

Minimizing travel restrictions for criminal clients

Lawyers who assist criminal defendants attempt to minimize the negative impacts of their clients' criminal activity—but an often overlooked collateral consequence is their clients' restricted access to the U.S.

The U.S. standard for criminal inadmissibility takes a few forms. For an individual who has engaged in prostitution, whether there is a conviction or not, she must wait 10 years to gain legal access to the U.S. When it comes to drug trafficking, if the inspecting U.S. Customs and Border Protection Officer has reason to believe the person is or was involved in drug trafficking, inadmissibility results; again, no conviction is required. In either of these cases, however, a conviction will definitely result in inadmissibility. For inadmissibility based on drug possession to attach, the individual must admit to the essential elements of the crime, admit to a conviction, or have a conviction. If the person was under 18 at the time of the offense, he is not rendered inadmissible, as this would be treated as an act of juvenile delinquency in the U.S., not a crime.

For all other criminal inadmissibility, the standard requires admission to the elements of a crime involving moral turpitude (CIMT), admission to a conviction for a CIMT or a conviction for a CIMT. The definition of CIMT is "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



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general...” (See *Matter of Franklin* 201 & N Dec. 867, 868 (NIA 1994); aff'd, 72F. 3d S22 (8th Cir. 1995)). Assessments under this standard are rather technical, depending on the wording of the statute under which a conviction occurs. Some examples of CIMTs include murder, theft, fraud, sexual assault, and possession of stolen property. Conspiring or attempting to commit a CIMT is itself a CIMT, rendering the defendant inadmissible.

For U.S. immigration purposes, crimes do not include acts of juvenile delinquency. Therefore any offence that would otherwise render someone inadmissible to the U.S. but does not fit within the definition of a crime of

violence (which removes it from the classification of juvenile delinquency) and which is committed before the age of 18, does not render him inadmissible.

The definition of conviction is important. To be a conviction, there must be a formal judgment of guilt entered by a court, or if withheld: (1) a judge or jury has found the defendant guilty or the defendant entered a plea of guilty or *nolo contendere*, or admitted sufficient facts to warrant a finding of guilt and (2) a judge ordered punishment, penalty, or restraint on liberty to be imposed. An absolute discharge in Canada is not a conviction for U.S. immigration purposes. This is a wonderful tool in assisting a client to maintain access to the U.S. Very importantly, however, a conditional discharge is a conviction for U.S. immigration law purposes. Sometimes diversion programs eliminate admissibility issues, but the determination may be limited to a particular port of entry, reflecting the subjectivity of U.S. immigration laws related to admissibility generally.

There are notable exceptions to criminal inadmissibility. For instance, if an individual committed only one CIMT, he was under the age of 18 at the time of the offence, and five years or more have passed since his last contact with the criminal justice system, he is not inadmissible (§212(a)(2)(A)(ii)(I) INA.)

Another important exception is the petit offence exception. If the individual has committed a single crime for which he could not be sentenced to a full year,

and he was not sentenced to six months or longer, he is not inadmissible. Canadian summary convictions fit squarely within this category. Super summary convictions do not, however, since the possible sentence is 18 months.

An individual with more than one conviction, none of which are CIMTs, can be found criminally inadmissible if her total sentences imposed (not necessarily executed) equal or exceed five years. Therefore, although drinking-and-driving offences do not render someone inadmissible, he can become inadmissible after multiple convictions and five years or more of imposed sentences.

Since most Canadians live fairly close to the U.S. border, maintaining access to the U.S. can carry great importance in the lives of clients facing prosecution. As a result, criminal counsel should have some knowledge of what constitutes a conviction under U.S. immigration law, as well as the effects of such a conviction on travel to the United States. With a bit of effort, travel restrictions can be minimized or even eliminated altogether by planning and pleading accordingly. ■

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