

# Baby Jail... Adult Consequences



*JUVENILE ADJUDICATIONS  
& IMMIGRATION LAW*

**MAGGIE ARIAS**

CRIMINAL DEFENSE & IMMIGRATION LAW ATTORNEY

# Keep the Case in Juvenile Court



- Adjudications of juvenile delinquency **are not** considered criminal convictions under immigration law.
- It is essential to keep clients under the age of 18 in the juvenile court system if at all possible.
- Juvy court and adjudications of delinquency are not the equivalent of “youthful offender” sentencing schemes.
  - *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Devison* was affirmed in 2013 by *Matter of V-X*, 26 I&N Dec. 147 (BIA 2013), in which BIA held that a “youthful trainee” status pursuant to Michigan law is a “conviction” because it is a sentencing provision, not a delinquency adjudication.

## What delinquency findings will trigger conduct-based grounds of inadmissibility and/or deportability?



- Although not a conviction, a delinquency disposition can create problems for juvenile immigrants.
- Certain grounds of inadmissibility and deportability do not depend upon conviction.
- Mere “bad acts” or status can trigger the penalty.

# What is my responsibility?



- PD's have a responsibility not only to *advise* clients about immigration consequences but to *defend them against* such consequences.
- **A general warning that a proposed plea bargain could make the client deportable or inadmissible is not sufficient.**
- Effective assistance of counsel requires PD's to consult an immigration expert on the immigration consequences of the various dispositions, pleas, convictions, and strategies the PD and client are considering.
- *PD's should refer all clients who are noncitizens to an immigration lawyer.*
- PD's should be able to explain to youth clients in clear, understandable language what the various options and consequences of his/her immigration status are.
- PD's should be prepared for some youth to prioritize quick processing in the justice system over concern for the long-term consequences of different forms of processing for immigration purposes.

# How should I be assessing my juvenile client's case?



*To analyze a criminal case, you must answer the following questions:*

1. What ground of inadmissibility or deportability is the client charged with or has to overcome to obtain an immigration benefit?
2. Can the government establish that the client is inadmissible or deportable under the ground(s) charged?
3. What potential relief is available?
4. Can the child get rid of the conviction and clear up her record by expungement or other means? If so, will DHS accept this?

# Conduct-based grounds that might provide the gov't with evidence that the person comes within the ground



Delinquency Disposition	Immigration Penalty	Immigration Waiver Available?
Prostitution	Inadmissible for engaging in prostitution	Waivers are often available
Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses	Inadmissible when DHS/ICE has “reason to believe” (RTB) participation in drug trafficking	No waivers except for the S, T, or U visa; **can and often does cause permanent bar to obtaining lawful status
Repeated drug findings, finding of abuse, addiction to drugs	Inadmissible and deportable for drug addict or abuser	Waivers often available
Suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), repeated alcohol offenses (alcoholism)	Inadmissible for mental disability posing threat to self or others	Waivers may be available
Use of false documents and fraud offenses relating to false claim to citizenship	Inadmissible and deportable for false claim to US citizenship	Waivers may be available, e.g., SIJS and U visa
Violations of protective or “no contact” orders designed to prevent repeated harassment, credible threats of violence, or bodily injury	Deportable where court finds violation of DV protective order designed to prevent repeated harassment, credible threats of violence, or bodily injury	Some waivers are available

# Conduct-Based Grounds of Inadmissibility and/or Deportability



- Prostitution
- Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses
- Repeated drug findings, finding of abuse, addiction to drugs
- Suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (alcoholism)
- Use of false documents and fraud offenses relating to false claim to US citizenship
- Violations of protective or “no contact” orders designed to prevent repeated harassment, credible threats of violence, or bodily injury

# What about gang-related activity?



- Delinquency findings for violent offenses including serious assault or gang-related activity do trigger consequences to obtaining immigration status.
- ***Such findings will be considered a negative factor in any discretionary decision.***
- This is particularly true for allegations of gang-related activity since targeting noncitizen gangs is a high priority for DHS.

# Reason To Believe!!! RTB



- If there is anything you manage to take away today, this is one of the most important facts:
  - Reason to believe the child engaged in or assisted in drug trafficking – that’s all DHS needs to deny your client entry to the U.S.!!
- A noncitizen is inadmissible if immigration authorities have probative and substantial “reason to believe” that she ever has been or assisted a drug trafficker in trafficking activities. INA §212(a)(2)(C).

# What is Trafficking?



The U.S. Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006), held that “ordinarily [illicit] ‘trafficking’ means some sort of commercial dealing.” The BIA similarly defined trafficking as “the unlawful trading or dealing of any controlled substance” in *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).

The BIA has explained that the concept of “trafficking” includes, at its essence, a “business or merchant nature, the trading or dealing in goods.”

Under the RTB standard, DHS must prove the specific intent to distribute a controlled substance.

