

Immigration Consequences of Virginia Criminal Offenses

Introduction: The accompanying chart is intended as an introductory and informative tool for criminal defense attorneys in Virginia advising their clients regarding the immigration consequences of criminal case dispositions. The chart does not attempt to provide legal advice or to give an opinion as to the immigration consequences that could apply in any particular case. This area of law changes frequently and is affected by both legislative and judicial developments. Thus, while this chart is meant to be a resource, attorneys must conduct independent research to ensure the accuracy of their advice.

Using the chart: The chart analyzes the consequences of selected Virginia criminal offenses under federal immigration law. With a few exceptions, the chart is organized numerically by Va. Code section and addresses the likelihood that convictions for the included offenses will give rise to grounds for removal (i.e. deportation). The chart takes a conservative approach and, where the law is in question, errs on the side of concluding that an offense will give rise to a ground of removability. As such, the chart is not intended for immigration attorneys who are seeking to make arguments in the context of an immigration court proceeding. Also, additional immigration consequences not listed here may arise from the offenses described in the chart, such as the denial of naturalization, inadmissibility, or the denial of discretionary relief. Finally, identifying the potential grounds of removability triggered by a particular Va. offense is never sufficient in and of itself to determine the immigration consequences of a particular conviction. **Defense attorneys must have a complete understanding of their client’s immigration and criminal history in order to provide accurate advice concerning the immigration consequences of a conviction.**

Fourth Circuit Analysis: Unless otherwise noted, the analysis in this chart is based on the law within the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit. In some cases, the possible immigration consequences of an offense may be different if analyzed under the law of another jurisdiction.

Key concepts:

Deportability v. Inadmissibility: There is an important distinction between criminal “inadmissibility” and criminal “deportability.” Grounds of inadmissibility prevent a noncitizen from being admitted to the U.S., whether traveling abroad or present in the U.S. without having been lawfully admitted. The grounds of deportability lead to the deportation of a noncitizen who was previously lawfully admitted (such as a lawful permanent resident (LPR)). Although criminal inadmissibility grounds do not apply directly to those who are lawfully present, a conviction that renders noncitizens inadmissible will prevent them from re-entering the country if they leave. While many grounds of deportability and inadmissibility overlap, there are important distinctions between the two. Some of those distinctions are addressed in this cover memo and in notes used throughout the chart.

Conviction and Admissions: A “conviction” is required for most but not all grounds of deportability and inadmissibility. Under 8 U.S.C. § 1101(a)(48)(B), a conviction is “a formal judgment of guilt ... 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.” Accordingly, dismissals, *nolle prosequi* dispositions, and adjudications of juvenile delinquencies are not considered convictions. However, many diversion programs, particularly those requiring an upfront guilty plea, are convictions. Also, a noncitizen’s admission to the elements of certain offenses, such as controlled substances offenses, can make him or her inadmissible.

Enforcement Priorities: In January 2017, President Trump issued an executive order broadly expanding categories for enforcement priorities, declaring that DHS will now prioritize for removal ANY immigrant who falls within a specified removal ground under the INA, including removable aliens with criminal convictions, those who have been charged with criminal offenses or committed crimes without being charged, those who have engaged in fraud or “abused” a program to receive public benefits, those who have a previous final order of removal, and those who “otherwise pose a risk to public safety or national security” in the eyes of an immigration officer. The broad enforcement priorities appear to apply to any removable immigrant, meaning that ANY interaction whatsoever with the criminal justice system could lead an undocumented or out-of-status immigrant to be an enforcement priority for ICE.

Sentence: Under 8 U.S.C. § 1101(a)(48)(B), a “sentence” for immigration purposes includes any period of incarceration ordered by a court, **whether imposed or suspended in whole or in part.** Defense attorneys should bear in mind that there is **no distinction** between a suspended sentence and a period of incarceration for immigration purposes.



Common grounds for removal:

Aggravated felony (AF): AF's are defined in 8 U.S.C. § 1101(A)(43). In general, an AF is the most severe category of criminal offense for immigration purposes and can result from crimes that are neither “aggravated” nor “felonies” (a misdemeanor with a sentence of at least one year can be considered an aggravated felony for immigration purposes). A noncitizen with an AF has very limited defenses to deportation, will likely be held in mandatory detention throughout his or her case, will be barred from becoming a citizen, and cannot return to the U.S. if deported. The following is a list of AF offenses, all of which can be found at 8 U.S.C. § 1101(a)(43)[the corresponding letter below]:

- (A) murder, rape, sexual abuse of a minor
- (B) trafficking in controlled substances
- (C) trafficking in explosives or firearms
- (D) money laundering if the amount exceeds \$10,000
- (E) firearms offenses
- (F) crime of violence with at least one year sentence imposed
- (G) burglary, receiving stolen property, or theft with at least one-year sentence imposed
- (H) extortion, kidnapping offenses , ransom offenses
- (I) child pornography
- (J) gambling/RICO offenses where one year sentence may be imposed
- (K) prostitution, slavery
- (L) security offenses such as espionage, sabotage, treason
- (M) fraud, deceit, tax evasion in which the loss to the victim exceeds \$10,000
- (N) alien harboring, smuggling, or transportation
- (O) Illegal re-entry offenses
- (P) Document fraud or passport fraud with at least one year sentence imposed
- (Q) Failure to appear
- (R) counterfeiting, forgery, or commercial bribery with at least one year sentence
- (S) perjury, subordination, obstruction of justice, or bribery of a witness with at least one year sentence
- (T) Failure to appear offenses
- (U) attempt or conspiracy to commit an aggravated felony offense

