

A NJ Criminal Defense Attorney's Guide to Avoiding Immigration Based Ineffective Assistance Claims

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Immigration Statuses

- US Citizen
- Lawful Permanent Resident (Green Card)
- Temporary visitors (visitors, student)
- EWI
- DACA
- Deferred Action Status
- There are over 60 different kinds of visas

Inadmissibility

- ❑ A Legal Fiction - mere physical presence in the U.S. does not mean that the FN lawfully entered or was admitted to the U.S.
- ❑ You had to have been inspected and authorized by an immigration officer to be admitted
- ❑ INA § 212 - Grounds of inadmissibility

Deportability

- ❑ A FN has been lawfully admitted to the U.S. and then commits a crime
- ❑ INA § 237 - Grounds of Deportability

WHY DOES A CRIMINAL DEFENSE LAWYER HAVE TO KNOW THAT?

Different immigration consequences between criminal grounds of inadmissibility and deportability.

For example:

A NJ criminal conviction may not have the same effect on a green card holder versus an EWI

A NJ criminal conviction may only effect a green card holder if he leaves the country and returns

EXAMPLES INADMISSIBLE OR DEPORTABLE?

- ✖ Mexican FN here for 10 years. Got here via “Coyote”. If he gets pulled over for DWI; coke in the car and ICE shows up, he is ?
- ✖ Polish FN gets here with a B-2 visitor visa. It expires in 6 months. He gets busted for only simple possession of pot. ICE shows up, he is ?
- ✖ Italian FN with a green card has a criminal conviction for theft. He travels to another country for vacation. When he returns to JFK, he is ?

Inadmissibility v. Deportability

Criminal Grounds

Inadmissibility

INA § 212(a)(2)

- Conviction or admitted commission of any *controlled substance offense*
- Conviction or admitted commission of a ***crime involving moral turpitude (subject to a one-time petty offense exception)***
- Conviction of ***two or more offenses of any type*** with aggregate sentences to imprisonment of at least five years
- ***Prostitution*** and commercialized vice

Deportability

INA § 237(a)(2)

- Conviction of any ***controlled substance offense (other than a single offense of simple possession of 30 grams or less of marijuana)***
- Conviction of a ***crime involving moral turpitude*** (“CIMT”), committed within five years of admission to the United States and punishable by a year in prison
- Conviction of ***two crimes involving moral turpitude*** committed at any time and regardless of actual or potential sentence.
- Conviction of a ***firearm or destructive device offense***
- Conviction of a ***crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, violation of an order of protection***, whether issued by a civil or criminal court.
- Conviction of an ***aggravated felony*** as defined in INA § 101(a)(43)

Petty Offense Exception

Inadmissible

- Maximum sentence possible does NOT exceed one year; AND
- You are NOT sentenced in excess of six months
- Regardless of actual time spent in jail
- Suspended sentence = Sentence

Deportable

- Maximum sentence possible is less than one year
- If 4th degree (or higher) CIMT crime committed after five years of green card status then one free CIMT crime
- Not applicable to AF's

Domestic Violence

- In order to be **deportable** for DV, it must be a “crime of violence” at 18 USC § 16
- 18 USC § 16a – An offense that has as an element the use, attempted use, or threatened use of physical force against a person or property.
- 18 USC § 16b – Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another maybe used in the course of committing the offense.
- Look to the *mens rea* – Purposeful v. Negligence
- Specific Intent to Harm v. Thoughtless or Careless Action

Definition of Conviction

- Immigration and Nationality Act (INA) defines a “conviction” as:

formal judgment of guilt of the alien entered by a court or, if adjudication of guilt 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 guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. (INA § 101(a)(48))

What does that mean for New Jersey “convictions”?

- Only a finality of conviction counts (all times for all direct appeals have expired)
- PCR is collateral. The filing does not change the finality of the conviction.
- Any PTI/Municipal Dismissal/CD with a PLEA is a conviction
- Juvenile Delinquency Adjudication is not a conviction (DON’T waive up)

CRIMES INVOLVING MORAL TURPITUDE

- The phrase “moral turpitude” is one of the most ambiguous in the long list of ambiguous legal phrases and the cases are far from consistent.
- Moral turpitude refers to conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general.
- In determining whether an offense involves moral turpitude, it is a common mistake to consider whether the crime is a DP or a “degree” crime. Intentional theft of a piece of bubble gum is theft and involves moral turpitude.
- The facts of your clients case does not determine whether an offense involves moral turpitude. If they did, immigration judges would be charged with retrying the criminal case in immigration court.
- The focus is on whether the elements necessary to obtain a conviction under a particular NJ Criminal Statute render the offense a crime involving moral turpitude.
- **Generally need a specific intent to do harm, or knowledge of the act's illegality. Recklessness might be enough. Negligence is not moral turpitude.**

