

Day 2 Afternoon Note-Taking Guide

Unit 8: Selected Forms of Status and Relief from Removal

(See Chapter 11, *California Criminal Law and Immigration* for detailed discussion)

(See “Immigration Relief Analysis for Non-Citizen Defendants” xxx)

1. Cancellation of Removal for LPR’s 8 USC 1229b(a)

- C Long-time LPR who is deportable can ask the immigration judge to “cancel” her removal as a matter of discretion.

2. Statutory requirements for LPR cancellation:

- C *Conviction of AF is absolute bar*
- C LPR for five years at time of application
- C Since person was admitted to U.S. in any status, seven years passed before
 - o commission of offenses that made the person inadmissible or deportable under particular grounds, or
 - o initiation of removal proceedings
- C Prior grant of cancellation, suspension or 212(c) is bar.

3. Former “212(c)” Relief

- C Consider in analyzing convictions from before 4/1/97
- C If def was LPR at time of plea, may be able to waive offenses including agg felony pleas from before 4/24/96.
- C See www.aif.org regarding *INS v St Cyr*, 121 S.Ct.2271 (2001), and consult expert.

4. Cancellation of Removal for Non-LPR’s 8 USC 1229(b)

- C 10 yrs residence and GMC
- C LPR or USC parent spouse or child
- C Can’t have been convicted of offense named in crimes grounds of inadmissibility or deportability (8 USC § 1182(a)(2), 1227(a)(2))

5. Family Immigration

- C Certain USC or LPR relatives can petition for close family members. Depending on category may be fast or slow (six months to twelve years).
- C Person immigrating cannot be inadmissible, or if inadmissible must be eligible for waiver.
- C AF not a bar per se because not grnd of inadmissibility. Some AF’s may not bar family immigration (like first offense misd stat rape). See also “212(h) relief”

6. “212(h) Relief,” 8 USC § 1182(h)

- C Will waive grounds of inadmissibility/deportability involving moral turpitude, prostitution, first conviction 30 gms or less marijuana, or two or more convictions with an aggregate 5 year sentence
- C Limitations for LPR’s (don’t apply to non-LPR’s, e.g. undocumented persons)
 - o If the person has been convicted of an aggravated felony since becoming an LPR, barred from applying for 212(h)
 - o An LPR always must have 7 years between obtaining LPR status and start of removal proceedings
- C Note: a non-LPR can waive a moral turpitude offense that also happens to be an aggravated felony

- C For example, could waive CMT offenses such as theft with a year sentence or statutory rape conviction
- C But couldn't waive drug conviction, because 212(h) doesn't cover them.

7. VAWA Family Immigration, 8 USC § 1154(a)(1)(A), (B)

- C If USC or LPR parent or spouse is abusive, the immigrant child or spouse can "self-petition" without that person's cooperation.
- C *AF is an absolute bar*
- C Must show good moral character for prior three years and not inadmissible, deportable for crimes

Some waivers available if conviction was linked to abuse

8. U Visa, 8 USC § 1101(a)(15)(U)

- C For victims of serious crime who cooperate in prosecution/investigation of crime
- C Need prosecutor, police, or judge to certify cooperation
- C Gives temporary status but can lead to LPR
- C Any conviction, even AF, potentially waivable

9. Asylum, Withholding, CAT, 8 USC §§ 1158, 1253(h)

- C Complex application requires expert immigration attorney
- C *AF is bar*, as is vaguely defined "particularly serious crime"
- C Must apply within one year arriving in U.S., absent special or changed circumstances
- C Harder to get "withholding of removal" or "Convention Against Torture" available for very strong cases; AF not absolute bar

10. Temporary Protected Status ("TPS"), 8 USC § 1254a

- C For nationals of designated countries devastated by war or natural disaster
- C Recent designated countries include Somalia, Angola, Bosnia-Herzegovina, Burundi, El Salvador, Guinea-Bissau, Honduras, Kosovo, Liberia, Montserrat, Nicaragua, Sierra Leone, Sudan
- C National must have arrived in U.S. by certain date. Go to www.ins.gov
- C Must be admissible, not convicted of felony or two misdemeanors, not barred under § 1253(h)(2)

11. Naturalization to U.S. Citizenship

- C LPR for 5 years (or less in some cases) can apply
- C Must show 5 yrs (or less in some cases) good moral character
- C Deportable natz applicant will be referred to removal proceedings
- C *AF conviction after 11/29/90 is absolute bar*

12. Special Immigrant Juvenile Status ("SIJS") 8 USC 1101(a)(27)(J)

- C Noncitizen under the jurisdiction of juvenile court (includes delinquency) who cannot be returned to natural or adoptive parent due to abuse, neglect or abandonment, where it would not be in child's best interest to return to home country
 - o E.g. JD placed in group home or treatment facility because parents are abusive or have abandoned
- C Juvenile court judge signs order certifying above
- C Extensive waivers, but do not apply to adult convictions or the INS having "reason to believe" drug trafficking.

- C See manual at www.ilrc.org; contact Public Council in southern California.

