WESTERN NEW YORK IMMIGRATION ASSISTANCE CENTER

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We are funded by the New York State Office of Indigent Legal Services (through Erie County) to assist you in your representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in Padilla v. Kentucky, 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. Our Center was established so that we can share our knowledge of immigration law with public defenders and 18b providers to help you determine the immigration consequences of any particular case you may be handling. There is no fee for our services.

Immigration Issues for the Noncitizen Defendant

Beginning in early 2017, we hope to come around again to give new CLEs to the Public Defender Offices and Assigned Counsel in the 7th and 8th Judicial Districts. This year's CLEs will focus on criminal convictions and family law findings that may affect naturalization and other benefits available to non-citizens, the grounds of inadmissibility, and an ethics component about the duty to advise non-citizen defendants. The hope is to answer the questions that arose in the first round of CLEs which we began last April. We hope to see even more of you in 2017. In the meantime, please feel free to call or email us for technical assistance.

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Happy New Year!

In this issue

WNY IMMIGRATION ASSISTANCE CENTER

A joint collaboration between the Erie County Bar Association Volunteer Lawyers Project, Inc. and The Legal Aid Society of Rochester, New York.

THE CONFUSING CRIME INVOLVING MORAL TURPITUDE AND THE PROBLEMS IT MAY CAUSE

By SOPHIE FEAL, ESQ., Director of The Immigration Program, ECBA Volunteer Lawyers Project, Inc.*

**Sophie is grateful to the Immigrant Defense Project for its outline on Crimes involving Moral Turpitude from which some of the information in this article is drawn.*

Crimes of moral turpitude (CMT) are the most common type of offense that can affect the immigration status of a non-citizen. But what are they?

It is clear that "neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." Matter of Serna, 20 I&N Dec. 579, 581 (BIA 1992). It is also clear that the distinction between a felony and a misdemeanor is not necessarily relevant, as both may be a CMT.

For decades, the Board of Immigration Appeals (BIA) and the federal courts have defined a CMT as involving 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 general." Rodriguez v. Gonzales, 451 F. 3d 60, 63 (2d Cir. 2006); Matter of Leal, 26 I&N Dec. 20, 25 (BIA 2012). Unfortunately, this definition is not all that helpful to the practitioner, especially when one considers that society's rules of morality shift with time. For example, I once successfully argued that a Florida conviction for lewd and lascivious behavior was not a CMT since the law had historically criminalized miscegenation and sexual conduct between unmarried couples. Additionally, this particular law required no scienter, which is an important element in a CMT.

More useful for a practitioner to understand what constitutes a CMT is that it must involve reprehensible conduct and have some degree of scienter, whether specific intent, deliberateness, willfulness or recklessness. Matter of Silva Trevino, 24 I&N Dec. 687, 689 n. 1 (A.G. 2008); Matter of Mueller, 11 I&N Dec. 268 (BIA 1965). The practical effect is that strict liability statutes (with the exception of statutory rape) and negligence offenses are generally not CMTs. As well, legally impossible crimes, such as those involving an attempted reckless mens rea (e.g. NYPL 110/120.05(4)), are not CMTs. Gill v INS, 420 F.3d 82 (2d Cir. 2005).

Reprehensible conduct involves an offense which is "malum in se" (evil in itself) versus "malum prohibitum." For this reason, most regulatory offenses will not be a CMT. In fact, offenses which are certainly CMTs involve intent to defraud (such a forgery pursuant to NYPL 170.05); theft with the intent to permanently deprive the owner (including petty larceny at NYPL 155.25); an intent to cause bodily harm (NYPL 120.00(1) and (2)); offenses against protected classes of persons, such as a child, a domestic partner, or a law enforcement officer; an assault with a weapon and sex crimes.

The second issue relevant to CMTs is when will they threaten a noncitizen's immigration status?

Immigration law states that a noncitizen is deportable for one conviction of a CMT for which a sentence of one year or more may be imposed (hence, this would include Class A misdemeanors, but not Class B misdemeanors unless the offense falls within another removal category such as a DV offense which does not have a sentence limitation) when it is committed with the first five years after admission to the US. Immigration and Nationality Act (INA) §237(a)(2)(2)(A)(i). This means that to properly assess whether a lawful permanent resident is subject to deportation, one must clearly know his/her date of admission, a fact that is recorded on the "green card." It would also require a clear knowledge of whether the defendant has been convicted of any prior CMTs anywhere in the world.[1]

On the other hand, two CMT convictions, regardless of the possible sentence or when the offense was committed, will lead to deportation. INA §237(a)(2)(2)(A)(ii). In this case, Class B misdemeanors would count. The only exception is if the convictions arise out of a "single scheme of criminal misconduct."

CMTs are also grounds of inadmissibility, which means that one such conviction can prevent a noncitizen from entering the US or gaining status in the US, including lawful permanent residence. INA §212(a)(2)(A)(i) as set forth in our November 2016 newsletter. The sole exception to this rule is if the conviction is deemed a "petty offense." A petty offense is one, and only one, conviction for a CMT for which a maximum sentence of one year may be imposed (a class A misdemeanor in NY), and when the actual sentence imposed is six months or less of incarceration. Obviously, pursuant to this provision, a Class B misdemeanor will always be a petty offense exception, and a felony will never be.

Finally, a CMT may bar a noncitizen from establishing that s/he is of "good moral character," an important immigration law term explained in our August 2016 newsletter.

Footnotes

[1]Be aware that certain offenses may be both a CMT and an aggravated felony or a crime of domestic violence. In such cases, a conviction for only one such offense, regardless of when committed, could lead to the removal of a noncitizen. Aggravated felonies are defined at INA §101(a)(43) and reviewed in our July 2016 newsletter. DV offenses are defined at INA §237(a)(2)(E).