Crimes involving moral turpitude



- Discussion of Specific NJ Offenses and Whether they are CIMTs:
 - Theft when a permanent taking is intended (not joyriding)
2C:20-11 Shoplifting
 - Burglary – CIMT if you are there to steal not watch TV or sleep
 - Fraud - need intent to defraud or guilty knowledge
 - 2C:21-5 Bad Checks** (intent to defraud is an element)
 - 2C:21-2.1(c) False Documents** (intent to defraud is not an element)
 - Crimes of violence (bodily harm is intentionally or knowingly caused or threatened)
 - Most sex offenses
 - DWI plus an aggravating factor like a 39:3-40 where defendant knew his license was suspended (knowledge)
 - CDS (generally not a CIMT but drug dealing is)
 - Firearms (standing alone, not a CIMT but a separate ground of deportability)
- Petty Offense Exception (one free bite at the apple). Max. penalty one year jail. Our DP's fall within this classification

Aggravated Felonies

- Definition found in INA §101(a)(43)
- Generally, no relief available to FN
- Three categories:
 - (1) Offenses that are AF by their very nature
 - (2) Offenses that are AF based on monetary amounts or loss to victim
 - (3) Offenses that are AF based upon sentence

Aggravated Felonies

Nature of the Offense

- Murder, rape, or sexual abuse of a minor
- Drug trafficking
- Firearms trafficking (including destructive devices)
- Prostitution business
- Human trafficking
- Kidnapping
- Child Pornography

Aggravated Felonies

Monetary Amounts

- Money laundering involving funds in excess of \$10,000
- Fraud or deceit where loss to the victim exceeds \$10,000
- Tax evasion where loss to the Government exceeds \$10,000

Aggravated Felonies

Sentence imposed exceeds one year

- Theft
- Burglary
- Crime of violence
- Possession of stolen property
- U.S. Passport Fraud
- Commercial bribery, counterfeiting, forgery, or trafficking in vehicles
- Obstruction of justice, perjury or subornation of perjury, or bribery of a witness
- Bail Jumping (2C:29-7 – third degree only)

NJ AF Crimes that MUST be avoided

- NJSA 2C:24-4(a) - Endangering the welfare of a child
(but see Safe Havens)
- NJSA 2C:12-1(b) - Aggravated assault
jail => one year
- NJSA 2C:20-et. seq. Theft
jail => one year
- NJSA 2C:18-2 Burglary of a dwelling to steal
jail => one year
- NJSA 2C:35-5 Possession with intent to distribute a CDS
(but see Safe Havens)

SAFE HAVENS FROM AF CLASSIFICATION

- NJSA 2C:24-4(a) - Endangering the welfare of a child (eliminate the “sexual conduct”)
- N.J.S.A. 2C:35-5(b) possession with intent to distribute any controlled substance, except a small amount of marijuana for no remuneration
- Criminal sexual contact in which age of the victim is not an element (e.g. N.J.S.A. 2C:14-3(a) and 2C:14-2(a)(7) – aggravated criminal contact in which the victim is helpless)
- Reduce Jail sentence to 364 days
- Reduce Monetary loss to < \$10,000

Specific Issues in NJ Municipal Court

- N.J.S.A. 2C:35-10c - Possession, Use or Being Under the Influence, or Failure to Make Lawful Disposition. Failure to turn over or under the influence. DP, no problem. Right? WRONG! SAFE HAVEN = Pot or N.J.S.A. 2C:35-10a(4) under 30 grams.
- §36 Conditional Discharge - Do NOT allow your client to plead guilty. Do NOT allow your client to make a statement of possession on the record. A “reopener” may be too late.
- N.J.S.A. 2C:36-2 – Drug Paraphernalia. “Relating to” a controlled substance violation.
- N.J.S.A. 2C:33-2.1 – Loitering. Not a good deal for FN. They lose out on a potential waiver (under 30 grams of pot).
- N.J.S.A. 2C:20-11 – Shoplifting. CIMT. SAFE HAVEN = N.J.S.A. 2C:33-2A(1) Disorderly Conduct. Neutral factual basis. I was in Wayne and created a disturbance.

