect him against deportation on account of that conviction? If the 1993 conviction occurred today, would deferred entry of judgment constitute a conviction under immigration law immediately after the guilty plea has been entered?

3. If Juan had no prior drug convictions, would **deferred entry of judgment** for a violation of the following statutes be safe for Juan from an immigration standpoint assuming successful completion and dismissal?

Simple possession of methamphetamines (Health & Safety Code § 11377) as a LIO in  
Count I?

Count II (possession of paraphernalia)?

(c) Count III (being under the influence of a controlled substance)?

4. Would an **expungement** of any of the following convictions under Penal Code § 1203.4(a) eliminate the conviction for immigration purposes?

(a) Transportation of methamphetamines (Health & Safety Code § 11379) as charged in Count I?

Simple possession of methamphetamines (Health & Safety Code § 11377) as a LIO in  
Count I?

(c) Count II (possession of paraphernalia)?

(d) Count III (being under the influence of a controlled substance)?

5. What solution in immigration court can you suggest to protect Juan from being deported on account of his 1997 conviction?

6. What would be a safe plea for Juan on the newest case?

7. Assume you represent a client charged with Health & Safety Code § 11352. He needs to avoid an aggravated felony conviction. What are two strategies?

8. Are the following convictions:

- C An aggravated felony conviction?
- C An offense “relating to controlled substances” that is a basis for deportability and inadmissibility based on conviction?
- C A basis for inadmissibility because the conviction gives the INS “reason to believe” the person ever has helped or been a drug trafficker?

a) Possession for sale of heroin.

- (AF? Deportable/inadmissible for conviction? Inadmissible for “reason to believe”?)

b) Transportation for personal use under H&S § 11360

- (AF? Deportable/inadmissible for conviction? Inadmissible for “reason to believe”?)

c) Second misdemeanor conviction for possession of methamphetamine.

- (AF? Deportable/inadmissible for conviction? Inadmissible for “reason to believe”?)

d) Conviction under H&S § 11352 where the record of conviction does not indicate whether the offense involved sale or offer to sell.

- (AF? Deportable/inadmissible for conviction? Inadmissible for “reason to believe”?)

**Exercise 4 (10 min.): Sentencing to Avoid Deportation**

1. Name three techniques by which you can avoid a sentence imposed of one year or more for immigration purposes.

2. Which of the following dispositions constitutes a sentence of one year or more under immigration law?

Imposition of sentence suspended and six months as a condition of probation?

Imposition of sentence suspended and one year as a condition of probation?

The lower term of 16 months, execution suspended, and six months as a condition of probation?

Two counts, imposition suspended, 360 days as a condition of probation, ordered to be served consecutively?

Waiver of 13 months presentence credit, imposition of sentence suspended, 10 months as a condition of probation?

3. Monica is convicted of burglary of a dwelling and sentenced to nine months. She violates probation by being found to possess heroin, which is a felony and is her first drug offense. She may have a choice: take the probation violation with no drug conviction but an additional three months added to the original burglary, or take the new conviction of possession of heroin. What do you recommend?

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***ANSWERS***

**Exercise 1. Deportability, Inadmissibility, Aggravated Felonies**

1. True or false: A permanent resident of twenty years can lose her status and be removed (“deported”) if she becomes *deportable* for a crime. Explain your answer.

**True.** All noncitizens can lose their status and be removed if they become deportable, e.g. are convicted of a crime that comes within a ground of deportability. They can avoid being removed only if they are eligible for and granted some kind of relief from removal.

2. True or false: A permanent resident who becomes *inadmissible* (but not *deportable*) for a crime will not lose her status. However, she should not travel outside the United States or she might be refused admission at the border and lose her status in that way. Explain your answer.

