

## **THE BOORA LAW GROUP PLC©**

### **NON-U.S. CITIZEN UNDER CRIMINAL INVESTIGATION OR HAS A CRIMINAL CONVICTION<sup>1</sup>**

If you are a non-U.S. citizen and are the subject of a criminal investigation or have a criminal conviction, you could be removable and subject to deportation. While being under investigation for a criminal offence affords an individual a presumption of innocence (innocent until proved guilty), a criminal conviction can or will have some far reaching consequences.

One should know that an individual can or will suffer some immigration consequences as a result of a criminal conviction, even being under investigation can bring with it a level of anxiety and emotions that can make a person feel afraid of the futuristic outcome of an investigation. Furthermore, immigration consequences can or may come in many different forms, including, removal or deportation from the United States, revocation of an existing immigration benefit, or ineligibility for future immigration benefits.

Even if you are a U.S. citizen, your immigration status in the United States will not be affected by a criminal conviction, however, a United States citizen charged with a sexual offense against a minor could lose the right to file immigration petitions on behalf of certain family members. Thus, 8 USC § 1154(a)(1) states in part that “... (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor.”<sup>2</sup>

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<sup>1</sup>This article is for information purposes only, if you require legal advice you will need to consult with a licensed attorney. Attorney Kulwant Singh Boora is a licensed attorney in the State of Michigan and a member of the State Bar.

<sup>2</sup>The Adam Walsh Act which was passed in 2006 imposes immigration penalties on U.S. citizens and permanent residents who are convicted of certain crimes against minors, Section 402 of the Adam Walsh Act, effective July 27, 2006.

It should be noted that 8 USC § 1154(a)(1) can have immigration consequences for a LPR (Legal Permanent Resident). The Immigration and Naturalization Act prohibits the admission of person who have committed or admit to the commission of acts (which could include attempts or conspiracy) that would constitute the essential elements of a crime involving moral turpitude (CIMT) or a violation of federal, state, or foreign laws relating to a controlled substance.<sup>3</sup>

Regarding the foregoing, exempted are ‘pretty offenses’ situations in which the person committed only one CIMT and (1) the person was under the age of 18 when the crime was committed, and was released from confinement more than five years prior to the date of the application for admission; or (2) the maximum penalty for the crime did not exceed one year in prison and the person was not sentenced to a term of imprisonment for more than six months.<sup>4</sup> With that said, any individual or person convicted of more than one crime (even if the crime did not involve moral turpitude) for which the aggregate sentence of confinement actually imposed was five years or more is admissible.<sup>5</sup>

An person or individual must understand that for admission of certain acts to be sufficient to cause inadmissibility the acts admitted to must constitute all of the essential elements of the crime. And that the said admission must have been made voluntarily and knowingly that includes a definition that also entails the essential elements of the crime.<sup>6</sup>

You should also note that for immigration purposes the definition of conviction must be met and there must be a final judgment of guilt. When a conviction has been vacated based on the merits of the case, because of some substantive or procedural defect it cannot

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<sup>3</sup>INA § 212(g)(2); 8 USC § 1182(g)(2).

<sup>4</sup>8 USC § 1182(g)(1)(C); INA § 212(g)(1)(C).

<sup>5</sup>INA § 209(c); 8 USC § 1159(c).

<sup>6</sup>*Matter of K*, 7 I&N Dec. 594 (BIA 1957).

be used or grounds for either inadmissibility or deportability.<sup>7</sup> It is important to note that a conviction occurs when the judgment is entered on the court docket, which is after the time of sentencing and not at the time a plea or verdict is reached.<sup>8</sup> The Immigration and Nationality Act broadly defines criminal conviction. 8 USC § 1101(a)(48)(A).

Even if you have been given diversion where a final conviction does not exist for state purposes upon the completion of some specified court ordered program, it will still be viewed as a conviction for federal immigration purposes as long as some form of punishment attaches as a result of the plea or admission.<sup>9</sup> For example in the State of Michigan, this could fall under Michigan's various deferral or diversion statute(s)—Holmes Youthful Trainee Act (HYTA) MCL § 762.11–.16; Spouse Abuse Act, MCL § 769.4a; or the Controlled Substance Act MCL § 333.7411, which for immigration purposes will be construed as a conviction, because each of these acts require that the defendant plead guilty.

However, where a court allows a person or individual to attend a pretrial intervention program without entering any type of plea or judgment and then dismisses the charges after successful completion of the pretrial intervention program, then there would be no conviction under the Immigration and Nationality Act. With the development of the law and the subsequent decision of the U.S. Supreme Court case of *Padilla v. Kentucky*, 559 U.S. 356 (2010), legal counsel for a defendant is now under a duty to inform his or her client whether the plea carries a risk of deportation or has immigration consequences.<sup>10</sup>

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<sup>7</sup>*Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

<sup>8</sup>Fed. R. Crim.P. 32(b)(1).

<sup>9</sup>*Qureshi v. INS*, 519 F2d 1174 (5<sup>th</sup> Cir. 1975).

<sup>10</sup>This is different to a claim of ineffective assistance of counsel, *Strickland v. Washington*, 466 US 668 (1984).

If you are LPR, green card holder or in the U.S. on a visa and are subject of a criminal investigation or has criminal conviction, it is very important, if not crucial that you contact an attorney to discuss your matter and individual case. Navigating the complex world of immigration law can be a daunting task, which requires the skills and experience of counsel. We understand that each case varies depending on person's particular circumstances, contact our office to discuss your needs and see how we can help you with your individual matter.

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