# What are the penalties for RTB?



- Because RTB does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports, or use a defendant's out-of-court statements.
- This is a very serious ground of inadmissibility for which there is no waiver.
- If the child is a lawful permanent resident, the RTB inadmissibility ground cannot be used as a basis to deport/remove her unless she departs the U.S. and attempts to reenter, at which point she would be placed in removal proceedings.
- Additionally, a finding of RTB will impact a permanent resident youth's application for U.S. citizenship.

# How does the government use RTB against an immigrant child?



- The government will argue that an arrest, admission, and/or adjudication in delinquency proceedings to sale or possession for sale will trigger this ground.
- The BIA and 11<sup>th</sup> Circuit have held that the facts underlying drug trafficking offenses even if the offenses themselves no longer trigger immigration consequences, can be used to exclude a person under this ground.
  - *See Matter of Favela*, 16 I&N Dec. 753 (BIA) (juvenile convicted under the Federal Youth Corrections Act of a drug trafficking offense, after expungement rendered the conviction itself of no immigration consequence, could still be excluded under the “reason to believe” ground based on facts underlying the expunged conviction); *Castano v. INS*, 956 F.2d 236 (11<sup>th</sup> Cir. 1992)(facts underlying a drug trafficking conviction which had been expunged under the former Federal Youth Corrections Act could still be used to exclude a person under the “reason to believe” ground).

# What about Prostitution?



A noncitizen is inadmissible, but not deportable, if she comes to the U.S. to engage in prostitution or has “engaged in prostitution” within the last 10 yrs. INA §212(a)(2)(D)(i).

While no conviction is required for this finding, one or more delinquency adjudications for prostitution will serve as evidence.

# Other potential consequences of juvenile dispositions



Certain juvenile dispositions can bar family unity:

In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, 1996 legislation barred family unity benefits to persons who “commit an act of juvenile delinquency, which if committed by an adult” would be a felony involving violence or the threat of physical force against another person.

“Family Unity” is a benefit for relatives of participants in the amnesty programs of the late 1980s, which currently affect few persons. The rule applies to family unity benefits “granted or extended” after September 30, 1996.

## Other consequences, continued...



Certain juvenile dispositions can bar a U.S. Citizen or LPR from petitioning a family member:

Effective July 27, 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 to prevent both U.S. citizens and lawful permanent residents convicted of certain crimes against minors from filing family-based petitions, unless they qualify for a narrow exception. If they are denied this narrow exception, there is no judicial review of this denial.

These offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct. Certain serious juvenile delinquency dispositions also will be considered “convictions” for this purpose.

# Important to remember



- First, under INA 212(a)(2)(A)(i)(I), an alien who is convicted of a crime involving moral turpitude (CIMT) is inadmissible or disqualified from obtaining a visa or admission into the US.
- However, under INA 212(a)(2)(A)(ii)(I), a CIMT conviction cannot be a basis for inadmissibility if: (1) the alien committed only one crime; (2) when the alien was under 18 years of age; (3) the crime was committed more than 5 years before the visa and admission application; and (4) the alien was released from prison more than 5 years before the visa and admission application.

## Important to remember cont'd...



- Second, under 22 CFR 40.21(a)(2)(i), a conviction which would otherwise qualify as a CIMT would not count as a conviction if the alien was under 15 years of age when the crime was committed. If the alien was over 15 but under 18 years of age, a conviction which would otherwise qualify as a CIMT would not count as a conviction except if the alien was tried and convicted as an adult for a violent felony.

## Important to remember, cont'd...



- Third, as far back as 1944, the Board of Immigration Appeals (BIA) has consistently held that: (1) juvenile delinquency proceedings are not criminal proceedings; (2) acts of juvenile delinquency are not crimes; and (3) findings of juvenile delinquency are not convictions for immigration purposes. The Federal Juvenile Delinquency Act (FJDA) explains that a juvenile delinquency proceeding results in the adjudication of a status rather than a conviction for a crime. The FJDA defines a juvenile as a person under 18. It defines juvenile delinquency as any federal crime committed by a juvenile.

## Example of how a Juv'l Adj'n can have lasting effects



- X was arrested for theft, which is a CIMT, when he was 16 years old. He went through a state proceeding that qualifies as a juvenile delinquency adjudication. If X applies for adjustment of status, he would not be found inadmissible for a CIMT which means he would not need to file an application for a waiver of inadmissibility. However, USCIS in its discretion may still deny his adjustment application if it finds that X's conduct that led to his juvenile delinquency adjudication was sufficiently serious as to outweigh the equities in his favor.

# Consult with Immigration Counsel—your client will greatly benefit from it!



- If budget allows, try to create and sustain an in-house immigration unit to assist with immigration consequence advice.
- Consulting with an immigration attorney can be extremely beneficial when negotiating with your prosecutor.
- A legal memo detailing the adverse immigration consequences as well as the client's home country conditions may significantly decrease your juvenile client's exposure.
- Lastly, please read the following article: The Duty to Advise of Immigration Consequences: The U.S. Supreme Court's Decision in *Padilla v. Kentucky* by Rebecca Sharpless.

Good Luck :o)



Maggie Arias  
Criminal Defense & Immigration Attorney  
*Arias & Pereira, PLLC*