Controlled Substance Violations

- Not all drugs are controlled substances
- Illegal possession of cancer drugs from Haiti is a crime but not a “controlled substance” violation
- Must be listed on the federal schedule (21 USC § 802) otherwise not a controlled substance
- CSV are independent grounds of inadmissibility and removability (deportability)
- Do not need a conviction – or even an arrest – on his record. “Reason to believe” he is a drug dealer is sufficient to be denied admission to the U.S.
- Green Card holder returning from abroad = convicted or admits = denied
- Simple possession of either Crack or Ruffies flu·ni·tra·ze·pam is AF

Mandatory Detention: INA § 236(c)

- Noncitizens who have committed certain offenses must be detained, without bail, by U.S. Immigration and Customs Enforcement (USICE) during the pendency of their removal proceedings
- **THERE IS HOPE!** We conclude that 8 C.R.F. § 287.7 does not compel state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as requests to local LEAs. Given this, Lehigh County was free to disregard the ICE detainer. **Galarza v. Szalczky** (C.A.3). March 4, 2014 WL 815127

Mandatory Detention INA § 236(c)



- Aggravated felonies
- Any controlled dangerous substance offense other than simple possession of less than 30 grams of marijuana
- Two crimes involving moral turpitude (for Legal Permanent Residents in the US)
- One crime involving moral turpitude if sentenced for one year or more
- Firearms offenses

- When your client is NOT subject to mandatory detention!!!
- When there is a HIGH probability that your client will get a BOND from ICE or the Immigration Judge

SO, when do I tell my client's family to post the county bail???

Post-Conviction Relief

- GROUND OF LEGAL INVALIDITY - To eliminate a conviction, PCR must be granted at least in part because of a ground of legal invalidity, that was in existence at the time the conviction first occurred.
- GROUND OF LEGAL INVALIDITY II - Relief granted solely to avoid immigration consequences, or because of rehabilitation or favorable equities, that happened after the plea, will NOT erase the immigration consequences.
- GROUND OF LEGAL INVALIDITY III - Matter of Pickering, 23 I&N Dec. 621 (BIA 2003)(applies only to vacating convictions). The vacatur can be based in part on immigration consequences, so long as it is ALSO based at least IN PART on a ground of invalidity.
- SENTENCES – Sentences may effectively be changed for any reason at all, even immigration consequences. Matter of Cota-Vargas, 23 I. & N. Dec. 849 (BIA 2005)(Pickering applies only to convictions, not to sentences).
- PADILLA CLAIMS – Holding counsel must affirmatively give accurate immigration advice before plea to render effective assistance of counsel. This requires showing (1) deficient performance by counsel, and (2) prejudice, a reasonable chance of a different outcome absent error. Padilla v. Kentucky, 120 S. Ct. 1473 (2010)

IAC Claims After Chaidez

- Padilla (3/31/10) requires defense counsel to give accurate immigration advice before plea
- Chaidez reaffirmed Padilla's holding that professional norms since 1995 required defense counsel to advise of immigration consequences. It even cited a 1968 ABA standard that did so.

