

How Immigration Law Can Affect Your Practice

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The Trump Administration's Executive Orders, high profile legal battles, and promises of an expansive border wall brought new attention to immigration law and underscored its wide-reaching nature. Immigration law and policy can affect decisions regarding marriage, divorce, adoption, guardianship, financial planning, higher education, interacting with police, hiring employees, and seeking public benefits, among others. Consequently, providing comprehensive representation requires understanding how a client's immigration needs intersect with your law practice.

The following discussion is intended to illustrate issues in which the immigration laws may influence the best resolution for your client. However, immigration law can be complex, so consulting with specialists is often necessary. We hope these materials will help you routinely identify immigration matters in your practice so that you and your clients can work with an expert to develop complete and integrated solutions.

The first step for any practitioner is *screening*:

Ask your clients about their immigration status by asking where they were born and where each member of their immediate family was born. If they were not born in the U.S., you can ask additional questions to find out if the client is a U.S. citizen through other means or if she or her family members have another form of immigration status in the U.S. Not everyone knows their status and it is not uncommon for someone to be a U.S. citizen without knowing it, so you may need to consult with an immigration attorney to verify your client's exact situation.

For Family Law Practitioners:

Much of immigration law is rooted in family relationships. A person's immigration status and her options for remaining in the United States are often tied to the status of her parents, spouse, and children. The immigration laws also include a number of benefits designed to protect people who have been harmed by family members. Here are a few ways in which family law practitioners can identify issues and opportunities for clients who are not U.S. citizens.

- *Screening*: If your client or her family member was not born in the United States, their permission to remain in the U.S. may depend on the immigration status of other family members. As a result, you need to verify the impact of any change in those relationships on their ability to stay in the U.S.
- *Divorce*: A client could lose her permission to be in the U.S. and so working with an immigration practitioner to identify alternative paths to lawful status and timing the completion of a divorce can be critical.

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- *Adoption:* U.S. citizenship is often conferred to children of U.S. citizen parents, but not always. If your client is adopting someone who is not a U.S. citizen, consulting with an immigration attorney regarding the timing and process of the adoption can be key.
- *Victims of domestic violence:* Several different immigration laws are designed to prevent non-citizens from staying in abusive relationships in order to preserve or obtain immigration status. Therefore, a spouse or child who has experienced domestic violence may be able to gain lawful immigration status independent of their partner or parent, but may be unaware of these options. By screening for immigration status and abuse, you can help your client identify opportunities and gather necessary evidence to apply for those benefits.
- *Child custody, guardianship, and termination of parental rights:* Children who are not U.S. citizens and who have been abused, neglected, or abandoned by one or both of their parents can obtain lawful immigration status as a means of protecting them from further harm. This status depends on receiving very specific factual findings from a state court, but those findings can be made through court proceedings ranging from a custody modification order to a probate determination. If you are working with a child who is not a citizen in any court matter, you may be able to facilitate these critical findings and help secure their long-term protection.
- *Powers of attorney:* The new wave of immigration enforcement under the Trump Administration has brought fear and uncertainty to many immigrant families. Consequently, helping families prepare for the care of their children and the care of their finances should they be detained or deported is a crucial service that is in high demand. Attached are sample delegations of parental powers and powers of attorney with instructions geared toward immigrant families to assist in this process.

For Prosecutors and Criminal Defense Attorneys:

Contact with the criminal justice system can have dramatic immigration consequences for anyone who is not a U.S. citizen, regardless of the length of time spent in the U.S., their family ties, the nature of their status, or the severity of the criminal charge. Long-time permanent residents can be deported as the result of a criminal conviction. So too can refugees. An international student can lose his ability to complete his education due to an arrest, and all non-citizens become priorities for immigration enforcement through the booking process.

The interaction between criminal and immigration law is especially complex and requires a tailored analysis in every case of the effect of each criminal charge and sentence on a person's immigration status. Below are a few examples of how the consequences of an arrest or conviction are much more significant for people who are not U.S. citizens and how criminal justice practitioners can account for those differences.

- *Automatic Information Exchange with Immigration Officials:* When a person is fingerprinted by a local police officer or sheriff's department, identity information and the charging information are automatically shared with the Department of Homeland Security (DHS). If the person also has an immigration record and is potentially subject to deportation based on the current charge

or past criminal or immigration history, DHS can deploy officers to detain the person on immigration grounds or ask local officials to assist in that process. As a consequence, booking noncitizens will often trigger deportation proceedings through the automatic exchange of information between the FBI database and DHS's records.

- *Immigration Detainers:* Once DHS is notified of the criminal detention of a non-citizen through the booking process or other communication, immigration officials may request that local law enforcement continue to detain the person beyond what is required in the criminal process so that DHS can interview and take custody of the person on immigration grounds. The legality of this policy is being challenged all over the country, but practically speaking, if DHS has filed an immigration detainer on an individual and the local law enforcement agency plans to concede to DHS's request, the person will not be released from criminal custody even if he posts bail or has his charge resolved in criminal court. As a result, it is important to understand if a detainer exists and then to work with the client on how to approach bail and whether to delay resolution of the criminal charge so as to allow him and his family to prepare for the immigration proceeding that will likely follow.
- *Plea bargaining:* Because different criminal offenses can have vastly different immigration consequences, it is important to understand the full impact of a conviction—beyond just the criminal justice system. It may be possible to agree to a charge that has similar criminal consequences but does carry additional immigration consequences. In other cases, a more serious criminal charge may be preferable because it carries fewer immigration consequences. The specific statutory language cited in the charging document and the plea colloquy can also make a difference for immigration purposes. An immigration attorney can evaluate in advance the potential impact of a given conviction and whether alternative charges or specific language in a plea could eliminate the disparate impact of a conviction on a non-citizen.