**True.** A permanent resident who is merely inadmissible will not lose lawful permanent residency as long as she doesn’t leave the U.S. If the person travels outside the U.S., however, she will be found to be seeking a new “admission” when she attempts to return, and can be found inadmissible for crimes. If she is inadmissible and is not granted a waiver, she will lose her permanent residency, just as if she had been found deportable and removed within the United States. In addition, a permanent resident who is inadmissible for crimes is not eligible for “good moral character.” She will have to wait to acquire more “good moral character” time before she can apply for naturalization to U.S. citizenship.

3. Who would be most hurt by becoming *deportable* based on a crime? Why?

- a. A permanent resident
- b. Someone who entered without inspection and is undocumented

**a. A permanent resident.** A permanent resident faces loss of all lawful status, and removal. Someone who entered without inspection and is undocumented already can be removed, so their situation is not that much worse if they become additionally deportable for crimes. Further, the grounds of deportability don’t even apply to a noncitizen who entered without inspection because they only apply to persons who have been “admitted.” (They can be removed under other section of the law.) The undocumented person needs to focus on any way she might acquire lawful status, which means focus on the grounds of inadmissibility.

4. Your client is undocumented but is trying to immigrate through a family member. You could plead to a crime that would make her *deportable but not inadmissible*, or a different offense that would make her *inadmissible but not deportable*. Which should you choose? Why?

***Deportable but not inadmissible.*** As discussed in Question 4, it does not hurt an undocumented person that much to be deportable. But being inadmissible may block the undocumented person from applying to get status.

5. One of your clients is a permanent resident who is already deportable but hopes to apply for a waiver called “cancellation of removal.” Another client may be eligible to apply for asylum. Will conviction of an aggravated felony pose a problem, and if so what?

**Yes.** No surprise here. The apparent purpose of the aggravated felony category is to destroy eligibility for relief from removal. These clients could stand to be convicted of an offense that made them “merely” deportable, but cannot get an aggravated felony conviction or they will no longer be able to apply for cancellation or asylum.

6. Your client is undocumented and has no current way of applying for lawful status. She is offered a plea to an offense that is an aggravated felony. Is there any problem in accepting this plea?

**Yes.** Even if she has no way to be here legally, she still needs to avoid terrible penalties for future attempts to come illegally. Just as some people tend to commit more than one crime, some people tend to continue to try to enter the United States, legally or illegally. Illegal re-entry after conviction of an aggravated felony and removal is a very commonly prosecuted federal offense (over 25% of the caseload of federal defenders operating in California) with a potential sentence of up to 20 years. This person may be doomed to be removed, but she will be much better off without an aggravated felony.

## **Exercise 2: Determining Client's Immigration Status**

### **Chronology of Immigration and Criminal History**

<u>Date</u>	<u>Event</u>	<u>Immigration Significance</u>
1983	Entry w/o Inspection	Undocumented
1984	Married US Citizen	Eligible to adjust to LPR
5/1/85	Adjusted status	Lawful Perm. Resident
1989	Two week vacation out of US	No Significance
9/1/90	Arrest for 11377 no plea diversion	No significance
9/1/91	Dismissal for successful completion	No plea so no conviction
11/1/93	Plea to 11377; sentence to 3 yrs prob. deportability. Also AF unless reduced to misd.	Drug conviction triggers
11/1/96	Probation successfully completed	
9/1/97	Third possession arrest	No significance
10/1/97	Plea to 11377; sentence to 90 days, 3 yrs probation	Drug conviction triggers deportability
4/1/00	Fourth possession arrest	Must get PC 32/IOSS/364
5/1/92	Seven years lawful residence 11377 is reduced to a misdemeanor so no longer is an Agg. Felony conviction	Eligible for cancellation if

## **Exercise 3: Finding an Immigration-Safe Plea**

1. Does the no-plea diversion dismissal of the 1990 simple possession charge constitute a conviction under immigration law? **No. Since there is no plea, there is no conviction. 8 U.S.C. § 1101(a)(48)(A).**