Specific IAC Claims

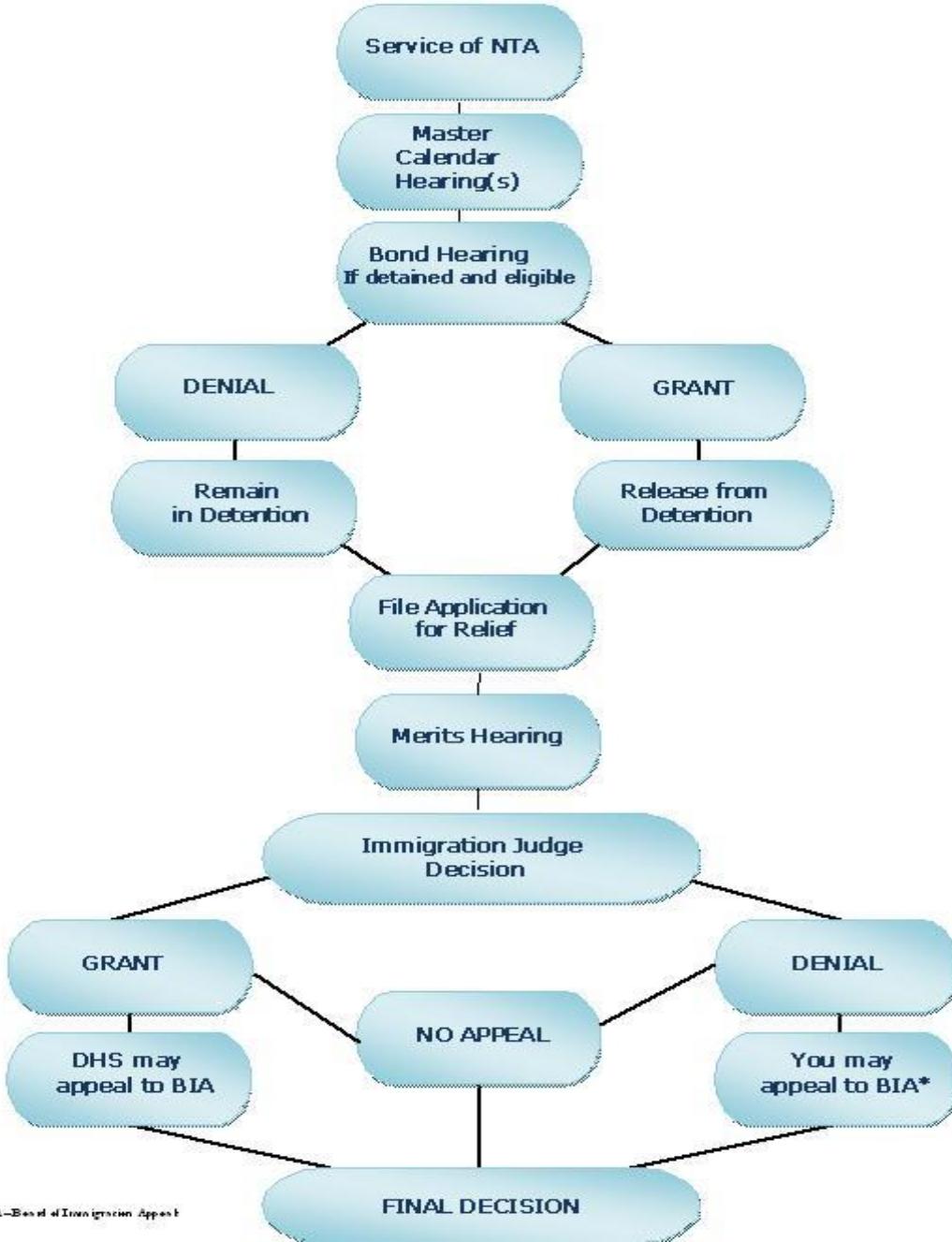
- Failure to Advise – failure to advise on immigration consequences not retroactive.
- Affirmative Misadvice – affirmative misadvice concerning immigration consequences can be retroactive and Chaidez does not apply to this ground.
- Affirmative Misadvice II – can be about any topic, not just immigration consequences.