EXAMPLES: A plea to possession of paraphernalia instead of possession of a controlled substance could avoid immigration consequences on top of the criminal ones. A first-time plea to possessing 30g or less of marijuana can also avoid additional civil consequences.

As discussed below, conviction for DUI renders a noncitizen a top priority and limits their ability to obtain release from immigration detention on bond. Consequently, a plea to inattentive driving or reckless driving—especially by tailoring the statutory language of the charge—even if more jail time is required, can be an equalizing plea for noncitizens.

- *Sentencing:* Not only does the specific criminal offense matter in immigration law but so does the sentence. For immigration purposes, the term of imprisonment includes any time that is suspended so that the duration of a sentence includes both time served and suspended time. Immigration law also considers some state misdemeanors to be “aggravated felonies” and therefore a plea to a state misdemeanor is not a sure fire way to protect immigration status. Limiting the total sentence to less than 365 days or less than 180 days can sometimes limit the

immigration consequences, but this is not always true. Thus, it is important to understand the impact of both the offense and the potential sentence before the conviction and sentence are entered.

- *The special meaning of “conviction” in immigration law:* Federal immigration law defines a conviction to include any admission of guilt or admission of facts that would support a finding of guilt even if a formal conviction is not entered in criminal court. This means that expunging criminal convictions do not eliminate the conviction for immigration purposes and that diversion programs that require admissions on the record do not eliminate the immigration consequences of the charge. In order to preserve the benefits of alternative criminal resolutions for non-citizens, attorneys could agree to continuances while certain conditions are met and then the charges could be dismissed without on-the-record admissions.
- *Driving Under the Influence:* Convictions for driving under the influence do not have direct immigration consequences by making someone deportable on the basis of that conviction. However, these offenses make noncitizens priorities for immigration enforcement if they are otherwise deportable. The Obama Administration also began a policy of revoking temporary visas, like student visas and employment visas, on the basis of a DUI arrest alone. This means that a student or worker will not be able to reenter the U.S. on that visa. Practitioners should be sure to counsel clients about future travel and the need to reapply for their visas after arrest alone.
- *Victims of Crimes:* Victims of certain crimes, including labor and sex trafficking, are able to apply for a visa to remain in the U.S. based on their cooperation with law enforcement, prosecutors, and the courts, in resolving the crime. With heightened enforcement under Trump and widespread fear in immigrant communities, immigrant victims of crimes are reporting those crimes and serving as witness at far lower rates. Prosecutors and other practitioners in the criminal justice system can facilitate participation in protecting victims of crime but informing victims of their immigration options and signing off on required documents.

For Estate Planning and Business Law Practitioners:

The immigration laws can affect a business’s ability to hire and retain employees. Attorneys who specialize in estate planning can provide critical assistance to immigrant communities and their advocates.

- *Powers of attorney:* The new wave of immigration enforcement under the Trump Administration has brought fear and uncertainty to many immigrant families. Consequently, helping families prepare for the care of their children and the care of their finances should they be detained or deported is a crucial service in high demand. Attached are sample delegations of parental powers and powers of attorney with instructions geared toward immigrant families to assist in this process.
- *Fraud and exploitation:* Because many immigrants come from countries where notary publics are also attorneys, they are vulnerable to fraudulent schemes by notaries in the U.S. who represent

themselves as licensed to provide legal advice. Due to the high demand for help with powers of attorneys, unscrupulous notaries are charging hundreds of dollars to certify signatures on these documents. Practitioners who specialize in estate planning can help immigrants avoid becoming prey to these scams by providing *pro bono* services and training immigrant advocates on how to advise and complete powers of attorney.

- *Contract completion:* Immigrants have some of the highest rates of business ownership in the United States, often finding it easier, and more profitable, to work within their local communities. However, many non-citizens for one reason or another have chosen to have all of their assets held by one member of the family who is not involved in the business or to use a pseudonym. Because an individual's immigration status can change over time, it is possible that business and personal documents reflect different names or other identifiers over time. It is important that attorneys have a frank and open discussion with their clients to identify all names and identifiers ever used so they understand the scope of work that may be required to ensure that all instruments, contracts and other documents are properly prepared.
- *Immigrant employment:* Businesses who advise clients doing business with individuals in the U.S. who have been admitted with a temporary non-immigrant visa must be cognizant of the temporal and substantive limits of the underlying visa. For example, a company that purchases goods from a foreign vendor, may receive training from the vendor's employees about how to use the goods purchased but be prohibited from allowing the same vendor employee from physically setting up the goods or machinery if they are on a B1/B2 visa. A non-citizen who is authorized to work may have their authorization tied to a particular company, like those who are admitted on an H2B, such that their employment by any other company is unlawful. A non-citizen admitted on an E visa for investors, can grow their investment and direct business related to investments but cannot work for another employer. An international transferee who is working at a U.S. subsidiary of a foreign company admitted to the U.S. on a L visa can only work for a subsidiary and could be affected by changes in the corporate structure.
- *Hiring practices:* Employers are not only obligated to ensure that their work force is lawfully permitted to work, but must do so in a manner that does not discriminate on the basis of national origin and does not constitute "document abuse" under the Immigration and Nationality Act. At hiring, employers must accept facially valid work authorization documents, refrain from requesting particular documents or asking for more documents than what is called for on the Form I-9. Violations of these rules may subject the employer to liability. In addition, employers may not pre-screen job individuals seeking work by requiring them to present proof of work authorization before they are considered for employment. This is particularly difficult because there are a variety of documents that establish work authorization, many of which do not resemble one another, and change over time. Businesses with high levels of non-citizen employees should be well versed in their I-9 obligations and the corresponding prohibitions in the INA.