2. Would an expungement under Penal Code § 1203.4(a) of Juan's 1993 conviction protect him against deportation on account of that conviction? **Yes. Since Juan would have been eligible for Federal First Offender Act treatment, under 18 U.S.C. § 3607, if prosecuted in federal court, the expungement of the first possession conviction will effectively eliminate it for immigration purposes. Lujan-Armendariz v. INS, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). This is so even if it is considered an aggravated felony conviction.**

If the 1993 conviction occurred today, would deferred entry of judgment constitute a conviction under immigration law immediately after the guilty plea has been entered? **Yes. Since there is a plea, there is a conviction, regardless of what the California Legislature says. The INS goes by what Congress says, and Congress**

**says it is a conviction because there is a guilty plea. 8 U.S.C. § 1101(a)(48)(A); Matter of Punu, Int. Dec. 3364 (BIA 1998)(*en banc*).**

3. If Juan had no prior drug convictions, would deferred adjudication for a violation of any of the following statutes be safe for Juan from an immigration standpoint assuming successful completion and dismissal?

- (a) Simple possession of methamphetamines (Health & Safety Code § 11377) as a LIO in Count I? **Yes. Lujan-Armendariz v. INS, 222 F.3d 728 (9<sup>th</sup> Cir. 2000).**
- (b) Count II (possession of paraphernalia)? **Yes. Cardenas-Uriarte v. INS, 227 F.3d 1132 (9<sup>th</sup> Cir. 2000).**
- (c) Count III (being under the influence of a controlled substance)? **Probably: the Cardenas case held that where a first-offense drug offense was less serious than felony simple possession, and was not specifically forbidden under federal drug statute, a first-offender dismissal effectively eliminated it for all immigration purposes.**

4. Would an expungement of any of the following convictions under Penal Code § 1203.4(a) eliminate the conviction for immigration purposes?

- (a) Transportation of methamphetamines (Health & Safety Code § 11379) as charged in Count I? **No. Expungements (as well as DEJ) only work for first-offense simple possession, possession of paraphernalia, and other minor drug offenses that are not criminalized under federal law. Lujan; Cardenas. While transportation is not criminalized under federal law, it is not more minor than the penalty for simple poss. under 11350.**
- (b) Simple possession of methamphetamines (Health & Safety Code § 11377) as a LIO in Count I? **Yes. Lujan.**
- (c) Count II (possession of paraphernalia)? **Yes. Cardenas.**
- (d) Count III (being under the influence of a controlled substance)? **Probably. See Cardenas.**

5. What immigration solution can you suggest to protect Juan from being deported on account of his 1997 conviction? **Cancellation of removal if the 11377 is reduced to a misdemeanor so it no longer constitutes an aggravated felony. No plea diversion means the first arrest did not result in a conviction. The expungement eliminated the first conviction (resulting from his second arrest) for immigration purposes. That leaves the 1997 conviction as now his first drug conviction. A first conviction of simple possession triggers deportation as a drug offense, but does not**

constitute an aggravated felony so long as it is not a felony under state law. **Matter of Yanez-Garcia; Matter of Santos-Campos.** Juan therefore has no aggravated felony conviction to bar cancellation, and does have the seven years lawful residence prior to commission of the deportable offense necessary to qualify for this discretionary relief. 8 U.S.C. § 1229b(a). Failing that, it would be necessary for Juan to vacate this conviction and plead to accessory after the fact. See below.

6. What would be a safe plea for Juan on the newest case? **Accessory after the fact to sale of drugs is not considered either (a) a drug offense, or (b) a drug trafficking offense, under immigration law. Matter of Batista-Hernandez, Int. Dec. 3321 (BIA 1997). It might be considered an aggravated felony, as an obstruction-of-justice offense if, but only if, a sentence of one year or more is imposed. Ibid.**

7. Assume you represent a client charged with Health & Safety Code § 11352. He needs to avoid an aggravated felony conviction. What are two strategies? **Section 11352 includes the offense of *offering to sell*, which is not an aggravated felony. U.S. v. Rivera-Sanchez. If you can keep the record of conviction vague as to whether the offense your client pleads to is sale or offering to sell, the INS cannot establish that the offense was an aggravated felony. In addition, transportation for personal use should not be held an aggravated felony.**