Crimes involving moral turpitude (CIMT): a conviction for a CIMT is one of the most common grounds of removal and can have severe consequences for all noncitizens, even those with very minor criminal offenses. A CIMT conviction (or the admission of conduct constituting a CIMT) will generally render a noncitizen inadmissible unless the conviction falls within the “petty offense” exception which applies to noncitizens with no other CIMTs, where the offense is not punishable by a greater than one year sentence, and the prison sentence imposed is not greater than 6 months. 8 U.S.C. § 1182(a)(2)(A)(i)-(ii). A CIMT can also render a noncitizen deportable if committed within 5 years of admission to the US and if a prison sentence of 1 year or more may be imposed; or if a noncitizen commits two CIMTs at any time after admission not arising out of a single scheme. 8 U.S.C. § 1227(a)(2)(A)(i), (ii). There is no statutory definition of CIMT, and case law is constantly evolving. In general, CIMTs result from: (1) crimes with intent to steal or defraud; (2) crimes in which bodily harm is caused or threatened by an intentional act or serious bodily harm is caused or threatened by a reckless act; and (3) sex offenses. This list is not exhaustive.

Other grounds of removal: In addition to AFs and CIMTs, the chart addresses the likelihood that offenses will trigger other grounds of removability, including:

- **Controlled substance offenses (CSO):** This is one of the most frequently applied and broadest categories of removable offenses and also makes a noncitizen ineligible for many of the most important forms of relief. Under 8 U.S.C. § 1227(a)(2)(B) (deportability), 1182(a)(2)(A)(i)(II) (inadmissibility), a CSO generally makes a noncitizen deportable or inadmissible if convicted of a violation (or conspiracy or attempt to violate) of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, **other than a single offense involving possession for one’s own use of thirty grams or less of marijuana (this exception applies to deportability only; not inadmissibility).** Even expunged CSOs will generally be considered convictions.
- **Firearms violations (FV):** Under 8 U.S.C. § 1227(a)(2)(C), a FV makes a noncitizen deportable if at any time after admission he or she is convicted of purchasing, selling, possessing or using in virtually any way a firearm or other “destructive device” in violation of any law (defined in 18 U.S.C. § 921(a)). Attempt and conspiracy will also make a person deportable.
- **Domestic violence (DV):** Under 8 U.S.C. § 1227(a)(2)(E), a noncitizen is deportable for conviction of crimes of domestic violence, stalking, child abuse, child neglect, child abandonment, and certain violations of protective orders (not including support or child custody orders or provisions).
- **Prostitution (Prost.):** Under 8 U.S.C. § 1182(a)(2)(D), prostitution is a ground of inadmissibility for persons who are coming to the U.S. “solely principally, or incidentally to engage in prostitution, or [who have] engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment” or who attempt to receive or receives the proceeds of prostitution. Regulations say that this ground of inadmissibility targets those who have engaged in a pattern of prostitution and individual instances are generally not sufficient to trigger inadmissibility.

A note concerning Temporary Protected Status (TPS): TPS is another form of temporary relief from removal for individuals from certain countries, as designated by the Secretary of DHS. Although the accompanying chart does not directly address TPS, it may be a significant factor in the advice that a criminal defense attorney provides to a client. A noncitizen is ineligible for TPS - or can have TPS revoked - if he is subject to any ground of inadmissibility, or has any felony or two misdemeanor convictions.

Key considerations when advising a client: when advising a noncitizen, criminal defense attorneys should keep in mind the following key principles, recognizing, however, that every case presents unique facts and circumstances:

- Whenever possible, avoid a criminal “conviction” (as defined above);
- For LPR clients, prioritize convictions that do not – or are unlikely to – be considered AFs under immigration law;
- Avoid “sentences” (as defined above) of more than 364 days;
- Avoid convictions for CSOs;
- Avoid all CIMTs and certainly those where 1 year or more may be imposed;
- For clients with TPS status, avoid all felonies and a second misdemeanor conviction.

Chart is a “live document,” questions/comments welcome: This chart is a “live” document and is updated frequently. As such, CAIR Coalition relies upon and greatly appreciates comments from practitioners who have information or suggestions that may improve the accuracy or thoroughness of the information contained herein. Please send all comments and questions to rachel@caircoalition.org.

Disclaimer and need for individual analysis: The information contained in this chart is intended for legal professionals and is not meant to serve as a substitute for a lawyer’s obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client’s case. Immigration consequences of crimes are a complex and constantly changing area of law. Practitioners should use this chart as a starting point rather than as a substitute for legal research.

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