EXERCISE 5: Forms of Relief (see materials)

Unit 9. Immigration Holds: Practical Strategies to Avoid, Remove and Deal with Them¹

1. How does INS identify removable persons?

- C INS jail and prison search and interviews based on booking sheet information
- C Cooperation from jailers

2. Best Defense to identification in a jail or prison

- C To avoid removal proceedings AVOID JAIL
- C This is especially critical for undocumented or out of status aliens or LPR's with prior removable offenses!
- C To avoid jail consider: work release; community service; counseling; home detention; programs (without passing through jail first); diversion; prop 36; a combination of the above – offer a more severe combination of the above rather than a jail sentence that will lead to removal.
- C Obtain bail before a hold is placed for pretrial detainees
- C Advise non-citizen to take the 5th at INS interview. Many immigration violations are federal crimes.
- C INS has the burden of proving alienage. Cal P.C. § 1016.5 bars judges from asking about immigration status

3. How does INS take custody of removable individuals and what to about it

A. Detainers are issued on Form I-247

- C “The detainer is a request that such agency advise the Service, prior to release of the alien, in order for the Service to arrange to assume custody ...” 8 CFR 287.7(a).
- C It's merely a REQUEST for notice before the person is released, to provide INS officers the opportunity to question the individual prior to release. Legally it does not limit the institutions' discretion re offender's classification, work and quarters assignment etc. In practice, however, it does.

¹ Many thanks to Attorney Michael K. Mehr of Santa Cruz CA for this section.

- C Obtain copy of detainer: there may be other boxes checked on Form I-247 – e.g. a warrant of prior removal order. Also you will need this form to find phone and fax numbers to get the hold removed if possible.

B. INS request for temporary detention: Limited to 48 hours.

- C This detainer is not a mere notice and request for information. It applies when the individual is no longer subject to detention by the criminal justice agency. On form I-247 a box is checked
 - o X Federal regulations (8 CFR 287.7) require that you detain for the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal Holidays) to provide adequate time for INS to assume custody of the alien. You may notify INS by calling ...
- C If individual not released within 48 hours after the time the individual would otherwise be released (e.g. bail or O.R. or out-date after sentence) then habeas will lie and/or Sheriff will be liable for false imprisonment civil damages.
- C Enforce this by being vigilant. Talk to quality control office at jail/county counsel. Take them to court if they don't comply!
- C Many jailers confuse these with out-of-county warrants where a jail can hold a prisoner for 5 days.

4. How to get an immigration hold removed

- C It is a misconception that you can't get bail or OR with an immigration hold. But don't have the client post bond or OR without discussing this with an immigration attorney. In many cases criminal detention can have many advantages over immigration detention. Clients in immigration detention often are taken to remote locations, sometimes "hidden" by immigration authorities; keeping client from immigration detention delays removal hearing where that is beneficial, etc..
- C For LPR's: If you plead them to non-removable offenses and they have no prior removable offenses, you still might need to refer them to immigration counsel if the line INS officer thinks it is removable offense
- C For LPR's without prior removable offenses except for the instant one: FILE NOTICE OF APPEAL. If appeal still pending at time of release from jail or prison, the hold should be removed or an immigration lawyer can file a Motion to Terminate and WIN!

5. How to set up an appeal: slow-plea and late-filed

- C Appeal after court or jury trial; "slow plea" – submit on police report or prelim; §

1538.5(m) after denial of suppression motion and plea; or certificate of probable cause after guilty plea. Note: Even aggravated felons” can take advantage of this

- Even better: double up your protection with a “slow-plea” to a non-deportable offense or non-aggravated felony.
- Example: Jose is charged with possession for sale. No prior convictions. He is LPR with over 5 years from admission. Do “slow-plea” with appeal (procedural protection) with “offer to sell” indicated finding on record (substantive protection, since “offer to sell” is not an aggravated felony and arguably not a deportable offense)..

C Late-File Appeals

- Rule 4.305 California Rules of Court: The court “shall advise” of appeal rights upon conviction after trial, or imposing sentence following revocation of probation, except where the revocation is after D’s admission
- Obtain permission to file late appeal in Court of Appeals by Motion if failure of court to notify or lawyer promises to file and does not.

C Warning: You should refer client to immigration attorney and educate them. They will need to convince the line INS officer to remove the hold or file a Motion to Terminate

6. What happens if detainer is not removed and client is picked up by immigration?

A. Mandatory Detention by immigration authorities for most removable offenses, under 8 USC § 236(c)

- C INS must take into custody and not release (i.e., no bond) non-citizens deportable when “released” from custody if they have the following: conviction of one crime of moral turpitude within 5 years of last entry if one-year sentence was *imposed* (different from deportation ground); conviction of 2 crimes of moral turpitude; conviction of aggravated felony; a drug offense; a firearms offense, drug abuse and addiction.
- C Convictions that do require mandatory detention: domestic violence, one conviction of CMT if 1 year potential top within 5 years of admission unless 1 year actually imposed.
- C Also INS must take into custody and not release a non-citizen inadmissible under grounds related to CMT, drug convictions, drug trafficking, prostitution, misc convictions.

B. Immigration Bond for those eligible

C Full cash bond, or 10% for two years minimum (i.e. 20% total – possible to pay each year) and real property collateral.

C. Removal proceedings while in immigration custody

C It is common that client is detained and has removal proceedings at remove location (e.g. El Centro CA or Eloy or Florence AZ)

C No right to free immigration attorney

C If you have “set-up” defense definitely refer that person to immigration attorney – they can do Motion to Terminate – usually telephonically after written Motion. Immigration attorney may not understand “slow plea,” explain it.

C If person is Aggravated Felony and you have not “set-up” a defense, then refer them to criminal/immigration attorney to try to vacate conviction.