Potential Future IAC Claims

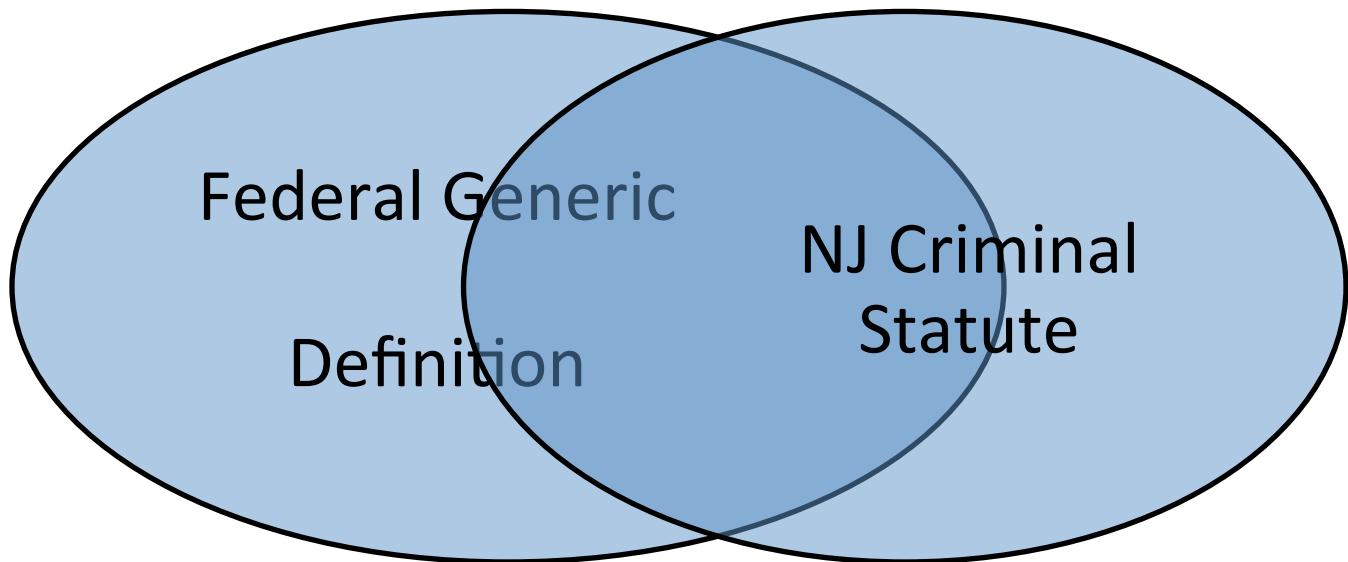
Problems to “Look Out” for

- **Failure to Defend** against adverse immigration consequences. Even if correct immigration advice was given, defense counsel has a duty to try to prevent bad consequences. Padilla is inapplicable, since it deals only with advice. Many cases predating Padilla recognize this ground. E.g., Janvier v. US, 793 F.2d 449 (2d Cir. 1986)(failure to seek JRAD); People v. Bautista, 115 Cal.App. 4th 229 (2004)(failure to seek to plead up to greater non-deportable offense).
- **Failure to Mitigate** plea or sentence. Since Strickland, in 1984, defense counsel has always had a duty to minimize sentence. A sentence eve one day greater caused by IAC = prejudice. Glover v. US, 531 U.S. 198 (2001). Padilla is irrelevant.
- **Failure to Investigate** immigration status, to use as a tool in defense of the criminal case, such as trying to reduce sentence from 365 to 364. This duty has existed since Strickland, in 1984. This ground can neutralize a governmental claim that defense counsel had no immigration-related duties because he or she was unaware of D's noncitizen status.
- **Failure to Negotiate** effectively is a variation of the failure to defend ground. Missouri v. Frye, U.S. 132 S. Ct. 1399, 1406 (2012); Lafler v. Cooper, U.S., 132 S. Ct. 1376, 1384. These cases establish that prejudice includes failure to negotiate a better plea bargain, not merely to take a case to trial with a better result.

The Immigration Removal Process: *An Overview*

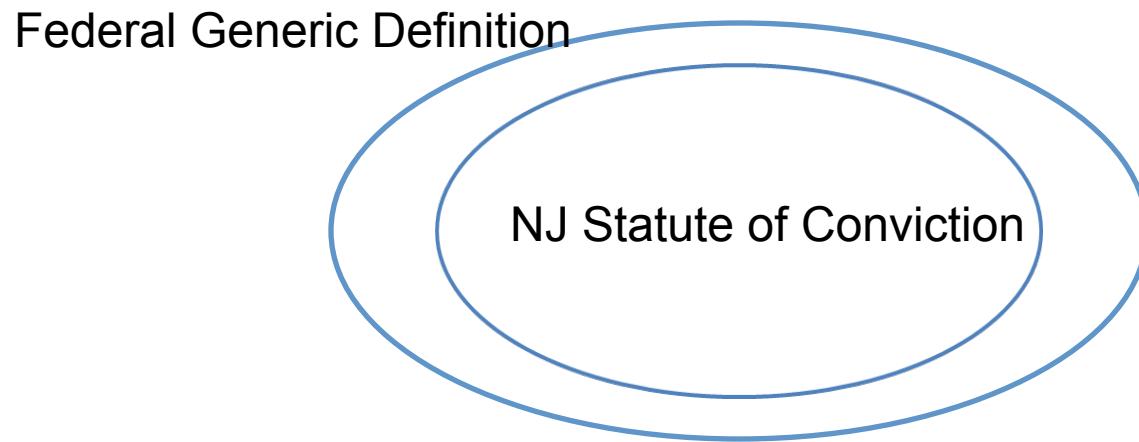


Not a Categorical Match



Where the NJ criminal statute defines the offense more broadly than the immigration grounds of removal at issue, the conviction will not trigger the immigration penalty regardless of the information that may appear in the individual's record of conviction

A Categorical Match



The NJ criminal statute is a categorical match with the applicable generic definition.