**Or you could attempt to plead to accessory after the fact with less than 365 day sentence. Accessory after the fact to a drug offense is not a drug offense, although the BIA has held that it is an aggravated felony as “obstruction of justice” if a year’s sentence is imposed. Matter of Batista-Hernandez, supra.**

8. Are the following convictions:

- C An aggravated felony?
- C An offense “relating to controlled substances” that is a basis for deportability and inadmissibility based on conviction?
- C A basis for inadmissibility because the INS now has “reason to believe” the person ever has helped or been a drug trafficker?

a) Felony possession for sale of heroin.

- **AF because it is a drug felony involving trafficking, with no “offer to” or other exception under Rivera-Sanchez, supra. Deportable and inadmissible because it is an offense “relating to” controlled substances. Inadmissible for “reason to believe” because the offense involves trafficking.**

b) Felony transportation for personal use under H&S § 11360

- **(Not an AF because it meets neither AF test: it does not involve trafficking as that is generally understood, and personal use transportation is not an offense punished under the referenced federal statutes. Is a deportable and inadmissible offense because it “relates to” controlled substances. Not inadmissible for “reason to believe” trafficking, because no trafficking**

involved.)

- c) Second misdemeanor conviction for possession of methamphetamine.  
-- (Not an AF because only felony possession is an AF. Yes a deportable and inadmissible because it is a conviction relating to controlled substances. Only one misdemeanor conviction could have been expunged, but this second one survives. Not inadmissible for reason to believe trafficking because doesn't involve trafficking.)
- d) Conviction under H&S § 11352 where the record of conviction does not indicate whether the offense involved sale or offer to sell.  
-- (Not an AF because the record does not establish that the offense involved was NOT offering to sell, and offering is not an AF. Arguably not a deportable/inadmissible conviction because offering does not come within the definition. Probably yes inadmissible for "reason to believe" because offering implies helping drug dealer.)

#### Exercise 4: Sentencing

1. Name three techniques by which you can avoid a sentence imposed of one year or more on a case in which this is important?

- (a) **First, obtain imposition of sentence suspended, and less than one year in county jail as a condition of probation.**
- (b) **Second, waive presentence credit for time served, and obtain the same.**
- (c) **Third, obtain multiple counts with the same sentence, even if the sentences must be served consecutively, because the analysis of whether an offense is an aggravated felony is determined count by count without reference to the other counts.**

2. Which of the following dispositions constitutes a sentence of one year or more under immigration law?

- (a) Imposition of sentence suspended and six months as a condition of probation? **No.**
- (b) Imposition of sentence suspended and one year as a condition of probation? **Yes.**
- (c) The lower term of 16 months, execution suspended, and six months as a condition of probation? **Yes.**
- (d) Two counts, imposition suspended, 360 days as a condition of probation, ordered to be served consecutively? **No.**
- (f) Waiver of 13 months presentence credit, imposition of sentence suspended, 10 months as a condition of probation? **No.**

3. Monica is convicted of grand theft and sentenced to nine months in jail as a condition of probation. She violates probation by being found to possess heroin, which is a felony and is her first drug offense. She may have a choice: take the probation violation with no drug conviction but an additional four months added to the original burglary, or take the new conviction of possession of heroin. What do you recommend?

**Adding three months to the nine months she has already will give her a theft conviction with one-year sentence imposed, which is an aggravated felony. A felony drug possession conviction also is an aggravated felony. Within the Ninth Circuit, however, it is possible to erase a first conviction for simple possession of a drug, whether it is a felony or misdemeanor, through rehabilitative relief. The drug conviction is better than the theft, as long as Monica is never brought under removal proceedings at a site outside the Ninth Circuit states. The very best choice from an immigration perspective would be to bargain for a theft sentence that was a day or more less than a year, so she doesn't "burn" her one shot at erasing a drug conviction.**

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